FILED
United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN VIGIL,

Defendant - Appellant.

No. 20-2160
(D.C. No. 1:18-CR-00739-MV-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

A jury convicted Kevin Vigil of aggravated sexual abuse of a six-year-old child. On appeal, Vigil challenges two pretrial rulings: (1) that federal criminal jurisdiction exists because the offense occurred in Indian country; and (2) that the government could admit certain hearsay statements the child made to her mother. We affirm both rulings. As Vigil recognizes, our precedent forecloses his argument that the land on which his crime occurred is not considered Indian country. And because the child made the hearsay statements while under the stress caused by the alleged

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

abuse, the district court properly admitted them as excited utterances under Federal Rule of Evidence 803(2).

Background

According to trial testimony, one weekend in early February 2018, Vigil invited longtime friends Consuelo War and Tommy War over to hang out and drink at his trailer home. Vigil and Consuelo had briefly developed an intimate relationship after she and Tommy divorced in 2004, and the Wars' children—including their six-year-old daughter A.W.—called Vigil "Uncle Kevin." R. vol. 3, 401. On Saturday morning, after drinking together in the morning and early afternoon, the trio left to pick up A.W. from her sister's house.

Once they returned to Vigil's home, the three adults continued drinking until around 9:30 p.m., when Vigil went to sleep in his bedroom. Consuelo testified that half an hour later, A.W. got tired and joined Vigil. Consuelo said she twice checked on A.W. over the next hour, noticing nothing unusual either time. At 1:15 a.m., A.W. woke up and came back out to the kitchen, followed by Vigil ten minutes later. She returned to Vigil's bedroom around 2 a.m., and Vigil did the same five or ten minutes later. Then at about 2:10 a.m., Consuelo also got into Vigil's bed, on the other side of A.W., so that A.W. lay between the two adults.

Consuelo testified that three minutes later, she heard A.W. move and suddenly "gasp like something painful" had happened. *Id.* at 406. Reaching over with her hand, Consuelo felt that A.W.'s pants and underwear were off. Reaching further, Consuelo "felt [Vigil's] underwear off and his erect penis." *Id.* Consuelo turned on the lights

and "threw off the blankets" as Vigil stood up and "pull[ed] up his underwear." *Id.* After grabbing A.W., Consuelo left Vigil's home with Tommy and headed to the hospital.[1]

According to Vigil, as A.W. left, she hugged him and said, "Bye, Uncle Kevin." *Id.* at 939. Consuelo denied seeing A.W. hug Kevin and said that when A.W. got in the car, she was "scared, shocked, crying, and in pain." *Id.* at 407. Consuelo also said that during the drive to the hospital, A.W. made statements about the incident that had just occurred, saying, "Mamma, my cookie hurts and my butt hurts. Uncle Kevin put his fingers in my cookie and his pee-pee in my butt twice. And I told him to stop and he wouldn't."[2] *Id.*

Based on this incident, a grand jury indicted Vigil on two counts of aggravated sexual abuse of a child under 18 U.S.C. § 1152 and § 2241(c). Count 1 alleged that Vigil engaged and attempted to engage in contact between his penis and A.W.'s anus. *See* 18 U.S.C. § 2246(2)(A). Count 2 alleged that Vigil penetrated and attempted to penetrate A.W.'s genital opening with his fingers. *See* § 2246(2)(C).

Before trial, the government filed two motions relevant to this appeal. First, the government sought a determination that "the land on which the alleged crimes occurred is Indian [c]ountry"—a prerequisite for federal criminal jurisdiction—

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[1] Vigil's version of events varied greatly. He testified that when Consuelo joined him and A.W. in his bed, she laid down in between him and A.W. He said that Consuelo then pulled down his pants and touched his penis but that he pushed her away because A.W. was sleeping next to them. Vigil said that Consuelo became upset, left the room for five minutes, and then returned to wake A.W. and leave.

[2] A.W refers to her vagina as "cookie."

because it is "within the exterior boundaries of the Ohkay Owingeh Pueblo, a federally recognized Indian [t]ribe." R. vol. 1, 72. The district court granted this motion, rejecting Vigil's argument that the land is not Indian country because it is "privately held by non-Indians." *Id.* at 344.

Second, the government moved to admit the hearsay statements A.W. made to Consuelo on the way to the hospital, arguing that they were either present sense impressions or excited utterances under Federal Rule of Evidence 803(1) and (2), respectively. The district court granted the motion over Vigil's objections that "the witness offering the statements [wa]s unreliable" and that "the statements were not made while under the stress of the event's excitement." *Id.* at 326. The government introduced A.W.'s statements at trial through Consuelo's testimony.

The jury ultimately found Vigil not guilty on Count 1 and guilty on Count 2. The district court sentenced Vigil to 360 months in prison, followed by five years of supervised release. Vigil appeals, challenging the district court's pretrial rulings on jurisdiction and hearsay.

Analysis

I. Jurisdiction

Proof that the crime occurred in Indian country is a prerequisite for federal criminal jurisdiction. *See* § 1152 (extending general federal criminal laws to "Indian country"). In his opening brief, Vigil points to his argument below "that Congress precluded the exercise of federal criminal jurisdiction over offenses occurring on the land where [he] lives when it extinguished all right, title, and interest of Ohkay

Owingeh Pueblo to that tract and relinquished all interest of the United States." Aplt. Br. 34. He again asserts lack of subject-matter jurisdiction on appeal, but he acknowledges that we recently rejected his argument. *See United States v. Antonio*, 936 F.3d 1117, 1121–24 (10th Cir. 2019) (holding that defendant's offense occurred in Indian country because land, though privately owned by non-Indians, was within exterior boundaries of Pueblo lands), *cert. denied*, 140 S. Ct. 818 (2020). And we are bound to follow that decision absent en banc reconsideration or intervening Supreme Court authority. *United States v. Berg*, 956 F.3d 1213, 1216 n.3 (10th Cir.), *cert. denied*, 141 S. Ct. 605 (2020). Vigil does not allege that either circumstance has occurred here and "raises this issue [only] to preserve it in order to seek certiorari from the . . . Supreme Court." Aplt. Br. 34. Therefore, his jurisdictional argument is foreclosed by *Antonio*.

II. Hearsay Statements

Next, Vigil argues that the district court erred in granting the government's pretrial motion to admit certain hearsay statements. We review this evidentiary ruling for abuse of discretion and will reverse only if the district court made clearly erroneous factual findings, relied on erroneous legal conclusions, or if its decision manifests a clear error in judgment.[3] *See United States v. Channon*, 881 F.3d 806,

[3] As the government points out, the more stringent plain-error standard might apply because in the district court, Vigil did not raise one of the objections he now offers to challenge the admission of A.W.'s statements—that the government failed to prove when the alleged sexual abuse occurred. *See United States v. Smalls*, 752 F.3d 1227, 1236 (10th Cir. 2014) ("If there was no objection, we review for plain

809–10 (10th Cir. 2018). And given the "fact-specific nature of a hearsay inquiry," we apply "heightened deference" to the district court's ruling. *United States v. Pursley*, 577 F.3d 1204, 1220 (10th Cir. 2009) (quoting *United States v. Trujillo*, 136 F.3d 1388, 1395 (10th Cir. 1998)); *see also Channon*, 881 F.3d at 810.

Vigil's argument centers on A.W.'s statements to Consuelo on the way to the hospital. These statements are hearsay because A.W. made them out of court and the government offered them to prove that what A.W. said was true—that is, as evidence that Vigil committed the charged acts. *See* Fed. R. Evid. 801(c). The statements are therefore inadmissible unless an exception to the rule against hearsay applies. Fed. R. Evid. 802. The district court applied two exceptions, reasoning that A.W.'s statements were admissible either as present sense impressions or as excited utterances under Rule 803(1) or (2), respectively. Vigil contends that neither exception covers A.W.'s statements.

We begin with the excited-utterance exception, which applies to "statement[s] relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). Such statements are admissible if (1) a startling event occurred, (2) the declarant made the statements while "under the stress of the event's excitement," and (3) there is "a nexus between the content of the statement and the event." *Pursley*, 577 F.3d at 1220. No one disputes that A.W.'s statements satisfy the first and third requirements: The alleged

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error."). We need not decide whether Vigil preserved this timing argument, however, because it fails even under the more lenient abuse-of-discretion standard.

sexual abuse is a startling event, and the statements are about that event. The dispute centers on the second requirement—whether A.W. made the statements while under the stress of the event's excitement.

On this requirement, our precedent sets out "a range of factors" that affect "whether a declarant made a statement while under the stress of a particular event." *Id.* Those factors include "the amount of time between the event and the statement; the nature of the event; the subject matter of the statement; the age and condition of the declarant; the presence or absence of self-interest; and whether the statement was volunteered or in response to questioning." *Id.* "[T]here is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance." *Id.* at 1221 (quoting *United States v. Ledford*, 443 F.3d 702, 711 (10th Cir. 2005)); *see also id.* (citing cases with delays ranging from 35 minutes to four hours).

