NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued August 1, 2023
Decided August 9, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-2868

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN DANFORD,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:20-CR-00275

James R. Sweeney II,
Judge.

O R D E R

Steven Danford recorded himself sexually abusing two minor children. He admitted that he produced "visual depiction[s]" of each victim engaged in "sexually explicit conduct" and pleaded guilty to two counts of sexual exploitation of a minor. 18 U.S.C. § 2251(a). The district court sentenced him to a total of 420 months in prison. On appeal, Danford argues for the first time that the district court erred in accepting his guilty plea on the second count of the indictment because the recordings of the second victim did not show the victim's anus, genitals, or pubic area. As Danford sees it, there was therefore no factual basis underlying his plea. Because the district court did not commit plain error in accepting the guilty plea, we affirm.

I

Danford was initially indicted on one count of violating 18 U.S.C. § 2251(a) after police discovered a flash drive that contained recordings of his abuse of a minor victim. A superseding indictment added a second count—the one at issue in this appeal—when law enforcement found two additional recordings of a second minor victim. Danford moved to enter a guilty plea without an agreement. At the plea hearing, the district court informed Danford that the government would be required to prove that he caused the minor victims to engage in "sexually explicit conduct" for the purpose of producing visual depictions of such conduct. Danford confirmed that he had discussed the charges with his attorney and that he understood the "nature of each charge." The government then provided the district court with the factual basis for Danford's guilty plea. See Fed. R. Crim. P. 11(b)(3). The government recited the facts underlying the second count of the indictment as follows:

> [T]he two files that were created as to Minor Victim 2 are files 4 and 5. File 4 is named 26657218, and file 5 is named 71455214. File 4 depicts Minor Victim 2 fully nude and bent over a bed with her nude buttocks visible. There is an adult male whose face is not visible, and he is applying lotion or some sort of lubricant to Minor Victim 2's buttocks. Although Minor Victim 2's genitals and anus are not visible because she is lying on her stomach, her genitals and anus are the focal point of file 4.
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> File 5 is a continuation of the event depicted in file 4, and it shows, again, Minor Victim 2 [lying] fully nude on the same bed. And again, despite her genitals and anus not being visible, Minor Victim 2's genitals and anus are the focal point of file 5, and at times during file 5 the defendant's face is visible while he masturbates his erect penis.

Danford confirmed that the government's description was true and provided a factual basis for his plea. The pre-sentence investigation report further detailed that "[a]t one point during File 4, the defendant reaches his hand between Minor Victim 2's buttocks and appears to touch her pubic area." Danford did not object to this description. The court then reviewed the other rights Danford was relinquishing, see Fed. R. Crim. P. 11(b), and accepted Danford's guilty plea. The court sentenced Danford to a total of 420 months in prison and 20 years of supervised release.

On appeal, Danford argues that there was no factual basis for his guilty plea on the second count because the recordings of the second minor victim do not fit the statutory definition of "sexually explicit conduct." 18 U.S.C. § 2251(a). Specifically, Danford argues that the recordings do not contain a "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

II

Because Danford raises this issue for the first time on appeal, we review only for plain error. *United States v. Williams*, 946 F.3d 968, 971 (7th Cir. 2020). "Plain error has four elements: (1) there was an error, (2) the error is clear and obvious, (3) the error affected the defendant's substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Under 18 U.S.C. § 2251(a), it is unlawful to "employ[ ], persuade[ ], induce[ ], or coerce[ ] any minor to engage in … any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." The statute defines "sexually explicit conduct" to include the "lascivious exhibition of the anus, genitals, or pubic area of any person" (among other acts not relevant to this appeal). 18 U.S.C. § 2256(2)(A)(v). Danford argues that this definition and our circuit precedent clearly require the minor victim's anus, genitals, or pubic area to be visible in the recording. But neither the statutory text nor our precedent is as clear-cut as Danford suggests.

First, we note that we held in *United States v. Price*, 775 F.3d 828 (7th Cir. 2014), that the statutory definition of lascivious exhibition does not require full or even partial nudity. In that case, the defendant argued that "to be a lascivious exhibition, a visual depiction of the genitals or pubic area requires full exposure without any covering at all … [i]n other words, full nudity." *Id.* at 837. Recordings and images of the victim in "lingerie," for example, would be insufficient. See *id.* at 833. We rejected that argument and held that the district court did not err in instructing the jury that "[t]he genitals or public area do not have to be fully or partially uncovered for a visual depiction to be a lascivious exhibition." *Id.* at 833, 837–38.

