FILED
United States Court of Appeals
Tenth Circuit

May 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEITH DUANE PARNELL,

Defendant - Appellant.

No. 22-5092
(D.C. No. 4:21-CR-00439-GWC-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

A jury convicted Keith Duane Parnell of three counts of Aggravated Sexual Abuse of a Minor under Age 12 in Indian Country, *see* 18 U.S.C. §§ 1151, 1153, 2241(c), 2246(2)(B) and (D); and four counts of Sexual Abuse of a Minor in Indian Country, *see id.* §§ 1151, 1153, 2243(a), 2246(2)(A) and (C), 2246(3). In this appeal, Mr. Parnell challenges the sufficiency of the evidence concerning three of the counts.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

He also raises a sentencing issue. We affirm his convictions but reverse and remand for resentencing on Count Eight.

BACKGROUND

The parties are familiar with the facts of this case. We discuss only those facts necessary to resolve the appellate issues.

Mr. Parnell was charged with ten counts of sexual abuse and aggravated sexual abuse involving two of his minor daughters. The acts took place over nearly a decade, with the last alleged act occurring approximately 15 years before his trial. The parties stipulated at trial that Mr. Parnell was an Indian and that the alleged abuse occurred in Indian Country.

Prior to their submission to the jury, the district court dismissed counts Four, Seven, and Nine. The jury convicted Mr. Parnell of the remaining counts. The district court denied his oral and written Rule 29 motions. He challenges the sufficiency of the evidence to convict him on Counts Three, Eight, and Ten.

DISCUSSION

I. Sufficiency of the Evidence

"In addressing the sufficiency of the evidence, we engage in de novo review." *United States v. Leal*, 32 F.4th 888, 891 (10th Cir. 2022). We consider the evidence in the light most favorable to the government and reverse only if no reasonable factfinder could have found the defendant guilty beyond a reasonable doubt. *Id.*[1]

[1] Mr. Parnell contends, however, that he waived de novo review concerning Count Three because he did not preserve the specific objection to the sufficiency of

A. Count Three

Count Three charged Mr. Parnell with sexual abuse of a minor in violation of 18 U.S.C. §§ 2243(a) and 2246(2)(A). This required proof of a "sexual act," defined here as "contact between the penis and the vulva . . ., and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight." § 2246(2)(A).

Mr. Parnell argues there was no evidence that he penetrated the victim's vulva. The victim testified that she woke up to find Mr. Parnell on top of her, naked, with his body positioned between her legs. He "had his penis on [her] vagina," and she was worried that he was going to "take [her] virginity." R., vol. 1 at 115. His penis was "touching [her] vagina," and he was "rubbing his penis on [her] vagina," but his penis did not go inside her body. *Id.* On further questioning, she explained that the tip of his penis was "right at the entryway of [her] vagina" and he was "starting to" enter her vagina but "it seemed like he was arguing within himself on whether to do it or not." *Id.* at 116.

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the evidence that he now raises on appeal. He argues his challenge to Count Three should therefore be reviewed for plain error. The government disagrees. It responds that the error was adequately preserved for plenary review. Under these circumstances, the government has affirmatively waived any appellate challenge to our de novo review of this issue. We therefore exercise our discretion to employ our usual, de novo standard. *See United States v. McGehee*, 672 F.3d 860, 873 n.5 (10th Cir. 2012) (noting government may "waive the waiver" entailed by a defendant's failure to preserve an issue). In any event, a conviction in the absence of sufficient evidence typically also satisfies the plain error standard. *See United States v. Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013).

When she began crying, Mr. Parnell rolled off her and did not further attempt to assault her that day.

The evidence was sufficient to meet the statutory "penetration" requirement. First, the victim stated Mr. Parnell was "starting to" enter her vagina. But even if this statement leaves the penetration issue unresolved (in light of her testimony that his penis did not go inside her body), the evidence is still sufficient for conviction, given the statute's use of the term "vulva" to define the penetration requirement. The "vulva" is "[t]he external part or opening of the female reproductive tract; the female external genitals." Vulva, Oxford English Dictionary (3d ed. 2019) (accessed online). The vulva includes both the external and internal labia, along with the entry to the vagina. *See id.*; *see also United States v. Jahagirdar*, 466 F.3d 149, 152 (1st Cir. 2006) (stating the term "vulva" includes "the mons pubis, the labia majora, the labia minora, the clitoris, and the vaginal orifice"). Mr. Parnell fails to show Congress intended any other meaning for the term "vulva" than the commonly used definition we have described.

Even if the evidence were insufficient to show that Mr. Parnell's penis entered the victim's *vagina*, that is, the opening covered by the labia, the evidence we have cited was sufficient for a reasonable jury to determine beyond a reasonable doubt that his penis, in arriving at the entryway to her vagina, penetrated her *vulva*, "however slight[ly]." *Cf. United States v. Norman T.*, 129 F.3d 1099, 1104 (10th Cir. 1997) (finding evidence sufficient to establish digital penetration of the victim's "genital opening" as required by § 2246(2)(C), where the defendant's finger injured both the victim's labia majora and labia minora; explicitly rejecting his argument that vaginal penetration was required);

Jahagirdar, 466 F.3d at 155 (stating "penetration of the labia majora is sufficient for conviction" under § 2246(2)(C)). We therefore affirm Mr. Parnell's conviction on Count Three.

