[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13063
Non-Argument Calendar

D.C. Docket No. 4:19-cr-00057-MW-MAF-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DISHAY HENDERSON,

Defendant-Appellant.

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

(April 27, 2021)

Before MARTIN, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

Dishay Henderson appeals his sentence, challenging the district court's finding that his offense involved two victims. After careful consideration, we conclude the district court did not clearly err in its finding. We therefore affirm.

I

In 2019, a federal grand jury issued a three-count superseding indictment for Henderson, charging him with enticement of a minor to engage in prostitution, sex trafficking of a minor, and financially benefitting from sex trafficking of a minor. At trial, the government called H.B., who testified that she ran away from home and began staying with Henderson. H.B. said she and her friend K.P. (both minors at the time) met Henderson at McDonald's. H.B. said Henderson allowed her to stay at his house so long as she "had something" for him. This sometimes meant money, drugs, or sex, but it also meant that "every day" Henderson would arrange for H.B. to meet with other men so that he could "exchange [her] for some drugs" or money. H.B. testified that when someone "wanted to have sex with [K.P.]," "[d]rugs had to be exchanged to [Henderson] for that" as well. The government also called Marvin Perry, who testified that he would drive H.B., and "a couple of times" K.P., to a hotel in order for them to meet with men. To set up the rides, Perry said Henderson would either contact him or "use the other females to contact" him "instead of contacting [him] directly."

The jury convicted Henderson on all three counts. The presentence report ("PSR") involved two Sentencing Guideline calculations at issue in this appeal. First, pursuant to Guideline § 2G1.3(d)(1) and its application note, the PSR included an adjustment to reflect the fact that the offense involved more than one

minor, here H.B. and K.P. Second, pursuant to Guideline § 4B1.5(b)(1), the PSR included a five-level increase because Henderson "engaged in a pattern of activity involving prohibited sexual conduct" and thus was a "repeat and dangerous sex offender against minors." Henderson objected, arguing that K.P. was not a victim because Henderson "was not involved in her prostitution." For support, Henderson provided the transcript for a deposition of K.P. in a related state proceeding. In response to Henderson's objections, the government provided excerpts of Facebook messages written by K.P. to support its view that K.P. was a victim of Henderson's offenses.

At sentencing, with respect to the Guideline § 2G1.3(d)(1) adjustment, the district court found "the government ha[d] more than met its burden to establish that K.P. was a second victim." The district court relied on H.B.'s "unequivocal" trial testimony that K.P. worked for Henderson, which the court found was corroborated by Perry's testimony and the Facebook messages. It also found K.P.'s deposition testimony to be "less credible" in light of her "overly aggressive" and "explosive" attitude and demeanor, "coupled with things she was clearly flat out lying about." With respect to the five-level increase for the pattern of activity under Guideline § 4B1.5(b)(1), the district court noted there were "multiple ways" the increase could apply. Among those, it expressly found H.B. was "the victim, as a minor, of sexual abuse more than once at the hands of Mr. Henderson," which

was "enough to properly apply this enhancement." The district court thus applied both Sentencing Guideline provisions and sentenced Henderson to 300 months' imprisonment. This is Henderson's appeal.

II

On appeal, Henderson argues that the district court erred in finding K.P. was a second victim and thus erred in applying the Guideline § 2G1.3(d)(1) adjustment applicable to offenses involved more than one minor.[1] Under the Sentencing Guidelines, if an offense involved more than one minor, the district court must adjust the Guideline calculation as though the prohibited conduct regarding each victim was contained in a separate count of conviction. USSG § 2G1.3(d)(1) & app. n.6. The district court's factual findings supporting an increase under the Sentencing Guidelines must be established by a preponderance of the evidence. See United States Dimitrovski, 782 F.3d 622, 628 (11th Cir. 2015).

This Court reviews the factual findings underlying a district court's application of the Sentencing Guidelines for clear error. United States v. Tejas,

[1] Henderson also says the district court erred in applying the five-level increase for a pattern of activity under Guideline § 4B1.5(b)(1) because K.P. was not a second victim. But the district court did not apply this sentencing increase because it found K.P. was a second victim. Instead, it applied the increase because it found H.B. was "the victim, as a minor, of sexual abuse more than once at the hands of Mr. Henderson." The district court's finding is sufficient to support the five-level increase for a pattern of sexual activity under this Court's precedent. See United States v. Fox, 926 F.3d 1275, 1279–80 (11th Cir. 2019) ("[R]epeated prohibited sexual conduct with a single victim may qualify as a 'pattern of activity' for purposes of § 4B1.5(b)(1)."). And Henderson does not challenge this finding, so we have no occasion to consider whether it was clear error.

868 F.3d 1242, 1244 (11th Cir. 2017) (per curiam). Clear error review means a factual finding will stand unless we are "left with a definite and firm conviction that the court made a mistake." Id. We give "great deference" to a credibility determination, and thus we will not reverse the determination unless it "is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." United States v. Cavallo, 790 F.3d 1202, 1227 (11th Cir. 2015) (quotation marks omitted).

We are not left with a "definite and firm conviction" that the district court made a mistake in finding K.P. was a second victim, so there is no clear error. See Tejas, 868 F.3d at 1244. As the district court noted, H.B. unequivocally testified that if someone "wanted to have sex with [K.P.]," "[d]rugs had to be exchanged to [Henderson] for that." H.B.'s testimony was corroborated by Perry's testimony, who said he drove K.P. "a couple of times" to a hotel for her to meet up with men and that such rides were either directly or indirectly set up by Henderson. H.B.'s testimony was also corroborated by K.P.'s own Facebook messages. In one chat, K.P. asked a man how much he was willing to pay for her and negotiated a price. In a separate chat, K.P. and H.B. talked about how much money they were bringing back to Henderson's house.

To be sure, in a related proceeding K.P. flat-out denied being involved in any work for Henderson. She said she "did not have to do anything to stay" at

Henderson's house. And when asked about Henderson's charges and whether there was "sex for drugs or sex for money," K.P. said "nothing happened." However, the district court found K.P. lacked credibility because of her "explosive" and "overly aggressive" attitude and demeanor, "coupled with things she was clearly flat out lying about." We defer to the district court's credibility finding because it is not "contrary to the laws of nature" or "so inconsistent or improbable on its face that no reasonable factfinder could accept it." Cavallo, 790 F.3d at 1227. During her deposition, K.P. refused to answer some questions and answered others with profanities. K.P. stated her "memory [was] messed up" because of the drugs she had taken. And when asked whether she knew anything about H.B. in relation to Henderson's charges, K.P. said she knew nothing, yet her own Facebook messages with H.B. directly contradicted her testimony.[2]

In short, the district court did not clearly err in finding K.P. was a second victim of Henderson's misconduct, and thus the court correctly applied the Guideline § 2G1.3(d)(1) adjustment.

AFFIRMED.

[2] Henderson says his right under the Sixth Amendment's Confrontation Clause was violated based on some of the evidence the district court relied on at sentencing. However, Henderson's argument is foreclosed by this Court's precedent, which holds that the Confrontation Clause does not apply at non-capital sentencing. See United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005) (per curiam).