United States v. Jonathan High

2024 | Cited 0 times | Eleventh Circuit | July 9, 2024

[DO NOT PUBLISH] In the United States Court of Appeals For the Eleventh Circuit

_____

No. 23-10601 Non-Argument Calendar _____

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus JONATHAN HIGH,

Defendant-Appellant.

_____

Appeal from the United States District Court for the Northern District of Florida D.C. Docket No. 4:22-cr-00020-AW-MAF-1 _____

Before LUCK, BRASHER, and ABUDU, Circuit Judges. PER CURIAM: Jonathan High secretly recorded two minor boys urinating in a church bathroom. He appeals his two convictions for production of child pornography, arguing that the recordings do not de- pict sexually explicit conduct. We affirm. FACTUAL BACKGROUND AND PROCEDURAL HISTORY The Florida Department of Law Enforcement received a tip that an internet user with a certain telephone number and email address uploaded videos and images depicting sexual exploitation of minor boys to an online storage account. The department re- ceived records showing that the telephone number was associated with High's mother and High's Quality Services, the family busi- ness that employed High. A search of the online storage account uncovered numerous photos and videos of the sexual exploitation of minor boys. Within this account, there were recordings uploaded from a cell phone rather than downloaded from the internet. Specifically, the account contained a video of a minor boy, approximately ten to eleven years old and wearing a grey polo shirt ("Minor Male 1"), standing and then urinating in a public bathroom stall. There was also a screenshot of the video at the exact instance Minor Male 1 is urinating. And there was another screenshot of another video of a different minor boy, approximately

ten to eleven years old ("Mi- nor Male 2"), urinating in the same public bathroom.

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 3 of 9

23-10601 Opinion of the Court 3

The department obtained an arrest warrant for High and ar- rested him at his home. High was read his Miranda rights and con- fessed that the phone number and email address linked to the online storage account were his, the bathroom depicted in the re- cordings was located at his church, and Minor Male 1 attended his church. A federal grand jury indicted High on three counts. Count one was the production of child pornography relating to Minor Male 1. Count two was the production of child pornography relat- ing to Minor Male 2. Both counts were violations of 18 U.S.C. sec- tions 2251(a) and (e). Count three was for the possession of child pornography in violation of sections 2252A(a)(5)(B) and (b)(2). High pleaded guilty to count three and opted for a bench trial on counts one and two. Before trial, High stipulated that he owned the online stor- age account, he downloaded and stored the videos and photos of the sexual exploitation of minor boys from the internet, he owned the two cell phones, and he took the videos and screenshots of Mi- nor Male 1 and Minor Male 2. However, High did not stipulate that the videos and screenshots of Minor Male 1 and Minor Male 2 de- picted sexually explicit conduct, leaving this single issue for the bench trial. At the bench trial, two investigators from the department testified. Special Agent Aida Limongi explained that High's online storage account contained numerous videos and images of the sex- ual exploitation of minor boys, including depictions of minor boys

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 4 of 9

4 Opinion of the Court 23-10601

performing sex acts in the bathroom. And Agent Limongi testified that High created the videos and screenshots of Minor Male 1 and Minor Male 2. Digital Forensic Consultant Lee Pierce explained that High created the screenshots of the videos of Minor Male 1 and Minor Male 2 using computer software and placed them in a separate folder with a collection of other child pornography of mi- nor boys. Following this testimony, the government rested, and High moved for a judgment of acquittal, arguing that he did not use Mi- nor Male 1 and Minor Male 2 to engage in sexually explicit conduct as required by section 2251 because the boys were not exhibiting themselves in a lustful manner. The district court denied the mo- tion, reasoning that High used the boys in sexually explicit conduct because the videos and screenshots contained a lascivious exhibi- tion of the boys' genitals. In the district court's view, the exhibi- tions were lascivious because High had an interest in minor boys' genitals, he deliberately took videos of Minor Male 1 and Minor Male 2 at a time he knew their genitals would be exposed, he took screenshots of the videos at the exact time of urination, and he placed these screenshots with other images of similar child pornog- raphy. As the factfinder, the district court found High guilty on counts one and two. High was sentenced to 264 months' impris-

onment for counts one and two and 120 months for count three. High appeals the denial of his motion for judgment of acquittal.

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 5 of 9

23-10601 Opinion of the Court 5

STANDARD OF REVIEW

We review de novo the denial of a motion for judgment of acquittal, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the factfinder's verdict. See United States v. Martin, 803 F.3d 581 , 587 (11th Cir. 2015). If "any reasonable construction of the evidence" would permit the factfinder "to find the defendant guilty beyond a reasonable doubt," we must affirm. United States v. Friske, 640 F.3d 1288 , 1291 (11th Cir. 2011) (citation omitted). DISCUSSION High argues that he did not use Minor Male 1 and Minor Male 2 for sexually explicit conduct as required by section 2251(a) because the recordings do not depict lascivious exhibitions of the genitals. In his view, because the recordings depict innocuous con- duct, they cannot be lascivious. Thus, he contends the district court erred in denying his motion for judgment of acquittal. We disagree. Section 2251(a) makes it unlawful to employ or use a child to engage in "sexually explicit conduct" for the purpose of produc- ing any visual depiction of that conduct using materials that have traveled in interstate commerce. 18 U.S.C. § 2251 (a). "[S]exually explicit conduct" includes the "lascivious exhibition of the genitals or pubic area of any person." Id. § 2256(2)(A). A "lascivious exhibition," we have found, is one that "poten- tially excites sexual desires or is salacious." United States v.

