[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15031
Non-Argument Calendar

D.C. Docket No. 4:18-cr-10008-JEM-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

BRUCE GOSSAGE,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 17, 2019)

Before MARCUS, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

Bruce Gossage appeals his 480-month total sentence for distribution of child pornography (Count One) and possession of child pornography (Counts Two and

Three). Gossage pleaded guilty to these counts following a forensic examination of his computer that revealed approximately 747 images, 94 GIFs (digital files associated with still or moving images), and 40 videos depicting child pornography, and another forensic examination of electronic storage devices found in Gossage's home and vehicle that revealed more than 15,000 images and 100 videos depicting child pornography. The images and videos depicted pre-pubescent children engaged in sexually explicit conduct, sadistic or masochistic conduct and other depictions of violence, and the sexual abuse or exploitation of infants and toddlers. On appeal, he argues that: (1) the district court improperly applied the pattern-of-activity and obstruction-of-justice enhancements under U.S.S.G. §§ 2G2.2(b)(5) and 3C1.1, respectively, in calculating his guideline range; (2) the court violated his due process rights by refusing to listen to certain recorded evidence related to the obstruction-of-justice enhancement and by limiting the length of the sentencing hearing; and (3) the court erred by failing to clearly provide him with an opportunity to allocute at sentencing. After thorough review, we affirm in part, and vacate and remand in part.

We review the sentence a district court imposes for "reasonableness," which "merely asks whether the [] court abused its discretion." United States v. Pugh, 515 F.3d 1179, 1189 (11th Cir. 2008) (quotation omitted). We review the district court's fact findings at sentencing for clear error. United States v. Doe, 661 F.3d 550, 565 (11th Cir. 2011) (discussing the obstruction-of-justice enhancement in U.S.S.G. §

3C1.1); United States v. Alberts, 859 F.3d 979, 982 (11th Cir. 2017) (discussing the pattern-of-activity enhancement in U.S.S.G. § 2G2.2(b)(5)). We review the sentencing court's application of the Sentencing Guidelines to those factual findings de novo. United States v. Rodriguez, 732 F.3d 1299, 1305 (11th Cir. 2013). Where a defendant challenges one of the factual bases for his sentence as set forth in the presentence investigation report ("PSI"), the government bears the burden of establishing the disputed fact by a preponderance of the evidence. Id. The court must ensure that the government carries this burden by presenting reliable and specific evidence. Id. The court may base its findings on facts admitted by a defendant's plea of guilty, undisputed statements in the PSI, or evidence presented either at trial or at the sentencing hearing. United States v. Wilson, 884 F.2d 1355, 1356 (11th Cir. 1989). We give substantial deference to the district court's credibility determinations at sentencing. United States v. Plasencia, 886 F.3d 1336, 1343 (11th Cir. 2018). Where there are two or more permissible ways of viewing the evidence, the district court's choice between them cannot be clear error. United States v. Ndiaye, 434 F.3d 1270, 1305 (11th Cir. 2006).

We review questions of constitutional law de novo. United States v. Duboc, 694 F.3d 1223, 1228 n.5 (11th Cir. 2012). We review a district court's decision to exclude evidence for abuse of discretion. United States v. Reeves, 742 F.3d 487, 501 (11th Cir. 2014). We apply the harmless error standard to erroneous evidentiary

rulings. United States v. Henderson, 409 F.3d 1293, 1300 (11th Cir. 2005). An error is harmless unless it had a substantial influence on the case's outcome or leaves a grave doubt as to whether the error affected the outcome. Id.

If a defendant fails to object to the sentencing court's denial of his right of allocution, we review only for plain error. United States v. Doyle, 857 F.3d 1115, 1118 (11th Cir. 2017). To establish plain error, the defendant must show (1) an error, (2) that is plain, and (3) that affected his substantial rights. United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007). If the defendant satisfies these conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.

First, we are unpersuaded by Gossage's claim that his sentence was procedurally unreasonable. In reviewing a sentence for procedural reasonableness, we "'ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range.'" Pugh, 515 F.3d at 1189 (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).[1] The

[1] The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the

party challenging a sentence bears the burden of showing that the sentence is unreasonable in light of the entire record, the § 3553(a) factors, and the substantial deference afforded sentencing courts. United States v. Rosales-Bruno, 789 F.3d 1249, 1256 (11th Cir. 2015).

A five-level sentencing enhancement applies to a defendant convicted of possessing or distributing child pornography, where that defendant is found to have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. U.S.S.G. § 2G2.2(b)(5). "Pattern of activity" means any combination of two or more separate instances of sexual abuse or sexual exploitation of a minor by the defendant, regardless of whether the abuse or exploitation occurred during the course of the offense, involved the same minor, or resulted in a conviction for that conduct. Id. § 2G2.2, comment. (n.1). The Sentencing Guidelines define "sexual abuse or exploitation" as, in relevant part, the employment, use, persuasion, inducement, enticement, or coercion of any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of that conduct or for the purpose of transmitting a live visual depiction of that conduct. Id.; 18 U.S.C. § 2251(a). An offense under state law that would have qualified as "sexual abuse or exploitation"

offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

under federal law also qualifies as sexual abuse of exploitation under the Sentencing Guidelines. U.S.S.G. § 2G2.2, comment. (n.1). However, "[s]exual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor. Id.

A two-level enhancement applies where a defendant is found to have willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction. Id. § 3C1.1. Destroying or concealing or directing others to destroy or conceal evidence that is material to an investigation or judicial proceeding, or attempting to do so, is an example of conduct warranting application of the obstruction-of-justice enhancement. Id. § 3C1.1, comment. (n.4(D)).

A defendant who clearly demonstrates acceptance of responsibility may receive up to a three-level reduction. Id. § 3E1.1(a)–(b). However, absent extraordinary circumstances, conduct resulting in an enhancement under § 3C1.1 typically indicates that a defendant has not accepted responsibility for his criminal conduct. Id. § 3E1.1, comment. (n.4).

A sentencing judge "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority," Rita v. United States, 551 U.S. 338, 356 (2007), and "must adequately explain the chosen sentence to allow for meaningful

appellate review and to promote the perception of fair sentencing," Gall, 552 U.S. at 50. The district court is not required to discuss each § 3553(a) factor and must only acknowledge that it considered the defendant's arguments and those factors. United States v. Gonzalez, 550 F.3d 1319, 1324 (11th Cir. 2008). "It is sufficient that the district court considers the defendant's arguments at sentencing and states that it has taken the § 3553(a) factors into account." United States v. Sanchez, 586 F.3d 918, 936 (11th Cir. 2009). Where a matter is "conceptually simple" and the record makes clear that the district court considered the evidence and the parties' arguments, a brief explanation of the sentences imposed is sufficient. Rita, 551 U.S. at 359.

Here, Gossage has not shown that the district court erred in calculating his sentence. Gossage first challenges the district court's two-level enhancement for attempting to obstruct justice, U.S.S.G. § 3C1.1, as well as the court's decision to deny him an acceptance-of-responsibility reduction, U.S.S.G. § 3E1.1(a)–(b). But the district court did not clearly err in finding that Gossage obstructed justice by arranging with an acquaintance, David DeGiacomo, to have his property removed from his house in Hollywood, Florida because there was sufficient reliable and specific evidence to support that finding. The government submitted an excerpt, as contained in a search warrant affidavit, from a phone call in which Gossage discussed removing hard drives from computers on which additional child pornography was found in order to facilitate their removal from his Hollywood home

and subsequent transfer to Arizona. While Gossage argues that the court would not have found that he had obstructed justice had it listened to the phone call, the court had the transcript of the relevant portion of the phone call before it, and Gossage does not show why hearing the tape would have changed the court's finding.

In addition, Special Agent Joshua Severson testified that a confidential informant ("CI") had informed him that Gossage was fearful that additional child pornography could be discovered at the Hollywood house and may have been attempting to destroy or conceal that evidence. The district court was permitted to credit Severson's testimony about Gossage's motivation for moving his property from the Hollywood house over that of other witnesses, and we give substantial deference to a sentencing court's credibility determinations. Plasencia, 886 F.3d at 1343. Further, the testimony from other witnesses that Gossage did not direct anyone to remove or destroy property in order to conceal evidence does not establish clear error because it does not contradict Severson's testimony that Gossage feared that additional child pornography would be discovered at the Hollywood house.

Because the record indicated that Gossage was aware of the evidence on the computers at the Hollywood house, feared that evidence would be discovered, and was being actively investigated for possession and distribution of child pornography, the court could have reasonably inferred that Gossage attempted to obstruct justice by arranging to move his property from the Hollywood house in order to conceal the

evidence contained therein. This kind of behavior is emblematic of the conduct at which the obstruction-of-justice enhancement is targeted. U.S.S.G. § 3C1.1, comment. (n.4(D)). And even if there somehow was an innocent interpretation of Gossage's conversation with DeGiacomo, there was sufficient evidence to support the court's finding that Gossage attempted to obstruct justice as we've already explained, and the court's choice between those two permissible interpretations cannot constitute clear error. Ndiaye, 434 F.3d at 1305. Therefore, the court did not clearly err in applying the obstruction-of-justice enhancement. Doe, 661 F.3d at 565. Nor, moreover, did the district court err in denying Gossage an acceptance-of-responsibility reduction because he has not argued for, nor does the record suggest the existence of, extraordinary circumstances that would warrant the reduction despite his efforts to obstruct justice. U.S.S.G. § 3E1.1, comment. (n.4).

We are also unconvinced by Gossage's claim that the district court clearly erred in finding that he had engaged in two or more instances of sexual abuse or exploitation based on the information contained in a thirteen-year-old victim's sworn statement concerning Gossage's sexually abusive behavior towards her. As an initial matter, Gossage does not dispute the accuracy of the victim's statement, as contained in the PSI, and thus, the court was permitted to rely on it. Wilson, 884 F.2d at 1356. According to that statement, Gossage admitted to placing cameras in the victim's bedroom and bathroom and to downloading the recorded footage into her computer.

Gossage himself admitted during a 2001 controlled phone call that he used the cameras to watch her, and his statement that he typically did not use the cameras to watch her suggests that he nevertheless did use them for that purpose on at least two occasions. When coupled with the victim's statement that Gossage watched and encouraged her to masturbate in front of the bathroom window, the court could have reasonably inferred that Gossage used the cameras for similarly sexual purposes.

While Gossage argues that he did not have two qualifying predicate convictions that justified the application of the enhancement, the government was not required to show that he had been convicted for two separate instances of qualifying conduct. Rather, the government needed only to show that Gossage had engaged in conduct that would have qualified as a federal offense involving the sexual abuse or exploitation of a minor if he had been convicted for that conduct. U.S.S.G. § 2G2.2, comment. (n.1). Here, the requisite pattern of abuse or exploitation was satisfied by several instances described in the PSI of sexual abuse or exploitation under § 2G2.2 that Gossage engaged in: (1) when he placed cameras in two different locations in the house, the bedroom and the bathroom, so he could watch her; and (2) when he repeatedly recorded, attempted to record, or live-streamed the victim in the two different locations over a four-month period. Therefore, it is irrelevant whether Gossage had two qualifying convictions because the court did not clearly err in finding that he engaged in qualifying conduct on at

least two occasions (indeed, in two different locations) based on the facts contained in the PSI about his abuse of that victim. Accordingly, the district court did not clearly err in applying the pattern-of-activity enhancement. Alberts, 859 F.3d at 982.

Nor can we say that Gossage's sentence was otherwise procedurally unreasonable. While the court's explanation for Gossage's sentences was brief, the court was only required under our case law to acknowledge that it made the relevant sentencing considerations and to hear argument from the parties regarding an appropriate sentence. Gonzalez, 550 F.3d at 1324; Sanchez, 586 F.3d at 936. Given the evidence before the court regarding Gossage's history of sexual abuse, the straightforward and undisputed nature of his convictions, the extensive nature of the offense conduct, the parties' arguments regarding an appropriate sentence, and the mitigating statements made on Gossage's behalf, the court was not required to explain at length why it believed the 480-month total sentence was appropriate. Rita, 551 U.S. at 359. Further, nothing in the record suggests that the court did not properly consider the § 3553(a) factors, and Gossage does not even argue that his sentence was substantively unreasonable. Thus, Gossage failed to show that the district court abused its discretion in imposing his 480-month sentence.[2]

[2] We recognize that the district court said that it would have imposed the same 480-month sentence irrespective of any alleged guideline calculation errors, and in these situations, we typically affirm the sentence so long as it is substantively reasonable. United States v. Keene, 470 F.3d 1347, 1348–49 (11th Cir. 2006). In determining whether a sentence is reasonable, we assume that the alleged guideline calculation error occurred, adjust the guideline range accordingly, and then ask whether the sentence imposed is reasonable under the § 3553(a)

We are also unpersuaded by Gossage's claim that the district court violated his right to due process. Due process requires that a defendant have adequate notice of and an opportunity to contest the facts used to support his sentence. United States v. Plasencia, 886 F.3d 1336, 1343 (11th Cir. 2018). At sentencing, the defendant's primary due process interest is the right not to be sentenced on the basis of invalid premises or inaccurate information. Id. Therefore, the due process protection required at sentencing is only that which is necessary to ensure that the district court is sufficiently informed so that it can exercise its sentencing discretion in an enlightened manner. Id.

Here, the district court did not violate Gossage's due process rights because his claim that the court arbitrarily limited the time in which he could present his evidence and cross-examine witnesses is not supported by the record. The court allowed him to contest the application of the obstruction-of-justice and pattern-of-activity enhancements for far longer than the half-hour originally allotted, notwithstanding the court's repeated statements about how long the sentencing hearing was taking. In fact, the record shows that Gossage was only prevented from

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factors and the alternate guideline range. Id. at 1349. In this case, if we assume the district court erred in calculating the guidelines, Gossage's resulting guideline range would have been 151 to 188 months' imprisonment. Because, as we've explained, there is simply no merit to Gossage's challenges to the sentencing calculations, and because Gossage did not argue that the 480-month sentence was substantively unreasonable, we do not address whether the alleged errors would have been harmless.

presenting an argument on one occasion, which was when he sought to respond to the government's argument in support of the pattern-of-activity enhancement. However, he did not object when the court denied him an opportunity to rebut the government's argument, he had already been given an opportunity to present his argument as to why the enhancement was not warranted, and he makes no argument on appeal as to how the court's denial of his rebuttal affected his ability to ensure that he was not sentenced on the basis of invalid premises or inaccurate information.

As for his claim that the district court did not allow him to play the tape of his phone call with DeGiacomo, the record indicates that the district court did not prevent him from playing it, but that he chose not to. Regardless, the relevant portion of the phone call was included in the transcript that the government provided to the court in its response to Gossage's objections to the PSI. Further, Gossage has not indicated what additional arguments he would have made or what questions he would have asked of the witness if he had been afforded more time. On this record, we cannot see how the failure to play the tape was not harmless. See Henderson, 409 F.3d at 1300.

In any event, due process does not guarantee a defendant the unlimited right to contest the premises or information that the sentencing court will rely upon in arriving at an appropriate sentence, but rather only an opportunity to sufficiently inform the court to the extent necessary for it to exercise its sentencing discretion in

an enlightened manner. Plasencia, 886 F.3d at 1343. Gossage has not shown that he was denied an opportunity to contest the facts used to support his sentence because his factual assertions concerning the district court's conduct are contrary to the record, and he has not indicated what additional evidence or argument he would have sought to introduce to ensure that the court was sufficiently informed in its exercise of its sentencing discretion. Accordingly, the court did not violate Gossage's right to due process by improperly limiting his opportunity to contest the factual bases underlying his sentence.

However, as for Gossage's last claim -- that the district court plainly erred by failing to clearly provide him with an opportunity to allocute at sentencing -- we agree. Allocution is the right of the defendant to personally "make a final plea on his own behalf to the sentencer before the imposition of sentence." Doyle, 857 F.3d at 1118. We've held that a district court's failure to address the defendant personally about his right of allocution is error that is plain and seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. This omission is also presumed to prejudice a defendant's substantial rights, and vacatur of his sentence and remand for resentencing is appropriate where the possibility of a lower sentence exists. Id. at 1121. Nevertheless, where a defendant's other challenges to his sentence have been rejected on appeal, he is not entitled on remand to reargue

objections to the PSI, file new objections to the PSI, or submit a new sentencing memorandum. Id.

Here, the district court plainly erred by failing to personally address Gossage about his right of allocution. Although Gossage made references to allocution by witnesses on his behalf, the court never personally informed him of his right to address the court, which satisfied the first, second, and fourth prongs of the plain error analysis. Id. at 1118. He also could have received a lower sentence, as the mandatory minimum term of imprisonment for Count One -- the only count with a mandatory minimum sentence -- was 60 months, which is well below the 480-month total sentence he received. Id. at 1121. Accordingly, because we've held that Gossage's procedural reasonableness and due process claims fail, we vacate his sentence and remand for the limited purpose of allowing the district court to resentence him after he has been given an opportunity to address the court. Id.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.