NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued February 28, 2023
Decided March 20, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-1406

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 3:19-CR-30167-SMY-1
EARL G. RICE, JR., *Defendant-Appellant*.	Staci M. Yandle, *Judge*.

O R D E R

Earl Rice appeals his 50-year sentence for enticing a minor, 18 U.S.C. § 2422(b), traveling with intent to engage in illicit sexual conduct, *id.* § 2423(b), and sexually exploiting a minor, *id.* § 2251(a). He argues that the district court erred by imposing a five-level enhancement under the federal Sentencing Guidelines for a "pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5(b). A "pattern" must include at least two "separate occasions" of prohibited conduct, *id.* § 4B1.5 app. n.4(B)(i), and Rice insists that his unlawful acts could constitute only one occasion because they were continuous, interrelated, and close in time. Rice did not object to the enhancement in the district court, so we review only for plain error.

The trial and sentencing evidence show that in February 2018, Rice met a 13-year-old girl, CJ, on a dating app, where they exchanged messages for two days. CJ's testimony and the Presentence Investigation Report characterize some of the earliest messages as "sexual." On February 14, the pair messaged about meeting for sex. By shortly after 10 p.m. that evening, Rice had driven from Missouri to Illinois, picked CJ up near her grandmother's house, and taken her to a hotel. By 6:30 a.m. on February 15, CJ was back at her grandmother's. At the hotel, Rice and CJ engaged in multiple rounds of oral and vaginal sex, interspersed with sleep and his taking two nude photos of her.

At sentencing, as at trial, Rice represented himself. The district court adopted the PSR's five-level enhancement under U.S.S.G. § 4B1.5(b)(1) for "a pattern of activity involving prohibited sexual conduct." Rice did not object to this enhancement, and the district court calculated his offense level at 43, which, when combined with a criminal history category of VI, yielded a guideline recommendation of life imprisonment. The district court sentenced him to 50 years' imprisonment. Now represented by counsel, Rice argues that the district court should not have applied the § 4B1.5(b) enhancement. Without the enhancement, his guideline range would be 30 years to life, rather than a flat range of life imprisonment.

Both parties agree that the plain-error standard applies. To establish reversible plain error, Rice must show that the district court made a "clear" or "obvious" error (in light of precedents available to us on appeal) that affected his substantial rights and the fairness or integrity of the proceedings. *Henderson v. United States*, 568 U.S. 266, 279 (2013); *United States v. Olano*, 507 U.S. 725, 732, 734 (1993); *United States v. Boyle*, 28 F.4th 798, 802 (7th Cir. 2022).

Section 4B1.5(b) of the Sentencing Guidelines adds five levels if an offense of conviction is a "covered sex crime" and the defendant engaged in a "pattern of activity involving prohibited sexual conduct." An application note adds that the "pattern" of prohibited conduct must cover at least two "separate occasions." *Id.* § 4B1.5 app. n.4(B)(i); *see United States v. Katalinic*, 510 F.3d 744, 746 (7th Cir. 2007) (commentary must be used to interpret guidelines).

Rice argues that his prohibited sexual conduct did not occur on "separate occasions" because the physical encounter and prior online messages about its logistics formed "a single episode" that spanned February 14 and the morning of February 15. The government counters that, among other things, Rice's enticement of CJ through online messages and the physical sexual encounter may be viewed as "separate

occasions" because they occurred over multiple days and Rice could have stopped acting unlawfully between committing the enticement and meeting CJ—across the state line—for sex.

We have not yet considered whether § 4B1.5(b) applies to a fact pattern like this one. We have directly considered § 4B1.5(b)'s scope in only one published opinion, which upheld the enhancement where a defendant had sex with one victim multiple times over the course of one month. *See United States v. Norwood*, 982 F.3d 1032, 1059 (7th Cir. 2020). But we did not confront anything like this question—whether enticing a minor with online messages before driving across state lines and having sex with her constitutes a set of "separate occasions."

Wooden v. United States, 142 S. Ct. 1063 (2022), which examined the plain meaning of "occasions" in context of the Armed Career Criminal Act, may provide guidance. *Wooden* considered whether burglaries of 10 adjoining storage units in one night were committed on "occasions different from one another." *Id.* at 1067. The Court said no: "Convictions arising from a single criminal episode, in the way Wooden's did, can count only once under ACCA." *Id*. The Court also set forth a multifactor analysis for identifying whether distinct acts took place on different "occasions," explaining that the timing, location, and character and relationship of offenses may all be relevant. *Id.* at 1071. Rice and the government both argue that *Wooden* supports their positions.

We do not decide who is correct, because the answer is less than plain. Even if *Wooden* guides courts in deciding whether criminal conduct occurred on one or more "occasions" for purposes of U.S.S.G. § 4B1.5(b), it is not obvious how to classify Rice's conduct under *Wooden*'s multifactor test. The interrelatedness of the offenses may cut in Rice's favor; the enticement and travel to Illinois may be sufficiently wrapped up in the scheme to have sex with CJ to constitute a single occasion. But the timing and location factors point the other way: Rice's online enticement began hours if not days before the physical sex acts, when Rice and CJ were separated by many miles and a state border. And although it may not be dispositive that Rice had an opportunity to stop the scheme at various points, *see id.* at 1067, we have interpreted *Wooden*'s test to allow courts to consider a defendant's opportunity to stop when parsing different occasions, *see United States v. Richardson*, 60 F.4th 397, 400 (7th Cir. 2023).

The answer to a question of first impression is rarely "plain," *United States v. Ramirez*, 783 F.3d 687, 695 (7th Cir. 2015), and nothing about the narrow legal question here takes it outside the realm of reasonable debate, *see Wooden*, 142 S. Ct. at 1081

(Gorsuch, J., concurring in judgment) (expressing concern that "[m]any ambiguous cases are sure to arise" under the Court's new test). Because the district court did not plainly err in applying the § 4B1.5(b) enhancement, we do not disturb Rice's sentence.

AFFIRMED