

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN FITZPATRICK KOEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Christy Posnett Martin

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INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 23-10717, *United States v. Koen*, 2024 WL 2816886 (5th Cir. June 3, 2024)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered July 7, 2023.
United States v. Koen, Dist. Court 4:22-CR-373-O.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10717
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 3, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN FITZPATRICK KOEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-373-1

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Defendant-Appellant Jonathan Fitzpatrick Koen appeals his convictions for four counts of sexual exploitation of a child, in violations of 18 U.S.C. § 2251(a), and one count of attempted obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), (j). The convictions are

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 23-10717

the result of Koen's engagement in a sexual relationship with Minor Victim One (MV1).

Koen argues that (1) his § 1512 conviction should be vacated because lay opinion testimony from a law enforcement official regarding the official's interpretation of the meaning of a recorded phone conversation and a gesture violated Federal Rule of Evidence 701; (2) the district court erred in imposing special conditions of supervision that were not narrowly tailored to his individual case and were not related to the statutory sentencing factors; and (3) § 2251 exceeds Congress's commerce authority. Because Koen did not raise these issues in the district court, review is for plain error only. *See United States v. Shows Urquidi*, 71 F. 4th 357, 372 (5th Cir.), *cert. denied*, 144 S. Ct. 268 (Oct. 2, 2023); *United States v. Sanches*, 86 F. 4th 680, 684-85 (5th Cir. 2023); *United States v. Ellis*, 720 F.3d 220, 224-25 (5th Cir. 2013).

Rule 701 limits non-expert opinion testimony to that which is "(a) rationally based on the witness's perception; [and] (b) helpful to clearly understanding the witness's testimony or determining a fact in issue." FED. R. EVID. 701. Lay opinion testimony that is permissible under Rule 701 "has the effect of describing something that the jurors *could not otherwise experience for themselves* by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event." *United States v. Haines*, 803 F.3d 713, 733 (5th Cir. 2015) (emphasis in the original) (internal quotation marks and citation omitted). "Testimony on topics that the jury is fully capable of determining for itself is not" admissible because it does not help the jury to clearly understand the testimony of the witness. *Id.*

Koen specifically asserts that the law enforcement official was no more qualified than the jury to interpret the meaning of the conversation, and that the testimony was not helpful but essentially usurped the jury's role as

No. 23-10717

factfinder. Even if Koen were correct that the district court committed plain error by allowing this testimony, he cannot show that the error affected his substantial rights. “A defendant demonstrates that an error had an effect on his substantial rights when he shows a reasonable probability that the jury, absent the error, would have acquitted him.” *United States v. Oti*, 872 F.3d 678, 693 (5th Cir. 2017). Here, apart from the law enforcement official’s lay testimony regarding the interpretation of a recorded jail conversation between Koen and MV1, there was ample evidence of Koen’s attempted obstruction of an official proceeding. We therefore affirm the district court on this issue. *See United States v. Haines*, 803 F.3d 713, 734 (5th Cir. 2015).

Koen next challenges the imposition of the supervised release conditions (1) prohibiting him from possessing any pornographic material or material sexually depicting minors under 18 years old, (2) requiring him to provide his probation officer with all business and personal financial information, (3) requiring him to refrain from opening any new lines of credit without prior authorization until any restitution obligation is satisfied, and (4) requiring him to work full time unless excused. Because his crime was “sexual in nature, it was reasonable for the district court to restrict [his] access to sexually stimulating material more broadly in an effort to prevent future crimes or aid in his rehabilitation.” *Ellis*, 720 F.3d at 227. Accordingly, Koen cannot demonstrate plain error in the imposition of a lifetime ban on adult pornography. *Id.*; *see also United States v. Abbate*, 970 F.3d 601, 606 (5th Cir. 2020).

Regarding the condition requiring Koen to obtain employment: Even if he could demonstrate a clear or obvious error, given that the condition is not absolute and can be modified, Koen cannot demonstrate that it seriously affects the fairness, integrity, or public reputation of the judicial proceeding. *See United States v. Prieto*, 801 F.3d 547, 554-55 (5th Cir. 2015) (declining to correct plain error when defendant could not meet the requirements of the

No. 23-10717

fourth prong because the complained of special condition of supervised release was modifiable and the defendant had previously overlooked two opportunities to object to the condition). As to the two financial reporting conditions, the Government concedes that they should be stricken from the judgment because the district court did not impose restitution or fines. *See* under U.S.S.G. § 5D1.3(d)(2), (3); *Abbate*, 570 F.3d at 606-07 (narrowing scope of supervised release condition in accord with district court's intent and affirming judgment as modified); *United States v. Sealed Juvenile*, 781 F.3d 747, 758 (5th Cir. 2015) (striking an unreasonably restrictive supervised release condition and affirming the judgment as modified). Accordingly, the judgment is MODIFIED to strike the two financial reporting conditions from it.

Finally, as to Koen's contention that § 2251 exceeds Congress's authority under the Commerce Clause, we have repeatedly held that "the Commerce Clause authorizes Congress to prohibit local, intrastate production of child pornography where the materials used in the production were moved in interstate commerce." *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019) (per curiam); *United States v. Dickson*, 632 F.3d 186, 192 (5th Cir. 2011); *United States v. Kallestad*, 236 F.3d 225, 227-31 (5th Cir. 2000). Koen concedes that this issue is foreclosed and that he raises it only to preserve it for possible future appellate review.

The district court's judgment is AFFIRMED as MODIFIED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v. Case Number: 4:22-CR-00373-O(01)
U.S. Marshal's No.: 36652-510
JONATHAN FITZPATRICK KOEN Brandie Wade, Assistant U.S. Attorney
John Stickney, Attorney for the Defendant

On March 7, 2023 the defendant, JONATHAN FITZPATRICK KOEN, was found guilty by jury verdict rendered as to Count One, Two, Three, Four and Five of the Second Superseding Indictment filed on February 22, 2023. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 2251(a) and (e)	Sexual Exploitation of a Child	06/18/2022	One
18 U.S.C. §§ 2251(a) and (e)	Sexual Exploitation of a Child	03/17/2022	Two
18 U.S.C. §§ 2251(a) and (e)	Sexual Exploitation of a Child	3/26/2022	Three
18 U.S.C. §§ 2251(a) and (e)	Sexual Exploitation of a Child	4/17/2022	Four
18 U.S.C. §§ 1512(c)(2) and (j)	Attempted Obstruction of an Official Proceeding	2/14/2023	Five


The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$500.00 (\$100 per Count) as to Count One, Two, Three, Four and Five of the Second Superseding Indictment filed on February 22, 2023. The Court concluded the defendant does not have the current financial resources or future earning capacity to pay an assessment under 18 U.S.C. § 2259A (The Amy, Vicky, and Andy Act). Thus, the assessment for Counts 1 through 4 shall be \$0, per count. The Court further concluded the defendant is indigent and the \$5,000 assessment required pursuant to 18 U.S.C. § 3014 is waived.

Upon motion of the government, all remaining counts are dismissed as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed July 7, 2023.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed July 7, 2023.

Judgment in a Criminal Case
Defendant: JONATHAN FITZPATRICK KOEN
Case Number: 4:22-CR-00373-O(1)

Page 2 of 5

IMPRISONMENT

The defendant, JONATHAN FITZPATRICK KOEN, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS as to Counts One through Four, to run CONCURRENTLY and ONE HUNDRED TWENTY (120) MONTHS as to Count Five, to run CONSECUTIVELY to Counts One through Four for a **TOTAL of FOUR HUNDRED EIGHTY (480) MONTHS**.

The Court makes a non-binding recommendation to the BOP that Defendant, if appropriately classified, be allowed to serve his term of imprisonment at an FCI Facility that can accommodate his medical needs.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of LIFE as to Counts One through Four and FIVE (5) YEARS as to Count Five of the Second Superseding Indictment filed on February 22, 2023, to run CONCURRENTLY for a **TOTAL of LIFE**.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of 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

Judgment in a Criminal Case

Page 3 of 5

Defendant: JONATHAN FITZPATRICK KOEN

Case Number: 4:22-CR-00373-O(1)

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.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

refrain from any unlawful use of a controlled substance. 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;

comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

Judgment in a Criminal Case

Page 4 of 5

Defendant: JONATHAN FITZPATRICK KOEN

Case Number: 4:22-CR-00373-O(1)

have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims;

have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer;

provide to the probation officer complete access to all business and personal financial information;

refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant has fully satisfied any restitution obligation;

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month;

neither possess nor have under his control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use;

register as a sex offender with state and local law enforcement as directed by the probation officer in each jurisdiction where the defendant resides, is employed, and is a student, providing all information required in accordance with state registration guidelines, with initial registration being completed within three business days after release from confinement. The defendant shall provide written verification of registration to the probation officer within three business days following registration and renew registration as required by his probation officer. The defendant shall, no later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction and inform that jurisdiction of all changes in the information required in the sex-offender registry; and,

participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

Judgment in a Criminal Case
Defendant: JONATHAN FITZPATRICK KOEN
Case Number: 4:22-CR-00373-O(1)

Page 5 of 5

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because the victim has not submitted a request for restitution.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY

Deputy Marshal