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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFERY DENTON SUMKA,

Defendant - Appellant.

No. 22-7023

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00225-JFH-1)

Doyle R. Bunch, III, of Burleson, Pate & Gibson, Dallas, Texas, for Defendant-Appellant.

James Robert Wolfgang Braun, Special Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with him on the brief), Office of the United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

SEYMOUR, Circuit Judge.

Mr. Jeffery Denton Sumka was sentenced to 137 months' imprisonment for sexual abuse of a minor. At sentencing, the district court applied several enhancements over Mr. Sumka's objection after finding that Mr. Sumka had undue influence over his victim,

engaged in a pattern of illegal sexual conduct, and committed an offense involving a vulnerable victim. On appeal, Mr. Sumka challenges the application of these enhancements. We hold that the court did not err in applying the enhancements and affirm.

Background

Mr. Sumka was charged with and pled guilty to one count of sexual abuse of a minor in Indian Country in violation of 18 U.S.C. §§ 2243(a)(1), 2246(2)(A), 1151, and 1153. The indictment alleged that, over a period of more than three years, Mr. Sumka engaged in sexual acts with S.M., a minor between the ages of twelve and sixteen. Mr. Sumka is eleven years older than S.M.

S.M. met Mr. Sumka through a friend he was dating, also a minor. Mr. Sumka provided S.M., who was eleven years old and addicted to drugs, with methamphetamine and marijuana. The two later began dating and started having sexual intercourse after she turned twelve. S.M. recounted recurring sexual relations, including at least ten times when she was twelve and once when she was thirteen. She also reported that on three occasions, when she was thirteen and fourteen, she sent Mr. Sumka photographs of her breasts at his request. The pair lived together at times, continuing their relationship until August 2020. S.M. reported that she last had sexual intercourse with Mr. Sumka when she was fifteen. She gave birth to a baby in December 2020, and genetic testing confirmed that Mr. Sumka was the father. S.M. reported that Mr. Sumka was verbally

abusive throughout their relationship and became physically abusive after she became pregnant.

S.M. had an unstable home life, with Child Welfare being involved since her birth. She was frequently in the custody of the Department of Human Services ("DHS"), including during her relationship with Mr. Sumka. She even ran away from DHS custody to be with Mr. Sumka.

The presentence report ("PSR") recommended several guideline enhancements to which Mr. Sumka objected. Relevant to this appeal, the PSR recommended a four-level enhancement under U.S.S.G. § 2A3.2(b)(2) because Mr. Sumka had undue influence on S.M., and a five-level enhancement under U.S.S.G. § 4B1.5(b)(1) because Mr. Sumka engaged in a pattern of illegal sexual conduct. Four days before sentencing, the district court alerted the parties that it was considering imposing an additional enhancement under U.S.S.G. § 3A1.1(b)(1) because S.M. was a vulnerable victim. *See* Rec., vol. I at 6.

At sentencing, the court overruled Mr. Sumka's objection to the undue influence enhancement because he had not rebutted the presumption that a defendant ten years or older than his victim exercises undue influence. Rec., vol. III at 46–47. The court also overruled his objection to the § 4B1.5 enhancement because Mr. Sumka engaged in sexual conduct with S.M. repeatedly over several years. *Id.* at 48–49. Mr. Sumka then argued that there was no basis for the vulnerable victim enhancement. The court disagreed, finding that S.M. was an unusually vulnerable victim "due to her lack of

support system, unstable homelife and frequent placement in DHS." *Id.* at 51. The court noted that S.M. "had a lengthy history with Child Welfare" and that "Child Welfare had been in her life since birth." *Id.* at 51–52.

Based on these and other rulings, the court calculated a guideline range of 110 to 137 months of imprisonment. The court imposed a sentence of 137 months.

Discussion

Mr. Sumka argues that the district court erred in applying three enhancements under the sentencing guidelines. "We review the district court's legal conclusions under the Sentencing Guidelines de novo and its findings of fact for clear error, 'giving great deference to the district court's application of the Guidelines to the facts.'" *United States v. Cifuentes-Lopez*, 40 F.4th 1215, 1218 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 467 (2022) (quoting *United States v. Evans*, 782 F.3d 1115, 1117 (10th Cir. 2015)).

A. Undue Influence

The guideline for sexual abuse of a minor is § 2A3.2. Under § 2A3.2(b)(2), the base offense level is increased by four if the defendant did not have custody, care, or supervisory control over the minor but "otherwise unduly influenced the minor to engage in prohibited sexual conduct." The commentary instructs courts to "closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." § 2A3.2, cmt. n.3(B). There is a rebuttable presumption that the enhancement applies, however, if "a participant is at least 10 years older than the minor." *Id.* The "rebuttable presumption shifts the burden

of producing evidence to rebut the presumption to" the defendant. *See United States v. Castellon*, 213 F. App'x 732, 737 & n.5 (10th Cir. 2007) (discussing an "identical" undue influence enhancement in U.S.S.G. § 2G1.3).[1]

Because Mr. Sumka is eleven years older than S.M., there is a presumption of undue influence. In attempting to rebut the presumption, Mr. Sumka argues that his relationship with S.M. was completely voluntary. He highlights that S.M. voluntarily lived with him (including in her father's home), ran away from home to be with him, sent him photographs of her breasts, and told investigators she still loved him. In sum, Mr. Sumka argues that S.M. "did, of her own volition make extraordinary efforts to continue her relationship with [him], even when [he] was not in proximity or even in contact with" her. Aplt. Br. at 13. Mr. Sumka made primarily the same arguments below, which the district court found insufficient to rebut the presumption. We agree.

To assume that a child who is addicted to drugs is capable of making "voluntary" decisions concerning sexual relations with an adult man is to begin with a false premise. The circumstances of the relationship cast further doubt on the voluntariness of S.M.'s behavior. As highlighted by the government, Mr. Sumka began providing S.M. with addictive drugs before their romantic relationship began. She reported that he later used the relationship to coerce her into acquiring drugs for him. Rec., vol. II at 31. S.M. also reported that Mr. Sumka had been verbally and physically abusive. *Id.* at 29, 31.

[1] Unpublished opinions are not binding precedent but may be relied upon for their persuasive value. 10th Cir. R. 32.1.

Moreover, the PSR indicates that S.M. sent Mr. Sumka the topless photographs at *his* request and that she thought of him as a father figure. *Id.* at 29. The import of S.M.'s supposed voluntariness is further diminished by the fact that she had an unstable home life and was in and out of DHS custody. In addition to the fact that S.M. was not able to legally consent to sexual relations with Mr. Sumka, these circumstances undermine Mr. Sumka's claims of voluntariness. Accordingly, the district court did not err in applying the undue influence enhancement.

B. Pattern of Activity

Under § 4B1.5(b)(1), a defendant convicted of a covered sex crime is subject to a five-level enhancement if "the defendant engaged in a pattern of activity involving prohibited sexual conduct." The commentary clarifies that a pattern of activity is established if the defendant engaged in the prohibited conduct "on at least two separate occasions." § 4B1.5, cmt. n.4(B)(i). A court can consider such an occasion of prohibited conduct regardless of whether it "occurred during the course of the instant offense" or resulted in a separate conviction. § 4B1.5, cmt. n.4(B)(ii). Interpreting this language, we have held "that § 4B1.5(b) may apply where the only pattern of activity is conduct involved in the present offense of conviction." *Evans*, 782 F.3d at 1117 (internal quotation marks, citation, and alterations omitted).

Mr. Sumka made a conclusory objection in district court, claiming that a voluntary sexual relationship lasting three years was insufficient to support the enhancement. The

district court overruled the objection, citing evidence in the PSR that Mr. Sumka engaged in prohibited sexual conduct with S.M. numerous times.

On appeal, Mr. Sumka argues there is no evidence he engaged in prohibited sexual conduct outside of the timeframe alleged in the indictment. Although he acknowledges our precedent stating that the enhancement can be supported solely by conduct constituting the offense of conviction, he argues for the first time that his case is distinguished by an "insufficiently specific indictment." Aplt. Br. at 17. The government asserts that this argument is waived. We need not reach that issue, however, because Mr. Sumka fails to explain how the indictment was lacking or why a vague indictment would make the enhancement inapplicable. The PSR identifies at least a dozen separate occasions of prohibited sexual conduct between Mr. Sumka and S.M. *See Cifuentes-Lopez*, 40 F.4th at 1220 (enhancement "can be applied to either repeated abuse of a single minor or separate abuses of multiple minors"). Mr. Sumka does not dispute that any of these incidents occurred. The district court therefore did not err in applying the enhancement for engaging in a pattern of prohibited sexual activity.

C. Vulnerable Victim

Under § 3A1.1(b)(1), a defendant is subject to a two-level enhancement if he "knew or should have known that a victim of the offense was a vulnerable victim." In relevant part, the guidelines define "vulnerable victim" as a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." § 3A1.1, cmt. n.2. The enhancement does *not*

apply "if the factor that makes the person a vulnerable victim is incorporated in the offense guideline." *Id.* Thus, "if the offense guideline provides an enhancement for the age of the victim," the vulnerable victim enhancement does not apply "unless the victim was unusually vulnerable for reasons unrelated to age." *Id.*

We have held that "'[v]ulnerable victims' are individuals unable to protect themselves who therefore require greater societal protection." *United States v. Proffit*, 304 F.3d 1001, 1007 (10th Cir. 2002). "[T]he evidence must . . . distinguish the victim as atypical of the usual targets *of the relevant criminal conduct*." *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008) (quoting *United States v. Caballero*, 277 F.3d 1235, 1251 (10th Cir. 2002)) (emphasis and second alteration in original). Courts "must make an individualized determination; it is not enough that a victim belongs to a class generally considered vulnerable." *Id.* at 1300–01.

At sentencing, Mr. Sumka argued that the vulnerable victim enhancement did not apply because age and gender could not be considered and S.M. did not have a relevant mental impairment. The government did not present an argument. Based on facts set forth in the PSR, the court concluded that S.M. was "vulnerable due to her lack of support system, unstable homelife and frequent placement in DHS." Rec., vol. III at 51. In applying the enhancement, the court noted that Child Welfare had been involved in S.M.'s life since birth. *Id.* at 51–52. The court modified the PSR to note that § 3A1.1(b)(1) should be applied in this case. *Id.* at 52.

On appeal, Mr. Sumka posits that S.M.'s lengthy history with DHS and unstable home life did not make her *unusually* vulnerable as compared to the typical victim of his crime of conviction. "We review the district court's identification of unusually vulnerable victims for clear error." *United States v. Chee*, 514 F.3d 1106, 1117 (10th Cir. 2008) (quoting *Caballero*, 277 F.3d at 1250). However, "to the extent the defendant asks us to interpret the Guidelines or hold that the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review." *Scott*, 529 F.3d at 1300 (internal quotation marks, citation, and alterations omitted). The parties dispute whether our review should be for clear error or de novo. We decline to resolve this issue because we would affirm the enhancement under either standard.

The government cites cases where our sister circuits affirmed the enhancement for defendants convicted of violating the Mann Act, 18 U.S.C. § 2421 et seq., which criminalizes sex trafficking offenses. *See United States v. Irving*, 554 F.3d 64 (2d Cir. 2009); *United States v. Evans*, 272 F.3d 1069 (8th Cir. 2001). In *Irving*, the Second Circuit held that the minor victims' homelessness and lack of parental supervision made them unusually vulnerable. 554 F.3d at 75. In *Evans*, the Eighth Circuit recognized that there was some commonality between the victims and typical minor Mann Act victims, who may be runaways with unstable home lives and drug addictions. 272 F.3d at 1089–90. The court nonetheless granted great deference to the sentencing court and affirmed applications of the enhancement under a clearly erroneous standard. *Id.* at 1090, 1091,

1095. The persuasive value of these cases, however, is undermined by our opinion in *United States v. Scott*, where we held that a victim's runaway status could not support the enhancement because "unstable personal life is sufficiently common among Mann Act victims." 529 F.3d at 1302.

But *Scott* is not dispositive here because Mr. Sumka was not convicted of violating the Mann Act. Unlike S.M., who had an unstable homelife, many minor victims of sexual abuse have familial relationships with their abusers who live or visit in their stable homes. Moreover, the district court did not rely solely on the fact that S.M. had an unstable home life; it also highlighted the length and extent of DHS and Child Welfare involvement in her life. These factors reasonably distinguish S.M. from other victims of sexual abuse.

Application of the enhancement is also supported by S.M.'s addiction and the fact that Mr. Sumka began providing her with drugs before their sexual relationship began. Because S.M. was dependent on Mr. Sumka to support her addiction, she was particularly susceptible to falling victim to sexual abuse by him. Although the district court did not cite this factor in applying the enhancement, we can affirm the application of a sentencing enhancement for any reason supported by the record. *United States v. Perrault*, 995 F.3d 748, 778 (10th Cir. 2021).[2] Considering S.M.'s drug addiction in

[2] We note that the district court applied this enhancement sua sponte. Sentencing courts, however, are obligated to consider all relevant factors and are not restricted to recommendations made by probation or the parties. *See Scott*, 529 F.3d at 1298–99 (where PSR contained facts relating to the victim's vulnerability, the "court clearly had

conjunction with the factors cited by the district court and giving due deference to the court's application of the guidelines to the facts, we cannot say that the court erred in applying the vulnerable victim enhancement.[3]

Mr. Sumka contends that there is no indication in the record that he knew or should have known of S.M.'s vulnerabilities. To the contrary, the PSR indicates that S.M. left DHS custody to be with Mr. Sumka and that he provided her with illegal drugs. He was certainly aware of her drug dependency and, at minimum, should have been aware of the circumstances that made it possible for her to live with him.

Conclusion

We hold that the district court did not err in applying the undue influence, pattern of prohibited sexual conduct, and vulnerable victim enhancements. Accordingly, we affirm Mr. Sumka's sentence.

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the authority to explore [this] aspect[] of the crime further, regardless of the probation officer's conclusion that [it] did not warrant additional enhancements"). As we have pointed out, the PSR in this case contains facts supporting the vulnerability of S.M.

[3] The district court's explanation was minimal as to why S.M. was an "atypical" or "unusually vulnerable" victim. But to the extent Mr. Sumka attempts a failure-to-explain argument on appeal, he did not object on that specific ground in district court, simply "not[ing] an objection to the Court's ruling under 3A1.1(b)." Rec., vol. III at 54. He therefore has waived this argument by failing to argue plain error on appeal. *See United States v. Durham*, 902 F.3d 1180, 1239 (10th Cir. 2018); *United States v. DeRusse*, 859 F.3d 1232, 1236 n.1 (10th Cir. 2017).