

**UNPUBLISHED****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 22-4601**

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**UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****ASHLEY NICHOLE KOLHOFF,****Defendant - Appellant.**

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Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:21-cr-00158-LMB-1)

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Submitted: August 18, 2023

Decided: October 3, 2023

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Before AGEE and RICHARDSON, Circuit Judges, and KEENAN, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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**ON BRIEF:** Christopher B. Amolsch, LAW OFFICES OF CHRISTOPHER AMOLSCH, Reston, Virginia, for Appellant. Jessica D. Aber, United States Attorney, Richmond, Virginia, Seth M. Schlessinger, Assistant United States Attorney, Jacqueline R. Bechara, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

## PER CURIAM:

Ashley Nicole Kolhoff appeals from her convictions for production and distribution of child pornography. On appeal, Kolhoff contends that the images at issue do not depict sexually explicit conduct and, thus, her convictions under 18 U.S.C. §§ 2251(a) and 2252(a) were improper. We affirm.

In September 2020, Ashley Nichole Kolhoff created an account at “Rapey.su,” a website dedicated to the sexual exploitation of children, including the production and dissemination of child pornography. Adopting the moniker “mommyxxx” on the Rapey website, Kolhoff produced nude images of a female infant and distributed them to numerous other Rapey users. These photographs included close-up images of the infant’s genitals and anus, in which Kolhoff used her hand to spread apart the infant’s labia or to expose the infant’s anus to the camera. The presentence report described the photographs without objection as follows:

A few of the files included images of a close-up view of an infant female's vagina being spread/manipulated by two fingers; an infant female laying on her stomach without pants/diaper while what appears to be an adult hand spreads the buttocks, exposing the infant female's anus. During an interview of the defendant, law enforcement observed on the defendant's right hand two distinct freckles that were visually consistent with freckles seen on the right hand of the individual manipulating the infant female's vagina and anus.

(S.J.A.\* 511).

Kolhoff waived her right to a jury trial, and the matter proceeded to a bench trial. At the conclusion of the evidence, the district court directed the parties to submit briefing

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\* Sealed Joint Appendix

addressing the factual disputes highlighted at trial. Kolhoff filed a motion for judgment of acquittal, averring that the photographs were not “lascivious” within the meaning of 18 U.S.C. § 2256(2)(A), because the images did not depict overt sexual activity. The court rejected Kolhoff’s arguments, finding that

these images would qualify as lascivious depiction of the child’s genitals by themselves, and then when you put them into the context of the exchange of emails, there can be no question in my mind that that would qualify as child pornography, and there’s no question that the defendant produced those images and did so with the intent to distribute them.

(J.A. 335). The court found Kolhoff guilty of both charges. Kolhoff timely appealed.

A person is guilty of producing child pornography under 18 U.S.C. § 2251(a) if she “employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” A person is guilty of distributing child pornography under 18 U.S.C. § 2252(a)(2) if she distributes a visual depiction that “involves the use of a minor engaging in sexually explicit conduct.” “Sexually explicit conduct,” as used in § 2251(a) and § 2252(a), means “(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person.” 18 U.S.C. § 2256(2)(A). The parties agree that the only way the photographs in this case could constitute a depiction of sexually explicit conduct is under § 2256(2)(A)(v).

We have explained that “lascivious exhibition” means “a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in

order to excite lustfulness or sexual stimulation in the viewer.” *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019). A mere picture of genitals is insufficient on its own to be lascivious, but the court may consider the context of the pictures when determining whether they were designed to sexually stimulate the viewer(s). *United States v. Cohen*, 63 F.4th 250, 256 (4th Cir. 2023) (holding that pictures of erect penis are not lascivious as a matter of law, but the fact that the pictures were “exchanged in the context of a sexual conversation with no other conceivable purpose” was appropriately considered by the district court and supported a finding of lasciviousness), *petition for cert. filed* (June 20, 2023); *see also See United States v. Donoho*, \_\_ F.4th \_\_, 2023 WL 4992866, \*7-\*9 (7th Cir. Aug. 4, 2023) (holding that defendant’s intent in creating images was relevant to determination of whether image was lascivious); *United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023) (finding that motive of photographer and intended response of viewer are relevant to finding of lasciviousness); *United States v. Johnson*, 639 F.3d 433, 440-41 (8th Cir. 2011) (noting that “even images of children acting innocently can be considered lascivious if they are intended to be sexual”).

