

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 SHARIF EL-BATTOUTY : NO. 18-352-3

MEMORANDUM

Bartle, J.

November 22, 2019

Defendant Sharif El-Battouty ("El-Battouty") was charged in a superseding indictment with one count of participation in a child exploitation enterprise, in violation of 18 U.S.C. § 22552A(g), and one count of conspiracy to advertise child pornography, in violation of 18 U.S.C. §§ 2251(d) and (e). After a five-day trial, the jury returned a verdict of guilty on both counts. Now before the court is the supplemental motion of El-Battouty for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and his motion for a new trial pursuant to Rule 33.

I

Under Rule 29, the court must "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The court must review the evidence in the light most favorable to the Government to determine whether a rational jury could have found a defendant guilty beyond a reasonable doubt. See United States v. Wolfe, 245 F.3d 257, 261

(3d Cir. 2001). All reasonable inferences, of course, are drawn in favor of the jury's verdict. See United States v. Smith, 294 F.3d 473, 478 (3d Cir. 2002). A defendant carries a heavy burden when challenging the sufficiency of the evidence. See United States v. Lore, 430 F.3d 190, 203-04 (3d Cir. 2005).

Pursuant to Rule 33, the court may grant a new trial "if the interest of justice so requires." The standard of review under Rule 33 is different than under Rule 29. Here, the evidence is not evaluated in the light most favorable to the Government. See United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). Instead, a new trial may be granted if in the view of the court the verdict is against the weight of the evidence. Id. The court must consider whether there is "a serious danger that a miscarriage of justice has occurred." See United States v. Silveus, 542 F.3d 993, 1004-05 (3d Cir. 2008).

## II

The facts presented as trial, taken in the light most favorable to the Government, are as follows. El-Battouty was a member of two servers on an internet website called Discord, first in a server called "Camgirls" and subsequently in a server called "Thot Counselors." During trial, the Government presented the testimony of seven witnesses and approximately 200 exhibits. The evidence generally fell into five categories: (1) screenshots of the Camgirls/Thot Counselors Discord servers

captured by the Federal Bureau of Investigation ("FBI") in an undercover capacity; (2) chats and image/video files obtained from the Discord servers; (3) child pornography and other Camgirls/Thot Counselors-related evidence found on the defendant's computer and other digital devices; (4) the defendant's statement to the FBI at the time of the execution of a search warrant at his residence; and (5) testimony from Timothy Friel, a separately-indicted member of the enterprise about the purpose and operation of Camgirls/Thot Counselors.

The evidence showed that members of the enterprise, while they did not know the identity of each other, worked together to create and exchange child pornography. Generally, users captured videos of minors engaging in sexually explicit conduct on web cameras from live-streaming sites and then shared links to the videos on the Discord servers. They also posted links to minor victims' profiles on the live-streaming sites so that other members could view the minors live on camera. Members of the servers posted child pornography in response to requests from other members and traded child pornography amongst themselves. Users further engaged in discussion regarding minor victims, tips for capturing and creating child pornography, and methods of evading detection by law enforcement.

The members of the Discord servers at issue were instructed by higher ranking members or administrators that they

had to contribute by posting content or they could be "purged" from the site. The servers had a hierarchy of membership whereby only certain members had access to particular areas of the site, which were found in locked channels.

El-Battouty, under the username "Fritos," was an active member of the Discord servers. He achieved one of the highest ranks on the servers and therefore had access to certain locked channels. He posted links to .gif files of child pornography, sometimes in response to other members' requests.<sup>1</sup> He also bragged about his "epic" skills in coercing minors to engage in sexually explicit conduct. His digital devices seized by law enforcement contained vast amounts of child pornography of the type sought by the Camgirls/Thot Counselors group as well as PowerPoint presentations of the "game" he used to coerce minors to engage in sexually explicit conduct for him on web camera.

### III

We begin with El-Battouty's motion for a judgment of acquittal. El-Battouty first asserts that the Government failed to prove at trial that El-Battouty engaged in a child exploitation enterprise as charged in Count One of the superseding indictment. That statute provides:

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1. The evidence presented at trial showed that a .gif is a short, animated image file. El-Battouty often created .gif files from longer videos of child pornography.

