No. 14-10350-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FAWAD SHAH SYED,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of Georgia

BRIEF OF APPELLEE

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14-10350-BB
United States v. Syed

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISLOSURE STATEMENT

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Hall, Hon. J. Randall, United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. In Syed's request for oral argument, he points to what he characterizes as a "tricky distinction in 18 U.S.C. § 2422(b)," one that precludes travel to meet a targeted child from qualifying as a "substantial step" for an attempt under 18 U.S.C. § 2422(b). (Syed Br. at i.) That particular claim, however, was not raised before the district court. Consequently, it is subject only to plain error review here on appeal. Syed cannot establish plain error given the absence of any decision that supports his argument and the substantial wall of decisions by this Court to the contrary. All of the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. See Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this direct appeal pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. While not jurisdictional, the notice of appeal was timely filed on January 24, 2014 (Doc. 90), within 14 days of entry of judgment on January 23, 2014 (Doc. 89).

STATEMENT OF THE ISSUES

I. Does Syed's claim that arrangements and travel to meet a targeted child cannot qualify as a "substantial step" for a prosecution under 18 U.S.C. § 2422(b), which was never raised before the district court, fail plain error review given substantial precedent in this Court to the contrary?

II. Do Syed's related claims of prosecutorial misconduct, also never raised before the district court, fail plain error review for the same reason?

III. Did the district court abuse its discretion under Fed. R. Evid. 404(b) by admitting evidence that Syed targeted two other children in a very similar way, given Syed's defense at trial that he had no intent to persuade a child to commit sexual activity?

IV. Did the district court properly conclude that Syed engaged in a pattern of activity involving prohibited sexual conduct when, on three occasions, he contacted children for purposes of enticing and coercing them to have sex?

V. Should Syed's convictions for destruction of evidence stand, despite his claims of spillover prejudice, given the overwhelming proof

of his guilt on those counts, including his own admission that he instructed his wife to delete his phone and e-mail accounts?

STATEMENT OF THE CASE

I. Course of proceedings.

Over the course of four days in February 2013, Syed contacted "Samantha," a 14-year-old girl, over mobile-based and internet chat programs. Unbeknownst to Syed, "Samantha" was an undercover law enforcement agent. Syed was arrested when he showed up at the supposed apartment of "Samantha" with three condoms in his pocket and a bag of alcoholic beverages in his hands. From jail, he instructed his wife to delete his cell phone, his computer, and his e-mail accounts. See infra pp. 4-12.

For this conduct, Syed was indicted by a federal grand jury on one count of attempted enticement of a minor, in violation of 18 U.S.C. § 2422(b), and two counts of destruction of records in a federal investigation, in violation of 18 U.S.C. § 1519. (Doc. 19.) He pleaded not guilty (Doc. 25) and proceeded to jury trial.

At trial, over Syed's objection, the district court admitted, pursuant to Fed. R. Evid. 404(b), evidence of two prior similar instances

in which Syed contacted children. (Doc. 108-Pgs. 179-82, 208-10.) Syed moved for acquittal following the close of the government's case-in-chief; he argued only that the evidence failed to demonstrate that he had the requisite intent to entice or coerce a minor into engaging in prohibited sexual conduct. (Id. at 298-99.) The district court denied that motion. (Id. at 304-07.) Syed testified in his own defense. (Id. at 308-60.) The jury needed just 40 minutes of deliberations to convict him on all counts. (Id. at 419-20; Doc. 73.)

The district court sentenced Syed to a total of 294 months' imprisonment.[1] (Doc. 89.) Syed filed this appeal. (Doc. 90.) He remains incarcerated.

II. Statement of the facts.

Investigator Mark Dobbins of the Richmond County Sheriff's Office created an undercover profile on a mobile-based chat network called Meet24. (Doc. 108-Pgs. 35-38.) He used an old picture of a female law enforcement colleague made when she was 14 or 15 years

[1] The sentence on each count was ordered to run concurrently with the others, not consecutively. (Doc. 73-Pg. 2.)

old. (Id. at 39.) The profile indicated that its user was "Samantha," a 14-year-old girl. (Id. at 40.)

On February 8, 2013, a user named "Daniel" contacted "Samantha." (Id. at 42.) The profile for "Daniel" contained no photograph. (Id.) "Daniel" asked "Samantha" for her telephone number, and "Samantha" provided him with a number set up by the investigator for undercover use. (Id. at 49, 75.) "Samantha" gave her "ASL" – age, sex, and location – as "14F, Augusta, Georgia." (Id. at 48-50, 75.) "Daniel" claimed to be 23 years old, divorced, with a male roommate; he later claimed to be 28. (Id. at 51, 75, 86, 97, 103.)

For the next four days (February 8-11, 2013), "Daniel" and "Samantha" texted back and forth both on the chat network and through the text messaging feature of their telephones. (Id. at 55.) "Daniel" asked to speak to "Samantha" on the telephone, and, on February 10, a law enforcement agent with a "very young voice, a very youthful voice" pretended to be "Samantha" on that call. (Id. at 56.)

"Daniel" actually was Syed, who was 46 years old and married at the time. (Id. at 69.) Agents were able to identify him through the Google Voice account associated with the number that he used when

speaking to "Samantha" by telephone. (Id. at 59-60.) That account was tied to two e-mail addresses: one belonging to "Daniel Spiles" and another belonging to "Fawad Syed." (Id. at 61-62.) The most common Internet Protocol (IP) address used to access the Google Voice account returned to Comcast subscriber "Nicole Syed," Syed's wife, at Syed's residence. (Id. at 62-67, 69.) "Daniel Spiles" was just an alias; no records existed to suggest that he was a real person. (Id. at 69.)