Kolhoff’s appellate claim is foreclosed by *Courtade* and *Cohen*. The photographs in this case were staged to focus on the infant’s genitals and anus and involved manipulation of the infant’s body so that these body parts would be more visible. In addition, the photographs were taken and shared for the purpose of sexually stimulating the persons in the Rapey chatroom by showing the infant’s genitals. Accordingly, the district court correctly found that the photographs depicted sexually explicit conduct under the meaning of § 2251(a).

Accordingly, we affirm Kolhoff's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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4 UNITED STATES OF AMERICA, : Criminal Action No.:  
: 1:21-cr-158  
5 versus :  
:   
6 ASHLEY NICHOLE KOLHOFF, : Tuesday, April 12, 2022  
:   
7 Defendant. : Volume III - Ruling  
8 -----x

8 The above-entitled bench trial was heard before the  
9 Honorable Leonie M. Brinkema, United States District Judge.

10 A P P E A R A N C E S:

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23 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES  
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Stephanie Austin, RPR, CRR USDC/EDVA (571) 298-1649

JA332

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P R O C E E D I N G S

THE DEPUTY CLERK: Criminal Case 21-158, United States of America versus Ashley Nichole Kolhoff.

Would counsel please note their appearances for the record.

MR. SCHLESSINGER: Good morning, Your Honor. Seth Schlessinger and Whitney Kramer for the United States. We're joined by Special Agent Brandon Smock of HSI.

THE COURT: Good morning.

MR. AMOLSCH: Good morning, Your Honor. Christopher Amolsch and Frank Salvato for Ashley Kolhoff, who is present.

THE COURT: All right. Well, as you know, we continued the bench trial to allow counsel to file post-trial briefs, which both sides have now done, briefing the legal and factual issues in the case. There really is just about no factual issue in dispute. This case involves a couple of legal arguments defense counsel have raised.

Mr. Amolsch or Mr. Salvato, is there anything you want to add to your positions?

MR. AMOLSCH: I don't believe so, Your Honor. Our brief, I think, was fairly comprehensive. I certainly can answer any questions the Court has about the brief.

THE COURT: No. I mean, we've read both briefs. I just wanted to know if there's anything further.

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1 MR. AMOLSCH: Nothing, Your Honor. Thank you.

2 THE COURT: Mr. Schlessinger, is there anything  
3 further the Government wants to add to its papers?

4 MR. SCHLESSINGER: No, Your Honor. Except,  
5 similarly, if the Court had any questions other than that.

6 THE COURT: Well, I'm satisfied having gone  
7 over -- excuse me, allergy season -- having gone over the  
8 record, as well as your briefs, I'm still satisfied, as I  
9 really was at the end of the trial, that the Government has  
10 produced more than enough evidence to establish guilt beyond  
11 a reasonable doubt as to both counts.

12 I mean, there's no dispute in this case that the  
13 child victim was under the age of 18 years of age. There's  
14 no question that a computer was used and that there were  
15 transmissions across state lines, some of which wound up in  
16 this district.

17 And so the only real issue are the two main  
18 arguments, which defense counsel made, which was, one, that  
19 the images themselves were not truly -- under the  
20 definitions of the statute, would not qualify as child  
21 pornography because the victim -- the pictures, as  
22 Mr. Amolsch tried to characterize them, were no different  
23 than one might find on any Google hit for diaper rash or in  
24 a medical journal. And I simply cannot find on the record  
25 before this Court that that would be the case.

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1           In my view, these images would qualify as a  
2 lascivious depiction of the child's genitals by themselves,  
3 and then when you put them into the context of the exchange  
4 of emails, there can be no question in my mind that that  
5 would qualify as child pornography, and there's no question  
6 that the defendant produced those images and did so with the  
7 intent to distribute them.

8           And so I'm satisfied that there is also the  
9 necessary scienter. Although the defendant clearly is a  
10 very sympathetic defendant, in this type of case an  
11 unusually sympathetic defendant, has a documented horrible  
12 history of herself being a victim, which is why I would hope  
13 that even though I'm finding the defendant guilty of both  
14 counts, that before sentencing, the Government gives some  
15 careful consideration to, in the interests of justice, where  
16 this case should really be. Because a 15-year exposure for  
17 a defendant with this type of case where there's absolutely  
18 no evidence that there was a monetary or a prurient  
19 incentive to engage in this conduct, I think a wise  
20 prosecutor's ought to think very carefully about how this  
21 case should have been prosecuted.

22           Nevertheless, I mean, I am presented with these  
23 two counts, I've been presented with the evidence and the  
24 arguments which counsel had presented. I'm satisfied the  
25 law will support both convictions.

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Stephanie Austin, RPR, CRR USDC/EDVA (571) 298-1649

JA335

1           The scienter was there. Even though there may  
2 have been a motivation that is, as I said, unusual for this  
3 type of case, the Government has, in my view, appropriately  
4 pointed to multiple activities during that three-day span  
5 which undercut an argument that the defendant was in some  
6 sort of dissociative state such that she could not  
7 appreciate what she was doing or know and intent what she  
8 was doing.

9           The motive might have been different from what we  
10 normally see in these child pornography cases, but in terms  
11 of the necessary scienter to commit a crime, I'm satisfied  
12 the Government has met its burden.

13           The fact that a defendant during this same time  
14 period was able to contact public officials about whether  
15 she was still eligible for food stamps or food support, that  
16 she could make communications with friends about going for a  
17 walk, in other words, engage in completely rational conduct  
18 during the same time period is -- I think undercuts an  
19 argument that she was, for a three-day period, in this kind  
20 of strange dissociative state.

21           So I'm finding the defendant guilty of both  
22 counts. As I said, before we go to the sentencing hearing,  
23 it would be very wise for everybody to reconsider where this  
24 case should finally be.

25           But we need to set a date for sentencing.

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JA336

1 Counsel, I hope you brought your calendars with you or that  
2 you know --

3 MR. AMOLSCH: We did not, Your Honor.

4 THE COURT: Well, I'm going to give you some dates  
5 then, and you're going to have to figure out when -- with  
6 two attorneys, one of you should be able to make it. I  
7 think in this case we're well into the latter part of July.

8 Are all of your major trials over by then,  
9 Mr. Amolsch?

10 MR. AMOLSCH: They should be, Your Honor.

11 THE COURT: At this point, do you or your family  
12 have a plan for a vacation in July?

13 MR. AMOLSCH: I'm usually the last to know of  
14 these sorts of things, Your Honor. So, no, not that I know  
15 of.

16 THE COURT: Well, July 19th would give you all  
17 98 days from today.

18 MR. AMOLSCH: July 19th Mr. Salvato and I start a  
19 trial with Judge Ellis that should take a week-ish. So that  
20 probably means two.

21 THE COURT: How about July 12th?

22 MR. AMOLSCH: Sure. Thanks.

23 THE COURT: Is that all right with the United  
24 States?

25 MR. SCHLESSINGER: Yes.

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JA337

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THE COURT: All right. That will be at 9:00.

And, Ms. Kolhoff, you'll be visited in your cell by a federal probation officer who will be conducting a background investigation. Your full cooperation with the officer is to your advantage; do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Anything further on this case?

MR. SCHLESSINGER: Not from the Government, Your Honor.

THE COURT: Anything further, Counsel?

MR. AMOLSCH: (Gesturing negatively.)

THE COURT: All right. I've got you out of here in time to get back upstairs. All right. We'll recess court until 9:00.

(Proceedings adjourned at 8:40 a.m.)

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I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin  
Stephanie M. Austin, RPR, CRR