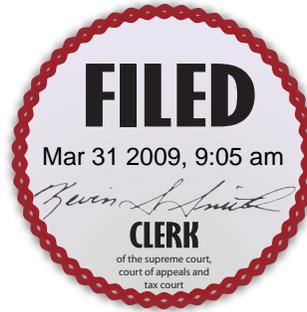


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

DAVID M. PAYNE
Ryan & Payne
Marion, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GARY M. HEVNER,)
)
Appellant-Defendant,)
)
vs.) No. 27A02-0808-CR-717
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0604-FD-72

March 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gary M. Hevner appeals his conviction for Possession of Child Pornography,¹ a class D felony, as well as the trial court's order that he register as a sex offender. He presents the following restated issues for review:

1. Did the trial court err by overruling Hevner's objection to allegedly prejudicial statements made by the State during rebuttal closing argument?
2. Did the State present sufficient evidence to support the conviction?
3. Is the sex offender registry statute an ex post facto law as applied to Hevner?

We affirm.

On November 17, 2005, Debbie Hevner became curious about her husband's computer use and decided to investigate by looking into the computer's recent on-line history. In addition to adult pornography, she eventually came across a link to pornographic photos of a young girl. She also found a subfolder on the computer that she could not access. The hidden subfolder was entitled, "invisible shit I'm trying to hide" (the hidden folder). *Transcript* at 103. After contacting a friend, Debbie decided to take the computer, along with the pictures of the young girl that she printed, to the Marion Police Department.

Pursuant to a search warrant, Sergeant Delmero Garcia conducted a forensic investigation of the files and information stored on the computer. With the assistance of the forensic program EnCase, Garcia was able to uncover, among other things, deleted files,²

¹ Ind. Code Ann. § 35-42-4-4 (West, PREMISE through 2008 2nd Regular Sess.).

² EnCase is a computer program widely used by law enforcement to retrieve information from both active files on the computer and unallocated space (essentially, deleted files). The program is also used to search the computer's internet history.

which included approximately five hundred photos of children of various ages.³ Many of the children who were posed in a sexually explicit manner appeared to be under sixteen years of age, including some under the age of twelve or thirteen. Hevner downloaded much if not all of the files from a peer-to-peer filing sharing program on the internet called SafeShare, which he installed on his computer on September 25, 2005.

With one exception, all of the images of children were located on the computer's unallocated space, meaning they had been deleted at some point after being downloaded by Hevner. The sole exception was an active file containing the same pictures of the young girl that had been discovered by Debbie. Garcia was able to determine that this file was created by Hevner in the hidden folder on November 9. The hidden folder contained ten other files of pictures and/or videos, but these all appeared to be adult pornography.

In further examining Hevner's internet user history, Garcia learned the names of several files Hevner had downloaded from SafeShare. Many of these had file names suggesting that they contained child pornography. For example, one jpeg file downloaded October 31 was titled "young, teen, girls, spread, our [sic] on couch, red-haired, pussy showing, and small tits, red-head, underage, illegal, [] school, amateur, sex, porn, nude, naked, preacher's daughter". *Transcript* at 142-43. Another jpeg file, downloaded November 14, had the title "3 pics 12 yr old step daughter new tits nipples ssap preteen panties pussy cunt ddoggprn kiddy sex porn Lolita". *Exhibit Volume*, State's Exhibit 4 at 60.

Garcia also performed certain "word searches" of the computer's hard drive.

³ Some of the images were duplicates, meaning they were downloaded more than once.

Transcript at 149. The searches resulted in, among other things, 4596 hits for Lolita and 3286 hits for preteen. Garcia testified that he would not expect to find this many hits for these terms on the computer of a user who does not seek out child pornography.

After the forensic examination of the computer, Hevner gave a voluntary statement to Garcia at police headquarters on April 25, 2006. Hevner initially indicated that in looking for pornography on SafeShare he would sometimes get questionable material involving young girls. He said, as he did at trial, that upon opening said files and realizing the content, he would delete them. Upon further questioning, however, Hevner admitted that in mid to late 2005 he began to enter search criteria “to get young girls,” including such terms as “pre-teen,” “daughter,” “Lolita,” “teen,” and “child.” *Exhibit Volume*, State’s Exhibit 5 at 7, 10, 11. Hevner explained that he started off with adult porn. *Id.* at 8. When asked if he eventually ventured into child pornography or bestiality, Hevner responded: “Uh, to a degree yeah I think you, you want you know, a little variety or whatever you know. I mean I, not so much the bestiality and all that. I, you know I, I think it depends on where your, your moral barometer is”. *Id.* at 8. Later in his statement, Hevner indicated that although he had searched for young girls, he was not seeking “child porn per se.” *Id.* at 9. He defined young girls for Garcia as “teens, you know I, and I don’t mean you know 13. You know more like 16 or 17”. *Id.* at 10. When asked if he had realized that some of the child porn he had downloaded may be of younger girls, the following discussion occurred:

