

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

FEB 5 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD RAY HORNER,

Defendant-Appellant.

No. 17-30240

D.C. No.

4:16-cr-00040-BMM-1

District of Montana,

Great Falls

ORDER

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.

35. The petition for rehearing en banc is denied.

NOT FOR PUBLICATION

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MEMORANDUM*

Appeal from the United States District Court
for the District of Montana

Brian M. Morris, District Judge, Presiding

Submitted December 6, 2018**
Seattle, Washington

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

Ronald Horner appeals the district court's refusal to declare a mistrial after a Canadian law enforcement officer testified that Horner responded, "No way, nice try," when asked if he wanted to provide a statement while detained in Canada. At the conclusion of trial, the jury found Horner guilty of transporting child

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

pornography in violation of 18 U.S.C. § 2252(a)(1), (b). Because the parties are familiar with the facts, we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review for abuse of discretion the denial of a motion for mistrial. *United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016).¹ Even if we assume the officer's testimony violated Horner's Fifth Amendment rights, the district court's curative jury instruction was insufficient, and Horner did not waive his objection to the testimony, the Government has "demonstrate[d], beyond a reasonable doubt, that the error was harmless." *United States v. Caruto*, 532 F.3d 822, 827 (9th Cir. 2008) (citing *United States v. Baker*, 999 F.2d 412, 416 (9th Cir. 1993)). The brief "extent of comments made by the [officer]" and the fact that "an inference of guilt from silence was [not] stressed to the jury" support this conclusion. *Id.* at 831 (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034 (9th Cir. 2001) (en banc)). Importantly, even setting aside the disputed testimony, the totality of evidence presented at trial was "virtually conclusive of guilt." *Whitehead*, 200 F.3d at 639. Canadian officials testified that an initial review of Horner's laptop uncovered several illicit images, and a forensic examination revealed hundreds of image and video files of child pornography and Internet activity

¹ Because we would affirm under either standard of review, we need not decide whether plain error review is more appropriate here. *See United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000).

suggesting that Horner accessed these and other illicit materials online. The jury was presented with an illustrative sample of these files. Finally, the short duration of jury deliberations here (i.e., less than an hour) further “suggest[s] that any error in allowing [the disputed] testimony . . . was harmless.” *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (two and a half hours of deliberation indicate that it was not a “difficult case” for the jury to decide) (citation omitted).

AFFIRMED.