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 6 of 9

6 Opinion of the Court 23-10601

Grzybowicz, 747 F.3d 1296 , 1306 (11th Cir. 2014) (cleaned up). And, critically here, "a lascivious exhibition may be created by an indi- vidual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently." United States v. Holmes, 814 F.3d 1246, 1248, 1252 (11th Cir. 2016). In Holmes, for example, the defendant secretly recorded nude images of his teenage stepdaughter while she used the bathroom. Id. at 1248 . On appeal, the defendant argued that he did not pro- duce child pornography because the images were not "lascivious" in that they depicted "mere nudity" as his stepdaughter "per- form[ed] normal everyday activities." Id. at 1251 . We rejected the defendant's argument and concluded that the images depicted "las- civious exhibition[s] of the genitals." Id. at 1252 . The courts, we explained, "look[] to the intent of the pro- ducer or editor of an image" to determine whether that image de- picts a lascivious exhibition. Id. (citation omitted). The producer's intent can be discerned by looking to his conduct in producing or editing the images. Id. Specifically, where the

producer of an im- age uses "freeze-framing" or zooming in on the genitals, it conveys an "intent to elicit a sexual response in the viewer." Id. (citing United States v. Horn, 187 F.3d 781 , 790 (8th Cir. 1999)). Thus, we held that the defendant's "placement of the cameras in the bath- room where his stepdaughter was most likely to be videoed while nude, his extensive focus on videoing and capturing images of her pubic area, the angle of the camera set up, and his editing of the

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 7 of 9

23-10601 Opinion of the Court 7

videos at issue . . . was sufficient to create a lascivious exhibition of 1 the genitals or pubic area." Id. Applied here, High engaged in the "lascivious exhibition of the genitals" when he recorded, edited, and stored the images of Minor Male 1 and Minor Male 2. § 2256(2)(A). High secretly posi- tioned a camera to record videos of the minor boys as they urinated in a bathroom. He then created screenshots of the boys when their genitals were exposed. And he stored these images and videos with other child pornography, which included other images and videos of minor boys performing sex acts in bathrooms. See United States v. Smith, 459 F.3d 1276 , 1296 n.17 (11th Cir. 2006) ("That the

1 Our court's pattern jury instruction is consistent with Holmes. Specifically, it instructs a jury to consider the following factors to determine whether an ex- hibition is lascivious: (1) the overall content of the material; (2) whether the focal point of the visual depiction is on the minor's genitalia or pubic area; (3) whether the setting of the visual depiction is sexually inviting or suggestive— for example, in a location or pose as- sociated with sexual activity; (4) whether the minor appears to be displayed in an unnatural pose or in inappropriate attire; (5) whether the minor is partially clothed or nude; (6) whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity; and (7) whether the depiction appears to have been designed to elicit a sexual re- sponse in the viewer. See 11th Cir. Crim. Pattern Jury Instructions O83.4A (numerals added). As the district court found, these factors also support a finding that the videos and screenshots High took of Minor Male 1 and Minor Male 2 were lascivious ex- hibitions.

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 8 of 9

8 Opinion of the Court 23-10601

photographs of the victim were found with other sexually explicit photographs could make it more likely that their purpose was to elicit a sexual response."). Thus, the evidence, when viewed in the light most favorable to the government, was sufficient to find that High recorded the videos, and specifically made the screenshots, in order to engage in sexually explicit conduct in violation of section 2251(a). Pushing back, High responds that Holmes does not apply for two reasons. First, he argues that Holmes is factually distinguishable because, unlike the defendant's editing in Holmes, he did not use "extensive focusing" on the minor boys' genitals. But High secretly recorded minors in a

bathroom when he knew their genitals would be exposed and then edited the recording by creating screenshots of the exact moments in which their genitals were exposed. This kind of "freeze-framing," we said, "can create an image intended to elicit a sexual response in the viewer." See Holmes, 814 F.3d at 1252. Second, High argues that the Supreme Court's decision in United States v. Williams, 553 U.S. 285 (2008) compels us to adopt the D.C. Circuit's decision in United States v. Hillie, 39 F.4th 674 (D.C. Cir. 2022), which held that videos depicting a minor merely engaged in "ordinary grooming activities" cannot fall within the def- inition of "lascivious exhibition of the genitals" because the "con- duct depicted in the videos must consist of her displaying her anus, genitalia, or pubic area in a lustful manner that connotes the com- mission of a sexual act." But Holmes instructed courts to look to

USCA11 Case: 23-10601 Document: 36-1 Date Filed: 07/09/2024 Page: 9 of 9

23-10601 Opinion of the Court 9

the intent of the producer to determine if an exhibition was lasciv- ious, and directly rejected a requirement that the child must be de- picted in a lustful manner as "[s]uch an interpretation would per- vert both the language and the logic of the legislation and the case law." 814 F.3d at 1251–52 (quoting United States v. Wolf, 890 F.2d 241 , 246 (10th Cir. 1989)). Applying Holmes, as we must, we con- clude that the district court did not err in denying High's motion for judgment of acquittal. AFFIRMED.