[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11403
Non-Argument Calendar

D.C. Docket No. 4:18-cr-00040-MW-CAS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICHOLAS HUGHES,

Defendant-Appellant.

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

(December 26, 2019)

Before WILSON, TJOFLAT, and ANDERSON, Circuit Judges.

PER CURIAM:

Section 2251(a) of Title 18 to the U.S. Code makes it a crime for any person to employ, use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct "for the purpose of producing any visual depiction of such conduct." Nicolas Hughes, formerly a music teacher and soccer coach at a charter school, was convicted of violating § 2251(a) based on sexual contact he had with a 14-year-old student at the school.[1] Hughes argues that the District Court erred in giving the following instruction: "While the Government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it need not be the Defendant's only dominant purpose." He also argues that the District Court erred by rejecting his proposed jury instruction. He proposed that the Government must prove that "one of the dominant motives" of the sexual activity was to produce a visual depiction. Because we conclude that this case is governed by *Lebowitz*[2] and *Miller*,[3] we dismiss Hughes's appeal.

We review the legal correctness of a district court's jury instructions *de novo* and the court's phrasing for abuse of discretion. *United States v. Seabrooks*, 839 F.3d 1326, 1332 (11th Cir. 2016). A district court has broad discretion to

[1] Hughes and the student exchanged nude images and pornographic videos and Hughes filmed and took pictures of himself and the student engaged in sexual acts at the school.

Hughes was also convicted of enticement of a minor to engage in sexual activity for which a person can be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b) and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2). He does not appeal those convictions.

[2] *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012).

[3] *United States v. Miller*, 819 F.3d 1314 (11th Cir. 2016).

formulate jury instructions provided the instructions are correct statements of the law. *Lebowitz*, 676 F.3d at 1014. The district court reversibly errs when its instructions give rise to a substantial and eradicable doubt as to whether the jury was properly guided in its deliberations. *Id.* An instruction that tracks the text of the relevant statute "will almost always convey the statute's requirements." *Id*.

A district court's rejection of a proposed jury instruction is reviewed for abuse of discretion. *Id*. We will reverse a district court's decision to refuse a requested jury instruction only when three requirements are met: "(1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover the gist of the instruction, and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *Id.* (quoting *United States v. Culver*, 598 F.3d 740, 751 (11th Cir. 2010)).

The District Court did not abuse its discretion in giving the Government's proposed instruction. The instruction was a correct statement of the law. The use of the indefinite article "the" in § 2251(a) does not require that the "single-minded" purpose of the sexual activity be the production of a visual depiction. *Id.*; *Miller*, 819 F.3d at 1316. In *Miller*, for example, we upheld the trial court's instruction, which said that the Government had to prove that making the photographs was "a purpose" of enticing the minor. 819 F.3d at 1316. The Government is "not required to prove that making explicit photographs was [the defendant's] sole or

primary purpose for enticing the minor to engage in sexually explicit conduct." *Id*. It is sufficient to show that it is "a purpose." *Id.* There is no doubt that the jury was properly guided in its deliberations of Hughes's charge.

The District Court also did not err by denying Hughes's requested instruction. As explained above, there is no dominant-motive requirement in § 2251(a). Hughes argues that, under Mann Act[4] precedent, the Government must show that the production of the visual depiction was the "efficient and compelling purpose" of the sexual activity. We considered—and rejected—the same argument in *Lebowitz*, finding that such a requested instruction is a "substantively incorrect" statement of the law. 676 F.3d at 1014–15. As we explained, the Mann Act deals with crimes that are unrelated to the production of child pornography. *Id.* at 1014. And, even if Mann Act precedent applies to § 2251(a) cases, refusal to give a dominant-motive instruction would not be an error because our precedent recognizes that "dual purposes are sufficient for a conviction, and [courts] 'need not concern [them]selves' with whether the illegal purpose was dominant over other purposes." *Id.* (quoting *Forrester*, 363 F.3d at 352).

[4] The Mann Act prohibits the transportation of women in interstate commerce for the purpose of prostitution or other immoral purposes. 18 U.S.C. §§ 2421–2424. We have held that although immoral practices need not be the "sole and single purpose" of the transportation, it must be "an efficient and compelling purpose." *Forrest v. United States*, 363 F.2d 348, 349–50 (5th Cir. 1966); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all Fifth Circuit decisions issued before October 1, 1981).

Furthermore, Hughes was not impaired in his ability to present an effective defense. Arguing that the visual depictions were incidental to a consensual romantic relationship with a minor is not a viable defense to a charge under § 2251(a). *Miller*, 819 F.3d at 1316. The Government did not need to prove that Hughes enticed the sexual activity for the "sole or primary purpose" of producing a visual depiction. *Id.* Hughes "is no less a child pornographer simply because he is also a pedophile." *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996).

The District Court did not abuse its discretion by rejecting Hughes's proposed jury instruction nor by giving the special instruction. According to *Lebowitz* and *Miller*, the instruction requested by Hughes was not substantively correct and the instruction that the court gave conveyed the accurate legal standard. Hughes was still able to present evidence that the production of the visual depictions was not "a purpose" of the sexual activity. Moreover, according to *Miller*, the defense Hughes claims that he was inhibited from using was not a viable defense.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 26, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11403-DD
Case Style: USA v. Nicholas Hughes
District Court Docket No: 4:18-cr-00040-MW-CAS-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion