

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12424
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL R. MCCAFFREY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:24-cr-00011-MCR-1

Before JORDAN, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

A jury found Daniel McCaffrey guilty of transportation of child pornography, possession of child pornography involving a prepubescent minor or a minor under the age of 12, and abusive

sexual contact with a minor under the age of 12. The district court sentenced him to a term of imprisonment of 420 months.

Mr. McCaffrey now challenges his convictions for possession and transportation of child pornography, contending that the evidence was insufficient to support those convictions. He also challenges his 420-month sentence on two grounds: (1) the district court violated his due process rights by considering acquitted conduct at sentencing and (2) the sentence is procedurally and substantively unreasonable. After careful review, we affirm.

I

In 2024, Mr. McCaffrey was charged by indictment with transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1), (b)(1); possession of child pornography involving a prepubescent minor or a minor under the age of 12, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2); aggravated sexual abuse of a minor under the age of 12, in violation of 18 U.S.C. § 2241(c); and abusive sexual contact with a minor under the age of 12, in violation of 18 U.S.C. § 2244(a)(5). He proceeded to trial, at which the following relevant testimony was presented.

In September 2019, Mr. McCaffrey's then-wife, Ms. Fontana, joined the United States Air Force. She left Mr. McCaffrey and their two daughters in New Mexico, where the family lived with Mr. McCaffrey's mother, to participate in boot camp in Texas. When Ms. Fontana completed boot camp in November of 2019, she went to Keesler Air Force Base in Mississippi. Mr. McCaffrey and their daughters joined her there a couple of months later.

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While in Mississippi, Ms. Fontana lived in dorms, while Mr. McCaffrey and their daughters lived in base housing. Around this time, Ms. Fontana testified that she noticed an increase in fear and anxiety in her daughters and that they would cry and ask not to be left with Mr. McCaffrey. After she completed her technical training in Mississippi, the family moved at the end of May of 2020 to Eglin Air Force base in Florida.

At Eglin, Ms. Fontana's work required her to leave home at 5 a.m. and return around 3 p.m. or 4 p.m. While she was at work, Mr. McCaffrey was the primary caregiver for their children. She testified that, at this time, their daughters continued to cry and ask not to be left with their father. In March of 2021, Ms. Fontana asked Mr. McCaffrey to leave the house, and he did so, taking his personal effects and returning to New Mexico.

Ms. Fontana testified that the next day their four-year-old daughter, referred to as MF1 (minor female 1), climbed into bed with her and started "humping her hand," then followed her downstairs crying and stating, "Mommy, Mommy, Daddy did this to me, Mommy. Mommy, help me with my daddy." Ms. Fontana testified that she later observed MF1 "humping the floor," and witnessed similar behavior from MF1 on subsequent occasions. As a result, Ms. Fontana became concerned and contacted the local police department and the Florida Department of Children and Families.

In April of 2021, Ms. Fontana took MF1 to the Child Advocacy Center in Niceville, Florida. MF1 was interviewed twice, but

when officials there attempted to conduct a physical examination of her genital area, MF1 refused. During the first interview, MF1 told the interviewer that her father was mean and gave her shots in the butt that felt bad. During the second interview, which followed both trauma counseling and speech therapy, MF1 told the interviewer that Mr. McCaffrey had “touched her private with his hand” and identified her private as her vagina.

Ms. Fontana also reported the incidents to the Office of Special Investigations for the Air Force (“OSI”), who reported it to the FBI. [*Id.* at 275] She allowed government agents to search her Eglin Air Base residence on April 20, 2021.

A few days later, agents searched the house again—this time with a police dog that detects scents associated with electronic storage devices like SD cards and hard drives. The dog alerted to the presence of electronics in the girls’ room, and agents found a micro-SD card concealed in the battery compartment of a lion stuffed animal toy. A forensic examination later revealed 40 images of child pornography on the micro-SD card, which had been saved there between October of 2019 and March of 2021. The government introduced evidence that Ms. Fontana’s aunt purchased the stuffed animal toy and shipped it to the family in New Mexico in December of 2019, when Ms. Fontana was in training in Mississippi.

