

United States Court of Appeals
For the Eighth Circuit

No. 20-1102

United States of America

Plaintiff - Appellee

v.

Loren Allen Copp, also known as Sensei

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: April 16, 2021

Filed: June 11, 2021

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Loren A. Copp was convicted of producing and attempting to produce child pornography in violation of 18 § U.S.C. 2251(a); possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B); using interstate facilities to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of RSMo § 566.083 and 18 U.S.C. § 2422(b); and using interstate facilities to transmit information with the intent to induce, entice, solicit, or encourage a minor to engage

in sexual activity, in violation of RSMo § 566.083 and 18 U.S.C. § 2425. The district court¹ sentenced him to 780 months in prison. Copp appeals, arguing the court should have (1) admitted photos of his penis into evidence, and (2) permitted testimony by a former cellmate about an (alleged) birthmark on his penis. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

In 2015, federal agents seized hundreds of photos and videos of child pornography from Copp's residence. Some of these images depicted a man sexually abusing a child. The man's naked torso, hands, feet, and genitals are visible in the images.

Before trial, Copp objected to the government's request to photograph his hands, feet, abdomen, and genitals to compare to the images found at his residence. He opposed photographing his genitals, arguing it was an invasion of privacy with little investigatory value. The court allowed the government to photograph everything but his genitals.

Two years later, during the fifth day of a bench trial, Copp requested to photograph and show photos of his penis, claiming he has an "identifying mark" not shown in the government's photos. The court denied the request. Copp then requested the court allow testimony from a former cellmate about the mark. The court denied the request.

This court reviews for an abuse of discretion, giving substantial deference to the district court's exclusion of evidence if it does not unfairly prevent a party from proving its case. *United States v. Condon*, 720 F.3d 748, 754 (8th Cir. 2013). If exclusion of evidence implicates a constitutional right, including the right to present

¹The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

a complete defense, this court reviews de novo. *United States v. West*, 829 F.3d 1013, 1017 (8th Cir. 2016).

II.

The district court did not abuse its discretion by denying Copp's request to photograph and show photos of his penis. The district court excluded the evidence (1) for lack of probative value, and (2) as a discovery sanction for late disclosure.

The court may exclude evidence if its probative value is substantially outweighed by unfair prejudice or undue delay. **Fed. R. Evid. 403**; *See Condon*, 720 F.3d at 755. Copp claims that photos of the birthmark would prove he was not the man in the pornographic images. But, in this case, photos of his penis taken years after the pornographic images have little probative value in showing his penis's appearance at the time of the images. The district court did not err in finding the proffered evidence had little probative value.

The court also did not err in finding the evidence, offered on the fifth day of trial near the close of the government's case, prejudiced the government. *See United States v. Davis*, 244 F.3d 666, 671 (8th Cir. 2001) (“[A] finding of prejudice can be inferred from the district court's comments.”). The district court admonished Copp at length for waiting until the eleventh hour to bring forth this allegedly exculpatory evidence. The district court did not abuse its discretion in ruling that the probative value of the evidence was substantially outweighed by prejudice to the government of undue delay. *See United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986) (“The task of balancing the probative value of this evidence against its prejudicial value is primarily for the trial court, and we normally defer to its judgment.”).

Alternatively, the district court did not abuse its discretion by excluding the photos as a discovery sanction for late disclosure. “A district court has broad discretion to sanction a party for failure to comply with discovery orders.” *United States v. Sims*, 776 F.3d 583, 585 (8th Cir. 2015); **Fed. R. Crim. P. 16(d)(2)(C)**.

Exclusion of evidence is a permissible sanction for discovery violations. *See Taylor v. Illinois*, 484 U.S. 400, 415 (1988). Courts may exclude evidence if the discovery violation is willful and motivated by a desire for a tactical advantage. *Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997). Copp concealed his “birthmark” evidence for a tactical advantage at trial. However, two years later, when he believed the evidence favored him, he attempted to introduce it. The district court did not abuse its discretion in imposing a discovery sanction for late disclosure of evidence.

Copp invokes the Compulsory Process Clause of the Sixth Amendment which forbids the exclusion of evidence solely to enforce discovery. But “[i]f the discovery violation was willful and motivated by a desire to obtain a tactical advantage, it is entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness’ testimony.” *Id.* (internal quotation marks omitted). Here, where Copp opposed efforts to photograph his penis before trial, the violation was willful and motivated by a desire to obtain a tactical advantage.

Copp also invokes his constitutional right to present a complete defense. Yet he had ample opportunity to present evidence of any birthmark when the government first requested photos, during *ex parte* hearings with the judge, and in cross-examination of the government’s witnesses. Copp had “an adequate opportunity to lay the foundation” for his defense that the penis in the pornographic images was not his. *United States v. Clay*, 883 F.3d 1056, 1061 (8th Cir. 2018).

Even if the court abused its discretion or otherwise erred, any error was harmless. *See United States v. Yarrington*, 634 F.3d 440, 447 (8th Cir. 2011) (“We will not reverse if the error was harmless.”). The evidence supporting Copp’s convictions is overwhelming. *See United States v. Willins*, 992 F.3d 723, 727 (8th Cir. 2021). The district court properly found Copp guilty beyond a reasonable doubt, based on the victims’ persuasive testimonies, computer evidence, and hundreds of pornographic photos and videos on his devices. *See United States v. Herbst*, 668 F.3d 580, 585 (8th Cir. 2012).

III.

The district court did not abuse its discretion by denying Copp's request to allow his former cellmate to testify about his penis. The district court excluded the testimony (1) for lack of probative value, and (2) as a discovery sanction for late disclosure.

The district court found that testimony about Copp's penis lacked probative value for the same reason as the proffered photos; such testimony offered little insight about his penis's appearance years earlier. The court also found that admitting the evidence would be "unfair delay." The court again admonished Copp for not disclosing the birthmark testimony or allowing the government to photograph his penis years earlier. The district court did not abuse its discretion in ruling that the probative value of the proffered testimony was substantially outweighed by prejudice to the government by undue delay. *See Bass*, 794 F.2d at 1312. Alternatively, like photos of his penis, the district court did not abuse its discretion by refusing to admit the testimony, as a discovery sanction for late disclosure. *See Sims*, 776 F.3d at 585 ("A district court has broad discretion to sanction a party for failure to comply with discovery orders.").

Again, even if the district court abused its discretion or otherwise erred by excluding McDonald's testimony, any error was harmless beyond a reasonable doubt. *See Yarrington*, 634 F.3d at 447.

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The judgment is affirmed.
