NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-11484
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BASILIO JIM DIAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cr-00122-TPB-AAS-1

Before BRASHER, ABUDU, and KIDD, Circuit Judges.

PER CURIAM:

Basilio Diaz challenges the district court's admission of evidence used to support his child pornography conviction. We find

that the district court did not abuse its discretion by admitting the evidence and affirm Diaz's conviction.

I. BACKGROUND

Law enforcement linked Diaz's IP addresses with "request[s] [for] blocks of files of suspected child pornography" on "the Freenet peer-to-peer program." Based on this information, officers secured a warrant to search Diaz's home and executed it in the early morning of March 9, 2023. Following an almost one-hour standoff, officers were able to enter the home and arrest Diaz. During their search, officers found several electronic devices, including a computer in the process of a factory reset and a laptop, both of which were linked to images and videos of child pornography.

The following month, Diaz was indicted for destruction of evidence, in violation of 18 U.S.C. § 1519, and accessing child pornography with the intent to view it, in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2).

In advance of trial, the government noticed its intention to introduce two pieces of evidence labeled "Sex Doll 1" and "Sex Doll 2." These items were two small, anatomical models of the female midsection, pelvic, and genital areas found in Diaz's home. Diaz thereafter filed a motion in limine "object[ing] to any evidence, testimony, or mention at trial of any 'sex dolls' or 'child-like dolls.'"

At the final pretrial conference, the government explained that the models were relevant to showing Diaz's "motivation" to look at child pornography, and it agreed with the court's characterization that "the doll[s] show[] that the [owner of such items] is

more likely to" access child pornography with the intent to view it. Diaz responded that the government was essentially using the models to make an impermissible propensity argument.

Upon seeing pictures of the models, the court remarked that this evidence was "bad . . . for the defense," and "strong . . . for the government, if . . . admissible." The government emphasized that this evidence "prove[d] that the child pornography that was in the computer [was] [not] there just by accident or mistake. [Diaz] likes children." The court remarked that this evidence was "crossing into possibly [being] so inflammatory that it might be substantially outweighed, but maybe not," so it requested the parties submit caselaw to support their positions and reserved final ruling. However, it concluded that, if admitted, the evidence would be referred to as only "anatomical models," and the jury could make its own conclusions as to whether these models appeared child-like.

Diaz's trial began on January 8, 2024. Prior to opening statements, the district court ruled that the models could be admitted as evidence. The court found that, after studying relevant caselaw, the models were admissible under Federal Rule of Evidence 404(b)(2) given that an issue for trial was whether what was found on Diaz's devices belonged to him.

Prior to the presentation of the models at trial, the district court gave the following instruction:

> Members of the jury, you are about to hear evidence of two anatomical models collected during the execution of the search warrant in this case . . . . You must

> not consider this evidence to decide if the defendant engaged in the activity alleged in the indictment, but you may consider this evidence to decide whether, one, the defendant had the state of mind or intent necessary to commit the crime of knowingly accessing with intent to view child pornography; two, the defendant had a motive to commit the crime of knowingly accessing with intent to view child pornography; or, three, the defendant knowingly accessed with intent to view child pornography by accident or mistake.

The government introduced the anatomical models through Officer Julio Tagliani, one of the officers who helped search Diaz's home. Officer Tagliani indicated that the items were found in the spare bedroom, and that "one [model] [wa]s much smaller than the other." He elaborated that he had seen similar models when executing search warrants during child exploitation cases and believed, from his experience, that these models were used "for sexual gratification."

The government also presented additional testimony and evidence that established the following: Diaz, who lived alone, was the only person present when the police searched his property, and when he was arrested, Diaz had cuts and dried blood on his hands. In a trashcan in the master bathroom, agents found a smashed Seagate hard drive wrapped in toilet paper and covered in dried blood. The reset computer was found in the master bathroom closet, and a cellphone in the kitchen had similarly been reset shortly after the police arrived at the property.

File paths from the reset computer showed that files with names indicative of child pornography were once stored on a Seagate hard drive, but the files had been deleted. Additional file paths revealed that someone with the username "Jim Diaz" had accessed files with names indicative of child pornography. The government also showed the jury a sample of the child pornography found on unallocated spaces of Diaz's laptop. The Federal Bureau of Investigation found no indication that anyone had remotely accessed Diaz's devices.

Diaz, while cross-examining one of the government's witnesses, suggested that malware could be used to control another person's computer without that person's knowledge. Diaz also presented testimony from Andrew Spurlock, a cyber security consultant, who was generally aware of cases where "Trojan horse" viruses had been used to access child pornography on another's device. Spurlock also testified that, because there was no definitive proof that there was not malware on Diaz's devices, the child pornography found on those electronics could not be linked to a particular person.

At the close of the evidence, the district court again instructed the jury on the limited basis it could consider the models. And, during closing arguments, the government opined that "[y]ou can look at [the model] and compare the size of the adult hand [included in the picture] to th[e] anatomical model . . . . It is child-size." The government also referred to the model being "used for sexual gratification," and argued that this evidence showed that

Diaz had a sexual interest in minors so it was no accident that child pornography was found on his devices. During the defense's closing argument, Diaz's counsel asserted that possessing a "sex doll[,] . . . anatomical model[,] or some kind of a toy for pleasure" was not evidence of knowingly accessing child pornography. Counsel also opined that "we do[] [not] know anything about malware on any of [Diaz's] devices."

The jury found Diaz guilty of both counts, and the district court sentenced him to 168 months of imprisonment. Diaz now appeals.

II. STANDARD OF REVIEW

We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009). Under this deferential standard, we "must affirm unless we find that the district court has made a clear error of judgment[] or has applied the wrong legal standard." *United States v. Barton*, 909 F.3d 1323, 1330 (11th Cir. 2018) (citation omitted).

III. DISCUSSION

Diaz first argues that the models were inadmissible because they were relevant only to prove his character—that is, he "was sexually deviant and that he later acted in conformity with that character trait by downloading child pornography." Diaz is correct that "[e]vidence of any crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion [they] acted in accordance with th[at] character." Fed. R. Evid. 404(b)(1). However, this evidence can be admissible for

certain non-propensity purposes, including proving "motive, . . . absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

In allowing the admission of the models, the district court found the Eighth Circuit's reasoning in *United States v. Bartunek*, 969 F.3d 860 (8th Cir. 2020), persuasive. While Diaz points us to other Eighth Circuit caselaw to support his contrary position, the abuse of discretion standard "recognizes the range of possible conclusions that a trial judge may reach and affords the district court considerable leeway in evidentiary rulings." *Barton*, 909 F.3d at 1330 (citation modified).

Under this deferential standard, we find that the district court was within its discretion to rely on *Bartunek* given its similar facts. In *Bartunek*, the defendant challenged the "admission of photographs of four life-sized dolls" of children wearing child's underwear that were found in his bedroom. 969 F.3d at 862. The Eighth Circuit affirmed the trial court's admission of the dolls as non-propensity evidence under Rule 404(b). *Id.* at 863. It noted that the theory of the defense was that someone else accessed the defendant's internet to download and distribute child pornography, so "[t]he dolls were relevant to overcome the defense by showing [the defendant's] motive for acquiring . . . child pornography." *Id.* The Eighth Circuit further explained the fact that the defendant "derived gratification from the replicas of young children gave him a motive to possess and distribute child pornography." *Id.*

Diaz contends that the models were merely small, legal sex toys that are popular among the general public, so his possession of these items does not indicate that he is attracted to children. However, a key theory of his defense was that a malicious computer virus deposited the child pornography on his devices, and these illicit images were on his electronics through no fault of his own. The district court, therefore, reasonably concluded that the models were admissible to overcome this defense and to show not only that Diaz had a motive to view child pornography, but also that it was by no mistake or accident that the images and videos were found on his devices. *See* Fed. R. Evid. 404(b)(2); *Bartunek*, 969 F.3d at 862–63; *see also United States v. Morrow*, 79 F.4th 1169, 1177 (10th Cir. 2023) (explaining that evidence the defendant "downloaded child-pornographic anime . . . helps rebut his claim that the charged material appeared by some accident, mistake, or act of an outside source"); *Kapordelis*, 569 F.3d at 1313 (holding that evidence of the defendant's travel abroad to engage in sexual acts with underaged boys was admissible under Rule 404(b) to prove, among other things, "absence of mistake or accident and intent" with regard to his association with child pornography).

Diaz alternatively asserts that, even if the models were admissible for a non-propensity purpose under Rule 404(b), they should have been excluded under Federal Rule of Evidence 403, which permits the "exclu[sion] [of] relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

We recognize that child pornography cases are of an inherently sensitive nature and that the evidence used to support such charges often invokes heightened emotions. However, "Rule 403 imposes no requirement that the government choose the least prejudicial method of proving its case." *United States v. Cenephat*, 115 F.4th 1359, 1365 (11th Cir. 2024) (citation modified); *see United States v. Smith*, 459 F.3d 1276, 1296 (11th Cir. 2006) ("That the nature of the crime itself, and therefore the nature of the evidence tending to prove it, is emotionally charged does not mean that the prosecution must be deprived of its most probative evidence."). "This [principle] is particularly true when the district court . . . offers limiting instructions as to the proper purpose of admitted evidence." *Smith*, 459 F.3d at 1296.

While Diaz maintains that the models were merely scaled-down depictions of adult women, the court specifically restricted the parties to referring to the evidence as "anatomical models" and left to the jury whether to infer that the models appeared child-like. Further, both prior to the admission of the evidence and before deliberations, the court advised the jury of the limited basis on which the evidence could be considered, and we presume the jury followed these explicit instructions. *United States v. Hill*, 643 F.3d 807, 829 (11th Cir. 2011); *see United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005) (explaining that a limiting instruction reduced "the risk of undue prejudice").

Because "Rule 403 is an extraordinary remedy and the balance should be struck in favor of admissibility," we cannot say that

the probative value of admitting the models for the narrow purpose of showing motive, lack of accident, or absence of mistake was outweighed by any undue prejudice. *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011) (citation modified).

In any event, "even an abuse of discretion will not warrant reversal where the resulting error was harmless." *Barton*, 909 F.3d at 1330. Although Diaz points to the district court's remarks about the strength of the evidence and the government's heavy reliance on the models in their case-in-chief and in closing argument, he cannot show that their admission had "a substantial prejudicial effect." *Id.* at 1330–31 (citation modified).

While a prosecutor's closing argument can prejudice a defendant's substantial rights in certain circumstances, *cf. United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006), prosecutors are permitted to "state conclusions drawn from the trial evidence," *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). Here, the government referred to the models as "child-size" during its closing argument, but it did so to invoke the idea that their size, in conjunction with the other evidence presented, indicated that Diaz did not mistakenly have child pornography in his home. *See id.* (noting that "[t]he purpose of closing argument is to assist the jury in analyzing the evidence").

Further, even without the models, the government presented "overwhelming evidence" for a jury to find, beyond a reasonable doubt, that Diaz accessed with the intent to view child pornography. *United States v. Guzman*, 167 F.3d 1350, 1353 (11th Cir.

1999); *see Barton*, 909 F.3d at 1331 ("Where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." (citation modified)). For example, the jury heard evidence that: (1) someone using Diaz's IP address requested suspected child pornography; (2) Diaz lived alone and there was no indication anyone else had used his devices; (3) Diaz refused to leave his home for almost an hour when law enforcement attempted to search the property; and (4) during the search, officers found several electronics that were ultimately linked to child pornography, and some of them had been recently reset or damaged.

Given the substantial weight of the evidence against Diaz, we find no reversible error in the district court's decision to allow the admission of the models at trial.

IV. CONCLUSION

We **AFFIRM** Diaz's conviction.