A friend of Ms. Fontana’s testified that she went to the house in May of 2021 to help Ms. Fontana clean out some toys. She stated

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that they found a purple thermometer toy and that when Ms. Fontana showed that toy to MF1, MF1 said she and her father played with that toy and pointed to her vagina.

MF1 testified, as well. She testified that Mr. McCaffrey “put a shot in her private” that hurt and that he touched her private parts with his hand. She also identified pictures she had drawn in a dance class, which depicted Mr. McCaffrey and her and a shot between them.

Mr. McCaffrey did not testify at trial, but his defense called a few witnesses, including (1) a DCF investigator who testified that, during her forensic interview of MF1, MF1 did not disclose sexual abuse, and (2) a forensic nurse consultant who testified that the kind of abuse MF1 described would usually result in physical injury requiring medical treatment.

Following trial, the jury found Mr. McCaffrey guilty of the first, second, and fourth charges, but not of the third charge. He filed a post-verdict motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) arguing that the government failed to prove that he transported child pornography across state lines and did so knowingly and argued that the government failed to prove he knew about or possessed the micro-SD card containing child pornography. The district court denied the motion.

The district court calculated an offense level of 32, a criminal history category of I, and a guideline range of 121 to 151 months. After considering the sentencing factors in 18 U.S.C. § 3553(a), the court varied upward to impose a 420-month sentence.

II

We review the sufficiency of the evidence to support a conviction de novo, “viewing all the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury’s verdict.” *United States v. Grzybowicz*, 747 F.3d 1296, 1304 (11th Cir. 2014) (quotation omitted). “We review the reasonableness of a sentence for abuse of discretion.” *United States v. Thomas*, 108 F.4th 1351, 1356 (11th Cir. 2024) (citing *United States v. Irely*, 612 F.3d 1160, 1188–89 (11th Cir. 2010) (en banc)). And we review constitutional sentencing challenges de novo. *See United States v. Hicks*, 166 F.4th 933, 937 (11th Cir. 2026).

III

We first consider whether the evidence was sufficient for the jury to find Mr. McCaffrey guilty of knowingly possessing and transporting child pornography. The jury’s verdict must stand so long as “any reasonable construction of the evidence would have allowed [it] to find the defendant guilty beyond a reasonable doubt.” *Grzybowicz*, 747 F.3d at 1304 (quotation omitted). We conclude that the evidence was sufficient for a reasonable jury to find Mr. McCaffrey guilty of the possession and transportation charges.

With respect to the possession charge, the government had to prove that Mr. McCaffrey “knowingly possesse[d] . . . an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce . . . or that

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was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means.” 18 U.S.C. § 2252A(a)(5)(B). With respect to the transportation charge, the government had to prove that he “knowingly mail[ed], or transport[ed] or ship[ped] using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography.” 18 U.S.C. § 2252A(a)(1). Proof of any element “may be established through circumstantial evidence or from inferences drawn from the conduct of an individual.” *United States v. Bryan*, 159 F.4th 1274, 1287 (11th Cir. 2025) (quotation omitted).

Mr. McCaffrey contends that the evidence supporting the possession count consisted only of the evidence that a micro-SD card containing child pornography was found in the family home a few weeks after he moved out. He argues that this evidence is insufficient, pointing out that the government did not present evidence that the card was in the house when Mr. McCaffrey was living there, nor did it present evidence about where or when the card was purchased or what device was used to access or save the images on the card.

Mr. McCaffrey also contends that there was no evidence that he knew about the card or that he transported it across state lines. He argues that the evidence established only that the stuffed animal toy traveled across state lines and that *someone* saved the child pornography on the SD card between October 2019 and March 2021.

Accordingly, he argues that the jury had to make a series of unsupported speculative leaps based on that evidence to find that *he* knowingly transported the child pornography on the card.

