FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LAWRENCE JAMES HALAMEK, *Defendant-Appellant.*	No. 19-10366 D.C. No. 4:17-cr-00477- JGZ-EJM-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Argued and Submitted June 14, 2021
San Francisco, California

Filed July 22, 2021

Before: MARY M. SCHROEDER, MILAN D. SMITH, JR., and LAWRENCE VANDYKE, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY*

Criminal Law

The panel affirmed a conviction for transporting a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a) (Count 1) and traveling with intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b) (Count 2), affirmed the sentence on Count 1, vacated the sentence on Count 2, and remanded for resentencing.

The panel held that the district court did not plainly err by admitting pursuant to Fed. R. Evid. 702 an FBI child forensic interviewer's relevant and reliable expert testimony on the topic of grooming for sexual abuse. The panel held that the district court did not abuse its discretion by admitting pursuant to Fed. R. Evid. 414 testimony about the defendant's prior acts of child molestation.

The panel held that the district court did not plainly err by applying a two-level sentence enhancement pursuant to U.S.S.G. § 2G1.3(b)(1)(B) for committing the offense against a minor who was in the defendant's "custody, care, or supervisory control." Because, as the Government conceded, the 35-year sentence on Count 2 (which was concurrent to the 35-year sentence on Count 1) exceeded the 30-year statutory maximum for Count 2, the panel remanded for resentencing on that Count. The parties agreed that the district court should not have assigned criminal history

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

points for the defendant's prior Arizona conviction for custodial interference, which yielded a criminal history score of III rather than II. But applying plain-error analysis, the panel concluded that the defendant did not show that the error was prejudicial, because his Guidelines range would have been the same had the district court applied the correct criminal history score

COUNSEL

Carol Lamoureux (argued) and Joshua F. Hamilton, Hernandez & Hamilton, Tucson, Arizona, for Defendant-Appellant.

Carin C. Duryee (argued), Assistant United States Attorney; Christina M. Cabanillas, Deputy Appellate Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

Lawrence Halamek was tried and convicted on two counts, arising from Halamek's transporting his cousin's twelve-year-old stepdaughter across state lines with the intent to engage in sexual activity with her. Halamek challenges his conviction based on improper admission of expert testimony and evidence of prior acts of child molestation. He challenges his sentence on the grounds that the court should not have applied a two-level enhancement to the base offense level for committing the offense against a minor who was in his "custody, care, or supervisory

control," U.S.S.G. § 2G1.3(b)(1)(B); that the sentence on Count 2 exceeded the statutory maximum; and that the PSR erroneously added two criminal history points for the Arizona state conviction for custodial interference arising from the same conduct as the federal charges. Halamek's evidentiary claims are meritless, and the district court properly applied the custodial enhancement. However, the Government concedes that the case should be remanded for resentencing on Count 2 because the sentence exceeded the statutory maximum. We affirm the conviction, vacate the sentence on Count 2, and remand for resentencing

FACTUAL AND PROCEDURAL BACKGROUND

In August 2016, Lawrence Halamek lived in Safford, Arizona with his then-wife, Amanda, their daughter, L.H., Amanda's daughter, M.L., and Amanda's son, N.R. Halamek's cousin also lived in Safford with her husband and stepdaughters, one of whom was eleven-year-old S.K., on the same street as the Halameks. Over time, S.K. and E.K. spent more and more time at the Halamek house; by December 2016, they were at the Halamek house almost every weekend. S.K. and E.K. also came to the Halamek house after school and did their homework there. During this time, Amanda noticed disturbing physical contact between Halamek and S.K.: Halamek laying his head in S.K.'s lap, Halamek's arms around S.K., and S.K. laying on Halamek's chest. S.K. testified that Halamek frequently referred to her as his girlfriend and called her cute or beautiful.

On December 4, 2016, Halamek and Amanda took M.L., N.R., L.H., E.K., and S.K. to Mount Graham to celebrate Halamek's birthday. On this trip, S.K. told Halamek that she was struggling with her mental health and was contemplating suicide due to physical and emotional abuse

from her stepmother. In response, Halamek suggested that they run away together the next morning. The next morning, Halamek told Amanda that he was going to get breakfast for them, but instead, he picked S.K. up from her normal bus stop. They drove out of Safford and stopped at a convenience store, where Halamek purchased several cases of beer and cans of Bud Light Clamato (which was S.K.'s preferred type of alcohol). Around 10:00 a.m., after crossing the border into New Mexico, Halamek drove off-road to find a spot to set up camp, and the truck he was driving became stuck. They laid a blanket out on the ground and drank some of the alcohol Halamek had purchased. S.K. testified that Halamek was fidgeting with her hand when she felt her hand "touch something that didn't really feel normal." When she looked over, she saw Halamek's penis. S.K. then got up and walked some distance away. Halamek followed her and apologized. That night, Halamek and S.K. slept in the truck. S.K. testified that Halamek placed his hands under her shirt and bra, and then under her pants and underwear, and touched her vagina.

Meanwhile, an Amber Alert had gone out that indicated S.K. and Halamek might be together. The next morning, December 6, 2016, the police department received several tips from individuals who reported seeing the pair walking along the side of the highway back toward Arizona. New Mexico police apprehended Halamek and S.K., extradited Halamek to Arizona, and took S.K. to the hospital. Halamek was charged with one count of transporting a minor with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a), and one count of traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). Halamek was also charged in state court with custodial interference. He was convicted of the state crime

of custodial interference and served his sentence for that conviction while awaiting trial on the federal charges.

Prior to trial, the Government noticed its intent to call Karen Blackwell, a child forensic interviewer with the FBI, as an expert on the practice of "grooming" children for sexual abuse, which includes "giving a child gifts and support, treating a child as special, isolating a child from his/her social support, gradually increasing sexually explicit talk about sex through jokes, . . . and gradually desensitizing the child to touch (e.g., cuddling, tickling, wrestling, hugging)." The basis for her testimony was her experience interviewing over 3,000 victims of child abuse, the majority of whom were victims of child sexual abuse. Blackwell also had received numerous hours of training. Defense counsel did not object to Blackwell providing expert testimony.

The Government also noticed its intent to introduce Halamek's prior acts of molestation through testimony from M.L., Halamek's stepdaughter, pursuant to Federal Rule of Evidence 414. Rule 414(a) states: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Halamek objected to the introduction of this evidence, but the district court issued an order allowing its admission. M.L. testified that Halamek repeatedly sexually abused her, but the frequency of the abuse decreased once S.K. started spending more time at the Halamek house. N.R. testified that he witnessed Halamek abusing M.L. The court instructed the jury that it "may use this evidence to decide whether the defendant committed the act charged in the indictment," but that it may not "convict the defendant simply because he may have committed other unlawful acts."

The jury found Halamek guilty of both counts charged. The presentence investigation report stated that the sentence for Count 1 was a term of imprisonment 10 years to life, and the sentence for Count 2 was not more than 30 years' imprisonment. The PSR applied a two-level guidelines increase "because the minor was in the custody, care, or supervisory control of the defendant" pursuant to U.S.S.G. § 2G1.3(b)(1)(B). Along with the other guideline level increases, the total offense level was 41. In the criminal history section, the PSR applied two criminal history points for Halamek's conviction for custodial interference in Arizona state court. Including these two points, the PSR calculated five total criminal history points, which placed Halamek in the criminal history category of III. The PSR concluded that "[b]ased upon a total offense level of 41 and a criminal history category of III, the guideline imprisonment range is 360 months to life. USSG § 5G1.2(b). However, the statutory maximum for Count 2 is 30 years." The district court sentenced Halamek to 420 months' (35 years') imprisonment on each count, with the terms to run concurrently.

STANDARDS OF REVIEW

Admission of expert testimony to which there is no objection at trial is reviewed for plain error. *United States v. Wells*, 879 F.3d 900, 925 (9th Cir. 2018). We review the admission of prior acts of child molestation pursuant to Rule 414 for abuse of discretion. *Unites States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001). In the sentencing context, "[w]e review the district court's factual findings for clear error, its construction of the United States Sentencing Guidelines de novo, and its application of the Guidelines to the facts for abuse of discretion." *United States v. Harris*, — F.3d —, 2021 WL 2346061, at *2 (9th Cir. 2021).

"Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal. However, imposition of an erroneous sentence may be reviewed for plain error." *United States v. Vieke*, 348 F.3d 811, 813 (9th Cir. 2003) (internal citation omitted).

ANALYSIS

A.

We first address the question of whether the district court erred by admitting Karen Blackwell's expert testimony on the topic of grooming for sexual abuse.

Pursuant to Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court listed several factors for assessing the reliability of scientific expert testimony under Federal Rule of Evidence 702. Among these were whether the expert's theory or technique has been tested; whether it "has been subjected to peer review and publication"; the "potential rate of error" "of a particular scientific technique"; and the general acceptance of a theory or technique within the scientific community. 509 U.S. at 593–94. Then, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court discussed how to apply *Daubert* to expert testimony that was not scientific in nature:

> We conclude that *Daubert*'s general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id. at 141–42 (citation omitted).

After *Daubert*, but before *Kumho Tire*, we confronted the question of how to evaluate *experiential* expert testimony. *United States v. Bighead*, 128 F.3d 1329, 1330 (9th Cir. 1997). In *Bighead*—which was also dealt with child sexual abuse—the Government presented expert testimony about delayed disclosure of incidents of sexual abuse to rebut the defense's impeachment of the victim. *Id.* The testifying expert had conducted interviews of approximately 1,300 purported victims of child abuse and drew on that experience to testify about "typical characteristics" of this class of individuals. *Id.* We held that "*Daubert*'s tests for the admissibility of expert scientific testimony do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory." *Id.* The district court was not required to exclude the expert in *Bighead* on the basis of the *Daubert* factors because her "testimony consisted of her observations of typical characteristics drawn from many years[']experience interviewing many, many persons, interviewed because they were purported victims of child abuse." *Id.*

The rule stated in *Kumho Tire* that *Daubert*'s general holding applies to non-scientific expert testimony conflicts with *Bighead*'s categorical exemption of non-scientific testimony from the scope of *Daubert*. However, *Bighead* is consistent with the Court's statement in *Kumho Tire* that "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141. To the extent *Bighead* could be read to state that a district court should *never* consider *Daubert* factors when fulfilling its gate-keeping role for expert testimony, *Kumho Tire* overruled it. But to the extent *Bighead* affirms a district court's flexibility to consider which *Daubert* factors apply to a particular expert, not consider the factors that are irrelevant, and consider other

factors that are relevant to determining the reliability of the expert's testimony, it is consistent with current Supreme Court precedent.

Halamek asserts that Blackwell's experience interviewing children did not qualify her to testify about the behavior of abusers, because her "experience does *not* include interviewing adult sex offenders or providing therapeutic services to either victims or offenders." However, Blackwell's interviews with children included the children's statements about the behavior of their abusers. Blackwell testified that she has studied the process of victimization because "we need to explore those things in the interview so that we have the full, entire context of what has happened, not just the assault or the incident, that we need to really understand everything that is going on around that." Extensive experience interviewing victims can qualify a person to testify about the relationships those victims tend to have with their abusers.

Halamek also contends that Blackwell's testimony was "neither probative nor helpful [to the jury]" because "[m]uch of Blackwell's testimony about grooming involved common sense observations that the government could have simply argued in closing." Our circuit appears not to have addressed the probative nature of expert testimony about grooming for child sexual abuse in a published opinion. However, several other circuit courts of appeal have held that admitting such testimony is not an abuse of discretion because the testimony "illuminate[s] how seemingly innocent conduct . . . could be part of a seduction technique." *United States v. Romero*, 189 F.3d 576, 585 (7th Cir. 1999); *see also United States v. Batton*, 602 F.3d 1191, 1201 (10th Cir. 2010); *United States v. Hitt*, 473 F.3d 146, 158–59 (5th Cir. 2006). We find the reasoning of the opinions of our

sister circuits persuasive. Blackwell's testimony explained for the jury that Halamek's behavior with S.K.—such as cuddling and paying special attention to her—that could be innocent parental behavior, could actually have been part of his plan to engage in illicit sexual activity with her. Halamek's contention that Blackwell's testimony was not probative or helpful to the jury lacks merit, and it was not erroneous for the district court to admit the evidence.

Finally, Halamek takes issue with Blackwell's statement that her opinion was based in part on studies conducted by the Behavioral Analysis Unit of the Federal Bureau of Investigation (FBI), because Blackwell did not discuss the methods or findings of these studies. However, in the Government's notice of intent to call Blackwell as an expert, it explained that Blackwell's opinion would be based on the *definition* of grooming used by the Behavioral Analysis Unit of the FBI. The Government's notice (and Halamek's lack of objection to it) was presumably what the district court relied on and implicitly adopted as its findings on the reliability and helpfulness of Blackwell's testimony. Moreover, Halamek cites no authority for the proposition that Blackwell's use of a definition from the FBI's Behavioral Analysis Unit needed further explanation before the district court could determine its reliability. We therefore hold that Blackwell's testimony was relevant, reliable, and properly admitted.

B.

Federal Rule of Evidence 414 states: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a). This creates an exception to the general rule that prior bad

acts cannot be introduced against a defendant at trial to show that he committed the charged crime. *See* Fed. R. Evid. 404(b). However, Rule 414 evidence must still be excluded under Rule 403 if "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. We have stated that Rule 414 evidence is inherently strong, so "a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence." *LeMay*, 260 F.3d at 1027 (quoting *Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)). The *LeMay* court articulated factors that trial judges must consider when determining whether Rule 414 evidence should be excluded pursuant to Rule 403:

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 1027–28 (internal quotation marks omitted).

The district court determined that M.L.'s molestation was similar to S.K.'s because they were approximately the same age, and the "alleged acts of molestation" were "similar"; M.L. stated that Halamek forced her to "rub" and "suck" his penis. Furthermore, the district court stated that the acts were alleged to be close in time to Halamek's offenses against S.K., and that M.L.'s testimony would be probative of S.K.'s credibility. As for frequency, the district court noted M.L.'s statement that the assaults occurred "a few times a week." Finally, because the offenses against the two victims were alleged to have occurred in different

locations and involved different witnesses, the district court determined that the testimony would not confuse the jury. On this basis, the district court held that the evidence was admissible as "relevant to [Halamek's] motive, plan, intent, and lack of mistake" with respect to his conduct underlying the charged offenses.

Halamek's opening brief argues that the district court's analysis was flawed because "any similarities" between Halamek's conduct with the two girls "were not particularly probative in this case" because the jury "only had to find that Halamek merely *intended* to engage in sexual activity with [S.K.] at the time of transportation across state lines." (Internal quotation marks omitted.) Halamek does not address the obvious point here, which is that the allegation that he molested M.L. is clearly probative of his *intent* to engage in sexual activity with S.K.

Halamek also contends that M.L.'s testimony was cumulative of other evidence presented. However, none of the other evidence had anything to do with Halamek's propensity to molest other children. Finally, Halamek states that the district court failed to consider the extent to which his molestation of M.L. had been proved or the extent to which the evidence would distract the jury from the "central issues of the trial." *LeMay*, 260 F.3d at 1032 n.1 (internal quotation marks omitted); To the contrary, the district court took into account that N.R. could and would corroborate M.L.'s account. Furthermore, Halamek's intent to molest S.K. *was* the central issue of the trial, and the district court determined that the allegations relating to M.L. spoke to Halamek's intent. The district court did not abuse its discretion by admitting M.L.'s and N.R.'s testimony.

C.

Halamek also argues that the district court erred by (1) applying a two-level enhancement because S.K. was in his custody, care, or supervisory control at the time of the offense; (2) exceeding the statutory maximum on Count II; and (3) adding two criminal history points for Halamek's Arizona conviction on the charge of custodial interference.

1.

The sentencing guidelines prescribe a two-level increase in the offense level of transportation of a minor with intent to engage in criminal sexual activity if "the minor was . . . in the custody, care, or supervisory control of the defendant." U.S.S.G. § 2G1.3(b)(1)(B). "A defendant is in a custodial position for purposes of this section when he 'is a person the victim trusts or to whom the victim is entrusted.'" *United States v. Castro-Romero*, 964 F.2d 942, 944 (9th Cir. 1992) (quoting U.S.S.G. § 2A3.1, Cmt.). However, the custodial enhancement will not be appropriate "where the relationship between the defendant and the minor arose almost entirely from the crime itself." *United States v. Brooks*, 610 F.3d 1186, 1201 (9th Cir. 2010). "[F]or the enhancement to apply, the defendant must have held a position of parent-like authority that existed apart from conduct giving rise to the crime." *Id.* "[A]ny relationship in which the defendant actually plays a caretaking role may subject that defendant to the enhancement." *United States v. Swank*, 676 F.3d 919, 923 (2012); *see also Harris*, 2021 WL 2346061, at *4 ("[T]he cases where we have affirmed the enhancement typically involve a minor who was left alone under the care of the defendant.").

Halamek did not object to the custodial enhancement, so we review the district court's application of the enhancement

for plain error. *Vieke*, 348 F.3d at 813. Imposing the enhancement was not plainly erroneous because the testimony established that Halamek played a caretaking role in S.K.'s life. For example, Amanda testified that when they had a birthday party planned for Halamek, Halamek initially left Amanda at home and drove away with S.K., E.K., M.L., N.R., and L.H. No other adults appear to have been in the vehicle. S.K. referred to Halamek as "Uncle Larry," and spent the night in the Halamek house almost every weekend. Halamek took S.K. with him to run errands, and spent time alone with her on numerous occasions. S.K. had also waited inside Halamek's truck for her school bus to come in the morning on more than one occasion. Because the record supported that Halamek played a supervisory and caretaking role in S.K.'s life, the two-level enhancement under U.S.S.G. § 2G1.3(b)(1)(B) was not plainly erroneous.

2.

Counts 1 and 2 were grouped for guidelines calculation pursuant to U.S.S.G. § 3D1.2(b). The PSR concluded that "[b]ased upon a total offense level of 41 and a criminal history category of III, the guideline imprisonment range is 360 months to life. However, the statutory maximum for Count 2 is 30 years." Notwithstanding the statutory maximum, the district court sentenced Halamek to 420 months' imprisonment (35 years) on each count, to run concurrently. The Government concedes that we should remand for resentencing on Count 2. We therefore vacate Halamek's sentence on Count 2, and remand for resentencing.

3.

The PSR assigned two criminal history points for Halamek's Arizona conviction on the charge of custodial

interference. The parties agree that this conviction should not have added criminal history points because it arose from the same conduct as the federal charges on which Halamek was being sentenced. Correcting the criminal history points calculation yields a criminal history score of II, rather than III. U.S.S.G. § 5A. However, the guidelines for offense level 41 are the same for individuals with criminal history scores of II and III: 360 months–life.[1] U.S.S.G. § 5A.

"If the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings[.]" 18 U.S.C. § 3742(f)(1). However, the court ordinarily performs a harmless-error analysis if it finds that a particular application of the guidelines was incorrect. "If the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required under § 3742(f)(1). . ." *Williams v. United States*, 503 U.S. 193, 203 (1992). In a harmless-error analysis, the burden is on the government to show that the error was not prejudicial. *United States v. Jordan*, 291 F.3d 1091, 1095–96 (9th Cir. 2002). But in a plain-error analysis, which applies because Halamek did not object to his criminal history score, "the burden of persuasion is on the defendant to show that the error was prejudicial." *Id.* at 1096. And where "the evidence

[1] Halamek contends that the criminal history points error was prejudicial when combined with the district court's alleged error in imposing the two-level custodial enhancement. Without the enhancement, the offense level would have been 39. An offense level of 39 yields a guidelines range of 292–365 for a criminal history score of II, and 324–405 for a criminal history score of III. U.S.S.G. § 5A. However, we have already rejected Halamek's argument that the custodial enhancement was improperly applied.

is insufficient to demonstrate" that a correct calculation "would have generated a lower Guidelines range," the defendant generally has not shown that the error was prejudicial. *United States v. Depue*, 912 F.3d 1227, 1235 (9th Cir. 2019); *see also United States v. Lopez-Cavasos*, 915 F.2d 474, 476 (9th Cir. 1990). As described above, Halamek's Guidelines range would have been the same had the district court applied the correct criminal history score of II. Therefore, we conclude that Halamek has not demonstrated plain error as to his criminal history points calculation.

CONCLUSION

Admission of Karen Blackwell's expert testimony about the "grooming" of victims of child sexual abuse was not plainly erroneous because the testimony satisfied Rule 702. The district court did not abuse its discretion by admitting M.L.'s and N.R.'s testimony about Halamek's prior acts of child molestation pursuant to Rule 414. With respect to sentencing, application of the two-level custodial enhancement did not constitute plain error. However, the Government concedes that the panel should remand for resentencing at or below the statutory maximum for Count 2. For that reason, we AFFIRM the judgment of conviction, AFFIRM the sentence on Count I, VACATE the sentence on Count II, and REMAND for resentencing on Count II.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.