No. _____

IN THE
Supreme Court of the United States

GEORGE ADRIEN BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. § 2242(b) criminalizes, among other things, the attempted inducement of a minor to engage in sexual activity. The question presented by this petition is about the required intent for this offense. This question has caused tension both within the Eleventh Circuit and among the other circuits. Most circuits recognize that the statute proscribes an intentional attempt to achieve a mental state in a minor — that is, a minor's assent to engage in sexual activity. And these circuits have also said that the required intent is not the intent to engage in sex with a minor. On the other hand, however, the Fifth, Eighth, Ninth, and Eleventh Circuits have affirmed convictions based on only an intent to engage in sex with a minor. Thus, the question presented here is:

> Whether the required intent for attempted inducement under § 2422(b) is the intent to cause a minor to engage in sexual activity (as the Eleventh Circuit held in this case), or the intent to change a minor's mental state about engaging in sexual activity (as most other circuits have held).

This petition presents the Court with an ideal vehicle to resolve the tension among the circuits on this important issue.

LIST OF PARTIES

Petitioner, George Adrien Brooks, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

George Adrien Brooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 723 F. App'x 671 (11th Cir. 2018), is unpublished and provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case under 18 U.S.C. § 3231. The Eleventh Circuit had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. On January 18, 2018, the Eleventh Circuit affirmed the district court's final judgment. Appendix A. On April 4, 2018, the Eleventh Circuit denied Mr. Brooks' petition for rehearing en banc. Appendix B. This Court may review the Eleventh Circuit's judgment under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the application of 18 U.S.C. § 2422(b). The pertinent part of that statute provides:

> Whoever . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be . . . imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b).

LEGAL BACKGROUND

This case raises an important question: What is the mens rea for attempted inducement under 18 U.S.C. § 2422(b)? This recurring question has created significant tension among the circuits. Indeed, it has even caused internal inconsistency in the Eleventh Circuit. Given the recurring nature of the issue and that § 2422(b) convictions carry a minimum prison term of ten years, the importance of this issue cannot be overstated. This Court's intervention is needed.

1. The Eleventh Circuit's Decision in *Murrell.*

The Eleventh Circuit first addressed the definition of "inducement" in *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004). Similar to this case, the defendant in *Murrell* was charged with attempting to violate § 2422(b) after speaking with an undercover officer posing as a deviant parent who could arrange sexual encounters with his child. The defendant argued that he could not have attempted to violate the statute because he spoke with only an adult intermediary. The Eleventh Circuit rejected that argument.

The Eleventh Circuit stated that it viewed the defendant's actions as inducement rather than persuasion, enticement, or coercion, so it focused on that component of the statute. 368 F.3d at 1287. The court began by stating the term "inducement" "is not ambiguous and has a plain and ordinary meaning." *Id.* But in its very next breath, the Eleventh Circuit stated that "inducement" has two definitions and chose one over the other to avoid superfluousness. The court said:

> We have previously held that the term "induce" in § 2422 is not ambiguous and has a plain and ordinary meaning. "Induce" can be defined in two ways. It can be defined as "[t]o lead or move by influence or persuasion; to prevail upon," or alternatively, "**[t]o stimulate the occurrence of; cause.**" The Am. Heritage Dictionary of the English Language 671 (William Morris ed., Houghton Mifflin Co. 1981). We must construe the word to avoid making § 2422 superfluous. To that end, we disfavor the former interpretation of "induce," which is essentially synonymous with the word "persuade."

Id. (emphasis added) (internal citations omitted). Applying that definition, the Eleventh Circuit held the defendant attempted to induce a minor because he negotiated with the purported bad dad.

Following *Murrell*, the Eleventh Circuit amended its pattern jury instruction to define "inducement" as "to stimulate the occurrence of; cause." *See* Eleventh Circuit Pattern Jury Instructions (Criminal) No. O92.3 (2017). The definition adopted in *Murrell* and placed in the pattern instruction, however, does not answer the question of what must be "stimulated" or "caused." Indeed, as explained below, plugging that definition into the pattern instruction as currently constructed advises the jury that the prohibited mens rea is intending to engage in sexual activity with a minor. *See id.*

2. The Eleventh Circuit's Decision in *Lee*.

After *Murrell*, the Eleventh Circuit decided *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010), which seemed to answer the question ostensibly left open by *Murrell* and the pattern jury instruction — what is it that must be "stimulated" or "caused"?

Like Mr. Brooks and the defendant in *Murrell*, the defendant in *Lee* was charged with attempted inducement under § 2422(b) after speaking with an undercover officer posing as a deviant parent who could arrange sexual encounters with her children. The Eleventh Circuit explained that in attempted inducement cases, "the government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity." *Lee*, 603 F.3d at 914 (internal quotation marks omitted).

The *Lee* court's seeming clarification was consistent with the position of several other circuits. *See, e.g.*, *United States v. Dwinells*, 508 F.3d 63, 68 (1st Cir. 2007) ("Plainly, the statute requires that a defendant possess the specific intent to persuade, induce, entice, or coerce a minor into committing some illegal sexual activity."); *United States v. Brand*, 467 F.3d 179, 202 (2d Cir.

2006) ("A conviction under § 2422(b) requires a finding only of an attempt to entice or an intent to entice, and not an intent to perform the sexual act following the persuasion."); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000); *see also United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014) ("The ordinary meanings of the verbs persuade, induce, entice, and coerce demonstrate that § 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor.").[1]

Lee's seeming clarification, however, was never added to the pattern instruction, and the definition of "inducement" provided there, when applied, continued to advise jurors that the prohibited intent was the intent to engage in sexual activity with a minor.[2]

STATEMENT OF THE CASE

1. Over the course of five days, from September 5 through September 10, 2015, Agent Rodney Hyre, a special agent for the Federal Bureau of Investigation (FBI) working in an undercover capacity, engaged in e-mail and telephone communications with Mr. Brooks. It

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[1] Indeed, *Lee*'s clarification even seemed consistent with dicta in *Murrell* that the intent proscribed by § 2422(b) is the intent to induce a minor and not the intent to engage in sex. *See* 368 F.3d at 1286; *id.* at 1287 (quoting *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000)) ("While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents . . . ."). However, as demonstrated below, in practice, that recognition turned out to simply be non-binding dicta.

[2] Although *Lee*'s clarification was never added to the pattern instruction, the Eleventh Circuit has recognized that courts may modify the "inducement" definition to account for that clarification. *United States v. Grafton*, 697 F. App'x 672, 672 (11th Cir. 2017) ("[Grafton] now appeals his Count One conviction, arguing that the District Court, in charging the jury, erred in defining the term 'induce' in § 2422(b) as 'to stimulate the occurrence of or to cause the minor's assent.' We affirm."). Indeed, the Solicitor General agrees that the intent proscribed by § 2422(b) is the intent to cause a minor's assent to sexual activity. *See* Brief for the United States in Opposition, *Grafton v. United States*, Case No. 17-7773 (U.S. 2018).

began when Agent Hyre responded to an advertisement posted by Mr. Brooks in the casual encounters section of Craigslist titled: "Family Play Time - m4m (Orlando)." The advertisement stated "I know there are families out there (fathers/sons/uncles/nephews/cousins) that play together. I would like to be part of your family and enjoy the closeness you enjoy as a family. I could be your long lost uncle." The posting also stated "If you are all 18 or older, then get back to me if interested," and "do NOT contact me with unsolicited services or offers."

Hyre responded, stating that he was a divorced father of a ten-year-old boy and thirteen-year-old girl, is "very close" with his children who enjoyed "meeting new people," and that Mr. Brooks should "hit him up if interested."[3] Mr. Brooks responded that he looked forward to talking more; Hyre replied that Mr. Brooks should let him know if he was "UP for it."[4] Mr. Brooks responded that he was "always UP for new adventures," to which Hyre replied: "Us too. Could be lots of fun, seeing new things." Mr. Brooks asked Hyre what he did for fun. Hyre responded "play with my kids :) what about you."

Early the next morning, Mr. Brooks asked, "What do you play?" Agent Hyre stated, "We make each other happy. Is this something you're interested in or are [you] just [role playing]? I need to know one way or the other. It's cool. Definitely not for everyone." *Id.*. Brooks responded he was interested and "also like[s] to make others happy."

The conversation continued for the next few days. Among other things, Agent Hyre rejected Mr. Brooks' attempt to have sex with him and stated that he has watched his children have sex before, the children enjoy it, and the children were excited about the prospect of meeting Mr.

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[3] The children were fictitious.

[4] Hyre capitalized the word "up" as a sexual innuendo.

Brooks. Hyre reassured Brooks several times that everyone involved wanted to engage in these activities and that he only wanted Mr. Brooks to participate if Mr. Brooks felt comfortable.

Eventually, Mr. Brooks and Hyre agreed to speak on the phone. During their conversation, Hyre said he had a consensual relationship with his children, and asked Mr. Brooks whether he has ever had sexual contact with a minor. Mr. Brooks replied that, although he had never had a sexual encounter with an incestuous family, he had been with a sixteen-year-old and responded to a Craigslist advertisement from the father of a twelve-year-old that never went anywhere.

On September 9, 2015, Mr. Brooks became concerned about the encounter and e-mailed Hyre. Hyre responded, "Dude, you don't have to do a thing. . . . I am not nor have I ever been with any law enforcement agency. I think the government has no business in consensual acts between people." Hyre also stated: "I know this would be a lot of fun but it's up to you." Hyre's reassurances assuaged Mr. Brooks, and they agreed to meet the following morning. Before ending the conversation, Mr. Brooks asked Hyre what he did with his children the previous night, and Hyre stated that he performed "oral on her and did light anal on him. So hot. She watched and liked it." Mr. Brooks then asked Hyre whether he ejaculated. Hyre said, "Hell yes," and Mr. Brooks asked whether Hyre's "son got [him] off?" Hyre said yes, and that his son "loves to please."

The next day, Mr. Brooks again expressed concern. Hyre responded, "Me too. But the thing to remember is that it's consensual. He gets pleasure out of it, and I'm his dad and it's good with me." They agreed to meet later that day, and upon Mr. Brooks' arrival, he was arrested.

2. Mr. Brooks was charged with violating § 2422(b) and went to trial. During the charge conference, the parties made several objections to the court's proposed jury instructions.

Among other things, Mr. Brooks requested a modification to the definition of "induce." The court's proposed instruction mirrored the pattern instruction, and defined "induce" as "to stimulate the occurrence of or to cause." Mr. Brooks argued that the definition is incomplete and misleading, and that based on *Lee*, it should read "to stimulate the occurrence of or to cause the assent of a minor to engage in unlawful sexual activity." The court declined to modify the definition of induce, and Mr. Brooks requested that the court reconsider. The district court stated Mr. Brooks' request was not "legally flawed," but kept the pattern instruction to avoid confusing the jury. Mr. Brooks objected to preserve the record.

During closing argument, the government argued that this case "falls squarely within the definition of inducement" because Mr. Brooks "attempted to stimulate or cause a minor *to engage in sexual activity*." The government concluded by stating that Mr. Brooks was willing to meet a child for sex "and that is the crime [he] has committed" and why the jury "should find him guilty." Mr. Brooks renewed his objection. Subsequently, the jury found him guilty as charged. Mr. Brooks was sentenced to eighteen years' imprisonment, followed by nine years' supervised release.

3. On appeal, Mr. Brooks renewed his contention that the district court erred by not granting his requested modification about the definition of inducement, and he argued that the pattern instruction allowed the government to argue he should be convicted for intending to have sex with a minor, which is not proscribed by § 2422(b). Mr. Brooks relied primarily on this Court's decision in *Lee*.

The panel, however, rejected Mr. Brooks' argument and affirmed his sentence, stating:

> Brooks' argument is foreclosed by our decision in *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004). In *Murrell*, we held that the term "induce" in § 2422 means "[t]o stimulate the occurrence of; cause." *Id.* at 1287 (alteration in original)

> (quoting The Am. Heritage Dictionary of the English Language 671 (William Morris ed., Houghton Mifflin Co. 1981)). Because this is the exact definition given by the district court in its jury instructions and the exact definition in the pattern jury instruction, we cannot conclude that the district court misstated the law or mislead the jury. Consequently, the district court did not abuse its discretion in instructing the jury on the term "induce."

723 F. App'x at 678. In its analysis, the panel did not once mention *Lee*.

4. Mr. Brooks petitioned for rehearing en banc, arguing that the pattern instruction, as used in his case, was inconsistent with *Lee* and permitted the jury to convict him based solely on an intent to engage in sex with a minor, which is not proscribed by the statute. The Eleventh Circuit denied Mr. Brooks' petition for rehearing en banc on April 4, 2018. Appendix B.

REASONS FOR GRANTING THE WRIT

1. There is a Significant Tension Among the Circuits About the Intent Proscribed for Attempted Inducement under 18 U.S.C. § 2422(b).

As evidenced by this case, there is significant tension within the Eleventh Circuit and among the other circuits about the proscribed intent for attempted inducement offenses under § 2422(b). The *Murrell* definition, as applied here and in the Eleventh Circuit's pattern jury instructions, as well as decisions from the Fifth, Eight, and Ninth Circuits, allow for jurors to convict defendants if the defendants have the intent to engage in sex with a minor. 723 F. App'x at 678; *United States v. Farner,* 251 F.3d 510, 513 (5th Cir. 2001) ("[T]he district court correctly concluded from the stipulated evidence, beyond a reasonable doubt, that Farner intended to engage in sexual acts with a 14–year–old girl . . . ."); *United States v. Meek*, 366 F.3d 705, 718 (9th Cir. 2004) ("[A] jury could reasonably infer that Meek knowingly sought sexual activity, and knowingly sought it with a minor."); *United States v. Hicks*, 457 F.3d 838, 840 (8th Cir. 2006) ("A defendant may be convicted of an attempt to violate § 2422(b) if he or she attempts, by use of the Internet, to engage in criminal sexual activity with a person under the age of eighteen."). Most

circuits, however, including the Eleventh, have stated the proscribed intent is causing a minor to assent to sexual activity. *See Lee*, 603 F.3d at 914 ("With regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he 'acted with the specific intent to engage in sexual activity.'"); *see also Bailey*, 228 F.3d at 639; *Brand*, 467 F.3d at 202; *Hite*, 769 F.3d at 1162; *Dwinells*, 508 F.3d at 68. As explained below, the Eleventh Circuit's decision is wrong because § 2422(b) proscribes the intent to achieve a mental state—a minor's assent to sexual activity—not the intent to engage in the sex act itself.