The government contends that there was sufficient evidence to support both convictions. With respect to the possession charge, as the government notes, the card was concealed in an unusual place in Mr. McCaffrey's home, the child pornography was added to the card on days between October 2019 and March 2021 when Ms. Fontana was away from the home, some of the images depicted the same kind of sexual abuse that MF1 described as committed by Mr. McCaffrey, and no images were added to the card after Mr. McCaffrey left the home. With respect to the transportation charge, the government argues that the evidence was sufficient for the jury to find that Mr. McCaffrey knowingly transported child pornography during the family's moves from New Mexico to Mississippi and then to Florida, given that many of the images were downloaded onto the card before those moves.

We agree with the government that there was sufficient evidence for the jury to conclude that Mr. McCaffrey knowingly possessed the child pornography found in the micro-SD card. The card was found concealed in a stuffed animal toy in the children's room of the family's home. Mr. McCaffrey and Ms. Fontana were the only adults living in the home in which the images were concealed in a storage device in a children's toy, and Mr. McCaffrey was the children's primary caretaker while Ms. Fontana was at work. Furthermore, the evidence demonstrated that the images depicted

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abuse similar to the abuse MF1 described as committed by Mr. McCaffrey, and the images were added to the card between October 2019 and March 2021, i.e. the images were being added to the card (1) until around the time Mr. McCaffrey left, and (2) at times when Ms. Fontana was not living in the family home.

“[T]he jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial.” *United States v. Watts*, 896 F.3d 1245, 1251 (11th Cir. 2018) (quoting *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989)). Here, the jury could draw the reasonable inference that one of the two adults living in the home possessed the child pornography found on the micro-SD card concealed in a children’s toy in that house and infer, based on the evidence presented about the timing and content of the images saved therein and MF1’s testimony about the abuse, that Mr. McCaffrey did so.

The evidence was sufficient for the jury to find Mr. McCaffrey guilty of the transportation charge, as well. The evidence demonstrated that Mr. McCaffrey resided in New Mexico in October of 2019, when the first images were added to the card, and then moved to Mississippi and to Florida in January and May of 2020, respectively. The evidence establishing Mr. McCaffrey’s possession of the child pornography—as well as the evidence showing that the images were saved on the SD card starting when the family lived in New Mexico and continuing up until Mr. McCaffrey left the family’s Florida residence—coupled with the evidence of the family’s moves, was sufficient for the jury to reasonably infer that

he knowingly transported the child pornography in those interstate moves.

Mr. McCaffrey resists this conclusion, contending that the evidence was insufficient to support the verdict on the transportation charge because it demonstrated only that the stuffed animal toy travelled with the family, requiring the jury to make the additional “speculative jumps” that (1) the micro-SD card was also present at the time of the moves, (2) that Mr. McCaffrey knew about it at that time, and (3) that he knew it contained child pornography. Absent such speculation, he contends there was no evidence that he obtained the card prior to the move to Florida and travelled with it across state lines.

To be sure, “where the government relies on circumstantial evidence, reasonable inferences, and not mere speculation, must support the jury’s verdict.” *Bryan*, 159 F.4th at 1287 (quotation omitted). However, “[a] jury’s verdict cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt.” *Watts*, 896 F.3d at 1251 (quoting *United States v. Herrera*, 931 F.2d 761, 762 (11th Cir. 1991)). Though the government’s evidence of transportation was not overwhelming, the jury could draw the reasonable inference, based on the fact that images were being added to the concealed micro-SD card up until Mr. McCaffrey’s departure from the family home, that he was the one adding the images to it and draw the inference from that evidence that he had the card when images were added to it in October 2019, before the move to

Mississippi and then to Florida, and transported it with him thereafter. Viewing the evidence in the light most favorable to the government, we conclude that the evidence was sufficient for a reasonable jury to find Mr. McCaffrey guilty of the transportation charge.

IV

We now consider the reasonableness of the 420-month sentence. Mr. McCaffrey argues that his sentence is procedurally and substantively unreasonable because (1) the district court refused to consider the need to avoid unwarranted sentencing disparities among similarly situated defendants—a mandatory sentencing factor under 18 U.S.C. § 3553(a)(6)—and (2) the 299-month upward variance imposed was unwarranted based on his personal history, e.g., his lack of criminal history and his status as a military veteran, and the circumstances of his offense.