The district court applied these factors to conclude that A.W. made the challenged statements under the stress caused by the incident. In particular, it found that only a "short amount of time" passed between the alleged abuse and the statements. R. vol. 1, 340. It further noted that the nature of the event—sexual abuse—was especially startling and that A.W. was only six years old. *Cf. United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993) (noting when analyzing different hearsay exception that "youth 'greatly reduce[s] the likelihood that reflection and fabrication were involved'" (alteration in original) (quoting *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988))). The district court also remarked that

A.W.'s statements lacked any apparent self-interest and found it relevant that A.W. was upset and crying at the time she made these statements. *See id.* (mother's description of child as "frightened, on the verge of tears[,] and trying to run away[ ]indicate[d] that she was still under the stress of the [sexual assault]").

On appeal, Vigil challenges the district court's conclusion that a "short amount of time" elapsed between the alleged abuse and the statements. R. vol. 1, 340. In his view, the district court "incorrect[ly] assum[ed]" that the conduct described in A.W.'s statements "occurred during the three minutes that Consuelo was lying next to [A.W.]." Aplt. Br. 29–30; *see also id.* at 30 (arguing that "the evidence does not support" conclusion that abuse could have occurred "while [Consuelo] lay awake beside [A.W.]"). But the district court's conclusion on this point is a factual finding, and we may disturb that finding only if it is clearly erroneous. *See Channon*, 881 F.3d at 809–10. A factual "finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Otuonye*, 995 F.3d 1191, 1203–04 (10th Cir. 2021) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

Vigil cannot meet this standard. Consuelo testified that the incident occurred at or around 2:13 a.m. (three minutes after she got into bed) and that A.W. made the statements on the ensuing drive to the hospital, where Consuelo signed a time-stamped medical form at 2:38 a.m. This evidence supports the conclusion that the abuse occurred in the time frame that Consuelo described and that A.W.'s statements

occurred shortly thereafter. And Vigil points to no other record evidence to undermine Consuelo's account. Instead, he complains generally about the amount of time and privacy required to sexually assault a child. He suggests, for instance, that "[i]t defies common sense to conclude that A[.W.] could have been anally penetrated twice during the three minutes that Consuelo was lying beside her," Aplt. Br. 27. But Vigil's complaints amount to nothing more than speculation, and we are not "left with the definite and firm conviction that a mistake has been committed." *Otuonye*, 995 F.3d at 1203 (quoting *Anderson*, 470 U.S. at 573). Accordingly, we find no clear error in the district court's factual finding that a "short amount of time" passed between the event and the statement. R. vol. 1, 340.

Vigil next argues that "the government did not demonstrate a continuous state of excitement from event to statement." Aplt. Br. 30. That is, Vigil asserts that even if A.W. "was in a state of excitement when she made her statements" in the car, "[t]he only evidence concerning A[.W.]'s condition prior to leaving [his] home was that she [was] calm." *Id.* For support, he cites his testimony that A.W. gave him a hug before leaving and said, "Bye, Uncle Kevin." R. vol. 3, 939–40.

This argument is both factually and legally flawed. In her testimony, Consuelo denied that A.W. gave Vigil a hug before leaving. Further, Consuelo's testimony about A.W.'s demeanor in the car—that A.W. was "scared, shocked, crying, and in pain"—casts doubt on Vigil's claim that A.W. appeared calm moments earlier when she left the house. *Id.* at 407. And in any event, even assuming A.W. seemed calm when she left, that fact isn't dispositive because "the declarant need not show signs

of excitement immediately upon witnessing or experiencing [the] startling event." *United States v. Lossiah*, 129 F. App'x 434, 437 (10th Cir. 2005) (unpublished);[4] *cf. United States v. Smith*, 606 F.3d 1270, 1279 (10th Cir. 2010) ("Admissibility hinges on a statement's contemporaneousness with the excitement a startling event causes, not the event itself."). To the contrary, the declarant must simply "still be under the continuing stress of excitement caused by the event or condition when making the statement." *Lossiah*, 129 F. App'x at 437; *see also id.* (rejecting argument that "statement was not an excited utterance because the younger child initially appeared calm following the startling event"). And here, the factors discussed by the district court—including its not-clearly-erroneous finding on the timing factor—suggest that A.W. remained under the stress of the event when she made her statements. For that reason, the district court did not abuse its discretion in admitting the statements as excited utterances, and we need not address whether the statements were also admissible as present sense impressions under Rule 803(1). *See Magnan*, 863 F.3d at 1287 n.1.

Conclusion

Because the district court properly determined that Vigil's offense occurred in Indian country and that A.W.'s statements were admissible hearsay under the

[4] Though *Lossiah* is unpublished and therefore lacks precedential value, we find it persuasive and cite it for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

excited-utterance exception in Rule 803(2), we affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge