

United States Court of Appeals For the First Circuit

No. 19-1538

UNITED STATES OF AMERICA,

Appellee,

v.

RAFAEL PÉREZ-RODRÍGUEZ,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Pedro A. Delgado-Hernández, U.S. District Judge]

Before

Kayatta, Lipez, and Barron, Circuit Judges.

Linda A. Backiel for appellant.

Julia Meconiates, Assistant United States Attorney, with whom
W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-
Almonte, Assistant United States Attorney, were on brief, for
appellee.

September 2, 2021

LIPEZ, Circuit Judge. Rafael Pérez-Rodríguez was convicted by a jury of attempted enticement of a minor for unlawful sexual activity in violation of 18 U.S.C. § 2422(b). He was apprehended through a sting operation in which a government agent created a profile on an adults-only dating application posing as a gay adult man, and, after being contacted by Pérez, then offered to arrange a sexual encounter with his minor "boyfriend." Pérez appeals on several grounds, including insufficiency of the evidence and the denial of a jury instruction on the entrapment defense. While we find Pérez's challenge to the sufficiency of the evidence meritless, we conclude that the district court committed plain error in failing to give the entrapment instruction. We therefore vacate the conviction and remand for a new trial.

I.

In 2015, Ryan Seig, a special agent with the child exploitation unit of Homeland Security Investigations ("HSI"), conducted a sting operation using the geosocial networking application Grindr. Agent Seig testified that the purpose of the application is "to talk and usually meet with someone else who shares your interests." On cross-examination, he added "it's social networking among homosexuals." Grindr describes itself as "the largest social networking app for gay, bi, trans, and queer people." About, Grindr, <https://www.grindr.com/about/> (last

visited August 25, 2021). Grindr allows users to create profiles and to exchange messages with other users with profiles in their geographic area. Per Agent Seig's testimony, "[a] profile is a small blurb about what you are looking for, possibly what you look like, and sort of a general description of who you are and what you want." Grindr requires users to be eighteen years of age or older and does not allow individuals to use the platform to seek sexual encounters with minors.

Agent Seig created a Grindr profile under the name "Dave W." He wrote in his profile, "Looking for young fun or to share my young fun." He testified that he chose this text as a "veiled" reference to a sexual encounter with a minor, explaining that "someone who was familiar with the way pedophiles communicate on the internet could read this and know what it meant." The profile also described "Dave W." as "Muscular, White, Single."

On December 30, 2015, the Dave undercover profile received a message from a profile with the name "Mirando," a profile created by Pérez. Dave and "Mirando" exchanged messages on Grindr, and then moved to text messaging. The precise language of the messages is crucial to this case.¹ Thus, we reproduce key parts of the exchange in full. The conversation began as follows:

¹ The messages were primarily in Spanish. We draw from the certified English translations that were admitted into evidence.

Pérez: Hello what are you doing?

Dave: Hey what's up

Pérez: Let's see you

Dave: Cool, do you like really young guys?

Pérez: Yes
Age?
I started at 8

Dave: Me? 35, but my boyfriend is young

Pérez: Hahaha Okk
How old is he?
What does your boyfriend like?

Dave: He likes everything :)
He is very young, what age do you like?

Pérez: The younger the better
I don't discriminate
I started at 8 hehehhe
So you tell me
What does he like to do?
We are close, we can come up with some fun
From there up I do it all

Dave: Do you understand English? I speak only a little
Spanish
My boyfriend is 11 years old. Do you want to play
with him?

Pérez: Mmmm yessss
Where is he?
I speak little only a little English?
Share pics??
You tell me when and where???
Do you prefer to call?
Yes, I want to play

Dave: We live in[] San Juan.
We're free next week.

Pérez: Ok
Have whatsapp?
Send me pics?
Can you now?

Dave: Yes I'm busy with a party

Pérez: Ok, but you are close
Can you get away?
Can you*

Dave: Last night, no haha :)
Do you want anal with him or oral?

Pérez: Everything
I want the 3 of us to play
You for a while and me for a while. You like?

Dave: Me too
Yes

Pérez: Send me something to see you playing with him
I like taboo

Dave: Me too :)

Pérez: Have a pic?
Are you with him at the party

Dave: I don't want to send a pic because I won't know
who you are until we meet
Yes, he is here
You can take pics if this happens. Just no faces
I don't have whatsapp
But I can text

Pérez: Text is better

Pérez then sent two photos of himself to "Dave," and Dave provided Pérez with a telephone number.

The next day, December 31, Pérez sent Dave a text message to continue the conversation. He again expressed sexual interest in "Dave's" minor "boyfriend." Dave messaged, "we're going to

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.