B. Counts Eight and Ten

Mr. Parnell challenges the sufficiency of evidence to show that his other minor victim was between 12 and 16 years of age when he assaulted her, as required by Counts Eight and Ten. To convict Mr. Parnell of these counts, the government had to prove that the victim had "attained the age of 12 years but ha[d] not attained the age of 16 years," and was "at least four years younger than" Mr. Parnell. 18 U.S.C. § 2243(a). The indictment charged that the assaults occurred on or between 2005 and 2007. The victim was born in 1993.

The victim's trial testimony concerning her age at the time of the incidents described in Counts Eight and Ten was imprecise and equivocal.[2] She stated the assaults occurred "after [she] had started [her] period," which she claimed was when she was in fourth grade, R., vol. 1 at 263. And she initially stated the assaults occurred when she was "about [in] fourth or fifth grade." *Id.* at 270. But after

[2] Further confusion is entailed by the similarity of the events described in Count Eight and (the ultimately dismissed) Count Seven. In his opening brief, Mr. Parnell argues that the events surrounding Count Eight occurred at some point prior to those of Count Ten. But this argument was apparently due to counsel referencing the victim's testimony concerning Count Seven rather than Count Eight. As the government argues, *see* Aplee Br. at 20, and Mr. Parnell concedes in his reply brief, *see* Reply Br. at 4, the events underlying Counts Eight and Ten allegedly occurred on the same day.

refreshing her recollection with a prior report she had made for law enforcement concerning the incident, for which she had calculated her age, she stated she was "[m]aybe 12 or 13" when the assaults occurred, *id.* at 271, and at that age, she was "probably [in] the fifth grade," *id.* at 270. When asked if she might have been older than 12 or 13 when the assaults occurred, she replied that was possible; but when asked if she could have been younger, she answered unequivocally, "No." *Id.* at 272.

Other testimony from the victim bolstered her chronology. She testified that about a week after the assaults occurred, she had her period, proving she was not pregnant. She also knew the assaults occurred when she was no older than 15, because at that age she remembered discussing with a boyfriend about whether she had previously had sexual intercourse.

Mr. Parnell calculates that the victim would have been 10 to 12 years old in the fourth to fifth grade. He bases this on testimony that the victim was five when she was in kindergarten, and she was then held back for a year in first grade. See R., vol. 1 at 239-40, 271; *see* Aplt. Opening Br. at 20 n.3. But even his calculation would allow a reasonable jury to conclude the victim was 12 years old and in the fifth grade when she was assaulted.

Such a calculation tallies with the victim's other testimony. Although she was unsure about her grade level and exact age at the time of the assaults, she was firm in testifying that they occurred when she was at least 12 or 13 years old. When asked, she specifically denied that she could have been less than 12 years old when she was

assaulted, though she admitted she could have been older than 12 or 13. And she also provided a basis for concluding she was not older than 15 when assaulted.

We find persuasive the Seventh Circuit's opinion on a similar issue in *Barger v. Indiana*, 991 F.2d 394 (7th Cir. 1993). That case was a § 2254 habeas appeal by a school principal convicted of child molestation in state court. Like the federal statute in this case, the relevant state statute criminalized sexual conduct with a child between 12 and 16 years old. *See id.* at 395 n.1. And as in the federal scheme, a sexual crime against a child under 12 was punished more severely. *See id.* at 395. The alleged molestation occurred right around the victim's 12th birthday, during one of two visits she made to the principal's office. But she could not recall the exact date of her visits or whether she was molested during her first or second visit. *See id.* Thus, it was "not entirely clear whether the victim was eleven or twelve at the time of the molestation." *Id.*

The Seventh Circuit determined the jury's verdict that the defendant had molested the victim when she was at least 12 was supported by adequate evidence. It found significant a male student's testimony that he had been present with the victim in the principal's office in the "springtime" of 1988 (the victim's twelfth birthday was February 22, 1988, making it likely she had turned 12 by that time). *See id.* The victim had testified that the boy was present on her visit during which the molestation later occurred. *See id.* But the court also noted various inconsistencies among the witnesses about the victim's two visits to the principal's office, and who was present during these visits. *See id.* It concluded these inconsistencies were not "fatal to the

state's case," however, because "[a] rational trier of fact could have determined that [the defendant] molested the victim during the spring of 1988." *Id.* at 398-99. Discrepancies between the children's stories "merely affect[ed] their relative credibility and probative value" and "[t]heir significance [was] purely a matter for the jury." *Id.* at 399. The Seventh Circuit concluded "that a rational jury could have found that the victim was twelve years old when [the defendant] molested her." *Id.*

As in *Barger,* it was the jury's job to resolve any inconsistencies in the victim's account in this case. Her testimony was not "unbelievable on its face," and we decline to re-weigh it to "com[e] to a conclusion at odds with the one reached by jurors." *United States v. Mendez-Zamora*, 296 F.3d 1013, 1018 (10th Cir. 2002). The victim's testimony was sufficient to sustain the jury's verdict. *See id.* We therefore affirm Mr. Parnell's convictions on Counts Eight and Ten.

II. Sentence on Count Eight

The district court sentenced Mr. Parnell to 420 months' incarceration on Count Eight, to be served concurrently with his other sentences. As the government concedes, this exceeded the maximum statutory sentence available under 18 U.S.C. § 2243(a) of 15 years (180 months). Consequently, we reverse the sentence the district court imposed and remand for resentencing on Count Eight.

CONCLUSION

We affirm the district court's judgment as to Counts Three and Ten. We affirm Mr. Parnell's conviction on Count Eight but reverse his sentence and remand for resentencing on that count.

Entered for the Court

Bobby R. Baldock
Circuit Judge