United States Court of Appeals

For the Eighth Circuit

No. 19-2417

United States of America

Plaintiff - Appellee

v.

Robert Nathan Hensley

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Arkansas - Little Rock

Submitted: September 25, 2020
Filed: December 16, 2020

Before LOKEN, SHEPHERD, and ERICKSON, Circuit Judges.

SHEPHERD, Circuit Judge.

Robert Nathan Hensley was charged with attempted enticement of a minor to engage in illegal sexual conduct, in violation of 18 U.S.C. § 2422(b) (Count 1); attempted production of child pornography after having previously been convicted of child sex crimes, in violation of 18 U.S.C. §§ 2251(a) and 2251(e) (Count 2); and possession of child pornography after having previously been convicted of child sex crimes, in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 3). Hensley filed a motion

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to suppress evidence, and after an evidentiary hearing, the district court[1] denied the motion. Following a jury trial, Hensley was found guilty on all three counts. The district court sentenced him to 420 months imprisonment on each count, to run concurrently, and supervised release for life. Hensley appeals the district court's denial of his motion to suppress as well as his conviction and sentence, arguing that the evidence was insufficient to support his convictions; that the district court erred in instructing the jury; that the government made improper and prejudicial closing remarks; and that his sentence for Count 3 was illegal. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

On October 12, 2017, Hensley responded to a Craigslist advertisement posted by an FBI agent. The advertisement indicated that a father and daughter, whose age was listed as 18, were traveling through the Conway, Arkansas area and were looking to have sex. Between October 12, 2017, and October 13, 2017, Hensley and the agent, posing as the father, exchanged numerous text messages relating to Hensley's meeting the father and his "daughter" so Hensley could have sex with the daughter. Approximately five minutes into their exchange on October 12, the father told Hensley that his daughter was 14. Sometime later, Hensley texted that he was "not into minors" and also said "18 and up only." R. Doc. 1, at 4. Nonetheless, Hensley continued to exchange sexually explicit text messages with the father, in which Hensley described in detail various sex acts he wanted to perform on the daughter. He also asked the father to "[s]end front pic tits and pus." R. Doc. 1, at 5. Hensley offered to pay to perform sex acts on the daughter while the father watched, and even offered to "buy" the daughter for $3,000, for which the daughter would receive "a lifetime of bondage and sex." R. Doc. 1, at 5. Upon the father's request, Hensley texted a picture of himself.

[1]The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

At around 4:00 a.m. on October 13, 2017, Hensley called the National Human Trafficking Hotline to anonymously report suspected trafficking of a 14-year-old minor female. Later, Hensley and the agent, still posing as the father, resumed their text conversation. Through text messages, Hensley and the father agreed to meet at an Exxon gas station in Cabot, Arkansas, at 2:00 p.m.; Hensley would pay $150 to have sex with the daughter; and the father could watch. Hensley admittedly drove to the Exxon. Additionally, four law enforcement officers drove to the Exxon. Hensley and the father exchanged text messages in which each party wanted the other to reveal himself first. The meeting did not take place. Shortly thereafter, Hensley texted the father, provided his address, and invited him to his house for oral sex.

The agents drove to Hensley's address, and they used his license plate data to pull up the associated driver's license information. The photo on the license was consistent with the photo Hensley had texted to the agent. FBI Special Agent John Sablatura then placed a ruse service call to Hensley's heating and air conditioning business. Hensley left his home in his work truck, and the agents pulled him over approximately a mile from his home. They questioned him about the minor female who he suspected was being trafficked. Hensley told the agents he was glad they were there and he had information about the girl to help them out. Further, he admitted sending the text message requesting "front pic tits and pus." Eventually the agents asked Hensley if he had a laptop computer and if they could review it. The agents obtained Hensley's consent to search his home for the laptop and to search the laptop. The agents found and seized the laptop.

On October 17, 2017, Hensley was arrested and charged with attempted enticement of a minor and attempted production of child pornography. A forensic examination of the laptop revealed three images of minor children engaged in sexually explicit conduct. Subsequently, the grand jury returned a superseding indictment, adding one count of possession of child pornography.

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Before trial, Hensley filed a motion to suppress the statements he made to the agents and any evidence obtained as a result of his custodial interrogation. The district court held an evidentiary hearing, at which Hensley, the agents, and other witnesses testified. Thereafter, the district court entered a comprehensive order denying the motion to suppress. The district court rejected Hensley's argument that he was unlawfully seized in violation of the Fourth Amendment when the agents pulled him over and questioned him, finding that the agents had reasonable suspicion to pull him over and that the encounter became consensual by the time questioning began. The district court further held that Hensley knowingly and voluntarily waived his Miranda[2] rights, but even if he had not, his interrogation was not custodial and thus the agents were not required to give him any Miranda warnings.

At trial, FBI Computer Analysis Response Team analyst Tim Whitlock testified for the government. He found three images of child pornography in unallocated space on Hensley's laptop, meaning the images were on the computer but had been deleted either by the user or the computer's operating system. He could not definitively say who deleted the images or when they were deleted. Whitlock explained that the images were digital and could have been received on the laptop or transferred from another digital source, but he could not definitively say which. Hensley's computer expert, Robert Gray, testified that the images could have been accessed by Hensley from links found on the websites in Hensley's browser history, as described in the trial exhibits. While Hensley denied producing or saving the images, he testified that he surfed the internet in his free time, typically for sexually explicit material by searching and then clicking on links. He did not testify about using any other digital source to access or upload sexually explicit material. It is undisputed that the laptop on which the images were found was manufactured in China.

Hensley's browser history revealed an interest in pornography where youth was emphasized, and the government introduced this history as evidence at trial.

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

Hensley admitted intentionally accessing all of the websites in the trial exhibits. For example, he accessed the website "youngpetite.org," the description of which included the word "teen." Gray testified that the websites' homepages indicated there was no child pornography on the sites and that there was a very high likelihood that no child porn was on the sites. Gray admitted, however, that he did not access the content of those sites but rather visited only the homepages. Hensley accessed some of the sites using the private browser function, although he denied using the function intentionally.

Both experts testified that the images found on Hensley's laptop could have been intentionally accessed from the internet or could have been temporarily saved without the user's knowledge as "pop-ups," which refer to items automatically opening on a computer. Hensley described seeing pop-ups when he accessed "adult videos" or websites. Whitlock determined that the laptop was used to access the internet and that Hensley was the user. Hensley admitted at trial that he used the laptop to access the internet, including the websites listed in the government's exhibits.

Whitlock testified that a program called CCleaner was on Hensley's laptop. CCleaner is a cleaning software that deletes and assists in hiding items. Whitlock determined that CCleaner was run at 1:52 a.m. on October 13, 2017. Gray testified that the launch of CCleaner did not necessarily mean Hensley's laptop was cleaned then. Hensley admitted that a store installed CCleaner on his laptop, but he denied intentionally launching it.

The government introduced into evidence certified records of Hensley's prior child sex crimes convictions. When Special Agent Sablatura was asked on direct examination about the nature of the convictions, Hensley requested a limiting instruction. The district court gave a limiting instruction during trial and admonished the jury that it "may not consider these convictions as evidence he actually committed the crimes that he's charged with in this case." R. Doc. 111, at 35. Hensley did not object or request any other specific language in this limiting

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instruction. The district court admitted only the nature of the prior convictions, not any of the underlying facts.

Over Hensley's objection, the district court's jury instruction on the attempted enticement charge contained the following illustrative example: "The act of driving to a planned meeting location has been found sufficient to show that a defendant took a substantial step towards commission of the crime." R. Doc. 91, at 13. Also over Hensley's objection, the district court's jury instruction on the attempted production charge contained the following illustrative example: "Asking for nude pictures of a minor may constitute a substantial step to produce child pornography." R. Doc. 91, at 16. Additionally, the district court instructed the jury that it could consider evidence of Hensley's prior convictions for its tendency to show a propensity to commit sex offenses against children, as well as to determine Hensley's intent, knowledge, and lack of mistake. R. Doc. 91, at 5. The district court's instructions further reminded the jury: "[I]f you were instructed that some evidence was received for a limited purpose only, you must follow that instruction." R. Doc. 91, at 4.

At the close of the evidence, Hensley moved for judgment of acquittal, which the district court denied. The jury returned a guilty verdict on all counts. The district court sentenced Hensley to three concurrent terms of 420 months imprisonment. During sentencing, Hensley acknowledged more than once that he faced a mandatory minimum of 420 months, or 35 years, on Count 2. At one point the district court acknowledged that the statutory maximum for Count 3 is 20 years but stated that Count 2's mandatory minimum "governs this sentence." R. Doc. 109, at 23. Hensley did not object to the sentence on Count 3.

On appeal, Hensley challenges: (1) the district court's denial of his motion to suppress; (2) the sufficiency of the evidence supporting his convictions; (3) the district court's jury instruction regarding his prior convictions and its use of illustrative examples in Instruction Nos. 9 and 11; (4) five of the government's closing remarks as being so prejudicial that they warrant reversal; and (5) the legality

of his sentence for Count 3. Due to the nature of the issues, we will begin by addressing the sufficiency of the evidence.

II.

A.

Hensley challenges the sufficiency of the evidence supporting his convictions for Counts 1-3. "We review the sufficiency of the evidence supporting a conviction de novo, 'viewing the evidence most favorably to the verdict, resolving conflicts in favor of the verdict, and giving it the benefit of all reasonable inferences.'" United States v. Riepe, 858 F.3d 552, 558-59 (8th Cir. 2017) (citation omitted). The verdict must be upheld "if 'there is an interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.'" Id. at 559 (citation omitted).

1.

Hensley argues that the evidence was insufficient to support his conviction for attempted enticement of a minor to engage in illegal sexual conduct, in violation of 18 U.S.C. § 2422(b). To convict Hensley of enticement of a minor, the government must prove beyond a reasonable doubt that he: "(1) 'used a facility of interstate commerce, such as the internet or the telephone system;' (2) 'knowingly used the facility of interstate commerce with the intent to . . . entice a person to engage in illegal sexual activity;' and (3) 'believed that the person he sought to . . . entice was under the age of eighteen.'" United States v. Young, 613 F.3d 735, 742 (8th Cir. 2010) (citation omitted). To prove an attempt, the government must prove that the defendant intended to commit the predicate offense and took a substantial step in furtherance of the offense. See United States v. Bernhardt, 903 F.3d 818, 827 (8th Cir. 2018).

Hensley contends that the evidence is insufficient to sustain his conviction on this count because: (1) he was responding to a Craigslist advertisement which listed

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the female's age as 18; (2) his text messages with the undercover agent indicated that Hensley was seeking a sexual encounter with a female who was 18 years old; and (3) he had no direct communication with the minor and alerted the National Human Trafficking Hotline about the situation. Additionally, he asserts that he did not take any substantial step towards committing the offense.

The evidence is sufficient to show that Hensley intended to entice the fictitious minor female to engage in illegal sexual conduct and that he took a substantial step towards commission of the offense by planning and ultimately driving to the Exxon station to meet the minor and her "father." In Hensley's messages with the undercover agent, the agent made it clear to Hensley that the fictitious minor was 14 years old. Hensley continued to engage in the conversation, responding multiple times with sexually explicit messages and inquiring as to whether the agent would "sell her." It is clear from the messages that Hensley was negotiating sexual activity with a minor child, and in particular that he was intending to violate Ark. Code Ann. § 5-14-127 (sexual assault in the fourth degree). His assertions to the contrary simply created a factual dispute for the jury to resolve, and a reasonable jury could have found unpersuasive his testimony that he was not serious about the exchange. Again, from the explicit nature of the messages, which evince an intent to have sex with the minor in exchange for cash, and his actually making plans to meet the "girl" and her "father," a reasonable jury could easily reject Hensley's view of the evidence and discount certain facts in his favor. The fact that the minor did not exist, or that Hensley never met her or communicated directly with her, is of no moment, as attempted enticement may occur through an adult intermediary or when there is no actual minor involved. See United States v. Spurlock, 495 F.3d 1011, 1014 (8th Cir. 2007) ("[T]he efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective." (citation omitted)); United States v. Pierson, 544 F.3d 933, 939-40 (8th Cir. 2008) (affirming conviction for attempted enticement of a minor where "victim" was an undercover profile posing as a 13-year-old girl); see also United States v. Yost, 479 F.3d 815, 819 n.2 (11th Cir. 2007) (per curiam) (explaining that an actual minor is not required for an attempted enticement conviction and that "[i]t is

sufficient that a defendant believe a minor is involved"). Finally, the fact that he arranged for and traveled to a potential meeting at the Exxon station satisfied the substantial step requirement. See Young, 613 F.3d at 743 (explaining that defendant's reserving a motel room and traveling to the motel in order to have sex with a minor constituted substantial steps towards committing the crime of enticement of a minor); see also Spurlock, 495 F.3d at 1014 (explaining that making plans with minors' mother to meet at a motel in order to have sex with minors constituted a substantial step towards committing the crime of enticement of a minor). Accordingly, we conclude that the evidence is sufficient to sustain Hensley's conviction for attempted enticement of a minor.

2.

Next, Hensley argues that there was insufficient evidence to support his conviction for attempted production of child pornography. To convict Hensley of attempted production of child pornography, the government needed to prove beyond a reasonable doubt that: (1) he believed that the female was a minor; (2) he attempted to entice the minor to engage in sexually explicit conduct; (3) he intentionally engaged in this behavior in order to produce a visual depiction of that conduct; and (4) he used a means of interstate or foreign commerce. See United States v. Schwarte, 645 F.3d 1022, 1030 (8th Cir. 2011). The government also needed to prove that Hensley took a substantial step towards the commission of the offense. Id.

Hensley does not dispute that he sent a text message to the undercover agent instructing the agent to send a photograph of the minor's breasts and vagina. Instead, Hensley argues that he did not believe the female was a minor, as evidenced by his messages in which he stated that the minor female looked 18 and that he was not interested in a minor child, and his message was not intended to be taken seriously. He also asserts that because there were no actual images, the jury would have resorted to speculation as to what those images would have depicted. Finally, he

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argues that mere nudity is insufficient to prove that the images would have depicted sexually explicit conduct.

The evidence is sufficient to show that Hensley believed the female was a minor and that, using a means of foreign commerce, he attempted to entice her to engage in sexually explicit conduct for the purpose of producing a visual depiction of said conduct. See Pierson, 544 F.3d at 938-40 (finding sufficient evidence for attempted production conviction where defendant and fictitious minor discussed minor's age to be 13 and defendant asked minor to transmit nude pictures of herself via webcam). First, there was ample evidence showing that Hensley believed the fictitious female was a minor. Indeed, the text messages between him and the undercover agent repeatedly reference the minor's age, 14. Additionally, Hensley called the National Human Trafficking Hotline to report his belief that a 14-year-old female was a potential victim of trafficking. Based on the evidence, a reasonable jury could conclude that Hensley believed the female was a minor and reject his testimony to the contrary.

Second, a reasonable jury could have disbelieved Hensley's claims that his request was not a serious one. He admitted on cross-examination that nothing in his request to the undercover agent would indicate that he was not sincere. Moreover, the explicit nature of his request, his prior convictions for sex offenses, and comments demonstrating his sexual purpose all supported a finding that Hensley was quite serious in requesting this image.

Third, there was sufficient evidence from which a reasonable jury could find that Hensley was seeking sexually explicit images. In the context of child pornography, "sexually explicit conduct" includes "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(B)(iii). "Lascivious" means "sexual in nature." United States v. Wallenfang, 568 F.3d 649, 657 (8th Cir. 2009) (citation omitted). "Lasciviousness may be found when an image of a nude or partially clothed child focuses on the child's genitals or pubic area and is intended to elicit a sexual response in the viewer." United States v. Petroske, 928 F.3d 767,

772 (8th Cir. 2019). Here, Hensley requested an image of the minor female's vagina while negotiating with the undercover agent to have a sexual encounter with the minor, and the nature of the messages evinced an inference that Hensley's request was intended for sexual purposes. Accordingly, a reasonable jury could infer from the evidence that Hensley was intentionally seeking a sexually explicit or lascivious image of the minor female.

Finally, it is established that asking for an image of a minor's genitals constitutes a substantial step to produce child pornography. Schwarte, 645 F.3d at 1030-31 (explaining that defendant took a substantial step towards committing production of child pornography where he asked minor to send him nude pictures and videos of herself, offered to provide her a laptop in exchange for said pictures or videos, and provided a mailing address where she could mail the video). Accordingly, we conclude that the evidence is sufficient to sustain Hensley's conviction for attempted production of child pornography.[3]

3.

Next, Hensley challenges the sufficiency of the evidence supporting his conviction for possession of child pornography. To convict Hensley of possession of child pornography, the government needed to prove beyond a reasonable doubt that Hensley: (1) knowingly possessed an item of child pornography, and that (2) the

[3]Hensley also argued in his reply brief and at oral argument that, because the photo he requested may have already existed at the time he requested it, the jury could not find beyond a reasonable doubt that he enticed or persuaded a minor to engage in sexually explicit conduct in order to produce a visual depiction of it. He cites a Second Circuit case, United States v. Broxmeyer, 616 F.3d 120 (2d Cir. 2010), in support of this proposition. But "[t]his [C]ourt does not consider issues raised for the first time on appeal in a reply brief 'unless the appellant gives some reason for failing to raise and brief the issue in his opening brief.'" Jenkins v. Winter, 540 F.3d 742, 751 (8th Cir. 2008) (citation omitted). Hensley does not provide a reason for his failure to raise and brief this argument in his opening brief. Therefore, the argument is waived. See id.

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item was transported or produced in interstate or foreign commerce by any means. See Schwarte, 645 F.3d at 1033.

Hensley brings two main challenges to the sufficiency of the evidence as to Count 3. He first argues that the government failed to prove the jurisdictional element beyond a reasonable doubt. He does not dispute that agents found three images of child pornography in unallocated space on Hensley's computer. He also does not dispute that the computer on which the images were found was manufactured in China, which this Court has found sufficient to satisfy the jurisdictional element of § 2252. See United States v. Koch, 625 F.3d 470, 479 (8th Cir. 2010) (citing United States v. Mugan, 441 F.3d 622, 627-30 (8th Cir. 2006)). Accordingly, Hensley's first argument fails.

Second, Hensley asserts that the evidence was insufficient to show that he knowingly possessed the images by virtue of their location in unallocated space on his computer. Although "the location of child pornography in inaccessible internet and orphan files can raise serious issues of inadvertent or unknowing possession . . . these are issues of fact, not of law." United States v. Kain, 589 F.3d 945, 949 (8th Cir. 2009). Here, there was sufficient circumstantial evidence supporting a finding that Hensley knowingly possessed the images, even if there is some evidence supporting his alternative explanation that he did not know those files were located on his computer and were automatically downloaded by his browser. Where the evidence "rationally supports two conflicting hypotheses," we "will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614-15 (8th Cir. 2009) (citation omitted) (affirming conviction for possession of child pornography over defendant's argument that images' location in unallocated space meant he did not knowingly possess them). A reasonable jury could find that Hensley knowingly possessed these images, notwithstanding the fact that they were located in unallocated space on the computer. Accordingly, we conclude that the evidence was sufficient to sustain Hensley's conviction for possession of child pornography.

B.

Hensley also contends that the district court erred in instructing the jury in two respects. First, Hensley challenges the instruction on how the jury may properly consider the evidence of his prior convictions. Second, Hensley challenges Instruction Nos. 9 and 11's illustrative examples regarding a "substantial step" for Counts 1 and 2, respectively.

1.

Hensley argues that the district court erred in not giving a written limiting instruction that his prior convictions may not be considered as evidence that he committed the crimes at issue. We review the district court's instruction on prior conviction evidence for plain error because Hensley failed to make a contemporaneous objection before the district court. See United States v. Poitra, 648 F.3d 884, 887 (8th Cir. 2011). To succeed under the plain error standard, Hensley must show there was an error that is clear or obvious under current law; the error affected his substantial rights; and the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id.

At trial, the government introduced into evidence certified records of Hensley's prior child sex crimes convictions. Hensley then requested a limiting instruction, which the district court granted. As Hensley requested, the district court verbally admonished the jury that it "may not consider these convictions as evidence he actually committed the crimes that he's charged with in this case." R. Doc. 111, at 35. Hensley did not object or request any other specific language in this limiting instruction.

At the initial instructions conference, Hensley requested a "[Federal Rule of Evidence] 404(b) limiting instruction" regarding his prior convictions. The district court rejected his request because, under Rule 414, his prior convictions were admissible for more purposes than his proposed instruction allowed. Before the final

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instructions conference, the district court circulated to the parties its limiting instruction, which reads as follows:

> You have heard evidence that the defendant has previously been convicted of other sex offenses concerning children. You may consider this evidence for its tendency, if any, to show the defendant's propensity to engage in crimes such as those charged in the Superseding Indictment. You may also consider that evidence to determine the defendant's intent, knowledge, and whether the charges in the Superseding Indictment are a result of mistake.

R. Doc. 91, at 5. We find the district court's instruction to be an accurate statement of law. See Fed. R. Evid. 414 (providing that, in a criminal case where the defendant is accused of certain sex offenses, evidence that the defendant committed other such sex offenses is admissible and "may be considered on any matter to which [they] [are] relevant"); Fed. R. Evid. 404(b) (providing that "[e]vidence of a crime, wrong, or other act" is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident"). Hensley did not object to this instruction, despite having the opportunity to do so at the time the instruction was first discussed and again following consideration of the last instruction. Moreover, although Hensley had proffered a limiting instruction stating that the jury may not convict a person simply because they believe he may have committed similar crimes in the past, the instruction further stated that the jury may consider prior convictions "only on the issue of [his] intent or lack thereof." The district court rejected the instruction as "too limiting" because it did not say the prior convictions were admissible to show propensity, knowledge, or lack of mistake or accident. R. Doc. 115, at 3-4. The district court did not err in rejecting Hensley's instruction because it was an incorrect statement of law. Additionally, the district court's Instruction No. 2 reiterated the limitation on the jury's consideration of Hensley's prior convictions, stating: "[I]f you were instructed that some evidence was received for a limited purpose, you must follow that instruction." "[A] jury is presumed to follow all instructions." United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000) (citing Jones v. United States, 527 U.S. 373, 394 (1999)).

Even if it was error for the district court not to expressly repeat in the written jury instructions the admonition that the jury could not consider Hensley's prior convictions as evidence that he actually committed the crimes at issue, that error was not clear or obvious under existing law. Given the district court's verbal and written instructions as a whole, the substantial evidence presented, and the fact that only the convictions and not the underlying facts were admitted, any error did not affect Hensley's substantial rights or the fairness, integrity, or reputation of the proceedings. See Poitra, 648 F.3d at 887. Accordingly, there is no plain error warranting relief.

2.

Hensley timely objected to the district court's use of illustrative examples in Instruction Nos. 9 and 11. "Accordingly, we review for abuse of discretion." United States v. White, 863 F.3d 784, 790 (8th Cir. 2017). "[W]e evaluate jury instructions by viewing them as a whole and affirm if the instructions fairly and adequately submitted the issues to the jury." United States v. Wright, 246 F.3d 1123, 1128 (8th Cir. 2001).

A district court "may comment on evidence to assist the jury so long as it makes it clear that the jurors must make all factual determinations themselves." United States v. Ray, 250 F.3d 596, 602 (8th Cir. 2001). However, it must avoid placing undue emphasis on one party's evidence. See Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1222 (8th Cir. 1997). "A [district] court must be careful if it intends to tie in principles of law to the facts." Vanskike v. ACF Indus., Inc., 665 F.2d 188, 202 (8th Cir. 1981).

We find the Tenth Circuit's decision in United States v. Bowen, where the court rejected a defendant's challenge to a jury instruction containing an illustrative example, to be instructive. See 437 F.3d 1009, 1017 (10th Cir. 2006). In Bowen, the defendant was charged with and convicted of possession with the intent to

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distribute methamphetamine. Id. at 1013-14. The court determined there was sufficient evidence to support the jury's verdict, including evidence that the defendant constructively possessed the drugs based on his presence in the car where the drugs were found, his reaching under the passenger's seat, his nervousness around the police, and the plastic baggies associated with drug distribution that police found in his pockets. Id. at 1015. On appeal, he challenged a jury instruction explaining what the government must show to prove that he constructively possessed the drugs. Id. at 1016-17. The challenged instruction stated:

> In addition to knowingly having the power or ability to control an object, the government must prove an act on the part of the defendant by which that power or ability is manifested and implemented, such as an act placing the object within easy reach of the defendant, or an act concealing the object from view.

Id. at 1017 (emphasis omitted). The defendant complained that the above-quoted portion "provided a 'formula for conviction' because it supplied the jury with specific examples of the evidence which would support a plausible inference that he had knowledge of" the drugs. Id. The Tenth Circuit concluded that the instruction was not reversible error. Id. It reasoned that the instruction was a correct statement of the law and that the examples "assisted the jury's understanding of constructive possession." Id. at 1018. Further, the court opined that the examples "were worded broadly and did not too closely track the specific facts presented in [the defendant's] case. Equally important, the examples provided did not unduly emphasize the prosecution's theory of the case, or usurp the jury's fact finding role." Id.

By contrast, the Second Circuit in United States v. Dove vacated a defendant's conviction for bank robbery based upon two "unbalanced" jury instructions. See 916 F.2d 41, 45-46 (2d Cir. 1990). The first challenged instruction centered on the eyewitnesses' failure to identify the defendant in the courtroom after identifying him in a police lineup. Id. at 43-44. The first instruction read as follows:

> The government has the burden of proving [the defendant's] identity as the perpetrator beyond a reasonable doubt. In this connection, *it is not essential that a witness be able to identify a defendant in open Court or be free from doubt as to the correctness of her identification of the defendant by other means.* However, if you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find him not guilty.

Id. at 44 (emphasis added). The court concluded the instruction was "unbalanced because it instructed the jury as to how the [government's key] witnesses' inability to identify the defendant in the courtroom might bear on guilt without indicating how this rather significant evidence might bear on innocence." Id. at 45. The court further noted that the imbalance could have been cured by adding the defendant's proposed one-sentence instruction advising the jury that it was "free to consider and weigh the effect" of the eyewitnesses' failure to identify the defendant in the courtroom. Id.

The second challenged instruction concerned the difference between direct and circumstantial evidence. Id. at 44. The majority of the government's evidence was circumstantial. See id. at 43-44. The instruction read as follows:

> Now, to illustrate the difference between direct and circumstantial evidence, let us assume that the fact in issue in a case is whether Jack shot and killed Mary. If a witness testified that he personally saw Jack shoot Mary, then we would say we have direct evidence of that fact. On the other hand, if a witness testifies that an hour before Mary was shot he sold Jack the pistol which has been identified as the murder weapon, and it was found in Jack's possession shortly after the murder, we would say we have circumstantial evidence of the fact that Jack did shoot Mary. That, as I say, is a very simple illustration and has no direct bearing on this case at all, but is illustrative of what I mean by circumstantial evidence.

Id. at 44. The Second Circuit opined that this instruction was improper because it assumed Jack's guilt in the premise, "and the jury is merely instructed how to look for evidence of that guilt." Id. at 46. Although the example "was not analogous to

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the facts of this case, the use in a criminal case of a hypothetical that assumes guilt where defendant asserts his innocence is disfavored." Id. The court also pointed out that "[v]irtually all of the circumstantial evidence pointed towards the possibility of [defendant's] innocence." Id. Finally, the court noted that the government and the defense had jointly urged the district court to use a neutral hypothetical, which the district court rejected. Id. at 45-46.

We are troubled by the district court's use of one-sided illustrative examples in Instruction Nos. 9 and 11, particularly Instruction No. 11's close similarity to the facts of Hensley's case. The examples are troublesome because they explain how the jury could find in favor of the government on the attempt element without explaining how the jury might find in favor of Hensley. However, viewing the instructions as a whole, see Wright, 246 F.3d at 1128, we conclude that the district court did not commit reversible error. Importantly, the district court also instructed the jury that it "should not take anything I have said or done during the trial as indicating what I think of the evidence or what I think your verdict should be." R. Doc. 115, at 88. In so doing, the district court made clear that "the jurors must make all factual determinations themselves." See Ray, 250 F.3d at 602. And like the instructions in Bowen, Instruction Nos. 9 and 11 are correct statements of law. See United States v. Herbst, 666 F.3d 504, 511 (8th Cir. 2012) (driving to a location may constitute a substantial step); Schwarte, 645 F.3d at 1030-31 (asking minor to send nude pictures and videos of herself, offering to provide her a laptop in exchange for said pictures or videos, and providing a mailing address where she could mail video is a substantial step in furtherance of production of child pornography). Additionally, they assisted the jury's understanding of a substantial step with respect to Counts 1 and 2. Cf. Bowen, 437 F.3d at 1018. Moreover, the instructions were permissive and did not compel the jury to reach a particular conclusion regarding the evidence. Although Instruction No. 11 arguably tracks more closely with the facts of Hensley's case than the instruction in Bowen, this fact does not change our conclusion. Taken as a whole, the instructions do not unduly emphasize the prosecution's theory or usurp the jury's fact-finding role.

The government represented at oral argument that the use of illustrative examples is common practice in the Eastern District of Arkansas. Nevertheless, we discourage the use of such one-sided jury instructions, particularly where, as here, they contain illustrative examples which track closely with the facts of a defendant's case. Nonetheless, the district court's inclusion of such examples here falls short of reversible error.

C.

Hensley next contends that the prosecutor made five improper remarks and misstated the evidence during closing arguments, and that these remarks and misstatements were so grave that they warrant reversal and remand for a new trial. Because Hensley failed to object to the closing remarks at trial, we review them only for plain error. See United States v. Robinson, 439 F.3d 777, 780 (8th Cir. 2006). First, the government remarked that Hensley waited at the Exxon for two-and-a-half to three hours. Second, the government stated that a person cannot get to the private browser function without being intentional about it. Third, the government argued that Hensley's accessing browser sites was intentional and that the experts did not testify that the sites in his browser history showed up as pop-ups. Fourth, the government argued that police found only three child porn images on Hensley's computer because Hensley ran the CCleaner program and spent time deleting images. Finally, the government stated that Gray, the defense expert, did not access the actual content of the porn sites in Hensley's browser history because "he knew what was on it," implying that he knew they contained child pornography.

Having carefully reviewed the five challenged remarks, we conclude that they were fairly supported by the evidence or reasonable inferences therefrom, and any error was not so prejudicial as to warrant reversal under plain error review. Additionally, because the district court properly instructed the jury on the elements of the offenses and "instructed the jury that arguments of counsel are not evidence, there is no plain error warranting relief." See United States v. Mullins, 446 F.3d 750, 760 (8th Cir. 2006) (citation omitted).

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III.

Hensley further argues that the district court erred in denying his motion to suppress on the sole ground that his interrogation on October 13, 2017, was custodial and the agents failed to advise him of his Miranda rights. "In reviewing the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo." United States v. Ferguson, 970 F.3d 895, 901 (8th Cir. 2020).

Even if the district court's failure to suppress Hensley's statements was error, we find it was harmless. "An error is harmless if it does not affect substantial rights of the defendant, and did not influence or had only a slight influence on the verdict." United States v. Martinez, 462 F.3d 903, 910 (8th Cir. 2006) (citation omitted). Given the other admissible evidence against Hensley, including his own testimony at trial, we conclude that failure to suppress his statements did not sufficiently influence the jury as to require reversal. Accordingly, any error was harmless. See id. (finding district court's failure to suppress defendant's statements to be harmless error given other evidence).

IV.

Finally, Hensley challenges the legality of his sentence for Count 3, arguing that 420 months imprisonment exceeds the statutory maximum. The government agrees. But because Hensley did not object to the illegality of the sentence at sentencing, it is reviewed only for plain error. See United States v. Bossany, 678 F.3d 603, 606 (8th Cir. 2012) (failure to object at trial to illegality of sentence that exceeded statutory maximum results in plain error review). Though this error is plain, under plain error review, we may correct the error only if it "affects substantial rights[] and 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" Id. (quoting United States v. Pirani, 406 F.3d 543, 549 (8th Cir. 2005) (en banc)). An error affects substantial rights by "prejudicially influenc[ing] the outcome of the district court proceedings." Id. (alteration in original) (citation

omitted). In this sentencing context, Hensley must show that, "absent the error, the [district] court could not have imposed [420] months[] imprisonment as his total punishment." Id. at 607. As Hensley acknowledged more than once during sentencing, the mandatory minimum sentence for Count 2 is 420 months. Thus, even absent the plain error as to Count 3, the district court was required to impose 420 months imprisonment as Hensley's total punishment. Accordingly, Hensley cannot show prejudice necessary for plain error relief as to the sentence, and Hensley's request to vacate the sentence is denied.

V.

For the foregoing reasons, we affirm the judgment of the district court.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. 4:17-cr-00310-SWW
	*	
	*	
	*	
ROBERT NATHAN HENSLEY,	*	
	*	
Defendant.	*	

ORDER

Robert Nathan Hensley is charged in a three-count superseding indictment with attempted enticement of a minor, attempted production of child pornography, and possession of child pornography. Hensley has pleaded not guilty to those charges.

Before the Court is a motion [doc.#57] of Hensley to suppress any statements he made and any other evidence obtained as a result of what he characterizes as an unlawful seizure and interrogation. The government has responded in opposition to Hensley's motion. The Court held an evidentiary hearing on Hensley's motion to suppress on January 15, 2019. This order

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ADD9

DEFENDANT: ROBERT NATHAN HENSLEY
CASE NUMBER: 4:17-CR-00310-001 SWW

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is 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.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

constitutes the Court's findings of fact and conclusions of law.[1]

I.

On October 12, 2017, the FBI placed an advertisement on Craigslist advertising a young female. Hensley responded to the ad and engaged in a series of text messages with an FBI undercover agent (UC), Hasheem Alexander, that centered around Hensley meeting a father and his 14 year old daughter so that Hensley could engage in sex with the daughter. Ultimately, Hensley agreed to meet the UC at an Exxon gas station near his home.

Four law enforcement officials were present at the Exxon where FBI agents parked a white Chrysler 300 that was supposed to contain the father and his minor daughter. FBI Agents John Sablatora and Alexander were parked on one side of the Exxon's parking lot and another surveillance vehicle was driving around as the agents were looking for Hensley's vehicle, a white Ford truck. The fourth law

[1] Two witnesses testified at the suppression hearing. In assessing their testimony, the Court may believe all of what a witness said, or only part of it, or none of it. In deciding what testimony of each witness to believe, the Court has considered the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with the evidence. In deciding whether or not to believe a witness, the Court has kept in mind that people sometimes hear or see things differently and sometimes forget things. The Court considered therefore whether a contradiction was an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail. See 8th Cir. Crim. Jury Instr. § 3.04 (2017).

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enforcement official was in the white Chrysler 300.

The UC continued to text Hensley attempting to locate and identify his vehicle. Hensley requested three times that the UC produce the minor female before he pulled into the meeting location. When no minor female was produced, the conversation between the UC and Hensley eroded and no meeting took place. Later, however, Hensley texted the UC and invited him to his residence for a "blow job." Hensley provided an address for his residence. The agents drove to the residence and determined that the residence matched the description that Hensley had earlier given of his residence. The agents ran license plates of vehicles in the driveway of the residence, researched the address, and were able to pull up Hensley's ID and picture. The picture matched the picture of Hensley that he had earlier sent to the UC.

Because the agents preferred to engage Hensley while he was in his vehicle rather than in his residence, the agents placed a ruse call to Hensley via his Heat and Air business and gave him an address nearby. After Hensley left his residence on what he thought was a service call, the agents followed him for a short distance and conducted a traffic stop. A vehicle containing Task Force Officer Grant Humphries pulled out in front of Hensley and stopped in front of him at a stop sign and a vehicle containing Agents Sablatora and Alexander pulled in behind him

with lights and sirens activated. Agents Sablatora and Alexander got out of their vehicle and approached Hensley's vehicle. Officer Humphries also exited his vehicle. Agent Sablatora went to the driver's side of Hensley's vehicle and asked him to get out while Agent Alexander was on the passenger side. Hensley claims both agents were pointing their guns at him through the windows.

As Hensley exited his vehicle, Agent Sablatora states he and Agent Alexander told him that he was not under arrest but that they were going to place him in handcuffs for everybody's protection and that they were trying to figure out what was going on. Hensley claims that Agent Alexander told him, "I think you're under arrest," after he admitted to sending a certain text.

Agent Sablatora states he told Hensley that he and Agent Alexander had information that there was an underage kid being trafficked for sex. He states Hensley said he was glad we were there and had information about that and would like to help us out with that.

Agent Sablatora states that after determining that Hensley was unarmed, his handcuffs were removed. Agent Sablatora estimates that Hensley was in handcuffs less than two minutes. Agent Sablatora told Agent Alexander to take Hensley to Officer Humphries' vehicle that had since been repositioned in a nearby parking lot. Agent Alexander and Hensley got in the vehicle and started talking while

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Agent Sablatora and Officer Humphries moved Hensley's truck and the vehicle behind it to the same parking lot.

Hensley claims he was initially handcuffed behind his back but that when he sat down in the front seat of Officer Humphries' vehicle, Agent Alexander unhooked one arm and brought them in front of him and rehooked the handcuffs. Hensley states he was handcuffed the entire time.

Agent Sablatora got into the back passenger's seat in the vehicle with Agent Alexander and Hensley. Both Agents Alexander and Sablatora were armed with their firearms in holsters on their hips. The agents did not have their firearms sitting out, neither of them had on their vests, there weren't any other officers in the vehicle, and there weren't any other officers standing around the vehicle. Hensley didn't check to see if the door where he was sitting was unlocked, but he states he didn't think you can secure that door.

According to the United States, Agent Alexander *Mirandized* Hensley and he waived his rights. Hensley denies he was read his *Miranda* rights and states that all of his questioning was recorded by Agent Alexander. He states that Agent Alexander spoke into the recorder, saying "we're here with Mr. Hensley and we're conducting an interview, and Mr. Hensley has been read his *Miranda* rights. And we're going to start this interview now." Hensley states his "first response was, 'I

haven't been read my *Miranda* rights, but I'm still willing to talk to you,' and we continued." Agent Sablatora denies the interview was recorded.

Agent Sablatora states it was a relaxed atmosphere in the vehicle and that he and Agent Alexander were making it feel like everyone was on the same team, acting like he and Agent Alexander didn't really know what was going on and that they were trying to catch somebody. Once the agents started talking to Hensley about the supposed sex trafficker, Agent Sablatora states Hensley told them that he had text messages on his phone that was still in his vehicle and that the agents could go get it and look at them, which Agent Sablatora states he did. Agent Sablatora states he pulled up the text messages and started asking Hensley about them. In addition to the text messages, some of which Hensley claims have been improperly deleted, there were multiple photographs of Hensley and girls using a "sex machine" that Hensley references in the text messages. Hensley denies he voluntarily handed over his phone but states that when he got out of his vehicle, Agent Alexander took his phone that was lying on the seat and started going through it right away.

Hensley states he openly agreed to cooperate with Agents Alexander and Sablatora to explain why they were wrong that he was the suspect. He states they started asking questions and he talked with them because he wanted to clear his

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name. Hensley advised the agents that he made a report to the National Human Trafficking Hotline a day earlier. He also advised that he is a registered sex offender and that "[i]t's quite possible" he told them he didn't want to go back to jail.

The interview with Hensley lasted about 30 minutes and ended with the agents asking him if he had a laptop. Hensley stated he had one at his residence about a mile away and gave them consent to search it. Agents Sablatora and Alexander, Officer Humphries, and Hensley then proceeded to Hensley's residence.

Once at his residence, Hensley states "[t]hey" had him sit on a bench in handcuffs in front of the residence and refused him a cigarette. Agent Sablatora states Hensley was walking around outside smoking a cigarette and that he was not in handcuffs.

Hensley states he was handed the keys to his residence and asked to open it, and so he "reached up and opened it and Agent Sablatora went in." Hensley states that after about five or seven minutes, Agent Sablatora stepped back out with his laptop in his hand. Hensley states Agent Sablatora then went over to his storage building and went through it and came out with the laptop in a laptop case. Hensley states that when Agent Sablatora stated they were going to take the laptop

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with them rather than search it right there, he at that point asked for a lawyer. Hensley was ultimately arrested after Agent Alexander consulted with the United States Attorney's Office.

On Hensley's laptop were several images of child pornography. One image depicted the bare vagina and anus of a prepubescent female. One image depicted a prepubescent female with a penis in front of her face. One image depicted a prepubescent female with a penis penetrating her anus.

II.

1.

Hensley first argues that because he was unlawfully detained, and because stopping an automobile and its occupants constitutes a seizure, he was seized in violation of the Fourth Amendment. Hensley argues that any statements allegedly made by him and any other evidence obtained as a result of his unlawful seizure must therefore be suppressed.

"A law enforcement officer may conduct an investigative stop of a vehicle if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir. 2012) (internal quotation marks and citation omitted). "Although reasonable suspicion must be more than a hunch, the Fourth Amendment only requires an

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officer to articulate some, minimal objective justification for an investigatory stop." *United States v. Coleman*, 603 F.3d 496, 499-500 (8th Cir. 2010) (internal quotation marks and citation omitted). In addition, "[i]t is well established ... that police officers may handcuff a suspect and place him in a patrol car during an investigative stop in order to protect their personal safety and maintain the status quo." *Robinson*, 670 F.3d at 877 (citation omitted). See also *United States v. Stachowiak*, 521 F.3d 852, 855 (8th Cir. 2008) ("At any investigative stop—whether there is an arrest, an inventory search, neither, or both—officers may take steps reasonably necessary to protect their personal safety.").

In this case, the agents were able to establish the identity of the individual (Hensley) who was communicating with the UC and arranging to have sex with a minor as Hensley had previously sent a photograph of himself to the agents and the agents were able to determine that the same individual lived at the address provided by the individual communicating with the UC. The agents thus had a reasonable suspicion that Hensley was attempting to have sex with a minor and therefore had reasonable suspicion to pull his vehicle over.

Moreover, the encounter between the agents and Hensley was consensual. "If the encounter becomes consensual, it is not a seizure, the Fourth Amendment is not implicated, and the officer is not prohibited from asking questions unrelated to

the traffic stop or seeking consent to search the vehicle." *United States v. Munoz*, 590 F.3d 916, 921 (8th Cir. 2010) (internal quotation marks and citation omitted). "Whether an encounter is consensual turns upon the unique facts of each case." *United States v. Quintero-Felix*, 714 F.3d 563, 568 (8th Cir. 2013) (internal quotation marks and citation omitted).

> "A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area." [*United States v. Flores,* 474 F.3d 1100, 1103 (8th Cir. 2007)]. A person is seized within the meaning of the Fourth Amendment when, under the totality of the circumstances, "a reasonable person would have believed that he was not free to leave." *Jones,* 269 F.3d at 925. Circumstances of a seizure may include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Flores,* 474 F.3d at 1103, *quoting United States v. White,* 81 F.3d 775, 779 (8th Cir. 1996); *see also United States v. Nunley,* 873 F.2d 182, 184-85 (8th Cir. 1989) (defendant was seized when officers' statements were more than routine questioning, and suggested to defendant that she was the particular focus of an investigation). Conversely, if a reasonable person feels free to "disregard the police and go about his business," the encounter is consensual. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), *quoting California v. Hodari D.,* 499 U.S. 621, 628, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan v. Chesternut,* 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988).

Munoz, 590 F.3d at 921.

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In this case, Hensley was told he was not under arrest, and he told the agents he was glad they were there, that he wanted to provide information to them concerning a potential human trafficker, and that he had contacted the National Human Trafficking Hotline. Indeed, as noted in the Court's November 28, 2018 order [doc.#71] following a pretrial hearing, Hensley's defense to the charges he faces is that he was trying to investigate child predators and assist law enforcement. Hensley also told the agents that he was a registered sex offender and did not want to go back to jail and he openly agreed to cooperate with Agents Alexander and Sablatora to explain why they were wrong that he was a suspect and to clear his name.

2.

Hensley further argues that when he was stopped away from his home and placed inside Officer Humphries' vehicle, he was not advised he was free to leave and that he did not have to speak with agents. Hensley states the agents conducted a custodial interrogation of him and that there is no signed *Miranda* waiver, no recording of his statement, and no signed consent to search waiver. Hensley argues that any statements allegedly made by him and any other evidence obtained as a result of his custodial interrogation must therefore be suppressed.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the admissibility at trial of any custodial statement is conditioned on warning the suspect, prior to any questioning, that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. *Miranda* warnings must be issued prior to questioning whenever a suspect is (1) interrogated (2) while in custody. *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990). "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 1292 (1985).[2]

As an initial matter, the Court finds that Hensley waived his right to any *Miranda* warnings when his response to Agent Alexander allegedly stating that Hensley had been read his *Miranda* rights was, "'I haven't been read my *Miranda* rights, but I'm still willing to talk to you,' and we continued."[3] However, to the extent Hensley didn't waive his *Miranda* rights, there is no persuasive evidence

[2] However, such unwarned but voluntary statements can be used to impeach a defendant's testimony at trial. *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620 (2004). In addition, a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements. *Id.* Such physical evidence remain admissible. *Id.*

[3] Hensley has, by his count, four prior felony convictions and has been arrested four or five times.

that Hensley was given *Miranda* warnings prior to questioning. The United States points to the transcript of Hensley's bond hearing where Agent Alexander testified that Hensley was *Mirandized* but that Hensley stated he wanted to make a statement. Agent Alexander did so testify, but the United States will not call Agent Alexander as a witness at trial because of an unrelated investigation into Agent Alexander's conduct. Moreover, the Court granted the United States' motion in limine to preclude reference to Agent Alexander. Hensley thus will have no opportunity to question Agent Alexander concerning his claim that he gave *Miranda* warnings to Hensley. Accordingly, the Court is unable to find that Agent Alexander gave Hensley *Miranda* warnings prior to questioning.

The question, then, is whether Hensley was interrogated while in custody such that *Miranda* warnings prior to questioning were required. Concerning the interrogation component, Agents Sablatora and Alexander escorted Hensley to a law enforcement vehicle where the agents asked him questions. Although Hensley told the agents he was glad they were there and that he wanted to provide information to them concerning a potential human trafficker, it is clear that the agents asked Hensley questions that were likely to evoke an incriminating response. Thus, the Court finds that Hensley was interrogated. See *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90 (1980) ("the term

'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

Although the Court finds that Hensley was interrogated, the Court finds that the interrogation was not custodial and, thus, no *Miranda* warnings were required (even if Hensley did not waive his *Miranda* rights). A custodial interrogation in this context is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. The "in custody" inquiry for *Miranda* purposes asks whether given the totality of circumstances surrounding the interrogation, a reasonable person in the suspect's position would have understood his situation to be one of custody and felt he was not at liberty to terminate the interrogation and leave. *Griffin*, 922 F.2d at 1347 (citations omitted). If Hensley believed that his freedom of action had been restrained to a "degree associated with formal arrest" and his "belief was reasonable from an objective viewpoint," then Hensley was "held in custody during the interrogation." *Id.*

Six factors inform the Court's analysis of whether Hensley was in custody, although the factors are not exhaustive and need not be applied ritualistically in

every case. *United States v. Giboney*, 863 F.3d 1022 1027 (8th Cir. 2017) (citation omitted). Those factors are: "(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning." *Griffin*, 922 F.2d at 1349.

As to the first factor, whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest, Hensley's interview in the front passenger seat of Officer Humphries' unlocked vehicle was a consensual encounter, during which Hensley was free to leave at any time. "While advising someone that he or she is not under arrest helps to mitigate an interview's custodial nature, an explicit assertion that the person may end the encounter is stronger medicine." *United States v. Ollie*, 442 F.3d 1135, 1138 (8th

Cir. 2006). Here, Hensley was told that he was not under arrest and Hensley claims that he was trying to assist law enforcement catch a child predator and that he wanted to cooperate and clear his name.

As to the second factor, whether the suspect possessed unrestrained freedom of movement during questioning, the Court finds that Hensley was not in handcuffs and the door to the vehicle was unlocked. Furthermore, Hensley indicated that he wanted to answer agents' questions and wanted to remain in the vehicle. Again, this is consistent with his defense that he was trying to investigate child predators and assist law enforcement and that he wanted to clear his name.

As to the third factor, whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions, Hensley told the agents he wanted to cooperate with them in catching someone that was trying to traffic a minor. He further told the agents that he did not want to go back to jail and would cooperate. Moreover, Hensley testified that although he hadn't been read his *Miranda* rights, he was "still willing to talk" to Agent Alexander even though he knew he was a suspect.

As to the fourth factor, whether strong arm tactics or deceptive stratagems were employed during questioning, there is no evidence or assertions in Hensley's motion to suppress that the agents employed strong arm tactics or deceptive

stratagems, although Hensley initially responded to a false Craigslist ad that the FBI had placed.

As to the fifth factor, whether the atmosphere of the questioning was police dominated, there is no evidence it was a police dominated atmosphere. Agents Sablatora and Alexander were the only two law enforcement officials in the vehicle. While there may have been one or two other officers present, they were not in or around the vehicle. *Cf. United States v. Axsom*, 289 F.3d 496, 502-503 (8th Cir. 2002) (no police dominated atmosphere where, although there were nine agents and specialists in the defendant's small house executing the search warrant, only two agents conducted the interview of the defendant who smoked a pipe in a chair inside the house while agents sat across from him: "[w]hile execution of the search warrant was certainly police-dominated, the interview between the two agents and Axsom was not.").

As to the sixth factor, whether the suspect was placed under arrest at the termination of the questioning, Hensley was ultimately arrested, but whether the suspect was placed under arrest at the termination of questioning does not alone "establish that the interview was custodial." *Giboney*, 863 F.3d at 1028. *Cf. United States v. Flores-Sandoval*, 474 F.3d 1142, 1146-47 (8th Cir. 2007) (defendant not in custody although he was arrested immediately after being

questioned by an ICE agent about his immigration status). Here, the decision to arrest Hensley was only made after obtaining Hensley's laptop and consulting with the United States Attorney's office.

In sum, given the totality of circumstances surrounding Hensley's interrogation, the Court finds a reasonable person in Hensley's position would have felt he was at liberty to terminate the interrogation and leave.

III.

For the foregoing reasons, the Court denies the motion [doc.#57] of Robert Nathan Hensley to suppress.

IT IS SO ORDERED this 1st day of February 2019.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

B

CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on October 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that the Appellee in the case is a registered CM/ECF user and that service will be accomplished by the CM/ECF system. I certify the addendum has been scanned for viruses and is virus-free. I further certify the full text of this addendum was prepared in Book Antiqua, size 14.

I also certify that a true and correct copy of this Appellant's Addendum has been mailed to the Appellant, Robert Nathan Hensley, at his current address, and served upon the government by mail at the address below:

Robert Nathan Hensley, # 31650-009
FCI Forrest City Medium
Federal Correctional Institution
P.O. Box 3000
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/s/ Latrece Gray
Latrece Gray

/s/ Sylvia Talley
Sylvia Talley