

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RANDALL FREDRICK MUHLENBRUCH,

Defendant.

No. 4:07-cr-00155-JEG

O R D E R

Before the Court is a Motion for New Trial brought by Defendant Randall Fredrick Muhlenbruch (Defendant), pursuant to Federal Rule of Criminal Procedure 33(a). The Government resists. Although Defendant has requested a hearing, the Court finds no hearing is necessary in resolution of this motion. The matter is fully briefed and ready for disposition.

I. BACKGROUND

On June 20, 2007, the Grand Jury charged Defendant in a three-count indictment with “Receipt of Child Pornography,” in violation of 18 U.S.C. § 2252(a)(2) (Count One); and “Possession of Child Pornography,” in violation of 18 U.S.C. § 2252(a)(4)(B) (Count Two). Count Three was for forfeiture of property relating to the charged offenses. On March 6, 2008, Defendant filed a motion to suppress, arguing the search and seizure of images from his computer by Jarett Klaas (Klaas), a private citizen, and the subsequent search and seizure of the computer by law enforcement violated his Fourth and Fourteenth Amendment rights. After a hearing on the motion, this Court issued an order denying Defendant’s motion to suppress. The case proceeded to a jury trial, which began on March 30, 2009. The jury returned its verdict on April 1, 2009, finding Defendant guilty on Counts One and Two.

Defendant filed the present motion,¹ arguing the interests of justice require that he receive a new trial because (1) throughout the trial the prosecuting attorney and the witnesses for the Government incorrectly and prejudicially referred to the Defendant's case as a child pornography case; (2) the final jury instructions describing both Counts One and Two were based on instructions for crimes under 18 U.S.C. § 2252A, not for sexual exploitation of a minor under 18 U.S.C. § 2252; (3) the Government's expert witness failed to preserve his technical notes; (4) the Court erred by replaying Defendant's videotaped statement for the jury; (5) the Court erred in overruling Defendant's hearsay objection; and (6) the Court erred by denying Defendant's motion to suppress, thus allowing Defendant's videotaped statement into evidence, which unfairly prejudiced Defendant's right to a fair trial.

II. DISCUSSION

“Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). “In determining whether a defendant is entitled to a new trial, the district court may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.” United States v. Johnson, 474 F.3d 1044, 1051 (8th Cir. 2007) (internal quotation omitted). “However, the authority to grant a new trial should be exercised sparingly and with caution. The jury's verdict must be allowed to stand unless the evidence weighs heavily enough against the verdict [such] that a miscarriage of justice may have occurred.” United States v. Sturdivant, 513 F.3d 795, 802 (8th Cir. 2008) (internal quotation omitted) (alteration in original).

¹ The Motion for New Trial was timely filed following the verdict. Defendant later sought a delay in the Court's consideration of the motion for the purpose of conducting further investigation regarding the forensic evidence. Several weeks later, the Court was advised by the parties that further investigation could be closed and the motion considered. There was no supplement to the record.

A. Government's References to Child Pornography

Defendant contends the use of the terminology "child pornography" by the Government and its witnesses during his trial prejudiced Defendant because the terminology "child pornography" is more expansive and covers more conduct than does the charged offense of "sexual exploitation of minors."

Count One of Defendant's indictment, captioned "Receipt of Child Pornography," charged as follows:

On or about August 6, 2004, and continuing until on or about December 11, 2004, in Marshall County, in the Southern District of Iowa, the Defendant, RANDALL FREDRICK MUHLENBRUCH, did knowingly receive visual depictions that had been shipped and transported in interstate and foreign commerce, and which contained materials which had been so shipped and transported, by any means including by computer, the producing of said visual depictions involving the use of minors, that is, persons under the age of eighteen years, engaging in sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2), and said visual depictions being of such conduct.

This is a violation of Title 18, United States Code, Section 2252(a)(2).

A person violates § 2252(a)(2) if that person

knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if --

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(2).

Count Two of Defendant's indictment, captioned "Possession of Child Pornography," charged as follows:

On or about December 11, 2004, in Marshall County, in the Southern District of Iowa, the defendant, RANDALL FREDRICK MUHLENBRUCH, did knowingly possess one or more matters, that is, computer files stored on a hard disk drive device and documents, which contained visual depictions that had been shipped and transported in interstate and foreign commerce, and which were produced using materials which had been so shipped and transported by any means, including by computer, the producing of said visual depictions involving the use of minors, that is, persons under the age of eighteen years, engaging in sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2), and said visual depictions being of such conduct.

This is a violation of Title 18, United States Code, Section 2252(a)(4)(B).

A person violates § 2252(a)(4)(B) if that person

knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if --

- (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- (ii) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(4)(B).

Section § 2256 of the statute defines “child pornography” as

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where --

- (A) the production of such visual depiction *involves the use of a minor* engaging in sexually explicit conduct;
- (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256(8) (emphasis added). In turn, § 2256 defines “sexually explicit conduct” as follows:

(A) Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated – (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; or (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.

(B) For purposes of subsection 8(B) of this section, “sexually explicit conduct” means – (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2256(2)(A)-(B).

Contrary to Defendant’s assertion, the definitions clarify that the classification “sexual exploitation of minors” is broader than and includes the terminology “child pornography.” The Eighth Circuit has rejected the argument that sexual exploitation of a minor is *limited* to child pornography or criminal sexual conduct involving a child captured in visual depictions, noting that “[a]lthough the federal statute does not define the term sexual exploitation of children, it covers ‘any criminal sexual conduct with a child [which by its very nature] takes advantage of, or exploits, a child sexually.’” United States v. Bach, 400 F.3d 622, 633 (8th Cir. 2005) (quoting United States v. Smith, 367 F.3d 748, 751 (8th Cir. 2004) (alteration in original)). This Court cannot hold that Defendant could be prejudiced by the use of terminology that is itself contained in the statutory definition of an element of the charged offense. The prosecutor’s and witnesses’ references to child pornography were consistent with the statutory definitions of the charged offenses, were not in this context made to inflame the jury, and did not prejudice Defendant. Cf. United States v. Bentley, 561 F.3d 803, 810-11 (8th Cir. 2009) (concluding the prosecutor’s reference to the defendant as a sexual predator during the defendant’s trial for sexual exploitation

of a child and receipt of child pornography did not amount to reversible prosecutorial misconduct because (1) the reference supported the government's theory of the case; (2) the reference was not used to inflame passions; (3) the reference did not cause the trial to be fundamentally unfair; and (4) based on the strength of the evidence, there was no reasonable probability the verdict would have changed without those remarks).

B. Final Jury Instructions

Defendant next argues he is entitled to a new trial because the Court's final jury instructions on Counts One and Two were based on instructions for crimes under 18 U.S.C. § 2252A, not for sexual exploitation of a minor under 18 U.S.C. § 2252, and that the Court should have used jury instructions based on the Ninth Circuit Model Criminal Jury Instructions § 2252(a)(1) and Eleventh Circuit Model Criminal Jury Instruction § 2252(a)(2). Defendant asserts the instructions as given lessened the Government's burden of proof as to the "knowingly" requirements under § 2252.

The Court submitted the following final jury instruction in regard to the elements of Count One:

INSTRUCTION NO. 12.
ELEMENTS OF THE OFFENSE: RECEIPT OF VISUAL DEPICTIONS OF A MINOR
ENGAGING IN SEXUALLY EXPLICIT CONDUCT

The crime of receipt of visual depictions of a minor engaged in sexually explicit conduct, as charged in Count One of the indictment, has three essential elements which are:

- 1) From on or about August 6, 2004 and continuing until on or about December 11, 2004, the Defendant, RANDALL FREDRICK MUHLENBRUCH, knowingly received a visual depiction of a minor engaged in sexually explicit conduct;
- 2) The defendant knew the visual depiction was of a minor engaging in sexually explicit conduct; and

- 3) The material containing the visual depictions were produced using materials that had been mailed, shipped, or transported by computer in interstate or foreign commerce, or the visual depictions had been mailed, shipped, or transported by computer in interstate or foreign commerce.

For you to find the Defendant guilty of the crime charged in Count One, the Government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of Count One.

Defendant's proposed instruction for the elements of Count One contained two additional elements: (1) that the production of the visual depictions involved the use of a minor engaging in sexually explicit conduct, and (2) that the defendant knew that at least one of the persons engaged in the sexually explicit conduct in such visual depiction was a minor.

The Court submitted the following final jury instruction in regard to the elements of Count Two:

INSTRUCTION NO. 13.
ELEMENTS OF THE OFFENSE: POSSESSION OF VISUAL DEPICTIONS OF A
MINOR ENGAGING IN SEXUALLY EXPLICIT CONDUCT

The crime of possession of visual depictions of a minor engaged in sexually explicit conduct, as charged in Count Two of the indictment, has three essential elements which are:

- 1) On or before December 11, 2004, the Defendant, RANDALL FREDRICK MUHLENBRUCH knowingly possessed one or more visual depictions of a minor engaged in sexually explicit conduct;
- 2) The defendant knew the visual depictions were of a minor engaging in sexually explicit conduct; and
- 3) The material containing the visual depictions were produced using materials that had been mailed, shipped, or transported by computer in interstate or foreign commerce, or the visual depictions had been mailed, shipped, or transported by computer in interstate or foreign commerce.

For you to find the Defendant guilty of the crime charged in Count Two, the Government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of Count Two.

Defendant's proposed instruction for the elements of Count Two contained one additional element: that the defendant knew that production of the visual depictions involved the use of a minor engaging in sexually explicit conduct.

The Court also gave the following separate jury instruction defining knowledge:

INSTRUCTION NO. 19.
PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. You may consider statements made and acts done by the Defendant, and all facts and circumstances in evidence that may aid in the determination of the Defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

The Court disagrees that the instructions as given failed to properly instruct the jury regarding the offenses charged. First, Instruction No. 12 included all the elements of the charged offense for violation of § 2252(a)(2), and Instruction No. 13 contained all the elements of the charged offense for violation of § 2252(a)(4)(B). Second, Defendant stipulated at trial that the individuals contained in the visual depictions (Government's Exs. 4-29) were minors; therefore, the additional requested elements were not only redundant, but also unnecessary because Defendant's stipulation relieved the Government of the burden of proving Defendant knew the individuals contained in the images were minors. Third, the Court's separate instruction defining knowledge adequately instructed the jury of the Government's burden of proving that element of the offenses charged. As it has been noted, the jurisprudence concerning provisions of § 2252A and § 2252 often converges. United States v. Miller, 527 F.3d 54, 64 n.10 (3d Cir. 2008) (citing United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004)). The statutory provisions of § 2252(a)(2) and § 2252(a)(4)(B) "have been characterized as 'materially identical' to § 2252A(a)(2) and § 2252A(5)(B)," respectively. Id. The Court finds no material prejudice

caused by the final jury instructions given on the elements of the offenses charged and must conclude this argument falls well short of demonstrating a miscarriage of justice.

C. Government's Expert Witness' Technical Notes

Defendant argues he was unfairly prejudiced because the Court overruled Defendant's objections to the trial testimony of the Government's computer forensics expert, Lieutenant Aaron Delashmutt (Lt. Delashmutt). Lt. Delashmutt testified that, as part of his standard computer forensic procedure, his first step is to make an identical copy of the subject computer's hard drive. Next, Lt. Delashmutt tests the subject computer using a forensic software program called "Encase." As he goes through the process, Lt. Delashmutt takes notes on a separate word-processing software program (technical notes). Lt. Delashmutt described that his technical notes will consist of a log of the process, comments about things such as deleted files he recovered and where he found those files, and the location of specific evidence on the subject computer's hard drive. Lt. Delashmutt further testified that the Encase program generates a report detailing the results of the tests performed and that the Encase report is wholly independent of his technical notes. Lt. Delashmutt further testified that during the execution of the forensic tests on Defendant's computer, his technical-notes document became corrupted, and his technical notes were lost.

Defendant argues he is entitled to a new trial because Lt. Delashmutt "destroyed his technical notes" and thereby "denied the defendant a fair trial and the right to favorable evidence." Def. Br. at 10. The Court disagrees with Defendant's characterization of the events and the impact Defendant attaches to the absence of Lt. Delashmutt's technical notes.

First, Lt. Delashmutt did not “destroy” his technical notes. Lt. Delashmutt testified that the document containing his technical notes became corrupted, the word-processing program crashed, and the document was unrecoverable. The record contains no evidence contradicting this explanation of inadvertent loss of the data. Second, the word-processing program Lt. Delashmutt used for taking his technical notes was a separate software program from the Encase forensic software program used to perform the forensic tests on Defendant’s computer. The corruption of the technical notes did not affect the forensic test being executed on Defendant’s computer, the forensic report generated by the Encase software program, or the computer hard drive that was examined. Third, Defendant has presented no evidence that Lt. Delashmutt’s technical notes contained or could have contained exculpatory evidence. Furthermore, as Defendant admits, while the Government has a constitutional duty to preserve evidence that might be expected to play a significant role in a Defendant’s defense, the lost “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” California v. Trombetta, 467 U.S. 479, 488-89 (1984) (concluding the state’s failure to retain breath samples did not constitute a constitutional violation because “[e]ven if one were to assume that the [breathalyser] results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence”). Even if the Court were to assume Lt. Delashmutt’s technical notes contained exculpatory evidence, Defendant received the forensic report, which contained the analysis of Defendant’s computer, and not merely Lt. Delashmutt’s notations, Defendant had the opportunity during trial to cross examine Lt. Delashmutt about his technical notes, and Defendant failed to demonstrate the Government acted

in bad faith. To the extent this argument has merit, it goes to the weight, not admissibility, of this testimony. Defendant is not entitled to a new trial based on the Court's admission of Lt. Delashmutt's testimony at trial.²

D. Replaying Defendant's Videotaped Statement for the Jury

Defendant argues the replaying of Defendant's videotaped interview (Government's Ex. One) placed excessive emphasis on that piece of evidence and thereby diminished the value of other evidence and unfairly prejudiced Defendant in violation of Federal Rule of Evidence 403. The Court must disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is *unfairly* prejudicial." United States v. Betcher, 534 F.3d 820, 825 (8th Cir. 2008) (quoting United States v. McCourt, 468 F.3d 1088, 1092 (8th Cir. 2006)).

² Defendant cites United States v. Pearl, 324 F.3d 1210, 1215 (10th Cir. 2003), wherein the defendant moved for a new trial, arguing his constitutional rights were violated because law enforcement destroyed e-mail messages from defendant's hard drive and then discarded the hard drive. The district court denied the motion, reasoning that because the defendant was able to produce the e-mail messages from the sender's computer and cross examine the detective responsible for deleting the e-mail messages, the defendant suffered no prejudice. Id. at 1214. The appellate court affirmed, reasoning the defendant utterly failed under Trombetta to make the required showing of a Due Process violation because the defendant had not shown (1) the deleted e-mail messages were exculpatory, (2) the deleted e-mail messages were unavailable on another hard drive, and (3) the law enforcement officer acted in bad faith. Id.

As in Pearl, in the present case, Defendant has failed to demonstrate Lt. Delashmutt's technical notes were exculpatory, Defendant could not obtain comparable evidence by other means, or Lt. Delashmutt acted in bad faith.

Government's Exhibit One was the digital video disc (DVD) recording of Defendant's interview conducted by Marshalltown, Iowa, Police Department investigators on December 11, 2004, following a warrant search of Defendant's residence. In that interview, Defendant made certain admissions regarding the images of child pornography the investigators discovered on the hard drive of Defendant's computer. The Court ruled on the admissibility of the videotaped interview prior to trial in the Court's order on Defendant's motion to suppress (Clerk's No. 57).

On the first day of Defendant's trial, the Government properly introduced the DVD into evidence through the testimony of Officer Jeremy Linsenmeyer, who was one of the officers that conducted Defendant's interview on December 11, 2004. The DVD was admitted into evidence and played for the jury. Later in the trial, when the Government confronted Defendant regarding conflicts between Defendant's trial testimony and statements Defendant made during his December 11, 2004, videotaped interview, portions of the DVD were replayed for impeachment purposes. During deliberations, the jury requested to view the DVD (Jury Questions 1, 3, 4, Clerk's No. 101). The Court notified counsel of the jury's requests and complied with those requests by playing the DVD in open court.³