One of the first questions that Syed asked of 14-year-old "Samantha" during their chats was whether she had a boyfriend. (Id. at 75-76, 83.) He asked her where she lived, and when she told him, he immediately mapped it out on the internet. (Id. at 76, 78.) He told her that he was tired of girls on the chat network being too far away, "taken, or just trying to play games." (Id.) He asked her to "[i]magine how crazy it would be if we ever actually met." (Id. at 77.) He said, "I guess you live with your parents or something," and "Samantha" replied that she lived with just her step-dad, a truck driver who often was out of town for work and left her home alone. (Id.) "How about brothers and sisters?" asked Syed, and "Samantha" replied "just me." (Id. at 78.)

Syed told "Samantha" that she was "so brave" and "sound[ed] way mature for your age." (Id. at 78, 82.)

Syed told "Samantha" to keep her telephone close because he "would hate for your daddy to find out that you're talking too [sic] much older guy." (Id. at 85.) After learning from "Samantha" that her father was an ex-Marine, Syed told her, "Don't be surprised if I end up changing my mind about going further with you." (Id. at 89.) He told her not to let her friends know that she was chatting with him. (Id. at 88.) He repeatedly asked "Samantha" to meet him in person. (Id. at 87, 92, 99, 101, 106.) He complained when "Samantha" said she could not meet because she was hanging out with a neighbor kid that "[i]t seems like you can't get away from this girl." (Id. at 92.)

Syed asked "Samantha" what she considered to be her "best features." (Id. at 93.) "Samantha" responded with "my legs because I run a lot," and Syed said that he "was hoping you'd mention a body part that I'd be able to see when we met." (Id. at 93.) He offered to show her his tattoos – which were "on [his] chest and other areas" – when they met, but he claimed that he was "just not sure about taking some of my clothes off on our first date." (Id. at 94.) He asked "Samantha" what

she found "attractive in a guy." (Id.) He asked her, "What's the oldest guy you'd date?" (Id. at 95.) He asked how "intimate" she had been with her last boyfriend, how "romantic" she was, and whether she liked to drink alcohol. (Id. at 95-96.) He pressed for details of how "intimate" she had been before:

> [Syed]: Elaborate on what you said about little intimacy in your past relationship.
>
> . . .
>
> [Samantha]: We didn't do it, just messed around.
>
> [Syed]: Well, I figured that much when you said little.
>
> [Samantha]: Just touching and kissing.
>
> [Syed]: Cool. Wait. You're what? 12? LOL.
>
> [Samantha]: Just turned 13.
>
> [Syed]: Oh, okay. No wonder you're so mature. LOL.
>
> [Samantha]: What do you mean?
>
> [Syed]: Well, a person who's confident and mature would only take a plunge like that.

(Id. at 97.) "Samantha" asked Syed if he was "okay" with her being so young, and Syed replied, "Yes, I am only because you seem so much more mature." (Id. at 97.)

"Samantha" agreed to meet Syed in person, while her stepfather was away, and she asked what they would do together. (Id. at 101.) Syed said, "Well, for our first time, hang out, talk, chill." (Id.) He chose to meet at her apartment. (Id.) He worried about whether the neighbors would see him arrive. (Id. at 102.) He realized that he could get into "trouble" if they were caught, but said, "[T]hank God, you're smart. Otherwise, I'd never take a chance like this." (Id. at 102-03.) Syed wanted to see whether he and "Samantha" had "the same chemistry in person as we do here on the phone." (Id. at 107.) He told "Samantha" that "if we like each other more and ever want to get intimate . . . it'd have to be down the road" due to her age. (Id. at 108.)

Syed's communications with "Samantha" were consistent with "grooming," that is, "behavior that's designed to either befriend or establish an emotional control with a young person to try to lower their inhibitions for the purpose of sexual assault or sexual exploitation of a child."[2] (Id. at 252.) Lying about his age and marital status made Syed

[2] There are six recognized components to the typical "grooming" process. The predator (1) targets a child, (2) gains access to the child through the creation of a trust relationship, (3) isolates the

more approachable to a child; claiming to be "totally open and honest" was an attempt by Syed to develop a trust relationship with the child that he could later exploit. (Id. at 253-54.) His insistence that "Samantha" keep their communications secret, his attempts to isolate her from friends and family, his flattery of her with compliments about her "maturity," and his questions about her prior boyfriends and experience with "intimacy," all were consistent with the grooming tactics of a child predator. (Id. at 257-58, 262, 264, 266, 272-75.)

On February 11, after trying to schedule a later rendezvous with "Samantha," eventually Syed said, "[F]uck it. Let's just meet tonight. LOL." (Id. at 109.) He wanted to be "spontaneous . . . call it a surprise. LOL. A good surprise, of course." (Id.) He told "Samantha" that they "can drink if you feel like it, but you don't have to. Just a thought. I was gonna chill with you." (Id.) When "Samantha" claimed that she was "a mess" and needed "to take a shower and stuff" before he arrived,

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child from friends and family, (4) fulfills an emotional need for the child, for instance, by bolstering self-esteem, (5) desensitizes the child to sexual activity, possibly through the use of pornography or alcohol, and (6) controls the activities of the child, ultimately leading to sexual activity. (Doc. 108-Pgs. 252-53, 279-280.)

Syed responded, "Put your hair up or something or take a quick shower and wear your PJ's or whatever." (Id. at 109-10.) "Samantha" finally agreed that he could come to her apartment at 11:30 p.m. that night. (Id. at 111.)

Syed showed up at the apartment, where he was arrested. (Id. at 113.) At the time of his arrest, he was carrying, in one hand, a grocery bag that contained a six-pack of Mike's Lite Hard Lemonade (a malt liquor beverage) and a pint can of beer. (Id. at 113-14.) In the other hand, he had a can of pepper spray. (Id. at 114.) In his pockets were three condoms and his iPhone. (Id.) Law enforcement had established surveillance on Syed that evening, and they watched him leave his house, drive to a Kroger grocery store, then to a convenience store, then to the apartment. (Id. at 116-17, 163-66, 169.) A receipt from that Kroger reflected that Syed purchased the alcoholic beverages there. (Id. at 124.) According to Syed, he grabbed the condoms from a box hidden in his garage before he left home. (Id. at 322.)

Syed's wife had divorced him by the time of trial, and she testified as a government witness. (Id. at 184.) According to her, Syed left their house the night of February 11, after their eldest son's birthday party,

with the excuse that a buddy was having "girlfriend problems." (Id. at 188-89.) Later she received a call from the police; she was told that Syed had been arrested and taken to jail, and that Syed had requested that she not be told the charges against him. (Id. at 191.) Soon after, Syed called his wife from the booking area of the jail. (Id. at 192.) That call was recorded; signs around the telephones informed prisoners that all calls were recorded. (Id. at 132-33.) Syed told her "to get on his computer and gave me a series of instructions for things to do for him . . . he wanted me to delete things." (Id. at 192.) At his request, she deleted his e-mail account and wiped his iPhone. (Id. at 193-96.) She tried to wipe their home computer at Syed's direction, but was unable to find the program that Syed wanted her to use. (Id. at 129, 196.) She admitted all that to the investigator who called her a half-hour later, after the investigator realized that Syed's seized iPhone had been returned remotely to its factory settings. (Id. at 128-29.)

Syed's ex-wife also testified that she met Syed in "[a]n AOL chat room" back in the year 2000, when she was 17 years old. (Id. at 185.) Syed lied to her about his age and his name at first; he said he was 25 and that his name was "Daniel." (Id. at 186.) They had sex for the first

time about a week after they starting chatting over the internet, on the day they first met in person. (Id. at 185-87, 204-05.) She did not know they were going to have sex that day; instead, Syed told her that they should meet just "to see if [they] have chemistry." (Id. at 206.) Syed told her later that "he always intended [her] to just be a one-night stand." (Id. at 205.)

Recovered from Syed's computer were chats between him and a 13-year-old girl in June 2012. (Id. at 226, 250.) He told that girl that he was 22 years old. (Id. at 231.) He asked her what her "turn-ons" were, and she responded "sexual ones, some aggressiveness, but not too much, and kissing, biting my neck." (Id. at 242.) He told her that she "sound[ed] so mature" (id. at 231), told her that he just wanted to "hang out" (id. at 239), and called her "my love" (id. at 243). They discussed meeting in person; she gave him her cell phone number. (Id. at 232, 234.) Syed told her to delete her chat account before meeting up with him (id. at 235) and to come alone (id. at 243). He wanted to avoid public places: "with our age thing, I think the less people know, the better." (Id. at 243-44.) They agreed to meet at a cemetery in Syed's van with tinted windows. (Id. at 234-35, 340.) Syed told the girl that

"we don't want to be seen at the place hanging out outside in case someone comes through." (Id. at 341.) Shortly after the girl arrived for the meeting, she walked away (id. at 343), and Syed later expressed his frustration to her: "I had to borrow [the] van to see you and for nothing." (Id. at 236.)

III. Standards of review.

The district court's denial of a motion for judgment of acquittal on sufficiency of the evidence grounds is reviewed de novo on appeal. United States v. Browne, 505 F.3d 1229, 1253 (11th Cir. 2007). However, objections not preserved in the district court – including specific arguments not raised as part of the motion for acquittal at trial – are reviewed on appeal only for plain error. See United States v. Olano, 507 U.S. 725, 733-34, 113 S. Ct. 1770 (1993); United States v. Hunerlach, 197 F.3d 1059, 1068 (11th Cir. 1999).

Claims of prosecutorial misconduct not raised before the district court are reviewed only for plain error. United States v. Flanders, 752 F.3d 1317, 1334 (11th Cir. 2014); United States v. House, 684 F.3d 1173, 1197 (11th Cir. 2012).

A district court's decision to admit or exclude evidence at trial is reviewed on appeal for abuse of discretion. See United States v. Antonietti, 86 F.3d 206, 207 (11th Cir. 1997); United States v. Brown, 587 F.3d 1082, 1091 (11th Cir. 2009).

"A challenge to the application of the Sentencing Guidelines is a mixed question of law and fact." United States v. Mandhai, 375 F.3d 1243, 1247 (11th Cir. 2004). The district court's factual findings are reviewed for clear error, and its interpretation and application of the guidelines to those facts is reviewed de novo. Id.

SUMMARY OF THE ARGUMENT

Sufficient evidence existed to support Syed's conviction for attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). He targeted and groomed "Samantha," who he believed to be a 14-year-old girl, arranged to meet her in person, and arrived at her apartment with condoms and alcohol. Syed never raised before the district court the argument he pursues on appeal: that his arrangements to meet "Samantha," and his travel to meet her, cannot constitute a substantial step for an attempt conviction under § 2422(b) as a matter of law. Because that argument was not raised below, it is

subject to plain error review. No precedent supports Syed's argument; in fact, a wall of this Court's decisions is to the contrary.

Syed's related claims of prosecutorial misconduct must similarly fail. The prosecutor at trial did not commit any error by arguing, consistent with this Court's precedent, that Syed's actions in arranging a meeting with "Samantha," and traveling there with condoms and alcohol, constituted a substantial step for purposes of the § 2422(b) charge.

The district court did not abuse its discretion by admitting evidence that, on two prior occasions, Syed similarly targeted children for sex, using tactics like those he employed against "Samantha": lying about his age, giving a false name of "Daniel," and insisting that they meet in person so that he could see if they had "chemistry" together. Given Syed's defense (that he was pursuing just friendship with "Samantha," not sex), the evidence was important to establish his criminal intent. No possible prejudice substantially outweighed the evidence's strong probative value, especially given the appropriate limiting instruction delivered by the district court.

No error occurred at Syed's sentencing. The district court appropriately concluded that by Syed's three attempts to convince children to have sex with him, one of which was successful, he had engaged in a pattern of activity involving prohibited sexual conduct, thus qualifying for a five-level Guidelines enhancement.

No spillover prejudice calls into question Syed's convictions for destroying evidence. The jury had before it overwhelming evidence of Syed's guilt on those counts, including his own admission during his trial testimony that he instructed his wife to destroy information on his iPhone and e-mail accounts. His only defense to that charge was legally insufficient and factually contradicted.

ARGUMENT AND CITATION OF AUTHORITY

I. Sufficient evidence existed to support the jury's conclusion that Syed attempted to persuade a minor to engage in sexual activity.

Syed argues on appeal that the evidence at trial was insufficient to convict him of attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). That statute provides:

> Whoever, using . . . any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18

> years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be . . . imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b). To convict Syed of an attempt, the government had to prove "(1) that [he] had the specific intent to engage in the criminal conduct for which he is charged and (2) that he took a substantial step toward commission of the offense." United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004) (citations omitted). The specific intent required for an attempt under § 2422(b) is "to persuade, induce, entice or coerce a minor to engage in unlawful sex." Id. A "substantial step" is established when "defendant's objective acts mark his conduct as criminal such that his acts as a whole strongly corroborate the required culpability." Id.

On appeal, the sufficiency of the evidence is viewed "in the light most favorable to the Government, drawing all reasonable inferences and credibility choices in the Government's favor." United States v. Browne, 505 F.3d 1229, 1253 (11th Cir. 2007). Under that standard, the proof at trial here easily was sufficient. The jury heard that Syed contacted a child online, "groomed" that child through all manner of

communications designed to entice and persuade her to consent to sexual activity, set up a meeting with her, traveled to meet her with alcohol and condoms, and twice before had similarly targeted children for sex. See supra pp. 4-14.

Syed argues on appeal that his travel to meet or preparations to meet "Samantha" could not qualify, as a matter of law, as a "substantial step" for purposes of an attempt charge under 18 U.S.C. § 2422(b). (Syed Br. at 27-35.) He never made that argument before the district court. Syed raised no objection when the government argued in its opening statement, and no objection when it argued similarly in its closing statement, that his travel and preparations constituted a substantial step. (Doc. 108-Pgs. 27-28, 364, 378.) When Syed moved for acquittal at the close of the government's case, he did not mention the "substantial step" requirement at all. (Id. at 298-99, 301-02.) He argued instead that the evidence did not demonstrate that he had the requisite intent to coerce or induce sexual activity:

> There are no texts on this computer that prove that my client was trying to coerce or induce sexual intercourse from ["Samantha"] on this date. For that reason I'm asking that the Court dismiss Count One.

(Id. at 299.)[3] That was his chosen defense, lack of intent:

> So my client never once tried to coerce sex, tried to induce sex, never once tried to persuade sex, . . . He was, in fact, the one saying that's not going to happen. For that reason, we ask Your Honor to grant the motion.

(Id. at 302.) The government responded to that argument by citing the many ways that Syed's intent had been demonstrated, including not only by the content of his communications with "Samantha," but also by his travel to her apartment with condoms and alcohol:

> It's the specific intent of the Defendant . . . that he is trying to groom or trying to persuade or entice or induce to cause a minor . . . to meet with him for the purpose of having sexual activity, and . . . him arriving with alcohol in his hand gives that signal of what his intent is – lowering her inhibitions, and the condoms in his back pocket certainly give that indication of what his intent was.

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[3] The only time that Syed mentioned his travel to the apartment during the argument on his motion for acquittal was to say that the condoms found in his pocket were irrelevant to his intent because "he was already under arrest at that point [and] according to the prosecution the crime had already been committed." (Id. at 298.) Now he concedes, differently, on appeal that such evidence "might be relevant, to the extent it might illuminate what a defendant's state of mind was during online chats," though he claims that "[i]t is not relevant to whether a defendant took a substantial step." (Syed Br. at 23.) This was not the argument made to the district court.

(Id. at 300-01.) The district court, in denying Syed's motion for acquittal, described the motion as going to the evidence of his intent:

> [L]et's move in to the real basis for the Defendant's motion and that is insufficient evidence to find guilt on the issue of enticement – specifically, the Defendant's assertion that there is a lack of evidence on whether the Defendant was using the computer or other instrument of interstate commerce for purposes of enticing Samantha or coercing Samantha or inducing Samantha to engage in sexual activity such that it would be a violation of Georgia state law.

(Id. at 304-05.) As its reason for denying Syed's motion, the district court detailed the ways in which Syed's intent had been shown. (Id. at 304-07.) No one – not Syed, not the government, and not the district court – had anything substantive to say about the substantial step requirement during these discussions.[4] (Id. at 297-300.)

Because Syed's argument was not raised below, it is subject to plain error review here on appeal. See United States v. Hunerlach, 197 F.3d 1059, 1068 (11th Cir. 1999) (applying plain-error review to sufficiency-of-evidence claim not specifically raised before trial court in

[4] The only mention of "substantial step" was by the government, solely as part of its recitation of the elements of the § 2422(b) crime at the very beginning of its argument in response to Syed's motion. (Doc. 108-Pg. 299.)

motion for acquittal); see also United States v. Louis, ___ F. App'x ___, 2015 WL 689634 (11th Cir. Feb. 19, 2015) (unpub.) (citing Hunerlach for proposition "that plain-error review applies even when a defendant moved for judgment of acquittal on sufficiency-of-the-evidence grounds but failed to articulate at that time the specific sufficiency-of-the-evidence claim later raised on appeal"); United States v. Little, 552 F. App'x 937, 939 (11th Cir. 2014) (unpub.) (citing Hunerlach; "[T]he record indicates that Little's motion for judgment of acquittal before the district court did not encompass his argument on appeal that the evidence was insufficient to show that he knew the names he used belonged to real people. Therefore, this argument has been raised for the first time on appeal, and we review it for plain error.").

For Syed's claim to amount to plain error requiring reversal of his conviction, he must show, inter alia, that the error was plain. See United States v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770 (1993). "It is the law of this circuit that, at least where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." United States v. Lejarde-Rada, 319 F.3d

1288, 1291 (11th Cir. 2003). Syed cites no precedent establishing that preparation or travel to meet a targeted child is a legally insufficient substantial step for an attempt under § 2422(b), and the language of that statute does not specifically resolve the issue. Any error thus is not plain.

If anything, it is plain that no error at all occurred. A wall of this Court's decisions stands for the proposition that travel to meet a targeted child, or preparation to travel, qualifies as a substantial step under § 2422(b). See, e.g., United States v. Lanzon, 639 F.3d 1293, 1299 (11th Cir. 2011) (substantial step where defendant "conducted sexually explicit online conversations . . ., drove several miles to the arranged meeting place, . . . and carried condoms and mint lubricant in his truck"); United States v. Yost, 479 F.3d 815, 820 (11th Cir. 2007) (substantial step where defendant "called [the child] on the telephone and, after hearing her voice, made arrangements to meet her so they could engage in sexual activity"); United States v. Murrell, 368 F.3d 1283, 1288 (11th Cir. 2004) (substantial step where defendant "traveled two hours to another county to meet a child for sex in exchange for money; and . . . carried a teddy bear, $300.00 in cash, and a box of

condoms when he arrived at the meeting site"); see also United States v. Prine, 569 F. App'x 859, 861 (11th Cir. 2014) (unpub.) (substantial step where defendant "arranged to meet the girls in their home on a day and time convenient for their schedule; he traveled to their home; and he arrived with a pizza to entice them."); United States v. Deal, 438 F. App'x 807, 811 (11th Cir. 2011) (unpub.) ("In addition to his sexually explicit conversations, Deal took other substantial steps to entice Alice to agree to sexual activities and to be photographed. Deal offered to buy Alice a bikini and thong underwear, obtained her permission to be photographed, arranged to meet at a location convenient for her, traveled to that location twice, and had in his possession a camera, thong underwear, and condoms."); United States v. Schmitz, 322 F. App'x 765, 768 (11th Cir. 2009) (unpub.) ("[T]he messages Schmitz sent the minor, combined with the fact that she drove 25 to 30 miles to pick him up in order to initiate a physical relationship, constituted a substantial step towards persuading, inducing, or enticing the minor to engage in prohibited sexual activity."); United States v. Bolen, 136 F. App'x 325, 328-29 (11th Cir. 2005) (unpub.) (in context of whether probable cause existed for warrant, "[t]he agents also had information

that Bolen took a substantial step toward the commission of the [§ 2422(b)] offense, in that he arranged meeting with the purported mother and the minor and arrived at the meeting site at the planned time.").

Syed discards this Court's prior decisions on the matter as just "dicta" because "in none of those cases was travel or setting up a meeting the only substantial step taken by the defendant; there were substantial steps toward persuasion in the communications themselves." (Syed Br. at 26-27.) He ignores Murrell, apparently, in which this Court found that the defendant's travel was sufficient for a "substantial step," even disregarding the defendant's sexually explicit communications with the undercover agent. See 368 F.3d at 1288 n.3. And Deal, in which this Court found what that travel was an "other substantial step[]," in "addition to his sexually explicit conversations." 438 F. App'x at 811. Moreover, that this Court set out alternative bases for its decisions does not makes those alternatives all dicta. See Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340, 48 S. Ct. 194 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same

conclusion."); United States v. Bravo, 532 F.3d 1154, 1162 (11th Cir. 2008) ("[I]n this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings."); McClellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n.1 (5th Cir. 1977) (en banc) ("It has long been settled that all alternative rationales for a given result have precedential value.").

Syed also claims that the cases amount to dicta because his particular argument about the validity of travel as a "substantial step" was not raised in them (Syed Br. at 38), but that slices these cases far too finely. At issue in every one of the cited decisions was whether there was evidence of a substantial step for purposes of a § 2422(b) attempt charge. The defendants in those cases argued that the evidence against them – including their arrangements to meet and travel to meet the minor – was insufficient. The holdings in each case necessarily include the proposition that travel to meet a targeted minor, or preparation to travel to such a meeting, is sufficient to prove a substantial step under § 2422(b).

The government knows of no circuit case in the country that has followed Syed's reasoning, despite abundant litigation over what

constitutes a sufficient "substantial step" under § 2422(b).[5] In fact, while courts recognize that travel or an agreement to meet is not required for a substantial step under § 2422(b), they generally hold that such action, if present, is sufficient. See, e.g., Yost, 479 F.3d at 819 (this Court, noting that "this is the first time we have been confronted with an attempt conviction under 18 U.S.C. § 2422(b) where travel is not involved," and holding that travel is unnecessary); United States v. Howard, 766 F.3d 414, 420 (5th Cir. 2014) ("Travel to a meeting place is, therefore, sufficient to establish attempt. But we have never held that travel or plans to travel are necessary.")

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[5] Syed resorts to citing United States v. Nitschke, 843 F. Supp. 2d 4 (D.D.C. 2011), a case involving a distinguishable set of facts. There, the defendant "merely t[old] an adult in an online chat that he would like to join him in sex the adult had already pre-arranged with the minor," then traveled to meet for that purpose. Id. at 5. Under such circumstances, there was no attempt to persuade a minor at all by the defendant; as the defendant understood the situation, the minor had already been persuaded. Consequently, the defendant's travel could not be a relevant substantial step in support of any persuasion; it was not part of, and did not corroborate, any attempt to persuade. See United States v. Jarrett, No. 3:12-CR-144, 2013 WL 1117871, at *8-*9 (E.D. Tenn. Jan. 18, 2013) (distinguishing Nitschke on that basis). Syed's case is different.

Even in the absence of this Court's precedent, and even if he had preserved his argument before the district court, Syed's claim would fail. Arrangements and travel to meet a targeted child are substantial steps for purposes of an attempt under § 2422(b). They are steps that strongly corroborate that the defendant's intent is indeed to coerce, persuade, or entice the child to have sex, and not just to chat idly online. It is a step that naturally furthers the prohibited enticement if uninterrupted.

Syed's contrary argument is flawed in at least two ways. First, it turns on the baseless idea that every component of an attempt to violate § 2422(b) must occur online (or otherwise using some facility or means of interstate commerce). Certainly, the statute requires that the defendant "use" a facility or means of interstate commerce during the attempt; that is the jurisdictional element making this a federal, rather than a state, crime. 18 U.S.C. § 2422(b). But the statute does not purport to require that every relevant step in the commission of the crime, or even the core act of persuasion, involve a facility of interstate commerce. See United States v. Hite, 769 F.3d 1154, 1165 (D.C. Cir. 2014) (rejecting argument "that the statute requires the use of a means

of interstate commerce for the act of persuasion of the minor (or the attempt to persuade the minor)"). The illicit process of attempting to "groom" a child victim online, as prohibited by § 2422(b), can and should include, as a substantial step, offline conduct – as Syed "theoretically" concedes. (Syed Br. at 23.)

Syed's argument also relies on artificially ending the defendant's attempt to solicit or entice his child victim at the point when the defendant first travels to meet the child. In reality, the meeting may be a component of the defendant's continuing attempts to entice, not an end point. In the course of attempting to persuade the child to have sex, the defendant could meet with the child to confirm her age or location, to take her gifts, to introduce himself in person, or to engage in any manner of additional "grooming" activity that is designed to further facilitate his online persuasion of her. All of that conduct properly should constitute a substantial step in furtherance of a § 2422(b) attempt. Any narrower view of the statute flies in the face of its stated purpose: to be a "comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers." H.R. Rep. No. 105-557, at 10 (1998).

II. Syed's related claims of prosecutorial misconduct fail.

Syed claims, relatedly, that the prosecutor committed misconduct by arguing to the jury that his travel constituted a substantial step for an attempt under § 2422(b). He never made that argument before the district court either. Consequently, it too is reviewed here on appeal only for plain error, as he concedes. See United States v. Flanders, 752 F.3d 1317, 1334 (11th Cir. 2014); United States v. House, 684 F.3d 1173, 1197 (11th Cir. 2012). Again, he cannot show any error that is plain, or any error at all, for the reasons stated supra section I. The prosecutor did not commit misconduct by arguing, consistent with significant Eleventh Circuit precedent, that Syed's preparation to meet "Samantha," and his travel to meet "Samantha, was a substantial step.

III. The district court did not clearly err by admitting evidence that, on two prior occasions, Syed committed similar attempts to entice children to engage in sexual activity.

Federal Rule of Evidence 404(b) provides for the admission of "other crimes, wrongs, or acts" of the defendant not to prove propensity, but rather for "other purposes," such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). At Syed's trial, the district court

admitted, under Rule 404(b), evidence of the two prior instances in which Syed sought to prey on children. The first involved Syed's ex-wife, who testified that in 2000, when she was just 17 years old, Syed communicated with her through an internet chat program, lied to her about his name and age, and had sex with her on the first day they met. (Doc. 108-Pgs. 185-87, 204-06.) The other involved chats found archived on Syed's computer between him and a 13-year-old girl in 2012, in which he asked the girl about her sexual turn-ons and arranged to meet her in person. (Id. at 226-43.)

Admission of this evidence, pursuant to Fed. R. Evid. 404(b), was no abuse of discretion. The district properly considered the three necessary prongs of analysis: (1) whether the evidence is relevant to an issue other than character; (2) whether the evidence is sufficiently reliable to prove that the defendant committed the act, and (3) whether the probative value of the evidence is substantially outweighed by undue prejudice. United States v. Jernigan, 341 F.3d 1273, 1280 (11th Cir. 2003).

As to the first prong, the evidence was relevant to Syed's intent. The district court rightly concluded that Syed squarely placed his intent

at issue at trial by his not-guilty plea and by his chosen defenses. (Doc. 108-Pgs. 182, 210.) "A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995). Far from removing intent as an issue, Syed's defense at trial was that nothing about the texts between him and "Samantha," or any of his other actions, demonstrated that he held the necessary intent to coerce or persuade a child to engage in sexual conduct. By doing so, he "expressly made his . . . intent a focal point of the case, plainly making the evidence . . . admissible for non-propensity purposes." United States v. Perez, 443 F.3d 772, 789 (11th Cir. 2006).

As to the second prong, sufficient evidence existed to conclude that Syed committed the earlier acts. Syed does not dispute that he committed those acts, and they were amply proven by the testimony at trial of Syed's ex-wife (Doc. 108-Pgs. 185-87, 204-06), and the forensic examiner who discovered the 2012 chats on Syed's computer (id. at 211, 225.)

As to the third prong, evidence admitted under Rule 404(b), like all other relevant evidence, is subject to exclusion only "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. In reviewing the district court's balancing decision on appeal, this Court "looks at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." United States v. Elkins, 885 F.2d 775, 784 (11th Cir. 1989). "Whether the probative value of Rule 404(b) evidence outweighs its prejudicial effect depends on the circumstances of the extrinsic offense. Factors to be considered in that balancing test include the strength of the government's case on the issue of intent, the overall similarity of the extrinsic and charged offenses and whether it appeared at the commencement of the trial that the defendant would contest the issue of intent." United States v. Dorsey, 819 F.2d 1055, 1061 (11th Cir. 1987).

Here, the probative value of this evidence was significant. It directly rebutted Syed's defense that his chats with "Samantha" were innocent attempts by him just to befriend a 14-year-old girl, not part of a "grooming" process designed to entice sex. As Syed concedes, "the

government's need for the prior acts evidence was high" (Syed Br. at 38), because his communications with "Samantha" did not explicitly set out his intent to have sex with her. His prior conduct effectively illuminated that intent for the jury. That prior conduct was remarkably similar to his communications with "Samantha": he targeted children online, "groomed" them for sex, and convinced them to meet with him in person. Any possible prejudice was minimized by the district court's limiting instructions to the jury. The court gave a thorough and appropriate instruction, tracking the Eleventh Circuit's pattern, that told the jury to consider this evidence only for narrow non-propensity purposes. (Doc. 108-Pg. 407); see Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction 4 (2010). Given the standard applicable here on appeal, it cannot be said that the district court here abused its discretion in admitting this evidence.

Syed levies a number of arguments to the contrary, none of which have merit. He argues that the conduct with his wife in 2000 was too old to have any significant probative value. (Syed Br. at 33.) Certainly, "temporal remoteness depreciates the probity of the extrinsic offense." United States v. Beechum, 582 F.2d 898, 915 (5th Cir. 1978). However,

this Court has refused to adopt a "bright-line" rule and instead has made clear that "decisions as to impermissible remoteness are so fact-specific that a generally applicable litmus test would be of dubious value." United States v. Pollock, 926 F.2d 1044, 1048 (11th Cir. 1991). Accordingly, a defendant "bears a heavy burden in demonstrating an abuse of the court's 'broad discretion in determining if an extrinsic offense is too remote to be probative.'" Id. at 1047 (quoting United States v. Terebecki, 692 F.2d 1345, 1349 (11th Cir. 1982)). This Court has affirmed the admission of similarly-old conduct under Rule 404(b). See, e.g., United States v. Lampley, 68 F.3d 1296, 1300 (11th Cir. 1995) (15-year-old marijuana dealings); United States v. Gil, 581 F. App'x 766 (11th Cir. 2014) (unpub.) (plain-error review, 17-year-old drug conduct); United States v. Garcia Gutierrez, 438 F. App'x 762, 767 (11th Cir. 2011) (unpub.) (16-year-old conviction). Given the deference due, it cannot be said that the district court erred here by following suit.[6]

[6] This Court's decision in United States v. Dothard, 666 F.2d 498 (11th Cir. 1982), cited by Syed, did not turn on temporal remoteness of the prior act. In Dothard, the defendant tried in 1977 to enlist in the Army, and he lied on an enlistment form by checking "No" in a box that asked whether he had any arrests or convictions. Id. at

Syed says that any probative value of his 2000 conduct was dispelled or diminished by the fact that there were "enormous social and technological changes that took place online from 2000 and 2013." (Syed Br. at 34.) It makes little difference, though, that Syed may have used a different text messaging program, or a different way of accessing the internet, in those years. His predation of children employed the same tactics whether he used America Online or his iPhone. He targeted children in 2000 and 2013 by lying about his age, using the false name of "Daniel," and urging the child to meet with him to see if they had "chemistry" together. (Doc. 108-Pg. 186.) The only significant

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500. He actually had been convicted the year before of a false statement to the Veterans' Administration, and he was on probation for that offense at the time. Id. At trial, the government sought to admit under Rule 404(b) evidence that, in 1976, he lied to a Alabama driver's license examiner about his employment. Id. This Court found that the district court abused its discretion by admitting that evidence because, first, "we are unable to say that [Dothard] possessed the same state of mind" then and, also, because "no logical nexus existed between this extrinsic act and the present charge so that the extrinsic act was probative of Dothard' state of mind." Id. at 503. "Dothard's application for an Alabama license in no way demonstrates that he knew of the presence of items forty and forty-two on the form and that he knowingly and willfully falsified his Guard application." Id. at 504. Here, by contrast, there is a logical nexus, as the prior event in 2000 involved the same kind of conduct and same kind of intent as in 2013: Syed intended to convince a child to have sex with him.

difference between the two incidents, and not one that weighs in his favor in the context of Rule 403 balancing, is that Syed actually had sex with the child he targeted in 2000, at their very first meeting, but was prevented from doing so in 2013 because "Samantha" was actually an undercover law enforcement officer.

Syed argues that his 2012 chats had no probative value "because Syed did not persuade [that] teenager to have sex." (Syed Br. at 35.) He claims that his actions then did not amount to any criminal offense, that it just involved "highly inappropriate, [and] very mildly sexual" texts. (Id. at 36.) That is a highly skewed and self-serving view of his conduct in 2012. A different view, a more reasonable view, and the view apparently shared by the district court, is that Syed in 2012 committed a similarly illegal attempt to entice a child for sex, thwarted only by the good sense of the child not to enter his tinted-windowed van at the town cemetery.

IV. The district court did not clearly err by concluding that Syed engaged in a pattern of activity involving prohibited sexual conduct.

The Sentencing Guidelines provide for a five-level increase in the offense level for "covered sex crimes," including violations of 18 U.S.C. §

2422(b), if the defendant "engaged in a pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5(b). A "pattern of activity" is defined as "at least two separate occasions [on which] the defendant engaged in prohibited sexual conduct with a minor." U.S.S.G. § 4B1.5, comment. (n.4(B)(i)). "Prohibited sexual conduct" is broadly defined, and it includes persuading a child to engage in sexual activity, or attempting to do so, in violation of 18 U.S.C. § 2422(b). See U.S.S.G. § 4B1.5, comment. (n.4(A)).[7] The involved "minor" can be "an undercover law enforcement officer who represented to [the defendant] that the officer had not attained the age of 18 years." U.S.S.G. § 4B1.5, comment. (n.1).

The district court here applied that five-level increase to Syed's Guidelines offense level, over his objection. (PSI ¶ 33; Doc. 107-Pgs. 16-17.) To find the required "pattern," the court relied on the charged

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[7] The commentary defines "prohibited sexual conduct" as, inter alia, "any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B)." U.S.S.G. § 4B1.5, comment. (n.4(A)). That statute defines offenses that serve as a predicate for enhanced punishment for repeat sex offenders as including "a conviction for an offense . . . under this chapter" which refers to Chapter 117 of Title 18, which is the chapter that also contains 18 U.S.C. § 2422.

conduct with "Samantha" in the instant case, Syed's 2012 communications and meeting with a 13-year-old girl, and Syed's actions in 2000 in convincing a 17-year girl, later his wife, to have sex with him when she was underage. (Doc. 107-Pgs. 16-17; PSI, Addendum.)

Syed argues that his interactions with the 13-year-old in 2012 did not amount to "prohibited sexual conduct at all," and that his interactions with his ex-wife in 2000, when she was just 17, "might have been some crime, depending on what exactly happened," but "was not online enticement as argued by the government." (Syed Br. at 38-39.) That again is an extremely self-serving view of his prior conduct, and one that the district court did not clearly err by rejecting. See United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S. Ct. 177 (1949) ("Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"). His attempts to solicit those girls constituted online enticement in violation of 18 U.S.C. § 2422(b) no less than his conduct with "Samantha" did, and it properly counted as part of Syed's long pattern of preying on children. Moreover, even if his conduct in 2000 did not amount to a violation of 18 U.S.C. § 2422(b), it probably constituted interstate travel with intent to engage in illicit

sexual conduct,[8] in violation of 18 U.S.C. § 2423(b), another viable offense to support the "pattern" required by U.S.S.G. § 4B1.5(b).[9]

V. Syed's convictions for destruction of records should stand.

Syed contends that he should be retried on his convictions for destroying records in a federal investigation, in violation of 18 U.S.C. § 1519. (Syed Br. at 39-40.) He believes that the jury convicted him of those counts based on spillover prejudice from his other alleged trial errors, "because of the way he had been improperly portrayed: as a habitual sex offender who brought condoms, alcohol, and pepper spray to meet Samantha." (Id. at 40.) As has been discussed supra, there were no reversible errors at Syed's trial, no error in him being portrayed

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[8] In December 2000, Syed lived in Maryland, and the 17-year-old lived in Virginia. (Doc. 108-Pgs. 184-85.) They met and had sex when they first met later that month. (Id. at 186, 204-05.)

[9] Contrary to Syed's claims (Syed Br. at 39), the district court only needed one additional instance, other than the offense conduct, to justify application of U.S.S.G. § 4B1.5(b). See U.S.S.G. § 4B1.5, comment. (n.4(b)(ii)) (noting that one of the "at least two occasions" can be the instant offense); see also United States v. Rothenberg, 610 F.3d 621, 625 n.5 (11th Cir. 2010) (same). Either the 2000 incident or the 2012 incident sufficed to make out the required pattern.

in the way that he was, and, consequently, no spillover prejudice from any error to these separate counts of conviction.

Even if there was some error, Syed's convictions on the destruction-of-evidence counts should stand. The jury convicted Syed of those counts because he conceded at trial, during his own testimony, that he asked his wife to delete his iPhone, e-mail account, and home computer after he was arrested. (Doc. 108-Pg. 323.) Between that concession, his ex-wife's testimony at trial on the same point (id. at 192-96), and the introduction of the actual jail-recorded call between Syed and his wife (id. at 200; Gov. Trial Ex. 22), the proof of Syed's guilt on those charges was overwhelming. Syed's only defense to these charges at trial, that he did not know that he was the subject of a federal investigation, was legally insufficient, see United States v. McQueen, 727 F.3d 1144 (11th Cir. 2013),[10] and, in any event, factually dispelled. In a recorded interview, played at trial, an investigator told Syed that he was a member of a Federal Bureau of Investigation task force. (Doc.

[10] Despite McQueen, the jury was instructed that it had to find that "Syed . . . knew or contemplated" that the matter "was within the jurisdiction of the Federal Bureau of Investigation." (Doc. 108-Pg. 410.) It necessarily found by the verdict that Syed knew.

108-Pg. 355-56; Gov. Trial Ex. 28.) That interview occurred before Syed contacted his wife and instructed her to destroy records. (Doc. 108-Pg. 356.) Faced with that recording, Syed conceded on cross-examination that he was told about the FBI's role. (Id. at 356.) Syed's claimed errors do not call into doubt the jury's resolution of these counts at all.

CONCLUSION

For the foregoing reasons, this Court should affirm Syed's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2010.

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8,861 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief was filed today through the Court's ECF system, in compliance with 11th Cir. R. 25-3(a), and thereby served on Michael A. Clark, counsel for appellant, pursuant to Fed. R. App. P. 25(c)(1)(D) and this Court's "Guide to Electronic Filing," §§ 7.1 and 7.2.

This 9th day of March, 2015.

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