

UNITED STATES

v.

COPE

United States Court of Appeals,
Sixth Circuit (2001)

Before JONES, NELSON, and DAUGHTREY, Circuit Judges.

Randall E. Cope appeals the sentence imposed upon his pleas of guilty and nolo contendere to charges that he sent annoying and harassing electronic mail messages in interstate and foreign communication in violation of 47 U.S.C. § 223(a)(1)(C)[, which provides criminal liability for anyone who makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications.] . . .

Cope pleaded guilty and nolo contendere to multiple charges that he harassed his former girl-friend, Sarah K. Jackson, a nationally recognized high school teacher, by sending incriminating e-mail messages in her name. Cope sent the e-mail messages to Ms. Jackson's church minister, members of her Sunday school class, the principal of the high school where she taught, the superintendent of her school system, and others. The messages, which seemed to be from Ms. Jackson and her ex-husband, indicated that she had been having sexual relationships with her students.

Prior to sentencing, Cope objected to the proposed "vulnerable victim" and obstruction of justice enhancements, the lack of any reduction for acceptance of responsibility, and the district court's failure to group the counts under USSG § 3D1.2. The district court addressed Cope's objections and overruled them. Accordingly, the district court sentenced Cope to twenty-four months of imprisonment to be followed by three years of supervised release, fined him \$1,300.00, and ordered him to pay \$2,100.00 in restitution. . . .

In reviewing a challenge to a sentence, this court reviews a district court's factual findings for clear error, duly defers to the district court's application of the guidelines to those facts, and reviews the district court's legal conclusions de novo. *United States v. Curly*, 167 F.3d 316, 318 (6th Cir. 1999). A factual finding is clearly erroneous when a reviewing court is left with the definite and firm conviction that a mistake has been made. *United States v. Ales*, 167 F.3d 1021, 1035 (6th Cir.), cert. denied, 527 U.S. 1027 (1999). A district court's factual findings for sentencing purposes need only be supported by a preponderance of the evidence.

Upon review, we conclude that the district court properly determined that several of Cope's victims constituted vulnerable victims. See USSG § 3A1.1(b)(1). Cope argues that Sarah Jackson was the only victim and that the vulnerable victim enhancement applies only if the victim is a victim of the

offense of conviction. Whether victims are vulnerable is a factual finding subject to review for clear error. *United States v. Salyer*, 893 F.2d 113, 116-17 (6th Cir. 1989). Since 1997, the Guidelines Manual has specified that a "victim" for purposes of USSG § 3A1.1 includes either a victim of the "offense of conviction" or a victim of "relevant conduct" under USSG § 1B1.1(b). Section 3A1.1(b)(1) of the Guidelines Manual provides that if the defendant knew or should have known that a victim of the offense was a vulnerable victim, the calculation is increased by 2 levels. USSG § 3A1.1(b)(1). A "vulnerable victim" is a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. USSG § 3A1.1, comment. (n.2).

As part of his scheme for revenge against his ex-girlfriend, Cope impersonated Ms. Jackson's ex-husband (Kirk Jackson). Kirk Jackson was terminally ill with the HIV virus, and Cope referred to Mr. Jackson's illness in his e-mail messages. Mr. Jackson's status as HIV positive satisfies the vulnerable victim classification. *United States v. Moskal*, 211 F.3d 1070, 1072-73 (8th Cir. 2000). While impersonating Ms. Jackson, Cope published several messages in which he named two high school students as Ms. Jackson's current sexual partners. The juveniles' ages satisfy the vulnerable victim classification. Ms. Jackson's fourteen-year-old son also qualifies as a vulnerable victim because of his age, because of his proximity to his mother, and because he was forced to watch his mother suffer from Cope's scheme. The district court's factual findings with respect to the vulnerable victims are not clearly erroneous.

The district court properly enhanced Cope's sentencing calculation for obstructing justice. While this court reviews for clear error the district court's factual findings underlying an obstruction of justice enhancement, the district court's determination that the facts constitute an obstruction of justice is reviewed de novo.

"[T]hreatening, intimidating, or otherwise unlawfully influencing a . . . witness . . . , directly or indirectly, or attempting to do so," constitutes an obstruction of justice. USSG § 3C1.1, comment. (n.4(a)). In this case, Cope left nude pictures of Ms. Jackson at her father's home in an effort to intimidate her and influence her not to provide evidence against him. Moreover, Cope was convicted in a companion case for his role in the January 22, 1999, shooting that occurred at Ms. Jackson's residence and the subsequent murder for hire scheme involving Ms. Jackson. That shooting was obviously designed to intimidate Ms. Jackson from participating in the prosecution of this case and thus justifies the enhancement. . . .

Finally, we conclude that the district court properly applied a sentencing adjustment under USSG § 3D1.4. Cope argues that the district court should have grouped the counts of his conviction under § 3D1.2 rather than apply a five-level multiple count adjustment under § 3D1.4. Cope argues that the counts of conviction should have been grouped under USSG § 3D1.2

because his conduct involved the same act and, in essence, the same victim-Ms. Jackson. . . . Application Note 6 to § 3D1.2 provides that counts involving offenses to which different guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. . . . In the instant case, Cope's e-mail messages harmed multiple victims. Cope was convicted of thirteen counts of sending harassing communications with the intent to annoy or harass. The thirteen messages were sent to nine different victims. . . . Thus, the district court properly refused to group Cope's offenses under § 3D1.2 and properly applied a sentencing adjustment under USSG § 3D1.4.

Accordingly, we hereby affirm the district court's judgment.