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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL DAVID JACKSON,

Defendant - Appellant.

No. 22-7015

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:20-CR-00108-RAW-1)

Submitted on the briefs:*

Joshua Sabert Lowther and Bingzi Hu, of Lowther Walker, Atlanta, Georgia, for Defendant-Appellant.

Christopher J. Wilson, United States Attorney, Lauren S. Zurier, Special Assistant United States Attorney, and Linda A. Epperley, Assistant United States Attorney, Office of the United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

SEYMOUR, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Michael David Jackson was convicted and sentenced for several offenses stemming from the sexual abuse of his young niece, including two counts of possession of child pornography. On appeal Mr. Jackson argues, and the government concedes, that the possession convictions are multiplicitous and violate the Fifth Amendment's Double Jeopardy Clause. We agree and therefore remand to the district court with instructions to vacate one of these convictions. Mr. Jackson also contends that his sentence is procedurally unreasonable because the application of several sentencing enhancements constitutes impermissible double counting. He further asserts that his sentence is substantively unreasonable. Although the district court will have discretion to consider the entire sentencing package on remand, we reject these challenges and conclude that the sentence imposed is both procedurally and substantively reasonable.

Background

Mr. Jackson, a member of the Cherokee Nation, was indicted on six counts stemming from sexual encounters he had with his niece F.J., who was less than twelve years old at the time. Specifically, F.J. reported to law enforcement that Mr. Jackson molested her on various dates between May and December 2019 while he was babysitting her. F.J. also alleged Mr. Jackson took sexually explicit photographs of her and produced a video of them engaged in sexual conduct. A forensic examination of Mr. Jackson's cell phone conducted months after he was interviewed concerning these allegations determined that he self-produced and possessed almost two dozen images of

F.J. engaged in sexually explicit conduct. All relevant conduct occurred within the Cherokee Nation Reservation.

Counts One and Three of the indictment charged Mr. Jackson with aggravated sexual abuse in Indian country in violation of 18 U.S.C. §§ 1151, 1153, 2241(c), and 2246(2)(A). Count Two charged Mr. Jackson with aggravated sexual contact with a child under 12 years old in violation of 18 U.S.C. §§ 1151, 1153, 2244(a)(5), and 2246(3). Count Four charged Mr. Jackson with sexual exploitation of a child/use of a child to produce a visual depiction in violation of 18 U.S.C. § 2251(a) and (e). Counts Five and Six charged Mr. Jackson with possession of certain material involving the sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(4) and (b)(2). These two counts concerned the same conduct, occurring from May 2019 until March 2020, but had different jurisdictional elements: Count Five alleged that the conduct occurred in Indian country in violation of 18 U.S.C. §§ 1151 and 2252(a)(4)(A), whereas Count Six alleged that the conduct involved materials transported in interstate commerce in violation of 18 U.S.C. § 2252(a)(4)(B).

Mr. Jackson moved to dismiss Count Five or Six, arguing that they were multiplicitous because they differed only on the jurisdictional element.[1] The government opposed the motion, and the district court denied it, concluding that the two counts were not multiplicitous under the test set forth in *Blockburger v. United States*, 284 U.S. 299

[1] Mr. Jackson also argued that Count Four was multiplicitous of Counts Five and Six because possession of child pornography is a lesser-included offense of the child exploitation charged in Count Four. The district court rejected this argument, and Mr. Jackson has not renewed it on appeal.

(1932). The court further concluded that multiplicity issues could be remedied with proper jury instructions or at sentencing.

Mr. Jackson proceeded to trial, where he was found guilty on all six counts. At sentencing, the district court overruled Mr. Jackson's various objections to the presentence report ("PSR"), described in relevant part below, resulting in a total offense level of 43 and a guideline range of life. Mr. Jackson requested a downward variance, but the court sentenced him to life imprisonment on each of Counts One, Two, and Three, 360 months' imprisonment on Count Four, and 240 months' imprisonment on both Counts Five and Six, all to run concurrently.