Here, Danford agreed under oath with the government's statement that the victim's "genitals and anus are the focal point" of the two recordings, despite the fact that they are "not visible."[1] We recognize that there is some tension between these two

[1] The idea that the "focal point" of the image is relevant can be traced back to the district court's opinion in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), which

statements, and perhaps the government could have been clearer in its explanation. But these facts are analogous enough to the situation in *Price*—where we held that the minor's genitals and pubic area were "exhibited" despite the fact that they were covered by lingerie—that we cannot say that the district court *plainly* erred.

Second, other courts have rejected Danford's assumption that the statute necessarily requires the depiction of the *minor*'s anus, genitals, or pubic area. The statute defines "sexually explicit conduct" to include the "lascivious exhibition of the anus, genitals, or pubic area of *any person*." 18 U.S.C. § 2256(2)(A)(v) (emphasis added). As the Eleventh Circuit recently explained, the addition of the phrase "any person" could be interpreted as criminalizing not only "an offender who uses a minor by lasciviously exhibiting the minor's genitals," but also "an offender who uses a minor to engage in the sexually explicit conduct of lasciviously exhibiting the offender's genitals." *United States v. Dawson*, 64 F.4th 1227, 1237 (11th Cir. 2023); see also *United States v. Osuba*, 67 F.4th 56, 63 (2d Cir. 2023) (holding that a recording in which the defendant "ejaculated toward" a clothed minor was sufficient to constitute either "lascivious exhibition" or "masturbation").

Although we have held that section 2251(a) requires the *minor* (and not just the defendant) "to engage in sexually explicit conduct" to support a conviction, *United States v. Howard*, 968 F.3d 717, (7th Cir. 2020), we have not squarely decided whether a minor can engage in the sexually explicit conduct of lasciviously exhibiting someone else's anus, genitals, or pubic area. In *Howard,* we vacated a defendant's section 2251(a) conviction where he filmed himself masturbating next to a sleeping, clothed minor. But the government's only argument in that case was that "it [did] not matter whether the minor victim engaged in any sexually explicit conduct" so long as "the offender somehow 'use[d]' a child as an object of sexual interest." *Id.* at 721. We rejected this passive object-of-sexual-interest theory and held that the minor was not sufficiently engaged in sexually explicit conduct on the facts of that case. But we never reached the counterfactual question of what might constitute sufficient engagement. (What about a recording, for example, where a minor is forced to touch an offender's exposed

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suggested six relevant factors that shed light on the question whether an image depicts a "lascivious exhibition." We have steered away from reliance on the so-called *Dost* factors, and we have no need to consider them here, since this case can be resolved on other grounds.

genitals? Such conduct does not appear to be captured by any other definition of "sexually explicit conduct" in section 2256(2)(A).)

Indeed, in our subsequent decision in *United States v. Sprenger*, we distinguished between a recording in which the defendant masturbated near a sleeping minor but did not make "physical contact" with the minor (count one of the indictment), and recordings in which the defendant "made physical contact with [the minor victim's] clothed buttocks and vagina while she was sleeping, and ejaculated onto her clothed buttocks" (count two). 14 F.4th 785, 794 n.2 (7th Cir. 2021). We agreed with the defendant that *Howard* barred the defendant's section 2251(a) conviction for the first recording. *Id.* at 791. But we emphasized that the defendant's "physical contact" with the victim in the second set of recordings "leaves open the possibility that [the defendant's] count 2 conduct constitutes a § 2251(a) violation whereas his count 1 conduct doesn't." *Id.* at 794 n.2. Because we did not need to reach the issue to decide the appeal, we expressly declined to "decide whether, post-*Howard*, the count 2 conduct Sprenger stipulated to constitutes the production of child pornography within the meaning of § 2251(a)." *Id.*

The recordings at issue here showed Danford actively touching a conscious minor's nude buttocks and pubic area while masturbating. As we indicated in *Sprenger*, these facts are distinguishable from those of *Howard*. In sum, this is a "step 2" case for purposes of the plain error inquiry: even assuming there was an error, it was not clear and obvious. To the contrary, given the caselaw, there is room for debate over the question whether Danford's recordings of the second minor victim fit the statutory definition of "sexually explicit conduct." The district court thus did not commit plain error when it accepted the facts outlined by the government as an adequate basis for Danford's guilty plea.[2] See *United States v. Hopper*, 11 F.4th 561, 572 (7th Cir. 2021) ("In order for error to be 'plain,' it 'must be clear or obvious, rather than subject to reasonable dispute.'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009))). We therefore AFFIRM the judgment of the district court.

[2] In light of this conclusion, we have no need to reach the government's alternative argument, under which it contends Danford's conviction on the second count can also be upheld on the theory that he admitted to attempting to exploit the victim sexually.