A person engages in a child exploitation enterprise for the purposes of this section if the person violates . . . chapter . . . 110 (except for sections 2257 and 2257A) . . . as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

18 U.S.C. § 2252A(g). The superseding indictment charged three violations of chapter 110: (1) advertising child pornography, in violation of 18 U.S.C. § 2251(d); (2) transportation of child pornography, in violation of 18 U.S.C. § 2252(a)(1); and (3) distribution and receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2). El-Battouty contends that, under the plain language of the statute, the Government was required to prove at trial that each individual predicate offense was committed in concert with three or more other persons. He maintains that he acted alone and for his own benefit, and not as part of any enterprise of three or more persons.

El-Battouty's argument is not persuasive. While our Court of Appeals has not considered the issue, both the Courts of Appeals for the Sixth Circuit and the Ninth Circuit have held that the more natural reading of § 2252A(g) is that "the required total of three other persons may be tallied by considering the predicate counts together." United States v. Daniels, 653 F.3d 399, 412 (6th Cir. 2011); see also United States v. Grovo, 826 F.3d 1207, 1215 (9th Cir. 2016). The

statute proscribes committing "a series of felony violations" and states the defendant must "commit[ ] those offenses"—not "each offense"—"in concert with three or more other persons." 18 U.S.C. § 2252A(g) (emphasis added); see also Grovo, 826 F.3d at 1215. The "in concert" requirement is therefore best read as referring to the "series" of predicate felonies, rather than each offense individually.

Here, the Government introduced ample evidence that El-Battouty committed the series of predicate offenses required to sustain a conviction under § 2252A(g) in concert with three or more persons. Rather than showing that El-Battouty was a lone wolf who merely accessed Discord to view child pornography, the evidence presented at trial demonstrated that on numerous occasions El-Battouty posted child pornography in .gif files in response to requests from other Discord users. He requested child pornography involving certain victims from other users, offered to trade child pornography files with other users, and solicited technical help with accessing and downloading files from other users. Thus, El-Battouty's claim that he acted alone and not with others is contrary to the weight of the evidence admitted at trial and is not basis for a judgment of acquittal.

United States v. DeFoggi, cited by El-Battouty, is distinguishable. 839 F.3d 701 (8th Cir. 2016). There, the predicate offenses with which the defendant was charged under

§ 2252A(g) were four counts of accessing with intent to view child pornography in violation of 18 U.S.C. § 2252A(a)(5)(b). Id. at 710. For each predicate count, the jury was presented with screenshots of other members' profiles on a website called "PedoBook" and the images the defendant clicked on that were uploaded to the profiles on that website. Id. Here, as discussed above, El-Battouty did not merely access child pornography and exchange messages about it. He also requested certain pornography, traded files, posted his own content to share with other users, and sought and received assistance from other members on how to acquire child pornography.

El-Battouty also asserts that the Government failed to prove at trial that the predicate acts in question involved more than one victim. According to El-Battouty, the Government failed to connect him to any of the victims for which evidence was presented at trial. He reasons that the evidence presented by the Government as to victims of the enterprise was irrelevant and prejudicial to him. We disagree. To sustain a conviction for engaging in a child exploitation enterprise, the Government was required to prove beyond a reasonable doubt that more than one minor victim was involved in the series of predicate offenses. See Daniels, 653 F.3d at 412. The evidence presented at trial connected El-Battouty to at least five separate minor victims. Specifically, evidence from the Government's

surveillance of the Discord servers at issue showed El-Battouty posting and trading files of several different minor victims. Evidence from El-Battouty's computer and hard drive also showed that El-Battouty possessed a large magnitude of child pornography that depicted numerous minor victims. For example, one child pornography video posted on the Discord server by a user called "Choad" was later found on the defendant's hard drive.

We also reject El-Battouty's argument that he was prejudiced by the introduction of evidence regarding other victims of the enterprise. In a child exploitation enterprise, like any other conspiracy-type charge, the Government is entitled to introduce evidence of the criminal acts of other conspirators to establish the defendant's guilt. See United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001) (citing Pinkerton v. United States, 328 U.S. 640, 647-48 (1946)). Thus, evidence of other victims of the child exploitation enterprise was properly admitted at trial and is not grounds for a judgment of acquittal under Rule 29.

El-Battouty also contends with respect to Count One that the evidence was insufficient to demonstrate sexually explicit content. Contrary to El-Battouty's position, the Government presented at trial multiple .gif files, video files, and screenshots of minors masturbating or displaying their

genitals, including files depicting minors inserting objects into their vaginas. Such files were sufficiently explicit to constitute child pornography under the law. See 18 U.S.C. § 2256(2)(A). El-Battouty also cites to three instances in which the court experienced a delay or other technical difficulties in publishing to the jury exhibits depicting child pornography. These three instances were isolated and were all resolved. There is no evidence that any juror remained unable to view the evidence thereafter. In addition, all exhibits were sent back with the jury for deliberations. Accordingly, we decline to enter a judgment of acquittal on Count One on this ground.

We next turn to El-Battouty's motion for judgment of acquittal as to his conviction for conspiracy to advertise child pornography as charged in Count Two of the superseding indictment. According to El-Battouty, the Government failed to prove that he entered into any agreement to advertise child pornography and failed to prove that he committed the underlying substantive offense of advertising child pornography.

The statute at issue, 18 U.S.C. §§ 2251(d) and (e), provides punishment for anyone who

[k]nowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering . . . to receive, exchange, buy, produce, display, distribute, or reproduce,

any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct.

"In a conspiracy indictment, the gist of the offense is the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act." United States v. Applewhaite, 195 F.3d 679, 684 (3d Cir. 1999) (quoting United States v. Wander, 601 F.2d 1251, 1259 (3d Cir. 1979)). The Government need not introduce direct evidence to establish a conspiratorial agreement. United States v. Fullmer, 584 F.3d 132, 160 (3d Cir. 2009) (citing United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007)). Rather, the Government can prove an agreement using circumstantial evidence and "based upon reasonable inferences drawn from actions and statements of the conspirators or from the circumstances surrounding the scheme." Id. (quoting McKee, 506 F.3d at 238). A conspiracy under § 22551 does not require proof of an overt act. See Whitfield v. United States, 543 U.S. 209, 214 (2005). Moreover, the Government need not prove that the defendant or any other member of the conspiracy actually completed the underlying substantive offense. See United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014); Wander, 601 F.2d at 1259-60.

While there is no direct evidence that El-Battouty expressly agreed to participate in the conspiracy to advertise

child pornography, there was ample circumstantial evidence from which the jury could have inferred his agreement to do so. As discussed above, the evidence showed that El-Battouty asked other users of which minor victims to make child pornography .gifs and then posted files in response. He also posted and exchanged child pornography with users and offered to attempt to initiate communication with a particular minor victim requested by another user. The members of the Discord server established a hierarchy wherein members who posted child pornography gained access to more channels within the servers and "lurkers" or "leeches" who did not contribute were at least threatened with "purging," that is, removal from the server. They also exchanged tips for creating and sharing child pornography and techniques to avoid detection by law enforcement. This evidence was sufficient for the jury to find beyond a reasonable doubt that El-Battouty participated in a conspiracy to advertise child pornography.

El-Battouty also maintains that the Government relied improperly on the testimony of Timothy Friel. Friel was a member of the Discord servers at issue who was charged in a separate indictment and ultimately pleaded guilty to engaging in a child exploitation enterprise. Friel testified at trial regarding the existence of an agreement between users to share child pornography: "basically, it was a community effort where,

you know, you would either post videos of people or girls, and if you had missed something you could ask if somebody else had it and people use—would usually respond and help, help each other out.” As a member of the Discord servers, his testimony was relevant to establish the existence of a conspiracy to advertise child pornography even if he himself was not charged with participating in the conspiracy.

El-Battouty also takes issue with the credibility of Friel because he was a cooperating witness and he admitted to lying when initially approached by law enforcement. However, the jury was instructed on judging the credibility of witnesses and the impeachment of witnesses based on prior inconsistent statements. This court also specifically instructed the jury regarding assessing the credibility of Friel and cautioned that “[h]is testimony was received in evidence and may be considered by you, but you should consider his testimony with great care and caution. . . . Whether or not his testimony may have been influenced by the plea agreement is for you to determine.” Thus, the admission of Friel’s testimony and any reliance on it by the jury is not grounds for a judgment of acquittal.

El-Battouty further contends that the Government failed to prove at trial that he actually advertised any child pornography. He reasons that many of the channels on the Discord servers were locked and thus available only to certain

Discord members and not the public at large. Although our Court of Appeals has not addressed the issue, we agree with the other circuits to have considered the definition of "advertisement" under 18 U.S.C. § 2251(d) that such term includes not solely notices to the general public but also advertisements to a particular subset of the public. See Grovo, 826 F.3d at 1217-18; United States v. Franklin, 785 F.3d 1365, 1367-70 (10th Cir. 2015); United States v. Wayerski, 624 F.3d 1342, 1348 (11th Cir. 2010). El-Battouty also points to evidence that he "hoarded" child pornography and maintains that this evidence is inconsistent with any finding that he conspired to advertise child pornography. But to be guilty of a conspiracy, El-Battouty need not himself have ever advertised child pornography. It is sufficient that he knowingly joined an agreement whose purpose was advertising child pornography. Regardless, the evidence presented at trial demonstrated that El-Battouty did, in fact, post child pornography on Discord on multiple occasions and that he posted messages seeking or offering child pornography. This is sufficient evidence to sustain his conviction under Rule 29.

In addition, El-Battouty challenges his convictions on both Count One and Count Two on the ground that the Government failed to prove venue. His trial counsel did not specifically raise venue in his initial motion for a judgment of acquittal at

the close of the Government's case or at any other time before or during trial. Thus, this issue is waived. See United States v. Perez, 280 F.3d 318, 334-35 (3d Cir. 2002). Regardless, we agree with the Government that it produced sufficient evidence of venue through the acts of Friel, who committed acts in furtherance of the child exploitation enterprise in Penndel, Pennsylvania, which the court took notice is located within the Eastern District of Pennsylvania.

Finally, El-Battouty asserts that he is entitled to a judgment of acquittal on both counts because his statement to FBI agents was involuntary and was taken in violation of his rights under the Fifth Amendment to the United States Constitution. See Miranda v. Arizona, 384 U.S. 436, 496 (1966). Under Rule 12(b)(3)(C) of the Federal Rules of Criminal Procedure, any motion to suppress a statement or other evidence must be made before trial. El-Battouty did not file such pretrial motion and did not object to the introduction of his statement at trial. We therefore decline to consider this issue.

The evidence was more than sufficient to convict El-Battouty. Accordingly, his motion for a judgment of acquittal under Rule 29 will be denied.

IV

El-Battouty also moves for a new trial pursuant to Rule 33. In this instance, as stated above, the evidence is not evaluated in the light most favorable to the Government. See Johnson, 302 F.3d at 150. Instead, a new trial may be granted if in the view of the court the verdict is against the weight of the evidence. Id.

El-Battouty asserts that “[b]ased upon the rapidity with which the jury returned its verdict, it is clear that the jurors had made up their minds before [his] guilt even before they entered the jury deliberation room.” He thus reasons that the jury failed to deliberate properly and that such failure rendered the trial fundamentally unfair.

The jury in this matter deliberated for approximately 95 minutes. Although this is not a lengthy amount of time, it is not outside the realm of reasonable deliberation time given the fact that this trial involved only one defendant who was charged with two counts. Both counts were related and were based on the same evidence.

“The [law] presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” United States v. Hernandez, 176 F.3d 719, 734 (3d Cir.

1999) (quoting Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985)); see also United States v. Hakim, 344 F.3d 324, 326 (3d Cir. 2003). This court instructed the jury at length on the law relevant to the case as well as their duties as jurors. El-Battouty points to no specific evidence to support his position that the jury failed to deliberate or deliberated prematurely except for his subjective belief that the length of deliberations was inordinately brief. We will not disregard the well-established presumption that jurors follow instructions and conscientiously engage in their duties as jurors based on mere speculation. Instead, we conclude that the length of the deliberations was more likely due to the strength of the Government's evidence than any failure by the jurors to deliberate.

A new trial in the interest of justice is not required, and there is no serious danger that a miscarriage of justice occurred. Accordingly, the motion of El-Battouty for a new trial pursuant to Rule 33 will be denied.<sup>2</sup>

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22. In his motion for a new trial, El-Battouty raises many of the issues he raised in support of his motion for judgment of acquittal under Rule 29. We reject those issues as grounds for a new trial for the reasons stated above in connection with the motion for judgment of acquittal.

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SHARIF EL-BATTOUTY	:	NO. 18-352-3

ORDER

AND NOW, this 22nd day of November, 2019, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure (Doc. # 166) is DENIED; and

(2) the motion of defendant for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure (Doc. # 167) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.