

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-14146
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIGUEL HERNANDEZ GUTIERREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:25-cr-20182-JB-1

Before ROSENBAUM, GRANT, and KIDD, Circuit Judges.

PER CURIAM:

A grand jury returned an indictment charging Miguel Hernandez Gutierrez with attempted receipt of child pornography, in

violation of 18 U.S.C. § 2252(a)(2) and (b)(1), and attempted coercion and enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). A jury found Hernandez guilty of both counts, and the district court sentenced him to 120 months of imprisonment. Hernandez now appeals, challenging the sufficiency of the indictment as to the § 2422(b) offense.

Generally, “the sufficiency of an indictment is a legal question that we review *de novo*.” *United States v. Chalker*, 966 F.3d 1177, 1190 (11th Cir. 2020) (citation modified). However, because Hernandez failed to challenge the indictment’s sufficiency below, we will review his arguments on appeal only for plain error. *United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019). To establish plain error, Hernandez must show that “(1) an error occurred; (2) the error was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness of the judicial proceedings.” *United States v. Ramirez-Flores*, 743 F.3d 816, 822 (11th Cir. 2014). We conclude that Hernandez cannot meet this burden.

“An indictment is sufficient when it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.” *United States v. Wayerski*, 624 F.3d 1342, 1349 (11th Cir. 2010) (citation modified). “These requirements satisfy the Sixth Amendment’s guarantee of notice to the accused of the nature and the cause of the accusation, and the Fifth Amendment’s assurance that a grand jury

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will return an indictment only when it finds probable cause for all elements of the crime.” *Id.*

In this case, the indictment alleged that Hernandez, “using a facility of interstate and foreign commerce, did knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of eighteen years, to engage in sexual activity for which a person can be charged with a criminal offense.” This statement tracks the language of § 2422(b) and includes all of the offense’s essential elements. *See* 18 U.S.C. § 2422(b). This is all that is required under our precedent to apprise a defendant of the charges against him. *See Wayerski*, 624 F.3d at 1349–50; *see also United States v. Doak*, 47 F.4th 1340, 1351–52 (11th Cir. 2022) (“Simplicity is acceptable; an indictment is constitutionally sufficient when it tracks the wording of the statute, as long as the language sets forth the essential elements of the crime.” (citation modified)).

Nonetheless, Hernandez argues that the indictment was insufficient because it merely alleged that he attempted to entice a minor to engage in criminal sexual activity rather than identifying the specific criminal offense underlying the charge. However, § 2422(b) requires only that “the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed,” not that the defendant attempted to persuade the minor to commit activity constituting a specific criminal offense. *United States v. Jockisch*, 857 F.3d 1122, 1132 (11th Cir. 2017) (citation modified).

As we have explained, “the particular sex act that [a defendant] might have ultimately attempted to induce” is not an element of the offense that must be proven by the government. *Id.* at 1131. Rather, it is “a means of satisfying [an] element” of the crime—that is, whether the defendant “attempt[ed] to persuade a minor to engage in an unlawful sexual act.” *Id.* And, “[a]s long as the jury could unanimously conclude that [a defendant] was attempting to persuade [a minor] to perform *some* unlawful sex act . . . [it] could properly find [a defendant] guilty of violating § 2422(b).” *Id.*; *cf. Doak*, 47 F.4th at 1351–53 (explaining that, while “it is best practice to include the statutes criminalizing the sexual activity that the defendant planned to inflict on the transported child,” an indictment charging violations of 18 U.S.C. § 2423(a) was legally sufficient even where it omitted the criminal sexual offenses underpinning those charges).

As such, we can discern no error in the indictment’s failure to include the specific criminal sexual offense predicated by the § 2422(b) charge. And even if we were to assume error, Hernandez cannot establish that such an error was plain, as he has not identified controlling authority clearly resolving the issue presented by this appeal. *See United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015) (“There can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it.” (citation modified)). While Hernandez argues that *Jockisch* stands for the proposition that the indictment needed to contain some detail as to the underlying offense, that case merely held that the jury was required to agree that the defendant’s conduct would have violated

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at least one of the three predicate offenses listed in the indictment. *Jockisch*, 857 F.3d at 1133. *Jockisch* did not establish a requirement that an indictment list any predicate offenses or mandate that a jury agree on which predicate offense a defendant violated in order to return a guilty verdict. *See id.* at 1131, 1133.

We therefore conclude that Hernandez cannot show error, plain or otherwise, in the sufficiency of his indictment and need not address whether any alleged error prejudiced Hernandez.

The district court's judgment is **AFFIRMED**.