The government responds that the district court did consider each of the § 3553(a) factors, including the need to avoid unwarranted sentence disparities, and simply rejected Mr. McCaffrey’s proffered comparators. And the government argues that the upward variance was substantively reasonable, based on Mr. McCaffrey’s conduct and the district court’s weighing of the § 3553(a) factors. We agree.

“We use a two-step process to determine the reasonableness of a sentence imposed by the district court.” *United States v. Boone*, 97 F.4th 1331, 1338 (11th Cir. 2024). “First, we determine whether the sentence is procedurally sound.” *Id.* Then, we determine

“whether the sentence is substantively reasonable given the totality of the circumstances and the sentencing factors set out in 18 U.S.C. § 3553(a).” *Id.* Mr. McCaffrey bears the burden of showing his sentence is unreasonable. *See id.* at 1339.

Mr. McCaffrey’s claim of procedural error is that the district court refused to consider one of the 18 U.S.C. § 3553(a) factors—“the need to avoid unwarranted sentence disparities” between similarly situated defendants. *See* § 3553(a)(6). *See also United States v. Harris*, 964 F.3d 986, 987 (11th Cir. 2020) (“A sentence is procedurally unreasonable if the district court commits a significant procedural error, such as ‘failing to consider the § 3553(a) factors[.]’”) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Not so. The district court did consider the § 3553(a) factors, including § 3553(a)(6), but rejected Mr. McCaffrey’s comparators and considered, instead, the sentences it had given in comparable cases.

The district court did not err procedurally in doing so. Although § 3553(a)(6) required the district court to consider sentences imposed on other defendants who are similarly situated, *see United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009), Mr. McCaffrey’s statistics aggregated “sexual abuse” categories generally, without regard for individual case facts, and therefore provided little insight into the sentences imposed on defendants similarly situated with Mr. McCaffrey. *Cf. United States v. Jayyousi*, 657 F.3d 1085, 1118 (11th Cir. 2011) (instructing the district court on remand “not [to] draw comparisons to cases involving defendants who were convicted of less serious offenses, pleaded guilty, or who

lacked extensive criminal histories,” and faulting the court for failing to consider those distinctions). And unlike the sentences in the abusive sexual contact cases that Mr. McCaffrey offered as comparators, this case involved abusive sexual contact—“at a minimum”¹—of a child as young as four years old by her own father.

By contrast, the district court did consider *Boone*, in which we affirmed an 840-month sentence imposed after a father pleaded guilty to using his own four-year-old daughter to produce child pornography, *see* 97 F.4th at 1335, and *United States v. Puente*, 267 F. App’x 863, 864 (11th Cir. 2008), in which the defendant was convicted of aggravated sexual abuse of his six- to eight-year-old stepdaughter, under § 3553(a)(6). In sum, the record shows that the district court did not refuse to consider the need to avoid unwarranted sentencing disparities between similarly situated defendants, along with the other § 3553 factors, as Mr. McCaffrey asserts.

Second, the sentence imposed was not substantively unreasonable. “When reviewing a sentence imposed outside of the Guidelines range, we ‘may consider the extent of the deviation, but must give due deference to the district court’s decision that the 18 U.S.C. § 3553(a) factors, on a whole, justify the extent of the variance.’” *United States v. Butler*, 39 F.4th 1349, 1355 (11th Cir. 2022)

¹ At sentencing, the district court found, by a preponderance of the evidence, that Mr. McCaffrey committed a “sexual act”—as required to convict him of the aggravated sexual abuse charge under 28 U.S.C. § 2241(c)—on the victim, as well. As we discuss in Part V, our precedents establish that the district court was permitted to rely on acquitted conduct found by a preponderance of the evidence at sentencing.

