

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 27 2022

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT JIM, AKA Robert Slim Jim,

Defendant-Appellant.

No. 21-10212

D.C. No.
3:18-cr-08225-DGC-1

District of Arizona,
Prescott

ORDER

Before: GRABER, FRIEDLAND, and SUNG, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing.

Judge Friedland and Judge Sung vote to deny the petition for rehearing en banc, and Judge Graber so recommends. 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 panel rehearing and the petition for rehearing en banc are DENIED.

Appendix A

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NOT FOR PUBLICATION

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FOR THE NINTH CIRCUIT

SEP 22 2022

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3:18-cr-08225-DGC-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Submitted September 20, 2022**
San Francisco, California

Before: GRABER, FRIEDLAND, and SUNG, Circuit Judges.

Robert Jim appeals his jury conviction and life sentence after being found guilty of two counts of aggravated sexual abuse of a child under 18 U.S.C. §§ 1153, 2241(c), 2246, and 2247; and two counts of an offense by a registered sex offender under 18 U.S.C. §§ 2241(c) and 2260A. We have jurisdiction under 28

* 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).

Appendix B

U.S.C. § 1291, and we affirm.

1. The district court did not abuse its discretion by admitting evidence of Jim's prior sexual abuse of his daughter and his resulting conviction. The court properly engaged in a "searching inquiry," which included consideration of the five, non-exclusive factors identified in *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001). Notably, the prior abuse and the charged offenses were similar, both involving sexual abuse of a minor family member coerced into silence by Jim. The evidence was relevant to bolster the credibility of the child victims, which Jim attacked. *See id.* at 1028–30. The evidence was reliable because Jim confessed to at least one of the prior incidents of abuse of his daughter and was convicted. *See id.* at 1029. Other factors were neutral or favored admission.

Finally, the record shows that the district court exercised discretion "in a careful and judicious manner."¹ *Id.* at 1028.

2. Even assuming that Jim preserved his objection to the admission of a prior act of sexual abuse—the "ATV incident"—that did not result in a conviction, the district court did not abuse its discretion. Several *LeMay* factors supported admission, including the similarity, frequency, and lack of intervening circumstances in Jim's pattern of sexually abusing young relatives. Further, the

¹ Although the district court admitted this conviction, it excluded evidence of an older conviction, finding it too dissimilar, remote, unnecessary, and prejudicial.

district court considered the relevance of the evidence and “struck a careful balance between [the defendant’s] rights and the clear intent of Congress that evidence of prior similar acts be admitted in child molestation prosecutions.” *See id.* at 1030.

3. The district court did not abuse its discretion in excluding evidence that Jim argued was necessary for his defense. The district court provided a “rational justification” for exclusion, *see Crane v. Kentucky*, 476 U.S. 683, 691 (1986), finding that the evidence was only marginally relevant and violated Federal Rule of Evidence 412(a)(1)’s ban on evidence of a victim’s “other sexual behavior.” Because the evidence that Jim sought to present is tenuous and undercuts rather than “squarely prove[s]” his theory of being framed, he cannot show that his constitutional rights were violated. *See Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (district judges may “focus the trial . . . by excluding evidence that has only a very weak logical connection to the central issues”).

4. Because none of the district court’s evidentiary rulings was an abuse of discretion, Jim certainly cannot show “multiple errors” with a “cumulative effect” that renders the trial fundamentally unfair. *See United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017).

5. Sufficient evidence supported Jim’s convictions. *See United States v. Bachmeier*, 8 F.4th 1059, 1062 (9th Cir. 2021) (“We review challenges to the sufficiency of evidence de novo.”). When assessing the sufficiency of the

evidence, inconsistent testimony must be resolved in favor of the prosecution, “even if it does not affirmatively appear [resolved that way] in the record.” *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (internal quotation marks omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). Viewing the record that way, we hold that a rational juror could have found guilt beyond a reasonable doubt. *See id.* (“[A] reviewing court may not ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt,’ . . . only whether ‘*any*’ rational trier of fact could have made that finding.” (quoting *Jackson*, 443 U.S. at 318–19)).

6. We take no position on Jim’s argument that his defense counsel was ineffective for failing to file a motion for judgment of acquittal. *See Fed. R. Crim. P.* 29. Rather, we decline to address the merits of this claim on direct appeal. *See United States v. Rahman*, 642 F.3d 1257, 1259–60 (9th Cir. 2011) (holding that, ordinarily, we do not consider a claim of ineffective assistance of counsel on direct appeal).

7. Finally, despite Jim’s age, his life sentence is reasonable. Jim argues that the district court did not engage in the required “individualized assessment” at sentencing. We disagree. Because the district court stated the correct sentencing guidelines range, we review the imposed sentence for abuse of discretion. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1043–44 (9th Cir. 2017) (en

banc) (citing *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). In sentencing Jim, the district judge explicitly considered the 18 U.S.C. § 3553(a) sentencing factors. Jim fails to show which mitigating factors would have affected his sentencing. We recognize the gravity of Jim's sentence but cannot hold that the district court abused its discretion.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Robert Jim

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-18-08225-001-PCT-DGC

Bradley Lewis Miller (CJA)
Attorney for Defendant

USM#: 15460-051

THERE WAS A VERDICT OF guilty on 8/21/2019 as to Counts 1, 2, 3, and 4 of the Second Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153, §2241(c), 2246 and 2247 CIR: Aggravated Sexual Abuse of a Child, a Class A Felony offense, as charged in Counts 1 and 2 of the Second Superseding Indictment; Title 18, U.S.C. §2260A, CIR: Offense by a Registered Sex Offender, a Class C Felony offense, as charged in Counts 3 and 4 of the Second Superseding Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **LIFE**, which consists of **LIFE** on Count 1 and on Count 2, said terms to run concurrently; and **ONE HUNDRED TWENTY (120) MONTHS** on Counts 3 and 4, said counts to run concurrently with each other, but consecutively to Count 1 and Count 2, with credit for time served. If released from imprisonment, the defendant shall be placed on supervised release for a term of **LIFE**, which consists of **LIFE** on Count 1 and Count 2 and **THIRTY-SIX (36) MONTHS** on Count 3 and Count 4, all such terms to run concurrently.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$400.00 FINE: WAIVED RESTITUTION: N/A

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay a special assessment of \$400.00 which shall be due immediately.

The defendant shall pay a total of \$400.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payments of the total criminal monetary penalties are due as follows: Balance is due in equal installments of \$25.00 per quarter to commence 60 days after the date of this judgment.

Appendix C

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$400.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 3, 4 of the Superseding Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, you must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
- 2) You must cooperate in the collection of DNA as directed by the probation officer.
- 3) You must register as a sex offender in compliance with all federal, state, tribal or other local laws or as ordered by the Court. Failure to comply with registration laws may result in new criminal charges.
- 4) You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 5) You must attend and participate in periodic polygraph examinations as a means to determine compliance with conditions of supervision and the requirements of your therapeutic program, as directed by the probation officer. No violation proceeding will arise solely on the result of the polygraph test. A valid Fifth Amendment refusal to answer a question during a polygraph examination will not be used as a basis for a violation proceeding. You must contribute to the cost of such polygraph examination not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 6) You must reside in a residence approved, in advance, by the probation officer. Any changes in the residence must be pre-approved by the probation officer.
- 7) You must not be in the company of or have contact with children who you know are under the age of 18, including your own children. Contact includes, but is not limited to, letters, communication devices, audio or visual devices, visits, or communication through a third party.
- 8) You must not directly or indirectly contact any victim(s) and victim(s) family of the instant offense(s) without prior written permission. This also includes victim(s) disclosed in treatment, assessment and/or any other victim identified by the probation officer. Indirect contact includes, but is not limited to letters, communication devices, audio or visual devices, communication through a third party and /or your presence at any location the victim(s) may be known to frequent. You must immediately report any contact to the probation officer.
- 9) You are restricted from engaging in any occupation, business, volunteer activity or profession where you have the potential to be alone with children under the age of 18 without prior written permission. Acceptable employment shall include a stable, verifiable work location and the probation officer must be granted access to your work site.

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USA vs. Robert Jim

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THE DEFENDANT IS ADVISED OF HIS RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

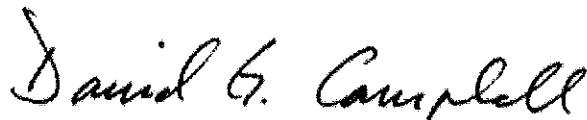
The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

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

Date of Imposition of Sentence: **Wednesday, July 21, 2021**

Dated this 23rd day of July, 2021.



David G. Campbell
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____, the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal
By: _____ Deputy Marshal