

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Argued June 5, 2024

Decided July 16, 2024

BeforeFRANK H. EASTERBROOK, *Circuit Judge*MICHAEL B. BRENNAN, *Circuit Judge*CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-2797

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*VALLIE FRANCIS ZELLER,
*Defendant-Appellant.*Appeal from the United States District
Court for the Southern District of
Illinois.

No. 20-CR-30101-NJR-01

Nancy J. Rosenstengel,
*Chief Judge.***ORDER**

A jury found Vallie Zeller guilty of multiple sexual crimes against a minor, and the district court sentenced him to 405 months' imprisonment. On appeal, Zeller argues that the district court erred by imposing a five-level sentencing enhancement for engaging in a "pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5(b)(1). Because the record contains adequate evidence supporting the sentencing enhancement, we affirm.

I. Background

In June 2020, Vallie Zeller arranged to have sex with someone who he thought was a 15-year-old girl but who was really an FBI agent. He was later tried by a jury and found guilty of attempted enticement of a minor, 18 U.S.C. § 2422(b), interstate travel with intent to engage in illicit sexual conduct, *id.* § 2423(b), and attempted production of child pornography, *id.* § 2251(a), (e).

Before sentencing, the United States Probation Office prepared a presentence investigation report (PSR), using the 2021 version of the Sentencing Guidelines. It calculated an offense level of 32 for the conviction of attempting to produce child pornography. U.S.S.G. § 2G2.2(1)(a). The PSR then added two levels because the offense involved a minor between 12 and 16 years old, *id.* § 2G2.1(b)(1)(B), and another two levels because Zeller used his smartphone to request a pornographic image from the victim, *id.* § 2G2.1(b)(6)(B).

Relevant to this appeal, the PSR also recommended a five-level enhancement because Zeller had “engaged in a pattern of activity involving prohibited sexual conduct.” *Id.* § 4B1.5(b)(1). The PSR noted three prior instances of prohibited sexual conduct. First, in 1999 Zeller was charged with “sexual battery” for having sex with a girl under 16; Zeller ultimately pleaded no contest to a reduced charge of “misdemeanor battery.” Second, he was charged in 1999 with two counts of lewd and lascivious assault arising from sexual intercourse with a 13-year-old girl. Third, investigators found text messages from July 31, 2019, through August 2, 2019, between Zeller and a 16-year-old girl in which he attempted to entice the girl to have sex with him. During the three-day conversation, Zeller and the girl exchanged pictures of themselves and discussed engaging in sexual intercourse.

The PSR concluded with an advisory guidelines range. As a result of the offense-level enhancements, Zeller’s total offense level was 41. This offense level, combined with Zeller’s criminal history category of I (he had no criminal history points), yielded a guidelines range of 324 to 405 months in prison for the conviction of attempting to entice a minor. The other two convictions yielded a lesser guidelines range of 324 to 360 months in prison (the maximum term of imprisonment for those convictions is 30 years, respectively). Finally, the PSR stated that the statutory range for Zeller’s term of supervised release was five years to life. *See* 18 U.S.C. § 3583(k).

Objecting to the five-level enhancement, Zeller argued that none of the three instances cited in the PSR constitute “prohibited sexual conduct.” He objected to the first instance (the battery conviction) because the conviction was for only a “non-sexual” misdemeanor battery. He contested the second instance (the charges for lewd and lascivious assault of the 13-year-old girl) because he was acquitted of those charges. And he challenged the third instance (texting a 16-year-old girl in 2019) on the basis that he merely texted a “virtual chatbot.”

In response, the government presented various documents to support the enhancement. For the battery conviction, the government supplied the police report, the affidavit supporting probable cause for Zeller’s arrest, and a transcript of deposition testimony from a witness who was a friend of the victim. To support the charges for lewd and lascivious assault, the government provided the charging documents, two transcripts of deposition testimony from the alleged victim and her friend, along with the alleged victim’s impact statement. Lastly, the government presented a transcript of the text exchange between Zeller and the 16-year-old that occurred from July 31, 2019, through August 2, 2019.

Based on these documents, the district court rejected each of Zeller’s arguments regarding the five-level enhancement. As for the “non-sexual” battery conviction and charges for lewd and lascivious assault, the court explained that it could consider evidence underlying the conviction and acquittal, and the evidence in the record supported the enhancement. Regarding the text messages, the court explained that Zeller provided nothing (other than mere assertions) supporting his view that he had texted a “chatbot” and not a human. The court adopted the guidelines range in the PSR and sentenced Zeller to 405 months in prison and a lifetime of supervised release.

II. Discussion

Zeller renews his challenge to the five-level enhancement. We review the district court’s application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *See United States v. Castro-Alvarado*, 755 F.3d 472, 475 (7th Cir. 2014).

Section 4B1.5(b)(1) of the Sentencing Guidelines adds five levels if the “offense of conviction is a covered sex crime” and “the defendant engaged in a pattern of activity involving prohibited sexual conduct.” Nobody disputes that Zeller’s offense of conviction is a “covered sex crime.” But the parties disagree on what constitutes a “pattern” of prohibited sexual conduct necessary to trigger the enhancement. In its

brief, and again at oral argument, the government contended that only one instance of “prohibited sexual conduct” need be found to trigger the enhancement. This is a mistaken reading of the Guidelines. The Application Note for § 4B1.5(b) explains that a “pattern” involves “at least two separate occasions” of prohibited sexual conduct. U.S.S.G. § 4B1.5, cmt. n.4(B)(i). Stated differently, a lone occasion is not a “pattern” that supports the enhancement. Nonetheless, the evidence in the record shows that Zeller engaged in prohibited sexual conduct on at least two occasions.

The first instance involves Zeller’s text messages to a 16-year-old girl. In finding that this instance constitutes prohibited sexual conduct, the district court relied on the information in the PSR, and it did not err in doing so. District courts “may rely on information contained in a PSR so long as it is well-supported and appears reliable.” *United States v. Moreno-Padilla*, 602 F.3d 802, 808 (7th Cir. 2010). In order to demand more evidence from the government in support of an enhancement, “it is the defendant’s task to show the trial judge that the facts contained in the PSR are inaccurate.” *Id.* at 809 (citation omitted). To meet this burden, the defendant must “produce some evidence that ‘calls the reliability or correctness of the alleged facts into question’; a ‘bare denial’ is not enough.” *Id.* (quoting *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994)). Only when the defendant creates “real doubt” does the burden then shift to the government to demonstrate the accuracy of the information. *Id.*

Zeller did not meet his burden. The PSR recounted evidence of a text conversation over three days in 2019 between Zeller and a 16-year-old girl during which they exchanged pictures of themselves and discussed having sex with each other. Zeller asserted—without evidence—that the correspondent was not a real person. By failing to provide any evidence to question the information in the PSR, Zeller did not meet his burden of going beyond a “bare denial.” See *United States v. Betts-Gatson*, 860 F.3d 525, 539 (7th Cir. 2017) (where the PSR provides a reliable basis for information, the defendant must produce “some evidence” calling the information into question).

Next is the battery conviction. Zeller argues that this is not an instance of “prohibited sexual conduct” because he was convicted of a misdemeanor “non-sexual” battery. This argument misses the point. The district court needed to find by a preponderance of the evidence facts sufficient to support the enhancement, *United States v. Williams*, 85 F.4th 844, 849 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1046 (2024), so it is irrelevant whether Zeller’s conduct resulted in a “sexual” or “non-sexual” battery. So long as the underlying conduct constitutes “prohibited sexual conduct,” the enhancement applies. See U.S.S.G. § 4B1.5, cmt. n.4(B)(ii) (conduct need not have

resulted in a conviction to be considered an instance of prohibited sexual conduct). Zeller next argues that the only evidence in the record supporting the conviction is a police report and the affidavit supporting his arrest. True, courts “cannot simply assume that any police report ... is reliable without more information or corroborating evidence.” See *United States v. Jordan*, 742 F.3d 276, 280 (7th Cir. 2014). But the government provided more than a police report: it also supplied sworn deposition testimony from a witness. (The government does not seem to have mentioned this particular deposition, filed as part of its sentencing exhibits, at any point until oral argument. Nonetheless, the PSR does specifically refer to this deposition.) Consistent with the police report and affidavit for Zeller’s arrest, the witness testified under oath that Zeller had sex with a girl under the age of 16. The district court thus did not err in finding that Zeller’s battery conviction is an instance of prohibited sexual conduct.

Relying on *United States v. Holding*, 948 F.3d 864 (7th Cir. 2020), Zeller pushes back on this conclusion, arguing that the government did not provide sufficient evidence to support the battery conviction. In *Holding*, we held that a district court erred by attributing drug weight to a defendant based on the unsworn statements of confidential informants when the PSR contained no evidence about the informants’ reliability. *Id.* at 869–70. We reasoned that the district court failed to take any step to ensure that the information provided by the confidential informant had a “modicum of reliability.” *Id.* at 871.

Zeller likens his case to *Holding*, contending that the government should have provided some evidence to corroborate the statements in the PSR regarding his battery conviction. According to Zeller, an affidavit from the victim or her testimony during the sentencing hearing would suffice. But we see no reason why sworn testimony from a witness would not be equally sufficient, especially when that testimony was elicited by defense counsel and was consistent with the police affidavit. See *United States v. Sandige*, 784 F.3d 1055, 1062 (7th Cir. 2015); *United States v. Rollerson*, 7 F.4th 565, 571 (7th Cir. 2021).

Because we conclude that the text messages found on Zeller’s phone and his battery conviction constitute two instances of prohibited sexual conduct necessary to trigger the enhancement, we need not address whether the charges for lewd and lascivious assault also supports the enhancement.

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III. Conclusion

For these reasons, we AFFIRM the judgment of the district court.