UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4924
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES RILEY CORNETT, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:91 CR 118 1)

(July 12, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA Circuit Judges.[*]

GARWOOD, Circuit Judge:

Appellant, James Riley Cornett, Jr. (Cornett), was convicted of one count of possession of photographs containing sexually explicit conduct of minors in violation of 18 U.S.C. § 2252(a)(4)(B), and one count of intentional interception of electronic communication without proper authority in violation of

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

18 U.S.C. § 2511(1)(a). The district court sentenced Cornett to a term of imprisonment of 120 months, a 3-year term of supervised release, and imposed a $15,000 fine and a $100 special assessment. Cornett now appeals his conviction.

Facts and Proceedings Below

On September 16, 1991, Detective Sergeant Donald McDonald, Jr. (McDonald), of the Orange, Texas Police Department, interviewed Gloria Turner (Turner) about an incident that occurred on July 28, 1991. On that date, Turner's ten-year-old daughter told her that she had watched a "bad tape" that Cornett had given her the day before. Turner then recovered from her daughter's bedroom a videocassette containing explicit scenes of sexual intercourse. McDonald then interviewed the ten-year-old daughter, her fourteen-year-old sister, and their fourteen-year-old cousin. The children stated that Cornett had invited them into his residence where he showed them a broadcast from what he identified as the Playboy Channel, and that he gave them the sexually explicit videocassette. The fourteen-year-old cousin also stated that Cornett asked her if she liked the sexually explicit videocassette and told her that he gave them the tape because he thought they would like it.

On September 18, 1991, McDonald was granted a search warrant for Cornett's residence based on the information in his affidavit, which recounted his interviews and contained his opinion that child pornography would be present at the house because, "Through training and experience I know that persons involved in pornography and pedophilia frequently maintain collections of pornographic

pictures, albums, movies, recordings and furnish such items to potential victims in an attempt to lower their inhibitions and gain their confidence. Said persons spend years aquiring [sic] collections and do not normally dispose of their collections for any reason." That same day a search pursuant to the warrant was conducted of Cornett's residence, and items seized included nineteen photographs of unclothed children and infants and an altered satellite descrambler unit attached to Cornett's television.

On October 16, 1991, Cornett was indicted on one count of possession of photographs containing sexually explicit conduct of minors in violation of 18 U.S.C. § 2252(a)(4)(B), and one count of intentional interception of electronic communication without proper authority in violation of 18 U.S.C. § 2511(1)(a). He was subsequently tried on June 15 and 16, 1992. Cornett did not make a motion to suppress the evidence seized during the September 18, 1991, search of his residence until during his trial when the prosecution moved to admit into evidence the seized items. Only then did he object and argue that such evidence should be suppressed. *Cf*. FED. R. CRIM. P. 12(b)(3). He did not seek a separate evidentiary hearing, but merely argued that the search warrant was issued on the basis of an affidavit that was constitutionally insufficient on its face because the information recited was too stale. The district court found that the affidavit was sufficient.

Also during trial, Cornett's counsel attempted to cross-examine McDonald on certain matters, but the district court, on

four separate occasions, sustained the prosecution's objections. Later, Cornett's counsel was cross-examining another witness when Cornett started laughing. The prosecution then stated, "I'm going to ask that the record reflect the Defendant is laughing, and I would like to find out what's so amusing about this." The district court then admonished Cornett not to laugh during his trial. Cornett's counsel objected to the prosecution's statement as being a comment on the defendant's right to remain silent. He asked the district court to instruct the jury to disregard the prosecution's objection, which the district court granted, and requested a mistrial, which the district court denied. Finally, the district court admitted, over a hearsay objection, the prosecution's photocopy exhibits of portions of *Webster's Third New International Dictionary* containing the definitions of "lascivious" and "lewd."

Cornett was found guilty on both counts, and the district court sentenced him to a term of imprisonment of 120 months, a 3-year term of supervised release, and imposed a $15,000 fine and a $100 special assessment. Cornett now appeals his conviction, contending that the district court erred in: (1) admitting evidence from the search; (2) limiting cross-examination; (3) denying his motion for a mistrial; and (4) overruling the hearsay objection to the dictionary definitions of "lascivious" and "lewd."

Discussion

I. Search Warrant

Cornett first argues that the information from the affidavit that served as the basis for the search warrant failed to

demonstrate sufficient probable cause for the search, and as a result the district court erred in admitting into evidence the items seized in the search. Cornett contends that the affidavit lacked probable cause because it was based upon stale information since the warrant was issued on September 18, 1991, but it was based upon events that had occurred around July 28, 1991.

Regardless of the existence of probable cause, evidence obtained by law enforcement officials acting in objectively reasonable good-faith reliance upon a search warrant is admissible in the prosecution's case-in-chief. *United States v. Leon*, 104 S.Ct. 3405, 3420-21 (1984). Therefore, we need not reach the constitutional issue whether there existed sufficient probable cause if we find that the evidence could have been admitted under the *Leon* good-faith exception. *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988). We find that the evidence is admissible under *Leon*.

"Issuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to the warrant." *Craig*, 861 F.2d at 821. However, good faith does not exist if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 104 S.Ct. at 3421 (quoting *Brown v. Illinois*, 95 S.Ct. 2254, 2265-66 (1975) (Powell, J., concurring in part)). As in *Craig*, Cornett's argument is: "The facts alleged in the affidavit were so dated that no reasonable officer could have believed that the affidavit established probable cause to search his home." *Craig*,

861 F.2d at 822. We disagree.

"Staleness is to be determined on the facts of each case. . . . [A] finding of staleness or timeliness of information can depend upon the nature of the unlawful activity, and when the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale." *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir. 1984). Here, the information in the affidavit tended to indicate that Cornett had been engaged in pedophilia for some time. Furthermore, "Courts are more tolerant of dated allegations if the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched." *Craig*, 861 F.2d at 823. In this case, the affidavit provided indicia of probable cause when it stated that persons involved in pornography and pedophilia tended to keep for long periods of time extensive pornography collections. This observation supports the conclusion that the less than two-month gap between receipt of the information and issuance of the warrant was not critical.[1]

This case closely resembles *United States v. Rugh*, 968 F.2d 750 (8th Cir. 1992), where a search warrant was upheld even though it was issued sixteen months after the suspect had sent his last

[1] As to the absolute period of delay of approximately two months, "In comparison to other staleness cases, the time periods involved here are lengthy, but not excessive." *Craig*, 861 F.2d at 823 (citing to cases where the gap in time between receipt of information and issuance of a warrant exceeded seven or eight months).

letter indicating that child pornography would be present in his residence. The warrant was upheld in part because "the officers reasonably could have believed the material . . . would still be present because pedophiles typically retain child pornography for a long time." *Id.* at 753; *see also United States v. Koelling*, 992 F.2d 817 (8th Cir. 1993). We agree with this conclusion. Furthermore, as in *Rugh*, the warrant in this case was not solely based on generalized statements concerning pedophiles but also on children's accounts of Cornett's behavior towards them. Therefore, McDonald "presented facts to support the conclusion that [Cornett] fit the definition of pedophile." *Id.* at 754.[2] As a result, McDonald could have reasonably believed that Cornett "was a pedophile and had retained child pornography for an extended period." *Id.* Therefore, the totality of the circumstances show that there were sufficient facts to establish an objectively reasonable and good-faith belief under *Leon* that the affidavit adequately established probable cause existed so as to justify the warrant.

II. Cross-examination

Cornett argues that the district court erred in limiting his

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[2] In *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990), it was held that twenty-month-old information linking the defendant to the receipt of child pornography was too stale and could not provide probable cause for a search of the defendant's residence. *Id.* at 1344-46. However, in that case, not only was the lapse in time much longer than in the present case, but also the information contained only generalized statements about the tendencies of pedophiles. No evidence existed in that case, unlike here, that the targeted defendant had displayed behavior indicating that there existed a reasonable suspicion that he was a pedophile. *Id.*

counsel's cross-examination of McDonald on four occasions. In reviewing such points of error, we are mindful that the "[l]imitation of the scope and extent of cross-examination is a matter committed to the sound discretion of the trial judge reviewable only for a clear abuse of that discretion." *United States v. Merida*, 765 F.2d 1205, 1216 (5th Cir. 1985). The district court retains a wide latitude to impose reasonable cross-examination limits concerning "among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1435 (1986); *United States v. Barksdale-Contreras*, 972 F.2d 111, 115 (5th Cir. 1992). However, regardless of the district court's discretion to impose reasonable limits, "this Court is bound to determine whether the trial court imposed unreasonable limits on cross examination such that a reasonable jury might have received a significantly different impression of a witness' credibility had defense counsel pursued his proposed line of cross examination." *United States v. Baresh*, 790 F.2d 392, 400 (5th Cir. 1986).

The first incident occurred when Cornett's counsel was questioning McDonald about the process for rating movies. The district court, upon the prosecution's objection, disallowed this line of questioning after McDonald stated that he was not familiar with the subject. Cornett argues that the district court erred in this instance because his counsel was trying to point out the witness's misconceptions about the rating system. However, once the witness admitted that he was unfamiliar with the rating system,

any further cross-examination on this point would have been irrelevant and repetitive. The district court did not abuse its discretion. *See* FED. R. EVID. 403; *United States v. Ellender*, 947 F.2d 748, 761 (5th Cir. 1991).

Next, Cornett argues that the district court erred in denying him the opportunity to cross-examine McDonald concerning his understanding of the term "sexually explicit conduct" as contained in 18 U.S.C. § 2252(a)(4)(B). The district court did allow some probing on this issue, until Cornett's counsel began questioning the witness about the Texas definition of "deviant sexual intercourse." The Texas state definition of a term not contained in section 2252 was irrelevant, and such a line of questioning contained the real possibility for jury confusion on what elements the prosecution had to prove. The district court clearly acted within its discretion under Rule 403 in preventing Cornett from asking the witness further questions on this matter. *See United States v. Duncan*, 919 F.2d 981, 989 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2036 (1991).

Cornett also complains that he was denied the opportunity to question McDonald about whether probable cause existed to support the search warrant. However, Cornett's counsel had already waived an evidentiary hearing on this matter and had stipulated that the determination for probable cause would be made from only the four corners of the affidavit. Therefore, any questions concerning matters outside of the affidavit were irrelevant. Also, the issue of probable cause is "not properly for determination by the jury, but rest[s] within the province of the trial judge." *Burris v.*

United States, 192 F.2d 253, 254 (5th Cir. 1951). In *Burris*, this Court ruled "that the legality of the search warrant and the evidence obtained as a result of its execution was a matter of law for [the district court's] determination. It was therefore entirely proper that the Court prohibit cross-examination of the witnesses upon this question when before the jury." *Id.* at 255. The district court did not abuse its discretion in refusing to allow such evidence before the jury.

Finally, Cornett contends that, in relation to the illegal interception charge, he should have been allowed to question McDonald about whether Cornett had actually told McDonald that he bought the satellite descrambler knowing that it was altered. McDonald testified that Cornett said that he "knowingly bought it altered." Cornett's counsel then noted that McDonald did not use the word "knowingly" in his report concerning Cornett's conversation with him, and asked McDonald which was the correct version. McDonald replied, "It's all one in the same." The district court then prohibited Cornett's counsel from asking McDonald again which version was correct. Apparently, Cornett's counsel was trying to make the point that the word "knowingly" was not used in McDonald's report.

No reversible error is shown here. In the first place, Cornett had access to the report and could have placed it in evidence and pointed out the absence of the word "knowingly" to the jury. Furthermore, it was irrelevant whether Cornett purchased the device knowing that it was altered. A defendant has violated 18 U.S.C. § 2511(1)(a) if he "intentionally intercepts, endeavors to

intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *Id.* A violation occurs whenever a person intentionally *intercepts* electronic communication, regardless of whether he knew that the actual device used to intercept the communications was illegally altered when acquired. *See also United States v. Lande*, 968 F.2d 907, 909-10 (9th Cir. 1992) (holding that "[a] person who views satellite television programming by use of a modified descrambler and a satellite dish 'intentionally intercepts' the satellite television signal, . . . [and] no exception is 'specifically provided' for the unauthorized viewing of scrambled satellite television signals").[3] Since Cornett was attempting to ask a question that was repetitive and irrelevant, and the report was available, the district court did not abuse its discretion in preventing him from pursuing this issue. *See United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993) (upholding "[t]he limitations by the court [where they] were made after the questioning became redundant and argumentative and most times only peripherally relevant").

III. Comment on Defendant's Silence

Cornett contends that the district court should have granted him a mistrial when the prosecution responded to his laughter by remarking, "I would like to find out what's so amusing about this." Cornett argues that this was an improper comment on his right to

[3] There are several exceptions to section 2511(1)(a)'s broad prohibition. *See* 18 U.S.C. § 2511(2). However, Cornett does not contend that any of these exceptions even arguably apply to this case.

remain silent and as such violated his Fifth Amendment privilege against self-incrimination. *Doyle v. Ohio*, 96 S.Ct. 2240 (1976). Claims of this nature are subject to a two-part test. "A prosecutor's or witness's remarks constitute comment on a defendant's silence if the manifest intent was to comment on the defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark." *United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir.), *cert. denied*, 112 S.Ct. 2980 (1992). This means that the remark must either refer in an explicit manner to the defendant's right to remain silent or the context must be such that the jury would naturally and necessarily construe the remark to be such a comment. Here, the prosecution's remark was not an explicit reference to defendant's silence, but was a contemporaneous comment on the defendant's in-court, vocal outburst. Furthermore, the jury would understand this remark to reflect the prosecution's spontaneous reaction to the defendant's inappropriate laughter in open court. A plain reading of the remark evidences neither a manifest intent on the prosecution's part, nor a natural or necessary construction on the jury's part, that the remark be construed as a comment on defendant's failure to testify.[4] Therefore, the district court did

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[4] Cornett cites *United States v. Robinson*, 716 F.2d 1095 (6th Cir. 1983), where he claims a similar prosecutor's comment resulted in reversal by the appellate court. However, that decision was eventually reversed by the Supreme Court, which held that the prosecution, in some instances of fair response, may explicitly refer to the defendant's silence. *United States v. Robinson*, 108 S.Ct. 864 (1988). In any event, in *Robinson*, the prosecutor remarked, during closing argument, that the defendant "could have taken the stand and explained it to you, anything he wanted to." 716 F.2d at 1096. First, the comment at issue here

not err in refusing to grant a mistrial.

IV. Hearsay

Finally, Cornett argues that the district court erred in admitting into evidence the dictionary definitions of "lascivious" and "lewd," because such matter was inadmissible hearsay. Cornett did not present at trial his own definitions. Nor is he arguing now, that in admitting the dictionary definitions, the district court misdefined or failed to further define the terms. Assuming that such matter is hearsay, Cornett has failed to show that these definitions in any way prejudiced his case. We find "that no substantial right of the defendant[] is affected, and therefore any error is harmless error." *United States v. Saenz*, 747 F.2d 930, 945 (5th Cir. 1984); FED. R. EVID. 103(a)(1).

Conclusion

Cornett has failed to demonstrate any reversible error. Accordingly his conviction is

AFFIRMED.

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was made during the prosecution's case-in-chief, so neither the prosecution nor the jury knew whether Cornett would exercise his Fifth Amendment right to remain silent. Second, unlike *Robinson*, the prosecution's remark in no way explicitly commented on the defendant's failure to take the stand but was merely a spontaneous statement in response to the defendant's own vocal interjection.