

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2343

UNITED STATES OF AMERICA

v.

SCOTT A. ANTHONY,
Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 1-15-cr-0028-001)
District Judge: Honorable David S. Cercone

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: February 1, 2023
Lmr/ All Counsel of Record

* Judge Scirica's vote is limited to panel rehearing only.

NOT PRECEDENTIAL

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v.

SCOTT A. ANTHONY,
Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 1-15-cr-0028-001)
District Judge: Honorable David S. Cercone

Submitted Under Third Circuit LAR 34.1(a)
November 10, 2022

Before: CHAGARES, *Chief Judge*, JORDAN, and SCIRICA, *Circuit Judges*

(Filed November 30, 2022)

OPINION*

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

JORDAN, *Circuit Judge*.

Scott Anthony appeals his eight-count conviction for sexual exploitation of a minor, in violation of 18 U.S.C. §2251(a). We will affirm.

I. BACKGROUND

In March 2012, Michele F. and her two teenage daughters, A.F. and G.F., moved into Anthony's home. Anthony and Michele F. slept in the master bedroom located on the first floor of the home. That bedroom contained two walk-in closets that were only accessible by first entering the master bathroom. A.F. and G.F. each had their own rooms on the second floor and had access to a shared bathroom.

Two months after Michele F. and her daughters moved in, Anthony informed the girls that, due to a leak, they could no longer use the shower in the upstairs bathroom and instructed them to use the master bathroom. Before the girls bathed, however, they should notify Michele F., who would in turn notify Anthony so that he could first retrieve anything that he needed from the bathroom. He also insisted that the door to his walk-in closet remain open.

In May 2015, Anthony and Michele F. were preparing to sell Anthony's house. Anthony was not at the home and Michele F. was tidying the walk-in closet to make it presentable to potential buyers when she discovered a hidden video camera wrapped in black athletic tape to cover its shiny surfaces. Pressing the "play" button on the camera, Michele F. watched a video showing then-18-year-old A.F. undress and take a shower.

Unnerved, Michele F. telephoned her sister, who urged her to call the police. Michele F. did so, and the police arrived shortly thereafter. When Anthony arrived home,

the police handed him a search warrant. Anthony was initially reluctant to open a gun safe in his garage, but he ultimately relented when the police indicated that they would open it if he did not.

The gun safe contained two flash drives. From the flash drives and video camera, forensic police officers recovered 49 videos shot from the camera positioned inside Anthony's walk-in closet. In each video, the camera had been aimed at the bathroom mirror and captured either A.F. or G.F. fully nude. Of the 49 videos, at least eight were taken before the girls reached the age of 18: four were of A.F. when she was between 15 and 17-years old, and four were of G.F. when she was 14 or 15-years old.

Forensic officers also found two still photographs of G.F. on the flash drives taken when she was 14 years old. In one photo, G.F. is wearing stretch shorts from her cheerleader outfit. In the other, she is wearing a bathing suit. Anthony had taken the photos of G.F. without her knowledge, and he had focused the camera on her buttocks. The 49 videos and two photos were saved in folders called "Golf" or "Golf Swing."

A grand jury indicted Anthony on eight counts of sexual exploitation of a minor under 18 U.S.C. § 2251(a) – one count for each of the eight videos recorded while the girls were minors. At trial, the jury heard testimony from Michele F., A.F., G.F., and a police officer who investigated the crime. The jury also saw portions of the eight videos. Defense counsel did not cross-examine any of the government's witnesses and did not put on a defense.

Anthony timely moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, arguing that the videos showed only "basic hygienic

behavior” and not “sexually explicit conduct” within the meaning of § 2251(a), but the District Court ruled that a jury could find that the videos meet the § 2251(a) definition.

Following closing arguments, the jury convicted Anthony on all eight counts.

Anthony timely filed this appeal.

II. DISCUSSION¹

Anthony does not challenge that he recorded the eight videos that are the basis for his conviction. His only argument on appeal is that the jury lacked sufficient evidence to convict him because “[a]ll of the video clips used to establish [his] guilt were depictions of hygienic behavior” and thus, his conduct was not proscribed by 18 U.S.C. § 2251(a). (Opening Br. at 21.) He is mistaken.

Congress defined “sexually explicit conduct” for the purposes of 18 U.S.C. § 2251(a) as “sexual intercourse[,]” “bestiality[,]” “masturbation[,]” “sadistic or masochistic abuse[,]” or a “lascivious exhibition of the anus, genitals, or pubic area of any person[.]” 18 U.S.C. § 2256(2)(A). At trial, the government argued that the videos are covered by the statute because they depicted a “lascivious exhibition of the genitals or

¹ The District Court had jurisdiction under 18 U.S.C. § 3231. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We review the sufficiency of the evidence underlying a conviction to see if, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Our review is “highly deferential,” and we take care “not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury.” *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc) (internal quotation marks omitted) (alteration in original). Where the record may support “multiple possibilities,” we draw all rational inferences in the prosecution’s favor. *Id.* at 430-32.

pubic area” of A.F. and G.F. (App. at 152.) In determining whether a rational juror could find that a visual depiction involves a lascivious exhibition under the statutory definition specifically noted in § 2256(2)(A)(v), this Court considers six factors first articulated in *United States v. Dost*, 636 F. Supp. 828, 831-32 (S.D. Cal. 1986). *United States v. Franz*, 772 F.3d 134, 156-57 (3d Cir. 2014) (“In determining whether a visual depiction involves ‘lascivious exhibition of the genitals or pubic area,’ we have adopted what have come to be called the *Dost* factors”). The *Dost* factors are:

- 1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989). Those factors, which are neither dispositive nor exhaustive, serve as a guide to assess the photographer’s intended effect in producing the visual depiction. *United States v. Larkin*, 629 F.3d 177, 182, 184 (3d Cir. 2010).

The videos meet the first, second, fourth, and sixth *Dost* factors. The first factor is met because a rational juror could find that, given the camera’s positioning and angle of the mirror, the “focal point” of the videos were the “child’s genitalia or pubic area.” The second factor is met because a rational juror could find that a shower, especially one with a camera pointed at it, is a setting that can be associated with sexual activity. See *Larkin*, 629 F.3d at 183 (noting that “showers and bathtubs are frequent hosts to fantasy sexual

encounters”). The fourth factor is clearly met because the videos depicted A.F. and G.F. entirely nude. And the sixth factor is met because, based on the content of the videos, Anthony’s repeated production of them, and the steps he took to conceal the videos from his family members, a rational juror could find that he made the videos to “elicit a sexual response” in himself.

Only the third and fifth factors are absent here. The absence of those two factors, however, which respectively consider whether the “child is depicted in an unnatural pose, or in inappropriate attire” and “whether the visual depiction suggests sexual coyness,” is unsurprising in a case like this in which a defendant secretly records or photographs a minor. *See United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013) (holding “that a sleeping child can ‘engage in’ sexually explicit conduct within the context of § 2251(a)” because Congress intended to protect children when they are treated as the passive objects of sexually explicit conduct).

Thus, after considering the *Dost* factors, we hold that a rational juror could find that the videos constitute “lascivious exhibition[s]” under 18 U.S.C. § 2256(2)(A)(v).

III. CONCLUSION

For the foregoing reasons, we will affirm Anthony’s conviction.

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
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PHILADELPHIA, PA 19106-1790
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November 30, 2022

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RE: USA v. Scott Anthony
Case Number: 21-2343
District Court Case Number: 1-15-cr-00028-001

ENTRY OF JUDGMENT

Today, **November 30, 2022** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.

Certificate of service.

Certificate of compliance if petition is produced by a computer.

No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszeit, Clerk

By: s/Laurie
Case Manager
267-299-4936

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District Judge: Honorable David S. Cercone

Submitted Under Third Circuit LAR 34.1(a)
November 10, 2022

Before: CHAGARES, *Chief Judge*, JORDAN, and SCIRICA, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on November 10, 2022. On consideration whereof,

It is now hereby ORDERED and ADJUDGED that the judgment of the District Court dated July 15, 2021 and entered on July 20, 2021, is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszeweit
Clerk

DATE: November 30, 2022

1 We're going to get to in a minute what sexually
2 explicit means. For this case, it means the lascivious
3 exhibition of the genitals.

4 No one is saying that there's any -- those first three
5 or four other factors involving a sex act are in any way
6 involved.

7 No. 3, in doing so, the defendant acted with a purpose
8 of producing a visual depiction of the conduct.

9 Could any person be more obvious in what their purpose
10 was than this defendant? 49 times he sets up that video camera
11 and on multiple locations even records himself. The whole
12 purpose of what he was doing was to end up at every juncture
13 with a visual depiction of these girls. So, clearly, it was
14 his purpose to produce a visual depiction.

15 Finally, and this is not in dispute because both sides
16 stipulated to it, the materials that were used to produce the
17 videos, namely, the camera, and also to save the videos, the
18 thumb drives, were manufactured in China and, therefore,
19 obviously traveled in foreign or interstate commerce. That's
20 stipulated to.

21 So the heart of the matter then becomes what is
22 sexually explicit conduct? The Judge is going to give you some
23 instructions. Again, I'm just summarizing and paraphrasing
24 here. A portion of the sexually explicit conduct definition,
25 that's what it says, the lascivious exhibition of the genitals.

Requiring the Government to prove that Hillie intended for JAA to engage in such sexually explicit conduct is important not just because that is the proper construction of the statute, but also to distinguish Hillie's conduct from the offense of voyeurism, see D.C. Code § 22-3531, which prohibits the nonconsensual recording of the private parts of a person by placing a hidden camera in a bathroom or a bedroom. As we have explained,

The sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than that for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment{2021 U.S. App. LEXIS 41} that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime. *United States v. Salamanca*, 990 F.2d 629, 638, 300 U.S. App. D.C. 384 (D.C. Cir. 1993). For reasons not explained in the briefing, the Government did not bring D.C. Code attempted voyeurism charges. (Hillie conceded in his brief that "there was overwhelming evidence {457 U.S. App. D.C. 351} that he had engaged in voyeurism" as defined by the D.C. statute. Appellant's Br. at 40.)¹ Thus, the jury was faced with a choice between holding Hillie completely blameless, even though he engaged in heinous, apparently criminal conduct, or convicting him of attempted sexual exploitation of a minor, even if the evidence did not support that charge. This was the precise danger we expressed in *Salamanca*.

CAPTION:

UNITED STATES

CERTIFICATE OF SERVICE*

Docket Number: _____

v.

SCOTT ANTHONY

I, Scott Anthony, hereby certify under penalty of perjury that
(print name)
on September 8, 2023, I served a copy of a writ of certiorari
(date)

(list all documents)

by (select all applicable)**

☐ Personal Delivery ☒ United States Mail ☐ Federal Express or other
Overnight Courier

☐ Commercial Carrier ☐ E-Mail (on consent)

on the following parties:

<u>US Attorney General</u>	<u>.555 4th Street NW</u>	<u>Washington</u>	<u>DC</u>	<u>20530</u>
Name	Address	City	State	Zip Code

_____ Name	_____ Address	_____ City	_____ State	_____ Zip Code
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_____ Name	_____ Address	_____ City	_____ State	_____ Zip Code
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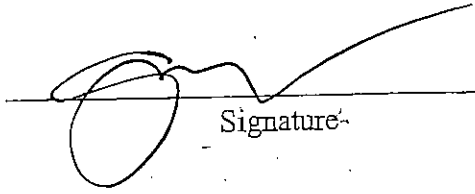
_____ Name	_____ Address	_____ City	_____ State	_____ Zip Code
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*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

09-08-2023

Today's Date


Signature