| | |
|--------------|---|
| GH [Hevner]: | I suppose but you know I don’t know, you look at it and you say gosh that’s probably not right you know and, and like I said I would delete it. |
| DG [Garcia]: | Ok, how long would you keep it on your |

computer after you downloaded it do you remember?
GH: Uh, just all depends I suppose. I mean I don't remember really.
DG: Now are there some that you would keep longer than others?
GH: I, possibly. I suppose if it struck my fancy. I, you know I don't know.
DG: Were there some instances and, and just, just to be totally honest there's some instances where you said man I, I know I shouldn't be doing this. These girls are too young but you still went ahead and downloaded it?
GH: Possibly yeah. Probably.
DG: Did you feel bad after doing that?
GH: Of course.

Id. at 12. At the conclusion of his statement, Hevner admitted that he had downloaded all of the pornographic material that had been found on his computer.

On April 28, 2006, the State charged Hevner with possession of child pornography, a class D felony. At his jury trial, which commenced on June 23, 2008, Hevner testified that he never intended to look for pictures of girls younger than sixteen years of age. Whenever he viewed his downloaded pictures and discovered they were of girls younger than this, Hevner indicated he deleted them immediately. While he claimed the hundreds of deleted photographs in question were accidents, on cross-examination Hevner admitted that he had used search terms such as preteen, illegal, and Lolita when looking for pornography to download. The jury ultimately convicted Hevner as charged. As a result, Hevner received a three-year suspended sentence, was placed on probation for two and one-half years, and was required to register as a sex offender. Hevner now appeals. Additional facts will be provided below as necessary.

1.

Hevner argues that the trial court “erred by allowing the State to violate an order on a motion in limine.” *Appellant’s Brief* at 11. He contends the State’s description of the children as victims during its rebuttal closing argument was “inflammatory and contrary to the order on the Motion in Limine.” *Id.* at 10.

Initially, we observe the well-settled rule that the granting of a motion in limine does not determine the ultimate admissibility of evidence or the propriety of a particular argument at trial. *See Francis v. State*, 758 N.E.2d 528 (Ind. 2001). Any error in allowing the State to make a particular argument must be predicated on the propriety of said argument, rather than on the violation of an order in limine. *See id.* at 533 (“[i]f the trial court errs by admitting evidence, the exclusion of which was sought by the motion in limine, then the error is in admitting the evidence at trial in violation of an evidentiary rule, not in rescinding a previous order in limine”).

The proper scope of closing argument is within the sound discretion of the trial court. *Nelson v. State*, 792 N.E.2d 588 (Ind. Ct. App. 2003), *trans. denied*. “On appeal, we will not find an abuse of discretion unless the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it.” *Id.* at 591. In seeking reversal of a conviction, therefore, “it is incumbent upon the appellant to establish that the trial court’s abuse of discretion was ‘clearly prejudicial’ to his rights.” *Id.* at 592.

In the instant case, Hevner’s appellate argument improperly focuses on the violation of the motion in limine, which the trial court ultimately rescinded. Moreover, aside from

bald assertions of prejudice and inflammatory tactics, Hevner presents no argument on appeal regarding how he was prejudiced by the prosecutor's arguments to the jury.

During closing argument, defense counsel stated: "The people that put this garbage on the computer [ought] to be tracked down and prosecuted. My client's not in that bracket, he didn't do any of that." *Transcript* at 266. Later, counsel argued: "When have the thought police taken a step too far? If they want to control what's sent out, I agree, control it. If you want to keep it off the internet, I agree, keep it off the internet. If a guys [sic] browsing the internet and sees it and says delete, he didn't commit a crime, that's nonsense." *Id.* at 269.

In response, the prosecutor argued:

When asked if he was outraged by the image of that little girl with semen running down her chin, Mr. Hevner responded, what could I do? What can you do? You've seen the images, ladies and gentlemen. I'll now ask you that question, are you outraged by what you've seen? What can you do? And I'll suggest this, the market for child pornography, just like any other market for any other product, is ruled by the law of supply and demand. Sure, there are suppliers putting it on the internet. Suppliers that [defense counsel] suggest [sic] we should go after, and in fact the suppliers that Detective Garcia has gone after in the past But there's also another side to that, as long as there's a demand there will be a supply. In order to contain child pornography, you have to effect [sic] one or the other, the supply or the demand. As long as people like Mr. Hevner are asking for more child pornography, producers will continue to take pictures of little girls with their legs spread wide open so that the viewer can see their vagina. As long as people like Mr. Hevner are asking for more child pornography, exploited children will continue to face the fact that intensely personal, intensely painful, visions of them remain on the internet and in homes across the world.

Id. at 275-76. Defense counsel objected, and the court held a bench conference:

[Defense]: She's starting to get into the victim stuff, and we didn't, uh, we've got a Motion in Limine on that. She's talking about exploiting children.

[State]: This is a child exploitation statute. He argued thought police

and censorship, and I should be able to get into the reason for the statute, which is to protect children.

[Court]: Counsel, anything else?

[Defense]: No.

[Court]: You can go ahead with it.

Id. at 276-77. At trial and on appeal, Hevner has wholly failed to establish that the prosecutor's rebuttal argument was not a proper response to Hevner's closing argument.

Therefore, we find no abuse of discretion or resulting prejudice.

2.

Hevner next argues the State presented insufficient evidence to support his conviction. He acknowledges the evidence presented at trial established that hundreds of pornographic pictures of children had been downloaded by him to his computer. Relying on his own testimony, however, Hevner claims that he did not knowingly possess any of these pictures because in each instance when he opened the file and realized what he had downloaded, he promptly deleted the file.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the jury's exclusive province to weigh conflicting evidence.'" *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the judgment, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740

N.E.2d 109, 111-12 (Ind. 2000)).

Possession of child pornography is statutorily defined as:

A person who knowingly or intentionally possesses:

- (1) a picture;
- (2) a drawing;
- (3) a photograph;

....

- (8) a digitized image; or
- (9) any pictorial representation;

that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

I.C. § 35-42-4-4(c). Hevner acknowledges that he downloaded illegal child pornography to his computer. Thus, he does not dispute that he possessed child pornography. *See Logan v. State*, 836 N.E.2d 467, 473 (Ind. Ct. App. 2005) (“the discovery of images on a computer hard-drive is circumstantial evidence that one did ‘possess’ the images”), *trans. denied*. His sole claim on appeal is that the State failed to sufficiently establish that he did so knowingly or intentionally.

Hevner testified at trial that each of the several hundred deleted pictures found on his hard drive were accidentally downloaded by him (sometimes multiple times) while seeking legal pornography. The State presented evidence, however, from which a reasonable trier of fact could infer that Hevner knowingly or intentionally sought out and downloaded child pornography. We cannot ignore the sheer number of deleted images. Moreover, Garcia testified that word searches on the computer resulted in 4596 hits for the term Lolita and 3286 hits for the term preteen. Garcia explained that he would not expect to find this many

hits for these terms on the computer of a user who does not seek out child pornography. While he may not have viewed the pictures prior to downloading, the file names are at least somewhat telling of Hevner's intent. For example a jpeg file downloaded and later deleted by Hevner was entitled "3 pics 12 yr old step daughter new tits nipples ssap preteen panties pussy cunt ddoggprn kiddy sex porn Lolita". *Exhibit Volume*, State's Exhibit 4 at 60. Moreover, Hevner admitted at trial and in his statement to police that he had used search terms such as preteen, illegal, and Lolita when looking for pornography to download. In his statement to police, Hevner explained that he began with adult pornography and had recently ventured into pornography involving young girls. Hevner indicated to Garcia that he probably kept some downloaded pictures of young girls in his hidden folder longer than others.⁴

The jury was fully aware of Hevner's claim that he accidentally downloaded all of the illegal child pornography on his computer and promptly deleted each file upon realizing its content. The jury did not believe Hevner. In light of the evidence presented by the State, the jury could reasonably conclude that Hevner knowingly possessed illegal child pornography. Therefore, his sufficiency claim fails.

3.

Finally, Hevner contends that the law requiring him to register as a sex offender for ten years violates the prohibition on ex post facto laws contained in the United States and

⁴ In fact, one of the downloaded picture files in question remained in Hevner's hidden folder at the time of the forensic analysis. The State seemed to acknowledge at trial, however, that the girl in this file could have been at least sixteen years of age.

Indiana Constitutions. *See* U.S. Const. art. I, § 10; Ind. Const. art. 1, § 24. He asserts the registry is punitive because it is widely accessible via the internet and includes his home address, place of employment, and photograph. He also notes that he was prohibited from living within 1000 feet of a school as a condition of probation because of his status as a sex offender.⁵

At the time Hevner committed his crime, a person convicted for the first time of possessing child pornography was not required to register as a sex offender. *See* Ind. Code Ann. § 5-2-12-4(a)(13) (requiring a person convicted of possession to register only if the person had a prior unrelated conviction for possession of child pornography). While Hevner’s case was awaiting trial in 2006, the Legislature repealed I.C. § 5-2-12-4 and replaced it with Ind. Code Ann. § 11-8-8-5. *See* P.L. 140-2006. The recodified statute contained the same language with respect to child pornography as the prior statute. Effective July 1, 2007, the Legislature amended the statute’s registration requirement for possessors of child pornography, I.C. § 11-8-8-5(a)(13), by deleting the requirement of a prior unrelated conviction for the same offense. *See* P.L. 216-2007. Thus, at the time of his conviction, Hevner was required to register as a sex offender.

The state and federal ex post facto clauses “prohibit enacting a law that imposes a punishment for an act that was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.” *Ridner v. State*, 892 N.E.2d 151, 154 (Ind.

⁵ Ind. Code Ann. § 35-38-2-2.2(2) (West, PREMISE through 2008 2nd Regular Sess.) provides that as a condition of probation for a sex offender, “the court shall...prohibit the sex offender from residing within one thousand (1,000) feet of school property...for the period of probation, unless the sex offender obtains written approval from the court”.

Ct. App. 2008) (quoting *Douglas v. State*, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007)). We apply the same two-step analysis under both clauses:

First, we must determine whether the legislature intended the proceedings to be civil or criminal. As an aid in this process, we may examine the declared purpose of the legislature as well as the structure and design of the statute. If the intent was to impose punishment, then the inquiry ends. If the intent was civil or regulatory, the next question is whether the statutory scheme is so punitive in either purpose or effect as to negate the State's intention to deem it civil. The second part of the analysis requires the party challenging the statute to provide the clearest proof of the punitive purpose or effect of the statute.

Douglas v. State, 878 N.E.2d at 878-79.

On several occasions, this court has held that the overall legislative intent in enacting the sex offender registry was civil and regulatory in nature. See *Ridner v. State*, 892 N.E.2d 151; *Douglas v. State*, 878 N.E.2d 873; *Spencer v. O'Connor*, 707 N.E.2d 1039 (Ind. Ct. App. 1999), *trans. denied*.⁶ Further, we have recently rejected claims that the registry is so punitive in effect as to overcome the nonpunitive intent of the Legislature, that is, to keep the public apprised of and monitor the whereabouts of offenders. See *Ridner v. State*, 892 N.E.2d 151; *Douglas v. State*, 878 N.E.2d 873.

Hevner presents no persuasive argument distinguishing *Ridner* or *Douglas*. In fact, Hevner does not even acknowledge the existence of any cases on this issue since *Spencer*. Hevner's slender argument on appeal fails to present the "clearest proof of the punitive

⁶ We held likewise in *Wallace v. State*, 878 N.E.2d 1269, 1274 (Ind. Ct. App. 2008) ("in light of our holding in *Douglas*, we reach the same result here"). Our Supreme Court granted transfer in *Wallace* on March 24, 2008 and held oral argument on May 15, 2008. We await direction from our Supreme Court on this issue. In the meantime, we observe that, aside from cases involving lifetime registration for sexually violent predators, see *Jensen v. State*, 878 N.E.2d 400 (Ind. Ct. App. 2007), *trans. granted*, and *Thompson v. State*, 875 N.E.2d 403 (Ind. Ct. App. 2007), *trans. denied*, our court has consistently upheld the sex offender registry against ex post facto challenges like Hevner's.

purpose or effect” of the sex offender registry. *Douglas v. State*, 878 N.E.2d at 879.

Therefore, we reject his ex post facto claim.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.