

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-11898
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONTAE D. BURTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:24-cr-00278-MSS-AAS-1

Before NEWSOM, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Dontae Burton appeals his convictions for two counts of sex trafficking of a minor, in violation of 18 U.S.C. § 1591(a)(1), (b)(2),

and (c), and one count of production of child pornography, in violation of 18 U.S.C. § 2251(a). First, Burton argues that the district court erred in denying his request for a special verdict form and therefore allowed the jury to convict him without a unanimous finding as to all elements of the offense of sex trafficking of a minor. Second, Burton argues that the court violated his Sixth Amendment right to confront Alize Warren by limiting his cross-examination of her. Third, Burton argues that the court erred in denying his motion for a new trial because the weight of the evidence preponderated heavily against the verdict on Count 1 (sex trafficking of minor victim 1 (“MV1”)). Lastly, Burton argues that the court erred in denying his motion for acquittal on Count 3 (production of child pornography involving minor victim 2 (“MV2”)) because the government failed to introduce evidence that he acted for the purpose of producing a visual depiction.

I. DISCUSSION

A. Jury Instructions and Verdict Form

We review the legal accuracy of jury instructions and verdict forms de novo but review questions on the phrasing employed in the instructions and verdict form for an abuse of discretion. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (stating that we review the legal correctness of jury instructions de novo and phrasing questions for an abuse of discretion); *see also McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1072 (11th Cir. 1996) (stating that we apply the same standard of review to special interrogatory verdict forms as we do to jury instructions).

25-11898

Opinion of the Court

3

We examine “whether the jury instructions and verdict form, considered as a whole, were sufficient so that the jurors understood the issues and were not misled.” *United States v. Poirier*, 321 F.3d 1024, 1032 (11th Cir. 2003) (quoting *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569 (11th Cir. 1991)). Generally, district courts have broad discretion in formulating jury instructions and the verdict form so long as the jury instructions and verdict form, as a whole, accurately reflect the law and the facts. See *Prather*, 205 F.3d at 1270. We will not reverse a conviction unless the issues of law were inaccurately presented or the jury was misguided “in such a substantial way as to violate due process.” *Id.* (quoting *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993)). Even if an isolated clause may be “inaccurate, ambiguous, incomplete, or otherwise subject to criticism,” no reversible error has occurred. *Poirier*, 321 F.3d at 1032 (quoting *Busby v. City of Orlando*, 921 F.2d 764, 776 (11th Cir. 1991)).

A jury in a criminal case must unanimously find that the government has proven each element of an offense to convict. *United States v. Jockisch*, 857 F.3d 1122, 1127 (11th Cir. 2017). However, “not every fact important to a determination of guilt constitutes an element of the offense” and “as to any fact that is not an element, unanimity by jurors as to the proof of that fact is not required.” *Id.* Jurors do not need to agree unanimously on “which of several possible *means* the defendant used to commit an element of the crime.” *Id.* (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

The determination of whether a fact constitutes a means or an element is an issue of statutory interpretation. *Richardson*, 526 U.S. at 818-20.

Section 1591(a)(1) states, in relevant part, that whoever knowingly “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished.” 18 U.S.C. § 1591(a)(1).

Section 1591(c) provides, “In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.” 18 U.S.C. § 1591(c). Section 1591(c) “relieves the government of its burden under subsection (a)(1) to prove knowledge or reckless disregard” if it instead proves that the defendant had a reasonable opportunity to observe the victim. *United States v. Whyte*, 928 F.3d 1318, 1328 (11th Cir. 2019). In allowing the government to prove that the defendant had a reasonable opportunity to observe the victim as a substitute to proving knowledge or reckless disregard, § 1591(c) provides an alternative means of proving the

25-11898

Opinion of the Court

5

defendant's mens rea as to the defendant's awareness of the victim's age. *Id.* When a defendant has the opportunity to personally observe the victim, he may reasonably be required to ascertain the victim's age. *Id.* at 1330.

Because § 1591(c) offers an alternative means of proving the defendant's mens rea element under § 1591(a), the jurors need not have agreed unanimously on whether Burton acted with knowledge or reckless disregard or, alternatively, had a reasonable opportunity to observe the victims. *See Whyte*, 928 F.3d at 1328. Additionally, these means are inherently similar, as observing the victims in person reasonably requires that the defendant ascertain her age, and therefore act with knowledge or reckless disregard that she is a minor. *See id.* at 1330. As such, no prejudice would have resulted from the jury finding one means over the other. Therefore, in not using a verdict form proposed by Burton that required the jurors to note if they had found that Burton had acted with knowledge or reckless disregard, the district court did not inaccurately present the law and did not err. *See Prather*, 205 F.3d at 1270.

B. Limitation of Cross Examination

We review the district court's decision to limit cross-examination for an abuse of discretion. *United States v. Barrington*, 648 F.3d 1178, 1187 (11th Cir. 2011).

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy

the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause guarantees the right to impeach adverse witnesses through cross-examination. *Barrington*, 648 F.3d at 1187-88. A defendant is entitled to cross-examine a government witness about any possible motivation for lying or bias. *Id.* at 1188. This right increases in importance where the witness is a chief government witness. *Id.* Nevertheless, this right does not entitle a defendant to cross-examine a witness in any manner or to whatever extent he wants to. *Id.* Indeed, a defendant is not entitled to conduct an unlimited inquiry into the potential bias of a witness. *Id.*

The inquiry under the Confrontation Clause is whether a reasonable jury would have a “significantly different impression of the witness’ credibility had counsel pursued the proposed line of cross-examination.” *United States v. Orisnord*, 483 F.3d 1169, 1179 (11th Cir. 2007) (quoting *United States v. Garcia*, 13 F.3d 1464, 1469 (11th Cir. 1994)). When the cross-examination permitted by the court “exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable,” a defendant’s rights under the Confrontation Clause are satisfied. *United States v. Pacchioli*, 718 F.3d 1294, 1304 (11th Cir. 2013) (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994)).

The Sixth Amendment is not violated as long as (1) the jury was exposed to facts sufficient to make inferences about the witness's reliability, and (2) there was a sufficient basis in the cross-examination from which counsel could argue that the witness was biased. *United States v. Van Dorn*, 925 F.2d 1331, 1335 (11th Cir. 1991). Where the court limits or truncates one topic of cross-examination, that does not violate the Confrontation Clause so long as the defendant generally had “ample latitude to attack the witness’s credibility.” *Pacchioli*, 718 F.3d at 1304-05.

Once the cross-examination satisfies the requirements of the Confrontation Clause, the district court’s broad discretion to limit cross-examination is triggered. *United States v. Maxwell*, 579 F.3d 1282, 1296-97 (11th Cir. 2009) (concluding that the district court had not abused its discretion, in part, because the Confrontation Clause had been satisfied). In particular, the district court has wide latitude to reasonably limit cross-examination that confused the issues, that was repetitive, or that was only marginally relevant. *Id.* at 1296.

Courts can exclude relevant evidence when its probative value is substantially outweighed by the danger of needlessly presenting relevant evidence. Fed. R. Evid. 403.

Here, the district court did not abuse its discretion in limiting Burton’s cross-examination of Warren because the testimony Burton sought to elicit about Warren’s prior prostitution experience would have been cumulative of other evidence, and thus the court generally had the discretion to exclude it. *See* Fed. R. Evid.

403. Warren's prior prostitution experience was introduced at trial through MV1's testimony, in which she confirmed several times that she was aware that Warren had experience in prostitution independent of Burton's involvement. To the extent that Burton wanted to introduce this fact as substantive evidence, it had already been sufficiently established, and further cross-examination was not necessary. Burton also had no need to elicit testimony on cross examination that Warren lied to Burton about MV1's age because Warren had already testified to this. Thus, as long as the initial Confrontation Clause requirements were satisfied, the court had discretion to reasonably limit this repetitive inquiry on cross-examination. *See Maxwell*, 579 F.3d at 1296.

Here, this was indeed the case. The limitation of cross-examination did not violate Burton's rights under the Confrontation Clause because this evidence would not have significantly changed the jury's impression of Warren's credibility. *See Orisnord*, 483 F.3d at 1179. Given that the jury already heard evidence that Warren had engaged in prostitution, further evidence of this would not have changed the jury's impression of Warren's credibility. Additionally, Burton does not explain how the proposed cross-examination about Warren's sex work experience and her boyfriend's involvement would have demonstrated Warren's bias toward Burton. If his argument is that Warren's boyfriend was distressed that Burton was interested in posting ads for her, this evidence had already been introduced and therefore would have been cumulative as well. *See Fed. R. Evid.* 403.

Moreover, Burton had a sufficient opportunity to expose the jury to facts sufficient to evaluate Warren's credibility and enable him to establish a record from which he properly could argue that she is unreliable. *See Pacchioli*, 718 F.3d at 1304. During Burton's cross examination of Warren, Warren testified that she had lied to Burton about MV1's age and that she was willing to lie for her friend. This testimony allowed Burton to establish a record to later argue during closing that Warren had lied to him. The minimum requirements of the Confrontation Clause were thus met, triggering the court's broad discretion to exclude repetitive evidence. *See Maxwell*, 579 F.3d at 1296-97. Therefore, the court's limitation of Burton's cross-examination of Warren did not violate his rights under the Sixth Amendment.

C. Weight of the Evidence

We review the denial of a motion for a new trial based on the weight of the evidence for an abuse of discretion. *United States v. Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019).

A motion for a new trial based on the weight of the evidence is "not favored" and is reserved for "really exceptional cases." *Id.* (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)). To warrant a new trial, the evidence "must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* (quoting *Martinez*, 763 F.2d at 1313). In considering a motion for new trial, the district court may consider the credibility of witnesses and weigh the evidence. *Id.*

The grant of a motion for a new trial based on the weight of the evidence is generally available only where the government's case is plagued by "uncertainties and discrepancies" and its witnesses have been impeached. *Martinez*, 763 F.2d at 1313.

We have found that a defendant had a reasonable opportunity to observe a minor victim when the defendant and victim interacted "five or six" times, including the "considerable interaction" of 20 minutes the defendant spent photographing the victim for online prostitution ads. *United States v. Blake*, 868 F.3d 960, 976 (11th Cir. 2017). We have also found that a victim's engagement in "adult activities" like smoking marijuana and failure to tell the defendant that she was under 18 "does not inform the reasonableness" of the opportunities the victim had to observe the victim. *Whyte*, 928 F.3d at 1331.

Criminal liability under § 1591 "is not conditioned on the actual occurrence of any commercial sex act." *United States v. Gatlin*, 90 F.4th 1050, 1061 (11th Cir. 2024), *cert. denied*, 145 S. Ct. 1065 (2025). Instead, "a defendant need only put the victim in a position where a sex act *could* occur, regardless of whether a sex act eventually *did* occur." *Id.* (quoting *Blake*, 868 F.3d at 977).

Here, the district court did not abuse its discretion in denying Burton's motion for a new trial because the evidence did not preponderate heavily against the verdict on Count 1 and the weight of the evidence was not plagued by uncertainties and discrepancies. *See Martinez*, 763 F.2d at 1313. The government presented substantial evidence that Burton satisfied the mens rea requirements of §

1591 as to MV1's age, which, as described in the discussion of Issue 1, can be proven either through knowledge or reckless disregard or through a reasonable opportunity to observe the victim. *See* 18 U.S.C. § 1591(a)(1), (c). First, as to Burton's argument that he did not have a reasonable opportunity to observe MV1, under this Court's precedent Burton's interactions with MV1 were sufficient to provide him with a reasonable opportunity to observe her because he personally took photos of her. *See Blake*, 868 F.3d at 976. Additionally, Burton's contentions that MV1 generally held herself out as an adult have no bearing on this reasonable opportunity to observe. *See Whyte*, 928 F.3d at 1331. Therefore, the evidence supported a finding that Burton had a reasonable opportunity to observe MV1, fulfilling the mens rea requirement under § 1591.

Next, as to Burton's argument that the evidence failed to show that he acted with knowledge or reckless disregard as to MV1's age, the government's evidence was also adequate to support this finding. The evidence establishes that Burton continued the offense conduct after April 17, 2024, when MV1 told him that she was 17. After this date, Burton continued to put MV1 in a position where a sex act could occur. *Gatlin*, 90 F.4th at 1061. While Burton argues that all relevant conduct for the sex trafficking charge ended when he found out that MV1 was 17 because she did not go on any dates after this point, Burton continued to message MV1 to set up dates and left her ads up online, which was sufficient to establish that the offense conduct continued even after he had actual knowledge that she was 17. *See id.* The evidence also sup-

ports that, even before MV1 told Burton that she was a minor, Burton acted with reckless disregard as to her age because MV1 never provided him with her ID and, rather than questioning her further, Burton used his ex-girlfriend's ID for MV1's ads. Burton also knew that MV1 lived with her mother and would need to be driven to the dates, suggesting she was a minor. Further, in considering Burton's motion for a new trial, the district court had the discretion to weigh the evidence and consider the credibility of witnesses in determining whether MV1 appeared to be 19 during Burton's relationship with her. *See Brown*, 934 F.3d at 1297. While Burton argues that all indications were that MV1 was 19 and that she, MV2, and Warren lied to him to this effect, the district court ultimately heard MV1's testimony at age 18 and was able to assess the evidence regarding her apparent age during the offense conduct accordingly. Ultimately, the evidence that Burton acted with knowledge or disregard as to MV1's age was also not plagued by uncertainties and disparities, so the jury could have properly convicted Burton on this basis as well. *See Martinez*, 763 F.2d at 1313. A new trial is not warranted because the evidence did not preponderate heavily against the jury's finding of Burton's guilt under § 1591

D. Motion for Judgment of Acquittal

We review the denial of a motion for a judgment of acquittal de novo. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir.

2005). We review the sufficiency of the evidence supporting a conviction de novo. *Id.* However, all factual and credibility inferences are made in favor of the government. *United States v. Cooper*, 203 F.3d 1279, 1285 (11th Cir. 2000).

The evidence is sufficient to support a conviction if “a reasonable trier of fact, choosing among reasonable interpretations of the evidence, could find guilt beyond a reasonable doubt.” *United States v. Diaz-Boyz*, 432 F.3d 1264, 1269 (11th Cir. 2005) (quoting *United States v. Pineiro*, 389 F.3d 1359, 1367 (11th Cir. 2004)). The evidence does not have to exclude every reasonable hypothesis of innocence. *Hernandez*, 433 F.3d at 1334-35. The jury may choose between reasonable constructions of the evidence and is free to disbelieve the testimony of witnesses. *Id.* at 1334.

Section 2251(a) provides, in relevant part, that “[a]ny person who 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 ... shall be punished as provided under subsection (e).” 18 U.S.C. § 2251(a).

We have held that the government need not prove that producing the visual depiction was the defendant’s primary purpose for engaging in sexual activity, but rather that it was a purpose. *Gatlin*, 90 F.4th at 1062. Circumstantial evidence can be used to establish this intent. *Id.* In *Gatlin*, the defendant, during sexual intercourse, “reached for his camera phone, unlocked the phone, and accessed the phone’s camera.” *Id.* We found that the jury could have reasonably inferred that based on the angle of the photo, the

defendant had to hold his phone in front of him while having sexual intercourse. *Id.* We reasoned that the “live photo” showed that Gatlin and the minor briefly paused, essentially posing for the photo, and that a jury could have reasonably inferred that Gatlin was engaging in sexual activity partly for the purpose of producing the photo during that time, at the very least. *Id.* We distinguished Gatlin’s actions from “a case of a security camera mechanically picking up a random act.” *Id.* (quoting *United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012)).

Here, the district court did not err in denying Burton’s motion for a judgment of acquittal. Like in *Gatlin*, the jury here could have reasonably inferred from the evidence that during the sexual activity, Burton took out his phone and angled the camera so that MV2 was in view performing oral sex, and during at least that brief moment, he was engaging in sexual activity partly for the purpose of producing the video. *Id.* at 1062. The jury could have also reasonably inferred that Burton wanted MV2 to continue performing oral sex for “three more minutes,” as he told her, for the purpose of making the video, and could have reasonably interpreted this as direction for the purpose of producing the video. Even though MV2 did not “pose” for the video, Burton actively took out his phone to record the sexual activity and instructed MV2, in stark contrast to a security camera passively picking up sexual activity. *See Gatlin*, 90 F.4th at 1062.

The jury therefore could have reasonably inferred that one of Burton’s purposes in engaging in sexual activity with MV2 was

25-11898

Opinion of the Court

15

to record it. The jury could also have made the reasonable inference that because Burton created a subsequent video of clips from MV2 in the first video, he had engaged in sexual activity with MV2 with the purpose of creating the first video, as his subsequent activity demonstrated his interest in creating these videos. Therefore, the evidence was sufficient to support the jury's finding of guilt beyond a reasonable doubt, and the district court did not err in denying Burton's motion for a judgment of acquittal on Count 3. *See Diaz Boyzo*, 432 F.3d at 1269. Accordingly, we affirm.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.