(quoting *Gall*, 552 U.S. at 51). While “a major variance . . . require[s] a more significant justification than a minor one,” *Irey*, 612 F.3d at 1198, we will not remand for resentencing unless we are “left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside of the range of reasonable sentences dictated by the facts of the case,” *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

The weight to be afforded to each factor is generally committed to the district court’s discretion. See *United States v. Croteau*, 819 F.3d 1293, 1310 (11th Cir. 2016). “A court abuses its discretion if it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.” *Irey*, 612 F.3d at 1189 (quotation omitted).

The district court gave significant weight to the nature and seriousness of Mr. McCaffrey’s conduct, which involved the sexual abuse of his own minor child, as well as the possession of child pornography victimizing other children. It did not abuse its discretion in doing so. See *id.* at 1206 (reasoning under 18 § 3553(a)(2)(A) that child sex crimes are particularly egregious and that the more serious the crime, “the longer the sentence should be”). Mr. McCaffrey contends that the court abused its discretion in varying upward as significantly as it did by (1) not considering relevant facts, namely the nationwide statistical data on sentencing; (2) giving too much

weight to irrelevant factors, namely sentences given in distinguishable cases and acquitted conduct; and (3) not giving enough weight to relevant factors, like Mr. McCaffrey’s military service, lack of criminal history, and character letters. None of Mr. McCaffrey’s arguments demonstrate an abuse of discretion.

As we have explained previously, the district court did not abuse its discretion in disregarding the general sentencing statistics and average sentences that Mr. McCaffrey put forth for comparison. *See United States v. Rosales-Bruno*, 789 F.3d 1249, 1265 (11th Cir. 2015) (rejecting the argument that a district court must compare the defendant to “the ‘average’ offender for each crime, at each offense level and within each criminal history category”). And though the defendant in *Boone*, for example, is dissimilar in certain respects—the defendant there was convicted of *production* of child pornography involving his own child—the district court imposed a far shorter sentence here than there, reflecting that distinction. We see no “clear error of judgment” on this score. *See Pugh*, 515 F.3d at 1191.

Moreover, as we explain in the following section, our precedents permit the district court to consider acquitted conduct found by a preponderance of the evidence at sentencing. *See* Part V. And that conduct provides additional justification for the substantial variance.

Finally, it was well within the district court’s discretion to assign less weight to certain factors—like Mr. McCaffrey’s military

service, lack of criminal history, and character letters—than to others, like the seriousness of his conduct. *See Butler*, 39 F.4th at 1355 (“[A] district court may attach great weight to one § 3553(a) factor over others.”). *See also id.* at 1356 (noting that the district court may, within its discretion, deem certain evidence “to be either aggravating or irrelevant rather than mitigating”). We see no abuse of discretion in the court’s determination that the seriousness of the offense outweighed Mr. McCaffrey’s personal history and characteristics in mitigation.

V

Finally, Mr. McCaffrey argues that the district court violated his due process rights by considering acquitted conduct in fashioning his 420-month sentence. As a reminder, the jury convicted Mr. McCaffrey of sexual contact with MF1 but acquitted him of aggravated child abuse by a sexual act, and he contends that the district court improperly considered the latter conduct in fashioning his sentence. This argument is foreclosed by binding precedent. *See United States v. Touray*, 151 F.4th 1317, 1331–32 (11th Cir. 2025) (rejecting the argument that consideration of acquitted conduct at sentencing violates a defendant’s Fifth and Sixth Amendment rights). In light of that precedent, we must hold that the court did not violate Mr. McCaffrey’s constitutional rights under the Fifth and Sixth Amendments by considering acquitted conduct at sentencing. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2018) (“[A] prior panel’s holding is binding on all subsequent panels

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unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.”).²

VI

For the foregoing reasons, we affirm Mr. McCaffrey’s convictions and sentence.

AFFIRMED.

² As of November 1, 2024, the Sentencing Guidelines—by virtue of Amendment 826—provide that “[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.” U.S.S.G. § 1B1.3(c). But that new provision does not render the use of acquitted conduct unconstitutional. *See Touray*, 151 F.4th at 1322.