Discussion

A. Convictions on Both Counts Five and Six Violate the Double Jeopardy Clause

Mr. Jackson argues that his convictions on the two possession charges, Counts Five and Six, violate the Double Jeopardy Clause. In denying Mr. Jackson's motion to dismiss, the district court applied the *Blockburger* test and concluded that Counts Five and Six were not multiplicitous because each required the government to prove a unique element—i.e., Count Five required the government to prove that the offense took place in Indian country and Count Six required the government to prove that materials affecting interstate commerce were used. On appeal, the government concedes that the *Blockburger* test does not apply and urges us to remand to the district court with instructions to vacate either Count Five or Count Six. Factual findings underlying a double jeopardy claim are reviewed for clear error, but the ultimate legal determination

regarding double jeopardy is reviewed de novo. *United States v. Leal*, 921 F.3d 951, 958 (10th Cir. 2019).

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy." U.S. Const. amend. V. This guarantee provides protection against both multiple prosecutions and multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688 (1980). The defendant carries the burden of proving that the Double Jeopardy Clause has been violated. *Leal*, 921 F.3d at 959. "When the government charges a defendant under separate statutes for the same conduct, the [*Blockburger* test] determines whether the crimes are the 'same offense' for double jeopardy purposes." *Id.* at 960. "But . . . the Double Jeopardy Clause also provides a distinct protection for defendants who have been charged with violating the *same statute* more than one time when they have in fact only violated it once." *United States v. Mier-Garces*, 967 F.3d 1003, 1012 (10th Cir. 2020) (emphasis in original). In these cases, we use statutory interpretation to determine congressional intent rather than employing the *Blockburger* test. *See United States v. Johnson*, 130 F.3d 1420, 1425–26 & n.2 (10th Cir. 1997); *Sanabria v. United States*, 437 U.S. 54, 70 (1978) ("Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on . . . congressional choice.").

Mr. Jackson was charged under two subsections of 18 U.S.C. § 2252(a)(4), which makes it a crime for any person who:

(4) *either*—

> (A) in [a federal enclave], or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; *or*
>
> (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct.

(emphasis added). The plain natural reading of the text of the statute, particularly with its disjunctive structure, demonstrates that Congress did not intend for subsections (A) and (B) to create two distinct offenses. *See Johnson*, 130 F.3d at 1425–26 (counts charging defendant under separate subsections of 18 U.S.C. § 922(g) were multiplicitous when defendant possessed a single weapon); *United States v. Rigas*, 605 F.3d 194, 208 (3d Cir. 2010) (en banc) (Congress' use of "either . . . or" disjunctive language created "alternative means of committing a single type of offense rather than creating separate offenses"). Rather, the statute establishes two ways to commit one offense: *either* by possessing child pornography in a federal enclave or Indian country *or* possessing child pornography transported or produced using interstate commerce. These are two separate jurisdictional hooks allowing Congress to criminalize possession of pornography, not two

separate offenses. Both subsections identify the same types of materials and criminalize possession of one or more depictions of minors engaged in sexually explicit activity.

Here, Counts Five and Six allege violations of subsections (A) and (B), respectively. As charged in the indictment, these counts cover the same conduct, occurring during the same time period. Accordingly, convictions on both counts violate double jeopardy, and the district court must vacate one of these convictions on remand.

Under the "sentencing package" doctrine, "after we vacate a count of conviction that is part of a multi-count indictment, a district court 'possesses the inherent discretionary power' to resentence a defendant on the remaining counts *de novo* unless we impose specific limits on the court's authority to resentence." *United States v. Hicks*, 146 F.3d 1198, 1202 (10th Cir. 1998) (quoting *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996)). Because our instructions to the district court to vacate either Count Five or Count Six include no specific limitation, the court has discretion to consider the entire sentencing package on remand. But we first turn to Mr. Jackson's challenges to the reasonableness of his sentence.

B. Mr. Jackson's Sentence Is Procedurally and Substantively Reasonable

"Reasonableness review is a two-step process comprising a procedural and a substantive component." *United States v. Verdin-Garcia*, 516 F.3d 884, 895 (10th Cir. 2008). First, we review for procedural reasonableness, which "focuses on whether the district court committed any error in calculating or explaining the sentence." *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009). Next, we review for substantive reasonableness, which "focuses on 'whether the length of the sentence is

reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a).'" *Id.* (quoting *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1215 (10th Cir. 2008)). Mr. Jackson challenges both the procedural and substantive reasonableness of his sentence.

We review the reasonableness of a sentence under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Under this standard, we review factual findings for clear error and legal determinations de novo. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014). However, "while a defendant need not object after pronouncement of sentence based on substantive reasonableness, i.e. the length of that sentence, he must object to any procedural flaws or receive, on appeal, only plain error review." *United States v. Romero*, 491 F.3d 1173, 1177 (10th Cir. 2007).

1. Procedural Reasonableness

Mr. Jackson asserts that the district court improperly calculated his guidelines by applying enhancements that resulted in impermissible double counting. "Impermissible double counting occurs in Guideline calculations when 'the same conduct on the part of the defendant is used to support separate increases under separate enhancement provisions which necessarily overlap, are indistinct, and serve identical purposes.'" *United States v. Cifuentes-Lopez*, 40 F.4th 1215, 1220 (10th Cir. 2022) (quoting *United States v. Fisher*, 132 F.3d 1327, 1329 (10th Cir. 1997)), *cert. denied*, 143 S. Ct. 467 (2022). "All three criteria must be satisfied to constitute double counting." *Id.* There is therefore no impermissible double counting when a court applies separate enhancements

that "aim at different harms emanating from the same conduct." *Id.* (quoting *United States v. Reyes Pena*, 216 F.3d 1204, 1209–10 (10th Cir. 2000)).

i. Cross Reference and Victim Age Enhancement

Mr. Jackson first challenges the district court's guideline calculation for Count Two, abusive sexual contact with a child under twelve in violation of 18 U.S.C. § 2244(a)(5). The guideline for this offense is U.S.S.G. § 2A3.4. Subsection (c)(1) of § 2A3.4 instructs courts to cross reference to U.S.S.G. § 2A3.1 "[i]f the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242)." Mr. Jackson concedes that his convictions on Counts One and Three for aggravated sexual abuse in violation of § 2241(c) are relevant conduct that trigger the § 2A3.1 cross reference. Under § 2A3.1(a)(2), Mr. Jackson's base offense level for Count Two was set at 30, eighteen levels higher than if the cross reference did not apply. *See* § 2A3.4(a)(3). The offense level was then increased by four because F.J. was younger than twelve at the time of the offense. *See* § 2A3.1(b)(2)(A).

At sentencing, Mr. Jackson argued that the § 2A3.1 cross reference was misapplied because Count Two charged him with a violation of § 2244(a)(5), not §§ 2241 or 2242.[2] Abandoning that argument, Mr. Jackson now contends the application of both the cross reference and the enhancement for F.J.'s age resulted in impermissible double counting. He reviews the text of §§ 2241 and 2242, concluding that criminal sexual abuse can be committed through a variety of means, including force, threats, coercion, and

[2] As the government notes, this argument fails in light of our decision in *United States v. Platero*, 996 F.3d 1060, 1065 (10th Cir. 2021).

engaging in sexual acts with children under the age of twelve. He asserts there is no evidence that he forced, threatened, or coerced F.J. into sex and reasons that the cross reference is therefore only triggered by F.J.'s age. Mr. Jackson argues F.J.'s age was consequently "used up" as a sentencing factor, and that using her age to apply an additional four-level enhancement constituted impermissible double counting. Aplt. Br. at 16. He asserts that the district court should have calculated his guidelines under § 2A3.4, rather than cross-referencing to § 2A3.1, to avoid this impermissible outcome.

Because Mr. Jackson did not make this argument in district court, we review for plain error.[3] "To satisfy the plain error standard, a defendant must show that (1) the district court erred; (2) the error was plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014).

Considering our opinions in *United States v. Ransom*, 942 F.2d 775 (10th Cir. 1991), and *United States v. Ward*, 957 F.2d 737 (10th Cir. 1992), we conclude that Mr. Jackson's argument fails on the first prong of the plain error test. The defendant in *Ransom* violated § 2241(c) by having sex with a minor under the age of twelve. 942 F.2d at 776. His base offense level was set pursuant to a prior version of § 2A3.1 and enhanced under § 2A3.1(b)(2)(A) because his victim was younger than twelve. *Id.* at 778.

[3] Mr. Jackson makes no mention of the plain error standard in his opening brief. In his reply, he objects to our plain error review and instead asserts that he should be able to make his argument on remand. Although "we have repeatedly declined to consider arguments under the plain-error standard when the defendant fails to argue plain error," *United States v. Wright*, 848 F.3d 1274, 1281 (10th Cir. 2017), we have addressed this issue in the interest of judicial efficiency.

The defendant argued that "the base offense level of 2A3.1 necessarily takes into account the age of the victim and it is inappropriate to enhance that level based on a fact already considered." *Id.* In rejecting this argument, we explained that the base offense level of § 2A3.1 represented sexual abuse proscribed by § 2242, which does not necessarily involve a minor victim. *Id.* at 779. We therefore reasoned that "[t]he [Sentencing] Commission may have determined that the base offense level, while representing a lowest 'common denominator' for the offenses grouped under U.S.S.G. § 2A3.1, does not adequately punish a defendant for his conduct when the victim is so young." *Id.*

We relied on this reasoning in *Ward*, where the defendant was charged under § 2244(a)(1) and sentenced under a prior version of § 2A3.4. 957 F.2d at 738, 739. The sentencing court enhanced the defendant's sentence under § 2A3.4(b)(1) because the victim was younger than twelve. *Id.* at 740. The defendant argued this was impermissible double counting because the victim's age was already factored into the base offense level. *Id.* In rejecting this argument, we explained that "[t]he important teaching of *Ransom* is that even though the 'under the age of twelve' factor was present in determining the base offense level of Ransom, such did not preclude increasing the base offense level in that case by four levels where the victim of the sexual act was under the age of twelve years." *Id.*

Although neither *Ransom* nor *Ward* addressed § 2A3.4(c)(1)'s cross reference to § 2A3.1, without a controlling opinion on this issue we find them instructive. There are several ways to violate § 2244 and qualify for the cross reference that do not involve victimizing a minor under the age of twelve. *See* § 2244(a)(1)–(4), (a)(6), (b). The base

offense level set under § 2A3.1(a)(2) represents the lowest common denominator for all the offenses that trigger the cross reference and does not on its own account for the age of the victim. We are not persuaded that the cross reference and resulting base offense level serve the purpose of punishing defendants for victimizing young children. Because the cross reference and the enhancement do not necessarily overlap and have distinct purposes, application of both does not amount to impermissible double counting.

Mr. Jackson neither identifies precedent in support of his position nor attempts to distinguish his case from *Ransom* and *Ward*. He has therefore failed to establish that the district court erred, let alone plainly erred, in applying the cross reference and subsequent enhancement for F.J.'s age.

ii. Pattern of Activity Enhancement and Grouping

The district court also applied a five-level enhancement under U.S.S.G. § 4B1.5(b)(1) because Mr. Jackson engaged in a pattern of illegal sexual conduct. At sentencing, Mr. Jackson objected to the enhancement because it was "simply punitively duplicative" considering his lack of a criminal history. Rec., vol. II at 40. On appeal, he presents a new argument concerning the four-level enhancement that resulted from the grouping of his convictions under U.S.S.G. § 3D1.4. He argues that the application of both enhancements constitutes impermissible double counting because they punish him for the same criminal conduct.

Regardless of what standard of review we use, this argument is foreclosed by our decision in *United States v. Cifuentes-Lopez*, 40 F.4th 1215 (10th Cir. 2022). There, we noted that "the Guidelines anticipate a cumulative application of both enhancements"

because § 4B1.5(b)(1) explicitly states that the five-level increase is in addition to the offense level calculated under Chapters Two and Three of the guidelines. *Id.* at 1220. We also determined that the two provisions addressed distinct sentencing goals: "The purpose of the multiple count enhancement in § 3D1.4 is to provide incremental punishment for significant additional criminal conduct. The purpose of § 4B1.5(b)(1) is to protect minors from sex offenders who present a continuing danger to the public." *Id.* at 1221 (internal quotation marks and citations omitted). We therefore concluded that application of both enhancements was not double counting. *Id.*

Mr. Jackson, who does not cite *Cifuentes-Lopez*, offers no argument that his case is distinguishable from our controlling precedent. Accordingly, we reject his double counting argument and conclude that his sentence is procedurally reasonable.

2. Substantive Reasonableness

Finally, Mr. Jackson argues that the concurrent life sentences imposed by the district court are substantively unreasonable because they are greater than necessary to achieve the sentencing purposes articulated in § 3553(a). "A sentencing decision is substantively unreasonable if it exceeds the bounds of permissible choice, given the facts and the applicable law." *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013) (internal quotations, citation, and alteration omitted). "[W]e presume a sentence is reasonable if it is within the properly calculated guideline range." *Id.* Here, the district court overruled Mr. Jackson's objections to the PSR, which resulted in a guideline range of life imprisonment. Because "the sentence of life was within [the] guideline range properly calculated by the PSR, . . . it is Mr. [Jackson's] burden to rebut the presumption

of reasonableness." *United States v. Woody*, 45 F.4th 1166, 1180 (10th Cir. 2022). Mr. Jackson has failed to do so.

First, Mr. Jackson argues a life sentence overstates the seriousness of his convictions. In doing so, he provides statistics on the average sentences for sexual abusers and child pornography producers. However, these statistics offer only one data point and tell us nothing about the offense characteristics and personal circumstances that resulted in individual sentences. Here, we have a particularly egregious set of facts: Mr. Jackson repetitively sexually abused his niece, who was less than twelve years old. Not only did Mr. Jackson have a close familial relationship with F.J., but he took advantage of his position of trust as her babysitter. Moreover, he documented some of this abuse and stored the resultant child pornography on his devices even after law enforcement began investigating his conduct. F.J.'s parents also reported that F.J. suffers severe mental health issues stemming from Mr. Jackson's abuse, including suicidal ideation and self-harm. Given these circumstances, we cannot say that a life sentence overstates the seriousness of Mr. Jackson's offenses.

Next, Mr. Jackson asserts that the sentence is greater than necessary for the purposes of deterrence and protecting the public. He notes his lack of criminal history and argues that long-term sentences have diminishing returns for public safety, in part because individuals are less likely to commit crimes as they age. Mr. Jackson made the same arguments at sentencing, and the district court explicitly stated that it considered his criminal history in fashioning its sentence. These factors do not persuade us that a life sentence exceeds the bounds of permissible choice. In fact, we have affirmed, as

substantively reasonable, concurrent life sentences of a defendant convicted of aggravated sexual abuse and abusive sexual contact with a young child whose prior criminal history consisted of only one arrest for driving while intoxicated. *See Woody*, 45 F.4th at 1180. Furthermore, Mr. Jackson's recidivism arguments are largely generalized and do not persuade us that the district court abused its discretion in assessing the need to protect the public under the specific circumstances of his case.

Finally, Mr. Jackson contends that the life sentence fails to help him receive effective medical care for his depression, anxiety, and Attention Deficit and Hyperactivity Disorder. He describes suicidal ideation and asserts that his mental health has declined as a result of his incarceration. He does not, however, provide any evidence that the Bureau of Prisons is incapable of effectively meeting his mental health care needs. Nor does he provide any medical records or details concerning his specific needs or the impact of incarceration on his mental health.

For these reasons, Mr. Jackson has failed to rebut the presumption that his guideline sentence was reasonable.

Conclusion

In sum, we hold that Mr. Jackson's convictions on both Counts Five and Six are multiplicitous and violate his Fifth Amendment rights. Accordingly, we remand this case to the district court to vacate one of these convictions. However, we reject Mr. Jackson's challenges to the procedural and substantive reasonableness of his sentence.