

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Crim. No. 14-595
	:	
BURTON GERSH & LES SIDWEBER	:	

Diamond, J.

May 5, 2015

MEMORANDUM

Burton Gersh and Les Sidweber are charged with production of child pornography. 18 U.S.C. § 2251(a). As alleged, Defendants transported two girls—aged sixteen and seventeen—from Philadelphia to Defendants’ South Jersey homes, where they took sexually explicit photos of the minors. (Doc. No. 57).

Defendants allege “[u]pon information and belief” that: (1) one of the victims signed a release “indicating that she was 18 years of age or older”; (2) both victims “were strippers or exotic dancers”; and (3) both victims were physically mature. (Doc. Nos. 40 at 2, 45 at 1-2.) Gersh contends this evidence (assuming it exists) would be admissible at trial to support a “mistake-of-age” defense and to rebut the allegation that he purposefully produced child pornography. (Doc. No. 40.) Employing language that generates more heat than light, Sidweber argues that it “would be a travesty of justice” not to admit this evidence. (Doc. No. 45 at 4.) The Government moves to exclude the evidence. (Doc. Nos. 37, 47.)

Gersh also moves to introduce evidence of the victims’ “actual or purported” employment as strippers and their “admitted acts of prostitution” with him. (Doc. No. 40 at 10-12); Fed. R. Evid. 412. Once again, the Government asks me to exclude the evidence. (Doc. Nos. 38, 47.)

I. KNOWLEDGE OF THE VICTIMS' AGES

Mistake-of-Age Defense

Section 2251(a) provides in pertinent part as follows:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e)

18 U.S.C. § 2251(a). A “minor” is defined as “any person under the age of eighteen years.” Id. § 2556(1).

As Gersh concedes, “a defendant’s knowledge of the victim’s age is not an explicit element under . . . § 2251(a).” (Doc. No. 40 at 5-6.) Accordingly, courts have uniformly held that the prosecution must prove only that the victim was under eighteen, not that the defendant knew or should have known that the victim was a minor. See United States v. Fletcher, 634 F.3d 395, 401 (7th Cir. 2011) (collecting cases holding that “knowledge of the performer’s age is not an element of a prosecution for production of child pornography”); see also United States v. X-Citement Video, Inc., 513 U.S. 64, 76 (1994) (Congress deleted the word “knowingly” from an earlier version of § 2251(a) so that the Government would not have to prove “the defendant knew the actual age of the child”); United States v. Cochran, 17 F.3d 56, 60-61 (3d Cir. 1994) (same). Sidweber appears to agree that knowledge of the victim’s minority is not an element of § 2251(a). (Doc. No. 45 at 2 (citing United States v. United States District Court (Kantor), 858 F.2d 534, 538 (9th Cir. 1988)).)

Both Defendants nonetheless rely on Judge Kozinski’s majority ruling in Kantor that although “knowledge of the minor’s age is not necessary for conviction under § 2251(a),” it is a complete defense to show “by clear and convincing evidence that [the defendant] did not know,

and could not reasonably have learned, that the actor or actress was under eighteen years of age.” 858 F.2d at 538-44 (footnote omitted). The Kantor majority reasoned that a mistake-of-age defense would protect defendants from being “put at complete peril” in attempting to distinguish between protected speech (adult pornography) and non-protected speech (child pornography). Id. at 539-541. In the words of Judge Kozinski, were such a defense unavailable, producers of adult pornography “will almost certainly be deterred from producing such materials depicting youthful-looking adult actors; such actors may have considerable difficulty in finding producers willing to cast them; [and] audiences wishing to view films featuring such actors would be denied the opportunity.” Id. at 540. Accordingly, the Kantor majority held that a defendant charged under § 2251(a) has a First Amendment right to present a mistake-of-age defense. Id. at 543-44.

Every Circuit to address Kantor has rejected it. See Ortiz-Graulau v. United States, 756 F.3d 12, 21 (1st Cir. 2014); United States v. Malloy, 568 F.3d 166, 176 (4th Cir. 2009); United States v. Crow, 164 F.3d 229, 236 (5th Cir. 1999); United States v. Humphrey, 608 F.3d 955, 962 (6th Cir. 2010); Fletcher, 634 F.3d at 401-405; United States v. Wilson, 565 F.3d 1059, 1069 (8th Cir. 2009); United States v. Riquene, 552 F. App’x 940, 943 (11th Cir. 2014). Although the Third Circuit has not addressed Kantor, Judge Nealon has ruled that Judge Kozinski’s decision “is required neither by precedent nor common sense.” United States v. Krasner, 841 F. Supp. 649, 656 n. 5 (M.D. Pa. 1993).

I agree with Judge Nealon and the great bulk of Circuit authority. As I have discussed, knowledge that the victim is underage is not an element of § 2251(a). Had Congress intended to allow a mistake-of-age defense, it would have so provided, as have numerous state legislatures in adopting statutes intended to protect minors. See, e.g., Alaska Stat. Ann. § 11.41.445

("[W]henever . . . an offense [such as sexual assault and abuse] depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older."); Ark. Code Ann. § 5-14-102(d)(1) ("When criminality of conduct depends on a child's being below a critical age older than fourteen years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above."); Conn. Gen. Stat. Ann. § 53a-196 ("In any prosecution for obscenity as to minors, it shall be an affirmative defense that the defendant made (1) a reasonable mistake as to age, and (2) a reasonable bona fide attempt to ascertain the true age of such minor, by examining a draft card, driver's license, birth certificate or other official or apparently official document, exhibited by such minor, purporting to establish that such minor was seventeen years of age or older."); 18 Pa. Cons. Stat. Ann. § 3102 (establishing a mistake-of-age defense for sexual crimes "when criminality depends on the child's being below a critical age older than fourteen years"); 18 Pa. Cons. Stat. Ann. § 6301 (same for the crime of corruption of a minor, when the minor is sixteen or older).

I do not share Judge Kozinski's concern that the unavailability of a mistake-of-age defense will inhibit the production of pornography "depicting youthful-looking adult actors." Kantor, 858 F.2d at 540. Federal law already *requires* producers of pornography—including those casting "youthful-looking" actors—to "ascertain, by examination of an identification document containing such information, the performer's name and date of birth." 18 U.S.C. § 2257(b)(1). This record-keeping requirement ensures that "little legitimate pornography would be chilled" in the absence of a mistake-of-age defense. Malloy, 568 F.3d at 175.

Moreover, the Government has a “self-evident” interest “in safeguarding the physical and psychological wellbeing of children.” Id.; Fletcher, 634 F.3d at 403; see also New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) (citing Congressional reports describing the harm child pornography causes “children and the society as a whole”). As the Seventh Circuit has explained:

[P]rotecting children from sexual exploitation and abuse is a governmental objective of critical importance. . . . Even more than the passive viewer of child pornography, the creator of such material not only contributes to but is directly responsible for the exploitation of the child victim. Thus, § 2251(a) targets the very source of the harm.

Fletcher, 634 F.3d at 403 (citations omitted). Holding pornography producers strictly liable for their employment of minors will undoubtedly promote the well-being of children. See id. (“Recognizing a mistake-of-age defense would clearly be at odds with [the] compelling government objective” of “protecting children from sexual exploitation”); Gilmour v. Rogerson, 117 F.3d 368, 372 (8th Cir. 1997) (“[T]he mistake-of-age defense is directly contrary to . . . the State’s interest in banning the sexual exploitation of children . . .”).

Finally, § 2251(a)’s lack of *scienter* requirement as to the victim’s age is of a piece with innumerable laws similarly intended to protect minors:

[A]s both the Supreme Court and our sister circuits have noted, the production of child pornography may be analogized to those sex offenses, like statutory rape, that have traditionally been exempted from the common-law presumption of *mens rea*.

Fletcher, 634 F.3d at 403 (citing X-Citement Video, 513 U.S. at 72 n. 2; Wilson, 565 F.3d at 1068); see also Gilmour, 117 F.3d at 370 (“In construing criminal statutes that protect children from sexual predators . . . the child’s age is a long-established exception to the general rule that proof of *mens rea* is required.” (citing Morissette v. United States, 342 U.S. 246, 251 n. 8 (1952))); Pritchard v. State, 842 A.2d 1244, 1244 (Del. 2004) (legislature’s decision not to

provide a mistake-of-age defense to statutory rape is a “proper exercise of Delaware’s police power to protect children from sexual predators”); Owens v. State, 724 A.2d 43, 52 (Md. 1999) (“The state’s compelling interest in promoting the welfare of children provides a powerful justification for disallowing a mistake-of-age defense to statutory rape.”); State v. Oar, 924 P.2d 599, 602 (Idaho 1996) (“[T]he legislature, in codifying the crime of sexual battery of a minor child, intended to incorporate the immemorial tradition of the common law that a mistake of fact as to the complainant’s age is no defense.”).

In these circumstances, I will not rewrite § 2251(a) and “engraft a reasonable mistake-of-age defense” that Congress decided not put there. Humphrey, 608 F.3d at 962.

Rebuttal Evidence

Gersh asks me to admit at trial evidence that he believed the victims were eighteen to show that he did not “purposefully” produce child pornography. (Doc. No. 40 at 5.) This is not a very artful reformulation of his mistake-of-age defense.

The child pornography statute requires only proof that a defendant acted with the purpose of producing “any visual depiction of [sexually explicit] conduct” involving a minor, not that the defendant knew or should have known the victim was a minor. 18 U.S.C. § 2251(a). The statute’s “purposeful” element thus applies only to the production of the visual depiction, not the age of the victim. Accordingly, I will not allow Gersh to “rebut” the Government’s case with this mistake-of-age evidence.

II. RULE 412

Gersh asks me to admit at trial evidence that the victims: (1) were employed at a strip club; and (2) had sexual relationships with him. (Doc. No. 40 at 10-12.) Although evidence of a victim’s sexual activity or predisposition is generally inadmissible, Gersh argues that because

this evidence will explain the “the context and purpose of the relationship between him and the victim[s],” its exclusion would “violate [his] constitutional rights.” (Id.); see Fed. R. Evid. 412(a), (b)(1)(C).

Because the victims’ employment does not appear to be relevant to the instant charges, excluding this evidence likely would not violate Gersh’s constitutional rights. Evidence respecting the victims’ relationships with Defendants presents a more complex question. Gersh does not seek the admission of this evidence pursuant to subsection B—presumably because “consent” is not an issue in this case. See United States v. Raplinger, 555 F.3d 687, 692-93 (8th Cir. 2009) (consent evidence properly excluded in child pornography prosecution); Fed. R. Evid. 412(b)(1)(B). Rather, arguing that its exclusion would be unconstitutional, Gersh invokes only subsection C. Fed. R. Evid. 412(b)(1)(C). Yet, in urging the admission of the victims’ “admitted acts of prostitution” with him, Gersh has not “specifically describe[d] the evidence and state[d] the purpose for which it is to be offered.” Id. (c)(1)(A).

In the absence of detailed argument, and without an evidentiary record, I cannot rule on these questions with certainty. Accordingly, I will deny the Government’s and Gersh’s Rule 412 Motions without prejudice, and order the Parties to submit more detailed memoranda.

An appropriate Order follows.

/s/ Paul S. Diamond

Paul S. Diamond, J.

May 5, 2015