Defendant has not demonstrated how this use of properly admitted evidence violates Rule 403. Similarly, the Defendant has failed to demonstrate how replaying the DVD during deliberations upon the jury's request violated Rule 403 since the Court acted squarely within its discretion to comply with the jury's request. See United States v. Haren, 952 F.2d 190, 197 (8th Cir. 1991) ("Whether to allow the jury to review testimony during jury deliberations is within the sound discretion of the court."); United States v. Guerue, 875 F.2d 189, 190 (8th Cir. 1989) ("In

³ It is the Court's practice to allow the jury to view video testimony of this sort in open court rather than in the jury room for the purpose of protecting the integrity of the electronic evidence and avoiding equipment problems during deliberations. Thus, the Court and the parties become aware of the number of times the jury views this particular evidence. In the privacy of the jury room, a jury may give substantial, yet unknown, attention to one particular item of evidence.

response to the jury's request, the district court had discretion to replay the tape[-recorded conversation]."). Defendant was not unfairly prejudiced by the replaying of the DVD.

E. Hearsay Objection

Defendant also argues he is entitled to a new trial because the Court allowed inadmissible hearsay. Defendant's argument fails.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is inadmissible unless an exception applies. Fed. R. Evid. 801(c). However, "[a]n out-of-court statement is not hearsay if it is not offered for the truth of the matter asserted." United States v. Looking Cloud, 419 F.3d 781, 787 (8th Cir. 2005) (citing Fed. R. Evid. 801(c)).

Marshalltown Police Officer Joe Hansel (Officer Hansel) testified regarding the circumstance that prompted the Marshalltown Police Department to investigate Defendant for suspected possession of child pornography. Officer Hansel explained that Klaas came to the Marshalltown Police Department with two compact discs (CDs). Klaas told Officer Hansel that Defendant's wife, Tatiana Muhlenbruch (Tatiana), told Klaas she believed Defendant had images of child pornography on Defendant's computer. At Tatiana's request, Klaas downloaded the images to the CDs, brought the CDs to the Marshalltown Police Department, and presented the CDs to Officer Hansel. Officer Hansel testified that after confirming the contents of the CDs, Officer Hansel and Officer Linsenmeyer prepared an application and secured a search warrant for Defendant's residence and computer. While these CDs and Klaas' statements were utilized in the initiation of the investigation and obtaining a search warrant, it was evidence from the Defendant's computer, not the CDs presented by Klaas, that was used to prove the charges. Klaas' statements did not constitute hearsay because they were not admitted for the truth of the statements; rather, Klaas' statements were admitted to explain why the Marshalltown Police Department began its investigation of Defendant. See United States v. King, 36 F.3d 728, 732 (8th Cir.

1994) (“[A]n out-of-court statement is not considered hearsay if it is admitted not for its truth but for the limited purpose of explaining to the jury why a police investigation was undertaken.”).

F. Denial of Defendant’s Motion to Suppress

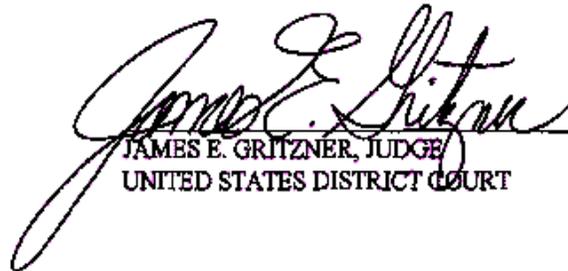
Defendant’s final argument is that he was prejudiced by the admission of statements Defendant made to law enforcement officers during his December 11, 2004, interview and that he is entitled to a new trial because the Court improperly denied his motion to suppress. Defendant does not advance any new evidence or argument regarding his motion to suppress but simply states that “for the reasons stated in his motion to suppress his video[taped] statement was inadmissible at trial.” The Court incorporates and reaffirms its reasons for denying Defendant’s motion to suppress that were thoroughly set out in the Court’s Order denying Defendant’s Motion to Suppress (Clerk’s No. 57).

III. CONCLUSION

For the reasons stated, Defendant’s Motion for New Trial (Clerk’s No. 109) must be **denied**.

IT IS SO ORDERED.

Dated this 11th day of August, 2009.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT