SUMMARY
June 22, 2023

2023COA56

No. 20CA1710, *People v. Neustel* — Crimes — Sexual Assault on a Child — Sexually Violent Predators — Victim — Fictional Persona

A division of the court of appeals considers whether a defendant who is convicted of attempted sexual assault on a child — but whose "victim" was in fact a fictional child persona created by law enforcement for a sting operation — may be designated a sexually violent predator (SVP) under section 18-3-414.5(1)(a), C.R.S. 2022. The division concludes that such a persona can be a "victim [who] was . . . a person with whom the offender established a relationship" for the purposes of an SVP designation. § 18-3-414.5(1)(a)(III).

COLORADO COURT OF APPEALS **2023COA56**

Court of Appeals No. 20CA1710
Jefferson County District Court No. 19CR2621
Honorable Philip J. McNulty, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Zachary Steven Neustel,

Defendant-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE KUHN
Fox and Welling, JJ., concur

Announced June 22, 2023

Philip J. Weiser, Attorney General, Megan Rasband, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, John Plimpton, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Zachary Steven Neustel, sent sexually explicit online communications to individuals he believed were under fifteen years of age. Neustel was actually communicating with fictional personas created by investigators from the Jefferson County Sheriff's Office.

¶ 2 Neustel pleaded guilty to added counts of sexual exploitation of a child and attempted sexual assault on a child in exchange for dismissal of his original charges.[1] The district court sentenced him to four years in prison and designated him a sexually violent predator (SVP). In doing so, the district court determined that Neustel had established a relationship with his fictional victim primarily for the purpose of sexual victimization.

¶ 3 Neustel appeals the district court's order designating him an SVP, arguing only that the court erred by finding that his relationship with the fictional victim satisfied the relationship criterion of the SVP statute. We affirm.

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[1] Neustel was originally charged with two counts of internet luring of a child and two counts of internet exploitation of a child.

I. Legal Authority and Standard of Review

¶ 4 The relationship criterion of the SVP statute allows an SVP designation for an offender "[w]hose victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization."[2] § 18-3-414.5(1)(a)(III), C.R.S. 2022; *see also People v. Gallegos*, 2013 CO 45, ¶ 8.

¶ 5 This appeal requires us to decide whether a fictional persona can be a "victim [who] was . . . a person with whom the offender established . . . a relationship primarily for the purpose of sexual victimization" within the meaning of the SVP statute. *See Gallegos*, ¶¶ 11, 14 (interpreting the "established or promoted a relationship" component of the relationship criterion). This presents a question of law that we review de novo. *Id.* at ¶ 7.

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[2] An SVP designation also requires that the offender (1) was eighteen years of age or older as of the date of the offense; (2) was convicted of an enumerated sexual offense, or an attempt of such offense, including attempted sexual assault on a child; and (3) is likely to recidivate. § 18-3-414.5(1)(a)(I), (II), (IV), C.R.S. 2022; *see also People v. Gallegos*, 2013 CO 45, ¶ 8. These other criteria are not at issue in this case.

¶ 6 When interpreting a statute, our primary purpose is to ascertain and give effect to the General Assembly's intent. *Cowen v. People*, 2018 CO 96, ¶ 12. "To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *McCoy v. People*, 2019 CO 44, ¶ 37. "We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage." *Id.*

¶ 7 Our interpretation of a statute "must also endeavor to effectuate the purpose of the legislative scheme." *Id.* at ¶ 38. Thus, we must "read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.*

¶ 8 "[I]f the language in a statute is clear and unambiguous, we give effect to its plain meaning and look no further." *Cowen*, ¶ 12. Only when the statutory language has more than one reasonable meaning, and is therefore ambiguous, may we resort to extrinsic aids of construction to address the ambiguity and decide which reasonable interpretation to accept based on the legislature's intent. *Id.*

II. Analysis

¶ 9 At the SVP hearing, Neustel objected to an SVP designation, partly because he had only been communicating with a fictional persona. The court rejected that argument, stating that the "established a relationship" prong of the relationship criterion "really goes to the mental state of the defendant, not whether there was an actual victim, or whether it was a police officer portraying one of those protected children." The district court then determined that Neustel had established a relationship with his fictional victim primarily for the purpose of sexual victimization.

¶ 10 On appeal, Neustel argues that the court erred by finding that the prosecution proved the "established a relationship" prong because the SVP statute requires his victim to be a real person, not a fictional persona.[3] We disagree.

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[3] Neustel does not otherwise challenge the court's findings on the relationship criterion. *See Gallegos*, ¶¶ 11-12 ("[A]n offender 'established a relationship' under the relationship criterion of the SVP statute where he created, started, or began the relationship primarily for the purpose of sexual victimization."); *Allen v. People*, 2013 CO 44, ¶ 4 (We review an SVP designation "by deferring to the trial court's factual findings when they are supported by the record.").

¶ 11 We are persuaded by the reasoning of *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009). There, a division of this court considered the same argument under the "stranger" prong of the relationship criterion: "whether a fictional fourteen-year-old girl, created by two police officers conducting an Internet sting operation, can be a 'victim' [who was a stranger to the offender] within the meaning of the [SVP] statute." *Id.* at 366. The division answered that question in the affirmative.

¶ 12 The core reasoning of *Buerge*'s holding — that "victim" as used in the relationship criterion can include a fictional victim — applies with equal force in this case. To explain why, we start with the same key observation the division made in *Buerge*: the SVP statute permits a designation even when the offender committed only an *attempt* crime. § 18-3-414.5(1)(a)(II); *Buerge*, 240 P.3d at 368 ("Because the General Assembly included attempt crimes in the SVP statute, it must have intended the statute to apply to perpetrators convicted of such crimes.").

¶ 13 Two consequences flow from this observation. First, as *Buerge* reasoned, "victim" in the relationship criterion can mean "intended victim." 240 P.3d at 367-68 (concluding the statutory definition of

"victim" for sexual assault crimes cannot control in an attempt case because that definition "applies when a completed assault has occurred"); *see* § 18-3-401(7), C.R.S. 2022 (containing a definition of "victim" that applies "unless the context otherwise requires").

¶ 14 Second, a defendant may be convicted of an attempt crime — and thus qualify for an SVP designation — "even when it is factually or legally impossible to commit the offense, as long as the actor could have done so if the circumstances were as he or she believed them to be." *Buerge*, 240 P.3d at 368; *see* § 18-2-101(1), C.R.S. 2022.

¶ 15 Taking these consequences together, *Buerge* concluded that so long as the defendant intended with the requisite culpability to sexually assault a real person, the defendant "can be determined to be [an SVP] because there would have been a victim (an intended victim) had the attendant circumstances been as the defendant believed them to be." *Buerge*, 240 P.3d at 369.

¶ 16 We agree with *Buerge*'s interpretation of "victim" to include fictional personas and conclude that it should be applied with equal force to an offender convicted of an attempted sexual assault who

established a relationship with an intended — but fictional — victim primarily for the purpose of sexual victimization.

¶ 17 Neustel, however, argues against the application of *Buerge*'s reasoning to his case. We address and reject each of his arguments in turn.

¶ 18 First, Neustel asserts that *Buerge* is distinguishable because it analyzed whether a fictional persona can be a "victim [who] was a stranger" to the offender, whereas here, the district court determined that a fictional persona could be a "victim [who] was . . . a person" with whom Neustel established a relationship. He claims that the legislature's inclusion of the term "person" to define the victim of an "established" relationship shows an intent for such "victim" to be a real person.

¶ 19 This is a distinction without a difference. A stranger *is also* a "person" in common parlance. *See People v. Hunter*, 2013 CO 48, ¶ 10 (citing Webster's New College Dictionary 1415 (2005)). And *Buerge*'s logic did not rely whatsoever on the meaning of the term "stranger" in the SVP statute — or whether a "stranger" is or is not a real person. Instead, it focused on the offender's *intent* to sexually assault a real person, whether they're a stranger or not. That same

logic applies to a "victim [who] was . . . a person" with whom the defendant established a relationship.

¶ 20 Neustel further argues that *Buerge* was wrongly decided. We disagree. For one, since *Buerge* was announced in 2009, the legislature has amended the SVP statute three times. *See* Ch. 136, sec. 47, § 18-3-414.5, 2021 Colo. Sess. Laws 721; Ch. 92, sec. 10, § 18-3-414.5, 2017 Colo. Sess. Laws 282; Ch. 171, sec. 7, § 18-3-414.5, 2017 Colo. Sess. Laws 624. None of those amendments undermined *Buerge*'s interpretation of "victim" in the SVP statute. And "[u]nder an established rule of statutory construction, the legislature is presumed, by virtue of its action in amending a previously construed statute without changing the portion that was construed, to have accepted and ratified the prior judicial construction." *People v. Swain*, 959 P.2d 426, 430-31 (Colo. 1998). Accordingly, we presume that the legislature ratified *Buerge*'s interpretation of the term "victim" in the SVP statute to include fictional personas. *See id.*; *see also Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007).

¶ 21 More importantly, we are convinced that *Buerge*'s interpretation of "victim" to include fictional personas best

effectuates the purpose of the legislative scheme. *McCoy*, ¶ 38. Although housed in the criminal code, "the SVP designation is not punishment." *Allen v. People*, 2013 CO 44, ¶ 7. Indeed, its "stated purpose is to protect the community." *Id.* (quoting *People v. Rowland*, 207 P.3d 890, 894 (Colo. App. 2009)). We must interpret the term "victim" in light of this purpose. *See Hunter*, ¶¶ 1, 2, 10 (interpreting the term "stranger" in the SVP statute "consistent with the community safety and notice purpose of the SVP designation").

¶ 22 Here, by interpreting "victim" to include intended fictional victims and thereby placing the focus on the offender's intent and conduct, we give proper effect to the legislature's purpose of providing notice to the community of — and protecting the community from — an offender who would have completed the assault had the victim been real, as he believed them to be. *See Allen*, ¶ 30 (Márquez, J., concurring in the judgment) (The relationship criterion "focuses on the 'predatory' nature of the offense" and "reflects a legislative judgment that offenders who demonstrate a propensity to target a broader pool of victims pose a higher risk to the broader community."); *see also State v. Charette*, 2018 VT 48, ¶¶ 12-13, 189 A.3d 67, 70-71 (relying on *Buerge* to

conclude that "[t]he fact that the purported victim turned out to be an undercover officer does not change [the] defendant's intent or conduct, nor the risk to the community arising from his sex offense"); *Czyzewski v. N.H. Dep't of Safety*, 70 A.3d 444, 447 (N.H. 2013) ("There is no indication in [New Hampshire's sex offender registration statute] that the legislature intended . . . to benefit a category of manifestly dangerous criminals for no other reason than the fortuitous fact that their intended victims turned out to be undercover police officers."); *People v. DeDona*, 954 N.Y.S.2d 541, 548 (App. Div. 2012) ("[T]here is a heightened concern for public safety and a greater need for community notification [even] where . . . an offender establishes a relationship with an undercover officer the offender believes to be an actual child victim.").

¶ 23 Accordingly, we conclude that the district court did not err by finding that the relationship criterion could be met even though the intended victim of Neustel's crime was in fact fictional.

III. Disposition

¶ 24 The order is affirmed.

JUDGE FOX and JUDGE WELLING concur.