2. The Decision Below is Wrong

The decision below, which strictly adhered to the pattern instruction and definition promulgated in *Murrell*, is wrong. The *Murrell* court defined "induce" as to "stimulate" or "cause" to avoid concerns about rendering other parts of the statute surplusage.[5] But defining "induce" as to "stimulate" or "cause" ironically renders the terms "persuade" and "entice" superfluous. Indeed, if a defendant "persuades" or "entices" an individual into committing an act, then the defendant's "persuasion" or "enticement" has "caused" or "stimulated" the individual's act. The *Murrell* analysis and definition are clearly wrong, and given the Eleventh Circuit's desire to avoid rendering parts of the statute superfluous, the result is clearly not what the Eleventh Circuit intended. The Eleventh Circuit's myopic concern about surplusage caused it to lose focus on the mens rea Congress' clearly wanted to proscribe — the intent to cause a

[5] Oddly, the Eleventh Circuit addressed the surplusage canon right after stating the text is unambiguous and has a plain and ordinary meaning. It is axiomatic that if a statute is unambiguous and has a plain and ordinary meaning, that should be the end of the inquiry. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018); *Nixon v. United States*, 506 U.S. 224, 232 (1993); *Ardestani v. I.N.S.*, 502 U.S. 129, 135–36 (1991).

minor's assent to sexual activity, and not the intent to engage in sex with a minor. *See Bailey*, 228 F.3d at 639; *Brand*, 467 F.3d at 202; *Hite*, 769 F.3d at 1162; *Dwinells*, 508 F.3d at 68.

Not only is *Murrell*'s definition wrong, the Eleventh Circuit has memorialized this error in its pattern jury instruction. The pattern instruction explains that the first element of the offense is:

> (1) The Defendant knowingly intended to persuade, induce, entice, or coerce [individual names in the indictment] to engage in [prostitution] [sexual activity], as charged.

See Eleventh Circuit Pattern Jury Instructions (Criminal) No. O92.3 (2017). The instruction, however, goes on to define "inducement" as follows:

> As used in this instruction, "induce" means to stimulate the occurrence of or to cause.

Id. Thus, read properly, the pattern instruction, which will continue to be given in every attempted inducement prosecution, advises jurors that the proscribed intent under the statute is the intent to engage in sex with a minor — an intent that most circuits have expressly held is not proscribed by the statute. Without this Court's intervention, this error and the tension between the circuits will continue, and countless individuals will be erroneously subjected to mandatory terms of at least 10 years' imprisonment.

3. This Case is an Excellent Vehicle for Considering this Important Issue.

The issue presented by this petition — whether the proscribed intent under § 2422(b) is the intent to cause a minor's assent to sexual activity, as opposed to the intent engage in sex with a minor — was fully litigated in the district court and on appeal to the Eleventh Circuit. Both courts rejected Mr. Brooks' argument that the pattern instruction should be modified to clarify that the proscribed intent is the intent cause a minor's assent to sexual activity. Instead, the Eleventh

Circuit affirmed the district court's decision to provide the jury with an instruction that effectively advised it to convict Mr. Brooks if he had the intent to engage in sex with a minor. As explained above, that was erroneous.

Moreover, it was a substantial error. A proper instruction may have made a difference in this case. Here, the requested instruction was not covered at all. Instead, the district court used the pattern instruction, which improperly allowed the jury to convict Mr. Brooks for a crime he was not charged with—attempting to engage in sex with a minor. Indeed, the prosecutor argued in closing that the jury should convict Mr. Brooks for intending to have sex with a minor. The court's failure to properly instruct the jury on the meaning of "induce" seriously impaired part of the defense's theory — that Mr. Brooks attempted to only engage in sex with minors, which is not proscribed by the statute.

If this Court were to agree that the district court erred in instructing the jury, then Mr. Brooks would be entitled to a new trial because the government would be unable to show the error was harmless beyond a reasonable doubt. *See Neder v. United States,* 527 U.S. 1, 17, 19 (1999).[6] Indeed, even if Mr. Brooks desired to have sex with a minor, a jury could still listen to Hyre and Mr. Brooks' conversations and rationally conclude that Mr. Brooks had no intent to cause a minor to assent to sex.

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[6] In establishing constitutional harmlessness, the government cannot simply rely on the fact that enticement and persuasion were also charged because the jury returned a general verdict. *See Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978) ("[A] verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."); *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 778 (11th Cir. 2003) ("An error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other independent basis.").

For example, Mr. Brooks posted an online advertisement seeking to engage in sexual activity *with adults*. Hyre responded, indicating that he often engaged in sexual activity with his children and *the children enjoyed it*. Hyre conveyed that his fictitious son was excited upon hearing Mr. Brooks may be coming over. Given this evidence, a properly-instructed jury could rationally conclude that Mr. Brooks had no intent to cause a minor to assent to sexual activity. In other words, a rational jury could have concluded that Hyre presented his fictional children as having already assented, and therefore Mr. Brooks did not have to cause any assent, let alone intend to cause it.

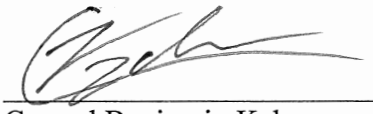
Given the importance of this issue and the tension among the circuits, Mr. Brooks respectfully seeks further review.

CONCLUSION

For the above reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



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APPENDIX A

723 Fed.Appx. 671
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
George Adrien BROOKS, Defendant-Appellant.

No. 16-14959
|
(January 18, 2018)

Synopsis

Background: Defendant was convicted in the District Court for the Middle District of Florida, No. 6:15-cr-00219-CEM-TBS-1, 2016 WL 10879729, of using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] government had race-neutral reasons for using peremptory strikes;

[2] disclosure at trial of previously non-disclosed email did not prejudice substantial rights of defendant;

[3] testimony that defendant had molested seven-year old nephew 44 years earlier fell under exception to general rule prohibiting propensity evidence

[4] probative value of testimony that defendant had molested nephew was not substantially outweighed by danger of unfair prejudice;

[5] defendant's conversations with father of 12-year-old boy in which defendant expressed interest in having sex with boy were admissible;

[6] reasonable jury could have found that defendant intended to induce special agent's fictitious ten-year-old son to assent to sexual contact with defendant and that defendant took substantial step towards causing that assent; and

[7] cumulative effect of alleged errors by district court did not deprive defendant a fair trial.

Affirmed.

West Headnotes (10)

[1] Jury
Peremptory challenges

Government had race-neutral reasons for using peremptory strikes on Indian-American man and Hispanic man, and thus jurors were not struck for discriminatory purpose, where government struck Indian-American man for demeanor, answers given regarding background, and because juror had heard something about a similar case, and government struck Hispanic man due to insufficient information about his background.

Cases that cite this headnote

[2] Criminal Law
Discovery and disclosure;transcripts of prior proceedings

Disclosure at trial of previously non-disclosed email did not prejudice substantial rights of defendant on trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, even though government's failure to turn over previously undisclosed e-mails was discovery violation; government presented ample other evidence at trial to establish predisposition and intent, government did not elicit testimony from agent about e-mails, and defendant presumably knew about existence of other e-mails because they were in his own e-mail account. Fed. R. Crim. P. 16(a)(1)(E).

Cases that cite this headnote

[3] **Commerce**
Offenses involving activity unlawful under state law

Infants
Communication or solicitation for immoral purposes

Telecommunications
Soliciting minor for sex or illegal act; child pornography

District Court did not misstate the law or mislead jury by defining induce as "to stimulate the occurrence of or to cause" in trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, where definition given by district court in jury instructions and in pattern jury instruction matched exactly accepted definition. 18 U.S.C.A. § 2422(b).

Cases that cite this headnote

[4] **Criminal Law**
Matters of defense

District Court's refusal to give jury instruction stating that defendant, who was on trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, should be acquitted if jury found that defendant did not intend to cause a minor to assent to sexual activity did not impair defendant's ability to present defense, and thus was not an abuse of discretion, where defendant's instruction was encompassed within instruction given, and defendant's instruction was adequately covered by the entrapment instruction given. 18 U.S.C.A. § 2422(b).

Cases that cite this headnote

[5] **Criminal Law**
Elements and incidents of offense in general

Addition of cellphone as a facility and means of interstate commerce to jury instruction in trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity did not permit jury to convict defendant solely on phone conversation with special agent posing as father of fictitious children, and thus was not constructive amendment of indictment, where cellular phones were instrumentalities of interstate commerce, defendant's cellphone was a smartphone that could access the Internet, e-mails in which defendant expressed interest in having sex with fictitious children had been transmitted over the Internet, and substantial evidence was found in e-mails. 18 U.S.C.A. § 2422(b).

Cases that cite this headnote

[6] **Criminal Law**
Sex offenses

Testimony that defendant, who was on trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, had molested seven-year old nephew 44 years earlier fell under exception to general rule prohibiting propensity evidence, and thus was admissible, even though attempted enticement allegedly did not classify under categorical approach as child molestation crime; categorical approach did not apply to exemption, and focus of exemption was on conduct itself and not how charges were drafted. 18 U.S.C.A. § 2422(b); Fed. R. Evid. 404(b)(1), 414(d)(2).

Cases that cite this headnote

[7] **Criminal Law**
Sex offenses, incest, and prostitution

Criminal Law
Limiting effect of evidence of other offenses

Probative value of testimony that defendant, who was on trial for using a facility of

interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, had molested seven-year old nephew 44 years earlier was not substantially outweighed by danger of unfair prejudice, and thus was admissible; district court gave an entrapment jury instruction, district court instructed the jury that defendant was not on trial for any conduct not charged in indictment, and district court instructed jury that they could not convict defendant on testimony of molestation of nephew alone. 18 U.S.C.A. § 2422(b); Fed. R. Evid. 403.

Cases that cite this headnote

[8] **Criminal Law**
Sex offenses, incest, and prostitution
Criminal Law
Sex offenses, incest, and prostitution

Defendant's conversations with father of 12-year-old boy in which defendant expressed interest in having sex with boy were admissible in trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, where defendant offered conversations when trying to convince special agent, who was posing as father of fictitious 10-year-old son, to let defendant have sex with son, conversations were inextricably intertwined with charged crime, conversations were evidence of motive, intent, plan, or absence of mistake or accident, conversations were against interest, and conversations were highly probative and not unduly prejudicial. 18 U.S.C.A. § 2422(b); Fed. R. Evid. 403, 404(b)(2).

Cases that cite this headnote

[9] **Infants**
Communication or solicitation for immoral purposes
Telecommunications
Soliciting minor for sex or illegal act; child pornography

Reasonable jury could have found that defendant intended to induce special agent's fictitious ten-year-old son to assent to sexual contact with defendant and that defendant took substantial step towards causing that assent, as required to uphold conviction for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, where defendant exchanged e-mails with agent in which he expressed interest in having sex with son, and defendant traveled to shopping center to meet agent and admitted that he groomed his genitals prior to meeting. 18 U.S.C.A. § 2422(b).

Cases that cite this headnote

[10] **Criminal Law**
Grounds in general

Cumulative effect of alleged errors by district court did not deprive defendant a fair trial in trial for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, where district court did not err in overruling *Batson* challenges, court did not err in instructing the jury, court did not err in challenged evidentiary rulings, court did not err in denying motion for judgment of acquittal, and defendant was not substantially prejudiced by the testimony regarding previously non-disclosed e-mails.

Cases that cite this headnote

***673** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:15-cr-00219-CEM-TBS-1

Attorneys and Law Firms

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Rosemary Cakmis, Donna Lee Elm, Conrad Benjamin Kahn, James T. Skuthan, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant

Before MARCUS and NEWSOM, Circuit Judges, and BUCKLEW [*], District Judge.

Opinion

PER CURIAM:

George Adrien Brooks appeals his conviction under 18 U.S.C. § 2422(b) for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. After careful review of the record, and with the benefit of oral argument, we affirm Brooks' conviction.

*674 BACKGROUND

In 2015, Rodney Hyre, a FBI Special Agent in charge of a group that investigates sexual predators, found a Craigslist ad titled "Family Play Time—m4m (Orlando)," which was posted by Brooks. Based on his previous experience, Special Agent Hyre understood that terms such as "family" and "play" were used by sexual predators seeking children with whom to engage in sexual activities. Special Agent Hyre posed as the father of a ten-year-old boy and a 13-year-old girl and responded to Brooks' ad by e-mail. During their subsequent e-mail exchange, Brooks expressed an interest in having sex with the fictitious children and eventually gave Special Agent Hyre his phone number.

In a recorded phone conversation, Special Agent Hyre confirmed his understanding that Brooks was interested in having sex with his fictitious ten-year-old son. Brooks stated that he was interested in "touching," "holding," "oral," and "kissing," and he was open to "giving" and "receiving." When asked how he became interested in this type of activity, Brooks stated that he had previously responded to a similar ad posted by the father of a 12-year-old boy by sending an e-mail expressing his interest. Brooks and Special Agent Hyre eventually agreed to meet in person at a shopping center. Prior to the meeting, Brooks asked Special Agent Hyre whether he should groom his genitals; Special Agent Hyre responded that "trimmed is probably best."

On the day of the meeting, Brooks parked behind an officer posing as Special Agent Hyre. When Brooks approached the officer, he was arrested. After his arrest, Special Agent Hyre seized Brooks' cellphone, and Brooks consented to a search of his cellphone. Brooks also disclosed his e-mail addresses and passwords, consented to searches of his e-mail accounts and vehicle, and signed a consent form authorizing officers to assume his online identity. Brooks admitted that he had posted several online ads regarding incestuous sex, that he had used his cellphone to communicate with Special Agent Hyre about having oral sex with Hyre's ten-year-old son, that he had traveled to the shopping center for that purpose, that he had groomed his genitals the previous night, and that four years earlier he had responded to a similar ad and communicated with a man about having sex with that man's 12-year-old son until the man stopped communicating. A forensic analysis of Brooks' cellphone showed that all of the e-mails between Brooks and Special Agent Hyre had been transmitted over the Internet through Brooks' cellphone.

On September 30, 2015, a federal grand jury in Orlando, Florida returned an indictment charging Brooks with using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity in violation of 18 U.S.C. § 2422(b). Prior to trial, the Government responded to Brooks' Federal Rule of Criminal Procedure 16 discovery request by disclosing copies of certain e-mails and the post-arrest form Brooks signed allowing the FBI to assume his online identity. The Government also gave notice of its intention under Rules 414 and 404(b) of the Federal Rules of Evidence to introduce at trial Brooks' statements to Special Agent Hyre regarding his prior conversations with the father of the 12-year-old boy. The district court denied Brooks' motion in limine to exclude these statements, finding that they were inextricably intertwined with the charged offense.

Ten days prior to trial, the Government learned that Brooks allegedly molested his then seven-year-old nephew, John Gopoian, 44 years earlier. The Government *675 sought to call Gopoian to testify at trial under Rules 414 and 404(b). Brooks objected and sought to exclude this testimony, arguing that the disclosure was untimely and unfairly prejudicial to the defense. The district court overruled Brooks' objection but continued the trial at

Brooks' request to remedy the late disclosure. Brooks renewed his objection to Gopoian's testimony prior to *voir dire*, arguing that the testimony was inadmissible under Rules 414 and 403 of the Federal Rules of Evidence. The district court ruled the testimony was admissible under Rule 414 and not precluded by Rule 403. The district court did, however, agree to give a limiting instruction regarding Gopoian's testimony.

After a three day trial, Brooks was found guilty of violating § 2422(b) and was sentenced to serve 216 months in prison. This appeal followed, in which Brooks raises nine arguments for reversal. As explained below, we reject Brooks' arguments and affirm his conviction and sentence.

DISCUSSION

I. *Batson* Challenges

Brooks first argues that the district court erred in overruling his *Batson* challenges to the Government's striking of two potential jurors, one Indian-American and one Hispanic, during jury selection. He asserts that the district court failed to evaluate the Government's stated reason for the strikes and erroneously found that Brooks failed to show a pattern of discrimination. Brooks further contends the Government's proffered reasons for its strikes were neither genuine nor sufficiently specific.

"Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986) (internal quotations marks and citation omitted). *Batson* established a three-step process for trial courts to use in adjudicating a claim that a preemptory challenge was based on race:

> (1) the objector must make a *prima facie* showing that the peremptory challenge is exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination.

United States v. Allen-Brown, 243 F.3d 1293, 1297 (11th Cir. 2001) (citation omitted). A district court "should consider 'all relevant circumstances' supporting the challenging party's assertion of discrimination" including "the striking party's 'pattern' of striking venire members of a particular race, or making questions or statements during *voir dire* to members of a particular race that support the inference of a discriminatory purpose." *United States v. Robertson*, 736 F.3d 1317, 1325–26 (11th Cir. 2013) (quoting *Batson*, 476 U.S. at 96–97, 106 S.Ct. at 1723). However, "[t]he reason given for the peremptory strike need not be a good reason. It can be an irrational, silly[,] or superstitious reason, as long as it is not a discriminatory reason." *United States v. Hill*, 643 F.3d 807, 837 (11th Cir. 2011) (internal quotation marks and citation omitted). In the last step, "the district court must evaluate the persuasiveness of the proffered reason and determine whether, considering all relevant circumstances, the objector has carried the burden of proving discrimination." *Id.* (citation omitted). Because a ***676** *Batson* challenge "turns largely on an evaluation of credibility," the "trial court's determination is entitled to great deference and must be sustained unless it is clearly erroneous." *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011) (internal quotation marks and citations omitted).

[1] Here, the Government used preemptory strikes on Ganesh Ramachandran, an Indian-American man, and Angel Aviles, a Hispanic man. As to Ramachandran, Brooks made a generic *Batson* challenge. The district court, without first making a finding that Brooks had made a *prima facie* showing of discrimination, went directly to step two and asked the Government to articulate a race-neutral explanation for striking Ramachandran. In response, the Government stated that it struck Ramachandran based on his demeanor, the answers he gave regarding his background, and because "he had heard something about a similar case." As to Aviles, the district court noted that striking the Hispanic juror was "the beginning of a pattern" and asked the Government for a race-neutral reason for its strike. The Government stated it struck Aviles due to insufficient information about his background. The district court denied both *Batson* challenges, finding

that the Government had proffered sufficient non-racial reasons for the preemptory strikes.

We first note that we have previously stated that "the district court should not require an explanation for a peremptory strike from the striking party unless and until the court is satisfied that the challenging party has made its *prima facie* case of discrimination." *Robertson*, 736 F.3d at 1326 (citations omitted). Our review of the record indicates that the district court did not make this finding for either juror in question prior to asking the Government to state an explanation for its strike. Nevertheless, we hold that Brooks has failed to demonstrate that the district court clearly erred in accepting the Government's race-neutral reasons for striking Ramachandran and Aviles. "As fact-finder and judge of credibility, the [district] court had great discretion to accept [the Government's] race-neutral reason as truth or reject it as pretext." *Id.* at 1328 (citation omitted). Brooks has not presented any compelling reason why the district court erred in concluding that Ramachandran and Aviles were not struck for a discriminatory purpose. We therefore defer to the district court's determination.

II. Rule 16 Violation

Brooks next argues that the district court erred in denying Brooks' motion for mistrial based on the disclosure at trial of previously non-disclosed e-mails.

We review the district court's denial of a motion for mistrial for abuse of discretion. *United States v. Chavez*, 584 F.3d 1354, 1362 (11th Cir. 2009) (citations omitted). Federal Rule of Criminal Procedure 16(a)(1)(E) requires the Government, upon a defendant's request, to permit the defendant to inspect and copy items that are material to the defense, items that it intends to use in its case-in-chief, and items that were obtained from or belonged to the defendant. *See* Fed. R. Crim. P. 16(a)(1)(E)(i)–(iii). The district court's criminal scheduling order imposed a similar duty on the Government.

In order for a discovery violation under Rule 16 or a standing discovery order to constitute reversible error, it must violate a defendant's substantial rights. *See United States v. Camargo-Vergara*, 57 F.3d 993, 998 (11th Cir. 1995) (citations omitted). "Substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense, or if the mistake substantially influences ***677** the jury." *Id.* at 998–99 (citations omitted). "Inadvertence does not render a discovery violation harmless; rather, the purpose of [R]ule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." *Id.* at 999 (citations omitted). We make the determination whether a defendant's rights were substantially prejudiced "in the context of the entire trial and in light of any curative instruction." *United States v. Newsome*, 475 F.3d 1221, 1227 (11th Cir. 2007) (citation omitted), *cert. denied* 552 U.S. 899, 128 S.Ct. 218, 169 L.Ed.2d 168 (2007). Further, any error is harmless where the record contains "sufficient independent evidence establishing guilt." *United States v. Adams*, 74 F.3d 1093, 1097–98 (11th Cir. 1996). In other words, we need a "reasonable probability that, but for the [error], the outcome would be different." *Id.*

[2] Here, Special Agent Hyre seized Brooks' cellphone upon arresting Brooks. Brooks disclosed his e-mail addresses and passwords, consented to searches of his e-mail accounts, and signed a consent form authorizing officers to assume his online identity. While being cross-examined at trial, Special Agent Hyre confirmed that Brooks had turned over his e-mail accounts and allowed the officers to assume Brooks' online identity. Brooks' counsel then asked Special Agent Hyre whether Brooks' e-mail accounts contained other e-mails about having sex with children. To the surprise of Brooks' counsel, Special Agent Hyre indicated that he had found such other e-mails and that they had not previously been turned over to the defense. Despite the fact that this testimony was not beneficial to Brooks' defense, Brooks' counsel continued to question Special Agent Hyre about these e-mails, prompting the prosecutor to ask to approach sidebar.

At sidebar, the prosecutor indicated to the district court that both parties had access to Brooks' e-mail accounts and passwords and that the Government had not planned to address these other e-mails in its case-in-chief. The Government then provided copies of these e-mails to Brooks and the district court. Brooks requested a recess so that he could review the newly disclosed e-mails.

After the recess, Brooks moved for a mistrial, arguing that the Government had violated Rule 16(a)(1)(E) by not turning over copies of these e-mails. He asserted that it was his understanding that he could no longer access his e-mail accounts because the FBI had stated

that the passwords would be changed. However, Brooks' counsel conceded that although she had been offered access to Brooks' cellphone during discovery, she never attempted to access the e-mails on the phone. The district court denied the motion for a mistrial, finding that no discovery violation had occurred. Brooks then requested a limiting instruction. When the district court denied Brooks' proposed limiting instruction but offered to give a more narrow limiting instruction, Brooks withdrew his request.

At oral argument, the Government conceded to a discovery violation by failing to turn over the previously undisclosed e-mails. Accordingly, the only remaining issue before us is whether this discovery violation prejudiced Brooks' substantial rights.[1] Brooks argues that the Rule 16 violation substantially prejudiced his defense, particularly his entrapment defense and the issue of whether he was predisposed ***678** to commit such a crime. But the Government presented ample other evidence at trial to establish predisposition and intent, including Gopoian's testimony and Brooks' own admissions that he had previously communicated with the father of a 12-year-old boy regarding having sex with the boy. And here, it was not the Government that elicited this testimony from Special Agent Hyre; it was only in response to questions by Brooks' own counsel that Special Agent Hyre mentioned the subject e-mails. Further, Brooks himself presumably knew about the existence of these other e-mails because they were in his own e-mail account. We therefore conclude Brooks has failed to demonstrate a reasonable probability that the outcome of the trial would have been different but for the discovery violation. Accordingly, the district court did not abuse its discretion in denying Brooks' motion for a mistrial.

III. Jury Instructions

Brooks makes three arguments on appeal regarding the district court's jury instructions. We address each in turn.

a. Definition of "Induce"

Brooks first asserts that the district court, in instructing the jury, erred by defining "induce" in § 2422(b) as "to stimulate the occurrence of or to cause." While the district court adhered to the pattern jury instruction for § 2422(b), *see Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* 92.2 (2010), Brooks contends this instruction was incomplete and misleading and that the district court should have defined "induce" to mean "to stimulate the occurrence of or to cause the assent of a minor to engage in unlawful sexual activity."

"We review *de novo* the legal correctness of jury instructions, but we review the district court's phrasing for abuse of discretion." *United States v. Seabrooks*, 839 F.3d 1326, 1332 (11th Cir. 2016) (citation omitted). Our goal is "to determine whether the instructions misstated the law or misled the jury to the prejudice of the objecting party." *Id.* at 1333 (quoting *United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir. 2013)).

[3] Here, Brooks' argument is foreclosed by our decision in *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004). In *Murrell*, we held that the term "induce" in § 2422 means "[t]o stimulate the occurrence of; cause." *Id.* at 1287 (alteration in original) (quoting THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 671 (William Morris ed., Houghton Mifflin Co. 1981)). Because this is the exact definition given by the district court in its jury instructions and the exact definition in the pattern jury instruction, we cannot conclude that the district court misstated the law or mislead the jury. Consequently, the district court did not abuse its discretion in instructing the jury on the term "induce."

b. Theory of Defense

Brooks next argues that the district court erred by denying his request for a theory of defense instruction. Specifically, Brooks asserts he requested an instruction that he should be acquitted if the jury found that he did not intend to cause a minor to assent to sexual activity. The district court denied the instruction, stating that Brooks had not produced any "evidence that could be considered legally sufficient to render [Brooks] innocent," that the proposed instruction was "essentially the inverse" of the offense instruction, and that the proposed instruction was "confusing."

We review the district court's refusal to give Brooks' requested theory of defense instruction for abuse of discretion. *See* ***679** *United States v. Votrobek*, 847 F.3d 1335, 1344 (11th Cir. 2017) (citation omitted). "Such a

refusal is reversible error only if the requested instruction '(1) was a correct statement of the law; (2) was not adequately covered in the instructions given to the jury; (3) concerned an issue so substantive that its omission impaired the accused's ability to present a defense; and (4) dealt with an issue properly before the jury.' " *Id.* (quoting *United States v. Westry*, 524 F.3d 1198, 1216 (11th Cir. 2008)). "The instruction must have 'legal support' and 'some basis in the evidence.' " *Id.* (quoting *United States v. Morris*, 20 F.3d 1111, 1114–15 (11th Cir. 1994)).

[4] Here, Brooks requested an instruction that he could not be found guilty if he did not intend to cause a minor to assent to sexual activity. But, as stated by the district court, this was encompassed within the jury instruction given regarding § 2422(b). And it was also adequately covered by the entrapment instruction given by the district court. Because of this, the failure to give such an instruction did not impair Brooks' ability to present his defense. Moreover, Brooks presents no argument to convince us that the district court incorrectly concluded that Brooks' proposed theory of the defense instruction was not supported by the evidence. Accordingly, the district court did not abuse its discretion by refusing to give the jury Brooks' theory of the defense instruction.

c. Constructive Amendment

Brooks also argues that the district court's jury instructions constructively amended the indictment by including an additional means of interstate commerce not included in the indictment. The indictment charged Brooks with enticing a minor "using facilities and means of interstate commerce, that is, the Internet and a computer." In its instructions to the jury, the district court added "cellphone" to the facilities and means specified in the indictment. Brooks asserts that this addition constituted a constructive amendment to the indictment because it allowed the jury to convict Brooks solely on the phone conversation he had with Special Agent Hyre, a ground not charged in the indictment.

"A constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment." *United States v. Gutierrez*, 745 F.3d 463, 473 (11th Cir. 2014) (internal quotation marks and citation omitted). We review *de novo* whether the jury instructions constructively amended the indictment. *Id.* (citation omitted).

[5] Brooks argues that by adding "cellphone" to the means of interstate commerce, the jury could convict him solely on his phone conversations with Special Agent Hyre, without reliance on his e-mails. But we have previously held that telephones and cellular phones are instrumentalities of interstate commerce sufficient to satisfy the interstate commerce element of § 2422(b). *United States v. Evans*, 476 F.3d 1176, 1180–81 (11th Cir. 2007); *see also United States v. Mathis*, 767 F.3d 1264, 1283 (11th Cir. 2014) (holding "that a defendant's use of a cell phone to call and send text messages constitutes the use of a computer, as that term is defined in 18 U.S.C. § 1030(e)(1), and warrants imposition of an enhancement under [United States Sentencing Guideline] § 2G2.1(b)(6)"), *abrogated on other grounds by Lockhart v. United States*, 577 U.S. ——, 136 S.Ct. 958, 194 L.Ed.2d 48 (2016). The evidence at trial showed that Brooks' cellphone was a smartphone that could access the Internet and that the e-mails between Brooks and Special Agent Hyre had been transmitted over the Internet. ***680** Indeed, Brooks did not argue at trial that his cellphone was not a computer and, in his reply brief, he admits that in some instances his cellphone operated as a computer. We find unpersuasive Brooks' argument that the jury could have convicted Brooks solely on his phone call with Special Agent Hyre because, while this evidence was highly incriminating, there was also substantial evidence found in Brooks' e-mails. Accordingly, we hold the jury instructions given by the district court did not constructively amend the indictment.

IV. Gopoian's Testimony

Brooks next asserts that the district court abused its discretion by admitting Gopoian's testimony under Rules 414 and 403 of the Federal Rules of Evidence.

We review the district court's interpretation of the Federal Rules of Evidence *de novo*, *Doe No. 1 v. United States*, 749 F.3d 999, 1003 (11th Cir. 2014) (citation omitted), and its decision whether to admit or exclude evidence for abuse of discretion, *United States v. Gunn*, 369 F.3d 1229, 1236 (11th Cir. 2004). Ordinarily, evidence that a defendant has a propensity to commit a crime is excluded from trial. *See* Fed. R. Evid. 404(b)(1). But Rule 414 provides an exception for similar crimes in child molestation cases. *See United States v. McGarity*, 669 F.3d

1218, 1243–44 (11th Cir. 2012). Rule 414 provides that, "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a). Rule 414 defines "child" as "a person below the age of 14," Fed. R. Evid. 414(d)(1), and defines "child molestation" as follows:

> **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:
>
> **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
>
> **(B)** any conduct prohibited by 18 U.S.C. chapter 110;
>
> **(C)** contact between any part of the defendant's body—or an object—and a child's genitals or anus;
>
> **(D)** contact between the defendant's genitals or anus and any part of a child's body;
>
> **(E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
>
> **(F)** an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Fed. R. Evid. 414(d)(2). Evidence admitted under Rule 414 must satisfy the other Rules of Evidence, including Rule 403. *United States v. Woods*, 684 F.3d 1045, 1064–65 (11th Cir. 2012).

[6] Brooks argues that the district court was required to apply a categorical approach to analyze whether his charged crime qualified as a child molestation crime under Rule 414. He contends that the district court improperly admitted Gopoian's testimony under Rule 414 because, using the categorical approach, attempted enticement under § 2422(b) does not categorically qualify as a child molestation crime. Under the categorical approach, used by sentencing courts when determining whether a defendant's prior convictions qualify as predicate offenses under the Armed Career Criminal Act, the sentencing judge is required to analyze the elements of a defendant's prior convictions instead of the "particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990) (citations omitted). According to Brooks, attempted ***681** enticement of a minor under § 2422(b) does not qualify as a child molestation crime under this approach.

But Brooks points to no authority requiring us to apply the categorical approach to Rule 414. Nor does he provide any persuasive authority or reason why we should extend the categorical approach to Rule 414. Further, we are persuaded by the reasoning of the Seventh Circuit in *United States v. Foley*, 740 F.3d 1079 (7th Cir. 2014). In that case, the Seventh Circuit declined to apply the categorical approach to Rule 413, a rule similar to Rule 414 that allows for the introduction of evidence of past sexual offenses in sexual assault cases. *Id.* at 1087. The court stated:

> The focus of the Federal Rules of Evidence is on facts, and the policy rationale for Rule 413 is that a person who has engaged in the covered conduct is likely to engage in it again. Rule 413 uses statutory definitions to designate the covered conduct, but the focus is on the conduct itself rather than how the charges have been drafted.

Id. This reasoning applies with equal force to Rule 414. Accordingly, we decline to apply the categorical approach to Rule 414 and find no error in the district court's decision to allow the introduction of Gopoian's testimony under this rule.

[7] Moreover, we are unconvinced that the district court abused its discretion by not excluding Gopoian's testimony under Rule 403, which provides that relevant evidence may be excluded "if its probative value is substantially outweighed by [the] danger of ... unfair prejudice." Fed. R. Evid. 403. Indeed, because the district court gave an entrapment jury instruction, Gopoian's testimony was especially probative of Brooks' predisposition to commit the charged crime. Further, the district court instructed the jury that Brooks was not on trial for any conduct not charged in the indictment and they could not convict Brooks on Gopoian's testimony alone.

In sum, we find the district court did not err in admitting Gopoian's testimony under Rule 414.

V. Brooks' Conversations with the Father of a 12-Year-Old Boy

Brooks also contends the district court erred in admitting at trial his statements to Special Agent Hyre regarding Brooks' prior communications with the father of a 12-year-old boy. The district court found these statements were inextricably intertwined with the charged offense. On appeal, Brooks argues that these statements were unrelated to his charged offense under § 2422(b) and were unduly prejudicial to his defense.

We review the district court's decision whether to admit or exclude evidence for abuse of discretion. *Gunn*, 369 F.3d at 1236. Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's character in order to show action in conformity therewith. *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (citing Fed. R. Evid. 404(b)). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* (citing Fed. R. Evid. 404(b)). Additionally, evidence falls outside of the scope of Rule 404(b) if it is "inextricably intertwined with the evidence regarding the charged offense" and "forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *Id.* (internal quotation marks and citation omitted).

***682** **[8]** It is clear here that Brooks' comments about his prior conversations with a father regarding having sex with the father's 12-year-old son were inextricably intertwined with the charged offense. Our review of the evidence shows that Brooks offered this information when trying to convince Special Agent Hyre to let Brooks have sex with his fictitious ten-year-old son. These statements are therefore inextricably intertwined with Brooks' charged crime. And, in any event, these statements could have been admitted as evidence of motive, intent, plan, or absence of mistake or accident under Rule 404(b)(2) or as a statement against interest under Rule 804(b)(3). Moreover, these statements were highly probative and not unduly prejudicial under Rule 403. We therefore conclude the district court did not abuse its discretion in admitting Brooks' statements regarding his previous conversations with the father of a 12-year-old boy.

VI. Judgment of Acquittal

Brooks next argues that the district court erred in denying his motion for a judgment of acquittal because the evidence was insufficient to show that Brooks intended to cause or took a substantial step towards causing a minor to assent to sexual activity, as required for an attempt conviction under § 2422(b).

Section 2422 provides, in relevant part:

> Whoever, using ... any facility or means of interstate or foreign commerce, ... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in ... any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned.

18 U.S.C. § 2422(b). "With regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he 'acted with the specific intent to engage in sexual activity.' " *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (quoting *United States v. Yost*, 479 F.3d 815, 819 n.3 (11th Cir. 2007)). In other words, "[t]he underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *Murrell*, 368 F.3d at 1286. A defendant can be convicted under § 2422(b) "even though he communicated only with an adult intermediary" and "even though he attempted to exploit only fictitious minors." *Lee*, 603 F.3d at 912–13.

Brooks was convicted of attempt under § 2422(b) because there was no actual minor involved who could have been influenced. "To sustain a conviction for the crime of attempt, the government need only prove (1) that the defendant had the specific intent to engage in the criminal conduct for which he is charged and (2) that he took a substantial step toward commission of the offense." *Murrell*, 368 F.3d at 1286 (citations omitted). A defendant takes a substantial step when his "objective acts mark his conduct as criminal such that his acts as a whole strongly

corroborate the required culpability." *Id.* at 1288 (citation omitted).

We review *de novo* the denial of a motion for a judgment of acquittal, viewing the evidence in the light most favorable to the Government and making all reasonable inferences and credibility choices in favor of the Government. *United States v. Evans*, 344 F.3d 1131, 1134 (11th Cir. 2003) (citation omitted). "A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." *United States v. Chastain,* 198 F.3d 1338, 1351 (11th Cir. 1999) (citation omitted). ***683** Thus, we will uphold Brooks' conviction if a reasonable jury could have found that Brooks intended to induce Special Agent Hyre's fictitious ten-year-old son to assent to sexual contact with Brooks and that Brooks took a substantial step towards causing that assent.

[9] Upon our review of the record, we conclude that a reasonable jury easily could have convicted Brooks of violating § 2422(b). First, there was ample evidence that Brooks intended to cause Special Agent Hyre's fictitious ten-year-old son to assent to sexual contact with Brooks. Brooks posted the Craigslist ad that contained words commonly used by predators seeking to have sex with children. He exchanged e-mails with Special Agent Hyre in which he expressed an interest in having sex with the fictitious ten-year-old. He indicated in a recorded telephone conversation that he was interested in "touching," "holding," "oral," and "kissing," and he was open to "giving" and "receiving." Brooks admitted that he had posted several online ads regarding incestuous sex and that he had communicated with another man about having sex with the man's 12-year-old son. Moreover, Gopoian testified at trial that Brooks performed oral sex on him when he was a child.

Second, a reasonable jury could also have found that Brooks took a substantial step towards causing the assent of a minor. As explained above, Brooks posted an online ad and communicated with Special Agent Hyre via e-mail and the telephone regarding his intent to have sex with Special Agent Hyre's fictitious ten-year-old son. Additionally, Brooks traveled to a shopping center to meet Special Agent Hyre and admitted that he groomed his genitals prior to this meeting. Considering the evidence of Brooks' actions as a whole, it is clear that a reasonable jury could conclude that Brooks took a substantial step towards causing the assent of a minor to engage in sexual activity with him. Accordingly, the district court did not err in denying Brooks' motion for a judgment of acquittal.

VII. Cumulative Effect

Lastly, Brooks contends that the cumulative effect of the district court's errors deprived Brooks of a fair trial. Under the cumulative error doctrine, "[e]ven where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative effects of errors to determine if the defendant has been denied a fair trial." *United States v. Lopez*, 590 F.3d 1238, 1258 (11th Cir. 2009) (citation omitted), *cert. denied*, 562 U.S. 981, 131 S.Ct. 413, 178 L.Ed.2d 322 (2010). "In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *United States v. Calderon,* 127 F.3d 1314, 1333 (11th Cir. 1997) (citations omitted).

[10] We have already determined that the district court did not err in overruling Brooks' *Batson* challenges, in instructing the jury, in the challenged evidentiary rulings, and in denying Brooks' motion for a judgment of acquittal. We further held that Brooks was not substantially prejudiced by the testimony regarding the previously non-disclosed e-mails. Reviewing the trial as a whole, we also conclude that the cumulative effect of these alleged errors did not deprive Brooks of a fair trial.

VIII. Conclusion

For all of these reasons, we affirm ***684** Brooks' conviction. [2] , [3]

AFFIRMED.

All Citations

723 Fed.Appx. 671, 105 Fed. R. Evid. Serv. 528

Footnotes

* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

1 While the Government admitted to a discovery violation at oral argument, based on the circumstances we are not so sure a Rule 16 violation occurred. Nevertheless, we will not address this issue given the Government's concession.

2 Brooks' Motion to Supplement the Record on Appeal, which was carried with the case, is **GRANTED**.

3 Brooks' Motion to Hold Appeal in Abeyance for 90 Days Following Oral Argument is **DENIED**.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14959-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GEORGE ADRIEN BROOKS,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: Before MARCUS and NEWSOM, Circuit Judges, and BUCKLEW*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

ORD-42

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

vs

GEORGE ADRIEN BROOKS

Case Number: 6:15-cr-219-Orl-41TBS

USM Number: 63200-018

James T. Skuthan, FPD
Suite 300
201 S. Orange Ave
Orlando, FL 32801

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Count One of the Indictment. Accordingly, the Court has adjudicated the defendant guilty of the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2422(b)	Attempted Persuasion, Inducement and Enticement of a Minor to Engage in Sexual Activity	September 10, 2015	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

June 27, 2016

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

June 29, 2016

George Adrien Brooks
6:15-cr-219-Orl-41TBS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 216 Months.

The Court recommends to the Bureau of Prisons that the defendant be incarcerated at FMC, Butner, North Carolina for medical and psychological treatment

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

George Adrien Brooks
6:15-cr-219-Orl-41TBS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 9 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The mandatory drug testing requirements of the Violent Crime Control Act are waived. However, the Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases without approval of the probation officer. The defendant shall provide the probation officer access to any requested financial information.

2. The defendant shall participate in a mental health program specializing in sex offender treatment and submit to polygraph testing for treatment and monitoring purposes. The defendant shall follow the probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. The defendant shall register with the state sexual offender registration agency(s) in any state where he or she resides, visits, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S.943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

4. The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate, including: schools, daycare centers, theme parks, playgrounds, etc.

5. The defendant is prohibited from possessing, subscribing to, or viewing, any video, magazine, or literature depicting children in the nude and/or in sexually explicit positions.

6. Without prior written approval of the probation officer, you are prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, your place of employment, or an educational facility. Also, you are prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, you must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including your employer, you must inform the third party of this restriction, including the computer inspection provision.

7. The defendant shall submit to a search of his or her person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable

time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

8. The defendant shall cooperate in the collection of DNA, as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	**$0.00**	**$0.00**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

The Special Assessment in the amount of **$100.00** is due in full and immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Final Judgment of Forfeiture, that are subject to forfeiture.

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

APPENDIX D

INSTRUCTION 11

ENTICEMENT OF A MINOR TO ENGAGE IN SEXUAL ACTIVITY 18 U.S.C. § 2422(b)

It is a Federal crime for anyone, using any facility of interstate or foreign commerce, including transmissions by computer, cell phone, or the Internet, to persuade, induce, or entice anyone under 18 years old to engage in any sexual activity for which any person could be charged with a criminal offense.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly persuaded, induced, or enticed an individual to engage in sexual activity, as charged;

(2) the Defendant used a computer, cell phone, or the Internet to do so;

(3) when the Defendant did these acts, he believed the individual was less than 18 years old; and

(4) if the sexual activity had occurred, the Defendant could have been charged with a criminal offense under Florida Statute subsection 794.011.

It is not necessary for the Government to prove that the individual was in fact less than 18 years old; but it is necessary for the Government to prove that the Defendant believed such individual to be under that age. Also, the Government need not prove that a real individual under the age of 18 was involved in the offense; it is sufficient that Defendant believed that an individual under the age of 18 was

involved.

The Defendant need not communicate directly with an individual under 18 years of age; it is sufficient if the Defendant induces the individual to engage in unlawful sexual activity by communicating with an adult intermediary for that purpose.

As used in this instruction, "induce" means to stimulate the occurrence of or to cause.

A computer, cell phone, and the Internet are each facilities of interstate commerce.

As a matter of law, the following acts are crimes under Florida law: sexual battery by a person 18 years of age or older upon a person less than 12 years of age. "Sexual battery" means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

INSTRUCTION 12

ATTEMPT

In some cases, it is a crime to attempt to commit an offense—even if the attempt fails. In this case, the Defendant is charged with attempting to knowingly persuade, induce, or entice a minor to engage in sexual activity.

The Defendant can be found guilty of an *attempt* to commit that offense only if both of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly intended to commit the crime of persuading, inducing, or enticing a minor to engage in sexual activity; and

Second: That the Defendant's intent was strongly corroborated by his taking a substantial step toward committing the crime.

A "substantial step" is an important action leading up to committing of an offense—not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in committing the offense.