UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4072

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL EDWARD GUNN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:17-cr-00137-CMH-1)

Submitted: August 30, 2018 Decided: September 12, 2018

Before NIEMEYER, KEENAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Gregory T. Hunter, Arlington, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Maureen C. Cain, Assistant United States Attorney, Kimberly R. Pedersen, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

PER CURIAM:

Michael Edward Gunn was convicted by a jury of conspiracy to engage in sex trafficking of minors, 18 U.S.C. § 1594(c) (2012); sex trafficking of minors (two counts), 18 U.S.C. § 1591(a)(1), (b)(2), (c) (2012); commission of a felony involving a minor, 18 U.S.C. § 2260A (2012); and, interstate travel and use of a facility in interstate commerce to promote prostitution, 18 U.S.C. § 1952(a)(3) (2012). The district court sentenced Gunn to a total term of 360 months' imprisonment—the bottom of the Guidelines range—followed by lifetime supervised release. Gunn noted a timely appeal.

Gunn first contends that there was insufficient evidence to support his convictions under 18 U.S.C. § 1591(a)(1), arguing that the Government failed to establish that he knew or recklessly disregarded the fact that the victims were minors. A defendant challenging the sufficiency of the evidence faces "a heavy burden." *United States v. McLean*, 715 F.3d 129, 137 (4th Cir. 2013) (internal quotation marks omitted). The jury's verdict must be sustained if, viewed in the light most favorable to the Government, there is substantial evidence in the record to support the convictions. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Jaensch*, 665 F.3d 83, 93 (4th Cir. 2011). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Jaensch*, 665 F.3d at 93 (internal quotation marks and brackets omitted). "Reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States v. Ashley*, 606 F.3d 135, 138 (4th Cir. 2010) (internal quotation marks omitted). In evaluating the sufficiency of the evidence, this

court does not review the credibility of the witnesses and assumes that the jury resolved all contradictions in the testimony in favor of the Government. *United States v. Kelly*, 510 F.3d 433, 440 (4th Cir. 2007).

In order to convict a defendant under 18 U.S.C. § 1591(a)(1), the government must prove that the defendant: "(1) knowingly recruited, transported, harbored, maintained, obtained, or enticed a person, (2) in or affecting interstate commerce, (3) knowing or in reckless disregard of the fact that the victim had not attained the age of eighteen years and would be made to engage in a commercial sex act." *United States v. Chapman*, 589 F. App'x 159, 160 (4th Cir. 2015) (citing *United States v. Garcia-Gonzalez*, 714 F.3d 306, 312 (5th Cir. 2013)). However, "[i]n a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years." 18 U.S.C. § 1591(c) (2012).

We have reviewed the trial testimony and conclude that the evidence amply supported a finding that Gunn had actual knowledge of one victim's age and that he either recklessly disregarded or had a reasonable opportunity to observe the age of the other victim. Therefore, we hold that the evidence was sufficient to support Gunn's convictions.

Next, Gunn argues that his 360-month sentence is procedurally and substantively unreasonable. This Court reviews a criminal sentence for reasonableness, applying a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51-52

(2007). We "must first ensure that the district court committed no significant procedural error," such as improperly calculating the Guidelines range, failing to consider the 18 U.S.C. § 3553(a) (2012) sentencing factors, or inadequately explaining the sentence imposed. *Id.*; *see also United States v. Zuk*, 874 F.3d 398, 409 (4th Cir. 2017). If a sentence is free of "significant procedural error," then we review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Gall*, 552 U.S. at 51. The sentence imposed must be "sufficient, but not greater than necessary," to satisfy the goals of sentencing. 18 U.S.C. § 3553(a). We presume that a sentence within the properly calculated Guidelines range is substantively reasonable. *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

The "sentencing court must place on the record an individualized assessment based on the particular facts of the case before it." *United States v. Lynn*, 592 F.3d 572, 576 (4th Cir. 2010) (internal quotation marks omitted). Although the sentencing judge "need not robotically tick through the § 3553(a) factors," *United States v. Helton*, 782 F.3d 148, 153 (4th Cir. 2015) (internal quotation marks omitted), he must "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 decision-making authority," *United States v. Blue*, 877 F.3d 513, 518 (4th Cir. 2017) (internal quotation marks omitted).

Gunn argues that the district court erred in applying a two-level enhancement for having "otherwise unduly influenced a minor to engage in prohibited sexual conduct," U.S.S.G. § 2G1.3(b)(2)(B), and a two-level enhancement for "use of a computer or interactive computer service in the commission of the offense," *id.* § 2G1.3(b)(3). He

contends that the application of these separate enhancements constitutes impermissible double counting.

A claim of double counting involves a legal interpretation of the Guidelines that we review de novo. *United States v. Schaal*, 340 F.3d 196, 198 (4th Cir. 2003). Double counting occurs when a Guidelines provision is applied based on considerations that have already been accounted for by another provision or by statute. *United States v. Reevey*, 364 F.3d 151, 158 (4th Cir. 2004). "[T]here is a presumption that double counting is proper where not expressly prohibited by the [G]uidelines." *United States v. Hampton*, 628 F.3d 654, 664 (4th Cir. 2010).

This Court has held that a two-level enhancement under § 2G1.3(b)(2)(B) does not amount to double counting in this context, because sex trafficking of a child, 18 U.S.C. § 1591, "does not include force or coercion as an element of the offense." *United States v. Clark*, 442 F. App'x 774, 775 (4th Cir. 2011). Because the use of a computer is also not an element of 18 U.S.C. § 1591, we similarly conclude that a two-level enhancement under § 2G1.3(b)(3) does not amount to double counting in this context.

We have reviewed the record included on appeal, as well as the parties' remaining arguments and discern no procedural or substantive error. The district court properly calculated Gunn's advisory Guidelines range, considered the relevant 18 U.S.C. § 3353(a) factors, and adequately explained its reasons for the chosen sentence. We also conclude that Gunn has failed to overcome the presumption of reasonableness accorded his within-Guidelines sentence. *See Louthian*, 756 F.3d at 306.

Accordingly, we affirm Gunn's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED