

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) 1:13-cr-00158-JAW
)
KEVIN LEE ROSS)

ORDER DENYING DEFENDANT’S MOTION IN LIMINE

With a jury selected and trial looming, Kevin Lee Ross has moved in limine to exclude all exhibits containing child pornography, arguing that such images are not necessary and prejudicial. *Def.’s Mot. in Limine to Exclude Presentation of Child Pornography Videos and Images to the Jury* (ECF No. 68). He explains that he is willing to stipulate that the exhibits contain child pornography. *Id.* at 1. In light of his proffered stipulation, he contends that the Court should exclude these exhibits because of their obvious prejudicial effect. *Id.* at 2-3.

The Government objects. *Gov’t’s Resp. to Def.’s Mots. in Limine* (ECF No. 69) (*Gov’t’s Opp’n*). The Government represents that as a part of its case in chief, it intends “on showing the jury a very limited number of these images and videos.” *Id.* at 1. Specifically, it “plans on showing the jury two images from each device and one video from each device for a total of 6 images and three videos.” *Id.* The Government contends that it need not accept Mr. Ross’s proposed stipulation, *id.*, and additionally argues that its planned presentation of the evidence is proper because “[t]he introduction of a reasonable number of child pornography images has been approved by many courts, including the First Circuit.” *Id.* at 3.

The Government is correct. In *United States v. Morales-Aldahondo*, 524 F.3d 115 (1st Cir. 2008), the First Circuit addressed this same issue and rejected the same argument that Mr. Ross is now making. As here, the defendant in *Morales-Aldahondo* offered to stipulate “to the fact that the images met the legal definition of pornography” and contended that his offer “obviated the government’s need to introduce any of [the images].” *Id.* at 120. The First Circuit observed that the “government need not accept a defendant’s attempt to use a stipulation to overcome the right of the government ‘to make a full presentation of the crime currently charged.’” *Id.* (quoting *United States v. Tavares*, 21 F.3d 1, 3 (1st Cir. 1994)). The *Morales-Aldahondo* Court observed that “full presentation” includes “the presentation of a sample of images.” *Id.* The First Circuit also indicated that the district court “properly balanced the competing concerns of Rule 403 by limiting the number of images presented.” *Id.* Other circuits have arrived at the same conclusion. *United States v. Cunningham*, 694 F.3d 372, 391 (3d Cir. 2012); *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Schene*, 543 F.3d 627, 643 (10th Cir. 2008); *United States v. Ganoë*, 538 F.3d 1117, 1123-24 (9th Cir. 2008); *United States v. Sewell*, 457 F.3d 841, 844 (8th Cir. 2006); *United States v. Dodds*, 347 F.3d 893, 898-99 (11th Cir. 2003).

Because the images and videos are potentially admissible, this does not mean that the Court foregoes its obligation to perform a Rule 403 analysis to determine whether the proffered exhibits are too much, either in number or content. Based on the Government’s representation, however, this case does not appear to be like

Cunningham, where the Third Circuit was concerned with the “needless presentation of unfairly prejudicial and cumulative evidence.” 694 F.3d at 391. Here, the Government has represented that it intends to limit the images of child pornography to only six images and three videos. *Gov’t’s Opp’n* at 1. Given the limited number of actual images or videos to be proffered by the Government, the Court cannot conclude on this record that Federal Rule of Evidence 403 requires exclusion of all images or videos.

Nevertheless, the Court has not viewed any of the images or videos, and the Third Circuit suggested in *Cunningham* that, if contested, a trial judge should actually view the child pornography before admitting it. *Cunningham*, 694 F.3d at 390 n.29. If defense counsel believes that the exhibits selected by the Government are too extreme and do not fairly represent what was on the computer, the Court will investigate further, view the proffered exhibits, and rule on any specific objections that Mr. Ross wishes to press. In other words, if there are specific objections by Mr. Ross that the Government’s images and videos do not fairly represent the pornography on the subject computers or that they are particularly inflammatory, the Court will resolve this issue after having seen the proffered evidence outside the presence of the jury. *See id.* at 390 (“Even in the cesspool of evidence presented here, Excerpts 1 and 3 in the second set of video clips stand out”).

However, the Court rejects the premise of Mr. Ross’s motion, namely, because he is willing to stipulate that the images and videos contain child pornography, they are inadmissible.

The Court DENIES Kevin Lee Ross's Motion in Limine to Exclude Presentation of Child Pornography Videos and Images to the Jury (ECF No. 68).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 17th day of October, 2014

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