APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 23-3008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE SOUTHERN DISTRICT OF
TIMOTHY W. WRIGHT,	)	OHIO
	)	
Defendant-Appellant.	)	

ORDER

Before: BATCHELDER, THAPAR, and DAVIS, Circuit Judges.

Timothy W. Wright, a pro se federal prisoner, appeals his convictions and sentence for sexual exploitation of minors (Counts 3 and 4), in violation of 18 U.S.C. § 2251(a) and (e), and possession of child pornography (Count 12), in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As discussed below, we affirm the district court's judgment.

In exchange for the dismissal of other counts of sexual exploitation, three counts of coercion and enticement of a minor, and four counts of receipt of child pornography, Wright pleaded guilty to the above charges pursuant to a Federal Rule of Civil Procedure 11(c)(1)(C) agreement that provided for a 240-month prison term. Wright waived his right to appeal his convictions and sentence unless the sentence imposed exceeded the statutory maximum.

The factual basis attached to Wright's plea agreement stated that during an investigation, federal agents discovered screen shots on his iPhone of his 13-year-old "family member" Jane Doe Three and her 14-year-old friend Jane Doe Four engaged in sexual conduct. The images appeared

to be from a hidden camera installed in the bathroom at Wright's residence that was used primarily by Jane Doe Three. Further investigation indicated that Wright had purchased a smoke detector with a hidden camera on December 14, 2020.

A forensic examination of Wright's phone revealed an app linked to the hidden camera. To save images or videos from the camera to his phone, Wright had to be viewing the video feed "live" as action occurred. Videos and images taken in January and February 2021 showed Jane Does Three and Four naked "and taking photographs of one another, filming themselves nude in a mirror, masturbating, bathing together, and overall, appearing to be involved in the 'exploration' of their own bodies and each other's." In a video taken on February 13, 2021, the date for the conduct charged in Counts 3 and 4, the girls were "filming each other masturbating and using their hands to manipulate their own nude vaginas." Eight videos depicted the girls "engaged in the lascivious display of their genitalia and acts of masturbation, while the rest of the videos" depicted the girls either nude or partially nude. The same activities were depicted in over 100 images recovered directly from the camera.

When interviewed, Jane Doe Four told investigators that she used Jane Doe Three's bathroom when in Wright's house to avoid encountering him alone. Wright made her uncomfortable by tickling her neck, touching her shoulders, and talking about her taking him on a date when she turned 16 or 17. Both girls stated that they had not known about the hidden camera.

At sentencing, the district court ordered Wright to serve concurrent terms of 240 months in prison on each count and ten years of supervised release. Neither party objected.

On appeal, Wright argues that (1) his appeal waiver is unenforceable; (2) the guilty-plea colloquy for Counts 3 and 4 did not comply with Federal Rule of Criminal Procedure 11 because (a) the district court did not adequately explain the nature of the offense, (b) the district court did not establish a factual basis by asking him to describe the facts underlying the charges, and (c) the facts did not show specific intent; and (3) he was sentenced above the statutory maximum for Count 12. The government argues that no plain error occurred with respect to Wright's plea or sentence.

Appeal Waiver

As an initial matter, we decline to consider whether Wright's appeal waiver is enforceable because the government does not seek to enforce it. *See United States v. Barry*, 647 F. App'x 519, 522 (6th Cir. 2016).

Guilty Plea to Counts 3 and 4

Federal Rule of Criminal Procedure 11 sets forth the procedure for a district court to follow when accepting a guilty plea. The purpose of Rule 11 is to ensure that a defendant understands the nature of his or her applicable constitutional rights, that the guilty plea is voluntary, and that a factual basis exists for the relevant crime. *See United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir. 2022); *United States v. Catchings*, 708 F.3d 710, 716 (6th Cir. 2013).

When a defendant does not object to a Rule 11 violation at the plea hearing, we review the plea for plain error. *United States v. Vonn*, 535 U.S. 55, 58-59 (2002). To demonstrate plain error, a defendant must show an obvious or clear error that affected both his substantial rights and the "fairness, integrity, or public reputation of the judicial proceedings." *Windham*, 53 F.4th at 1013 (quoting *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010)). "[A] reviewing court may consult the whole record when considering the effect of any error on substantial rights." *Vonn*, 535 U.S. at 59. To prevail on that factor, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

No plain error occurred. At the plea colloquy, the district court adequately ensured that Wright understood the nature of the charges by stating the elements of the offense, and then asking Wright if he understood. Wright confirmed that he did. Rule 11(b)(1)(G) can be satisfied when a court reads the elements of the offense and permits the defendant to ask questions. *United States v. Valdez*, 362 F.3d 903, 908-09 (6th Cir. 2004). Wright also acknowledged that he had received a copy of the superseding indictment, read it, and discussed the charges with counsel.

Wright asserts that the district court violated Rule 11 by failing to explain that, for a defendant to "use" a minor to engage in sexually explicit conduct in violation of § 2251(a), the defendant must directly interact with the minor and orchestrate the sexually explicit conduct. He

argues that he did not interact with the minors and that we should reconsider our decision in *United States v. Wright*, 774 F.3d 1085 (6th Cir. 2014), in light of the Supreme Court's discussion of the term "use" in *Dubin v. United States*, 599 U.S. 110 (2023).

We reject Wright's contention that the district court should have informed him that the "use" element requires a defendant to directly interact with the minor and orchestrate the sexually explicit conduct. In *Wright*, we concluded that the "use" element of § 2251(a) is satisfied when a minor is photographed to create pornography and that the government did not have to prove that the defendant had caused the minor to engage in the conduct photographed. 774 F.3d at 1089, 1091. "One panel of this court may not overrule the decision of another panel; only the en banc court or the United States Supreme Court may overrule the prior panel." *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017). The Supreme Court did not overrule *Wright* when it issued *Dubin*, which concerned the "use" of a patient's means of identification in relation to healthcare fraud in violation of 18 U.S.C. § 1028A(a)(1). *See Dubin*, 599 U.S. at 131-32.

We next reject Wright's contention that the district court erred by not asking him to describe the facts underlying the charges. Although we have stated that a district court ideally establishes a factual basis under Rule 11(b)(3) by asking the defendant to describe his criminal conduct, this is merely one of several ways to do so. *United States v. Lalonde*, 509 F.3d 750, 762 (6th Cir. 2007). Rule 11(b)(3) also can be satisfied when, as here, the "plea agreement's written description of the essential facts underlying the charge supports a finding of guilty" and the defendant expressly acknowledges the accuracy of the description. *Mirando v. U.S. Dep't of Treasury*, 766 F.3d 540, 547 (6th Cir. 2014) (quoting *United States v. Baez*, 87 F.3d 805, 810 (6th Cir. 1996)).

In response to Wright's next objection, we conclude that the factual basis in Wright's plea agreement provided more than "some evidence" to establish that he had the specific intent "to create visual depictions of sexually explicit conduct" and that he "knew the character and content of the visual depictions." *United States v. Frei*, 995 F.3d 561, 566 (6th Cir. 2021); *United States v. Mobley*, 618 F.3d 539, 545 (6th Cir. 2010). Among other things, Wright intentionally and repeatedly viewed and recorded the video feed from a hidden camera "live" over a two-month

period. And there is evidence that the visual depictions were of sexually explicit conduct, "which is defined to include the 'lascivious exhibition of the genitals or pubic area of any person.'" *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009) (quoting 18 U.S.C. § 2256(2)(A)(v)). Relevant factors for determining lasciviousness include, but are not limited to, whether the child was nude, "whether the visual depiction suggest[ed] . . . a willingness to engage in sexual activity," and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* As previously noted, eight of Wright's videos showed the girls in the nude willingly engaging in masturbation. *See id.* The number of videos and still photographs is sufficient to establish that the visual depictions were intended to elicit a sexual response in him as the viewer. *See id.* at 683-84. The videos and photos were of sexually explicit conduct.

Prison Term for Count 12

Last, Wright argues that the district court erred by sentencing him to 240 months in prison for possession of child pornography (Count 12), which has a statutory maximum of ten years. The government concedes that the prison term exceeds the statutory maximum but urges us to affirm under the concurrent-sentence doctrine.

> Under the concurrent-sentence doctrine, "an appellate court may decline to hear a substantive challenge to a conviction when the sentence on the challenged conviction is being served concurrently with an equal or longer sentence on a valid conviction," the defendant will suffer no collateral consequence from the conviction, and the issue does not involve a significant question.

Raines v. United States, 898 F.3d 680, 687 (6th Cir. 2018) (per curiam) (quoting *Dale v. Haeberlin*, 878 F.2d 930, 935 n.3 (6th Cir. 1989)). Invocation of the doctrine is appropriate "when there is no possibility of adverse 'collateral consequences' if the convictions stand." *Winn v. Renico*, 175 F. App'x 728, 732 (6th Cir. 2006) (quoting *United States v. Von Stewart*, No. 84-1084, 1985 WL 14060, at *3 (6th Cir. Dec. 17, 1985) (per curiam)). The concurrent-sentence doctrine may be applied even if the challenged sentence exceeds the statutory maximum. *United States v. Torres*, No. 21-2665-cr, 2023 WL 378942, at *5-6 (2d Cir. Jan. 25, 2023).

We decline to vacate Wright's sentence on Count 12. The maximum relief available to him would be the reduction of his prison term for Count 12 to ten years, while he would remain in

prison to serve 240 months on the other counts. Moreover, he does not argue that he will suffer any collateral consequences related to the excessive length of his prison term for Count 12.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

APPENDIX B

No. 23-3008

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UNITED STATES OF AMERICA,

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TIMOTHY W. WRIGHT,

Defendant-Appellant.

ORDER

BEFORE: BATCHELDER, THAPAR, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk