

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 19 CR 567
	)	
-vs-	)	
	)	Hon. Harry D. Leinenweber
	)	
ROBERT SYLVESTER KELLY, also known	)	
As "R.Kelly," DERREL MCDAVID, and	)	
MILTON BROWN, also known as "June	)	
Brown."	)	
	)	
Defendants.	)	

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**MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FED. R. CRIM. P 29(c)**

NOW COMES, the Defendant, ROBERT S. KELLY, by and through his counsel, Jennifer Bonjean, and moves this court to enter a judgment of acquittal on Counts One through Three of the indictment ("the child pornography counts") and Counts nine through eleven ("the inducement counts") where the government's evidence was insufficient to sustain a conviction on each of those counts.

**Background**

1. On February 13, 2020, the government filed a superseding 13-count indictment for conduct that occurred between 1996 and 1998. [Dkt No. 93]
2. After a jury trial, Defendant was found guilty of counts one through three of the indictment, namely engaging in sexually explicit conduct with "Jane" for the purpose of producing three separate videos in and around 1998 when she was 14-years old. Defendant was also found guilty of counts nine through eleven of the indictment which charged Defendant with

violating 18 U.S.C. 2422(b) having knowingly persuaded, induced, enticed, or coerced "Jane," "Nia," and "Pauline."<sup>1</sup>

3. The jury acquitted Defendant of all remaining counts of the indictment.

#### **Legal Standard**

4. Rule 29(c) provides that a defendant may move for a judgment of acquittal after the jury is discharged. The standard for a Rule 29(c) motion is "whether at the time of the motion there was relevant evidence from which a jury could reasonably find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government." *United States v. Hagan*, 913 F. 2d 1278, 1281 (7th Cir. 1990). Rule 29(c) relief is appropriate only whether the relevant evidence is insufficient to prove all the elements of the offense. *United States v. Beck*, 615 F. 2d 441, 448 (7th Cir. 1980).

#### **Argument**

##### **A. Counts One through Three of the Indictment (“the Child Pornography Counts”)**

5. A judgment of acquittal as to counts one through three of the indictment must be granted where the government’s evidence was insufficient as to each and every element of the offense. First, government’s evidence failed to demonstrate that Defendant did knowingly “use, persuade, induce, entice and coerce” Jane to engage in sexually explicit conduct for the purpose of producing the visual depiction of such conduct.

6. The scenario presented by the government was far removed from the typical scenario where a sexual predator uses the internet to entice an underage child to engage in sexual conduct for the purpose of creating child pornography. Indeed, the government made no showing that there was *any* commercial purpose related to the "production" of these videotapes.

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<sup>1</sup> Defendant uses the pseudonyms assigned to these individuals throughout trial.

7. Accepting the government's evidence as true, Defendant was engaged in an ongoing relationship with Jane that including sexual activity. According to Jane, she spent significant time with Defendant in his home where they engaged in sexual conduct with one another. While the evidence may have been sufficient to prove violations of criminal sexual abuse under the Illinois criminal code, it did not establish that Defendant: (1) enticed or persuaded Jane to engage in the prohibited conduct; or (2) that he did so with the *purpose* of producing the contraband images. The production of the images was ancillary to the sexual explicit conduct, it was not the *purpose* of the conduct.

8. Additionally, the government failed to produce sufficient evidence that the videotapes *or the images* on the video tapes were transported in interstate or foreign commerce.

9. Government Exhibit 001-1 was a VHS tape of unknown origins that was in the custody of the Cook County State's Attorney since 2002. This exhibit contains images from the so-called "Log Cabin" or "Colorado" room and were the subject of the 2008 prosecution for which Defendant was acquitted. There is no evidence whatsoever that the videotape ever left the state of Illinois.

10. The government contends that while the tape may have never left the state of Illinois, the images did. Assuming *arguendo*, the government is correct, the government's evidence that the *images* travelled in interstate commerce was insufficient as a matter of law as to the so-called log-cabin images. The only evidence offered by the government that these images travelled in interstate commerce came through witness Betty Allwang, a representative of the National Center for Missing and Exploited Children ("NCMEC").

11. Ms. Allwang testified about receiving child abuse images from various law enforcement agencies dating back to 2007 that was entitled "the panelled room" series which Ms.

Allwang described as "a series of child sexual abuse material that contains a female victim of child sexual abuse material production." (R. 1049). However, the government failed to establish that the so-called "panelled room" images were the images contained on Government Exhibit 001-1. At no point did Ms. Allwang identify the child pornography images in GX 001-01 and affirmatively state that the images were the same images that had been sent to NCMEC in 2007. Since GX001-01 was in possession of the Cook County State's Attorney since 2002, it was imperative that the government prove that the images in GX001-01 were the *same* images that Ms. Allwang claimed were submitted to NCMEC by law enforcement agencies in 2007. The government simply failed to connect those dots.

12. The evidence of interstate or foreign commerce as to Counts two and three is equally weak. The government admitted government exhibit 002-1 into evidence which was a VHS tape that came into the custody of the Cook County State's Attorney's office in 2019 via attorney Michael Avenatti who allegedly received it from witness Charles Freeman. The tape contained images from two different scenes (the living room and bedroom scenes) depicting Defendant and Jane engaged in sexual activity which were charged as counts two and three of the indictment.

13. The government evidence failed to prove that the tape or the images depicted on the tape were *ever* placed into interstate or foreign commerce. Ms. Allwange testified that the first occasion on which the images were received by NCMEC was when Homeland security submitted the images to NCMEC in connection with this case after Defendant's indictment. (R1058-1059) Ms. Allwang explained that at the time she prepared the distribution report post-indictment those videos had not been seen in any prior submissions. (*Id.*) There was no

additional testimony that the images depicted in GX002-01 were ever viewed on-line or placed into interstate commerce.

14. The government's *only* evidence that the tape left the state of Illinois came from Charles Freeman and Lisa Van Allen whose testimony was rejected whole cloth by the jury. Lisa Van Allen claimed to steal a single videotape from Mr. Kelly. The jury concluded that the videotape that Lisa Van Allen stole from Mr. Kelly did *not* contain child pornography which is why the jury returned not guilty verdicts as to counts 4, 6, and 8 of the indictment. Thus, the jury necessarily could not have concluded that GX002-1 was the video that Lisa Van Allen stole from Mr. Kelly.

15. The jury similarly concluded that the videotape that Charles Freeman obtained in and around 2008 that he used to extort money from Mr. Kelly did not contain child pornography which is why the jury returned not guilty verdicts against Kelly and his co-defendant as to counts 6 and 7 of the indictment. Again, the jury necessarily concluded that whatever tape Freeman possessed and turned over in 2008 did not contain the child pornography images that were depicted in GX002-1.

16. Thus, the question that the government never answered was *where* did GX002-1 come from? Although Michael Avenanti provided the video tape to the CCSAO, claiming it came from his client Mr. Freeman, no evidence was offered that the tape ever left the state of Illinois or traveled in interstate commerce. The government did not have an obligation to explain how Freeman got the tape, but it did have to prove that it traveled in interstate commerce. It failed to do so.

17. The government's interstate commerce evidence was insufficient as a matter of law and a judgment of acquittal should be entered in connection with the child pornography counts.

18. Lastly, there was no evidence presented that Defendant *knew* the video tapes or images would be placed in interstate commerce. The evidence is undisputed that Defendant Kelly played no role whatsoever in placing the tapes or images into interstate commerce, and that the videotapes that contained the images were stolen. Because Mr. Kelly lacked a *mens rea* in connection with placing the images in interstate commerce, he cannot, as a matter of law, be guilty as to the child pornography counts.

**B. Counts Nine through Eleven of the Indictment (“Inducement Counts”)**

19. The government’s evidence that Defendant did knowingly “persuade, induce, entice or coerce” any individual to engage in sexual activity is insufficient as a matter of law as to counts nine through eleven. The government takes the position that simply because a sex act is unlawful because of the age of the complainant, it automatically follows that it has proved inducement. Such an interpretation renders the inducement language superfluous. The government’s evidence showing that Defendant enticed or coerced the minors identified in counts nine through eleven of the indictment is insufficient.

20. A careful review of the testimony of Jane and Pauline show that Defendant took no acts to "persuade, induce, entice, or coerce" Jane or Pauline into sexual activity. As stated above, Defendant sexual interactions with Jane and Pauline may have constituted acts of criminal sexual abuse as defined by Illinois law, the prohibited sexual activity standing alone is not sufficient to satisfy the elements of an 18 U.S.C. 2422(b) violation.

21. As to Nia, her testimony established that she appeared at Mr. Kelly's studios uninvited. Mr. Kelly had no advance notice she was coming to his studios and she did not allege that he induced, compelled, coerced, enticed, *or even invited* her to his studios. According to Nia, once at the location, she had a brief encounter with Mr. Kelly in the hallway where he touched her put his hand down her pants. Again. Nia's testimony, taken in its best light, failed to show *any* inducement or enticement on the part of Kelly. The evidence taken in the light most favorable to the government failed to satisfy a violation of 18 U.S.C. 2422(b) as to Nia.

22. Last, the government's evidence did not prove that Defendant induced Jane, Pauline or Nia "using the mail or any facility and means of interstate and foreign commerce." Although Jane, Pauline, and Nia testified to having conversations with the Defendant by telephone, strictly intrastate telephone conversations do not qualify as a "means of interstate and foreign commerce."

23. As to Count 10 of the indictment, the use of a telephone had no connection whatsoever to the charged conduct. As the evidence showed, Mr. Kelly did not invite Nia to his studio for any purpose, let alone any sexual purpose, where the charged conduct occurred. Nia arrived to the studios unannounced with members of her family. The charged conduct consisted of a less-than-five-minute interaction in a hallway. Since the government cannot make a causal connection between the *charged* conduct and the use of a facility of interstate commerce, including the use of a telephone, it cannot establish the interstate commerce element. The government simply did prove Count 10 of the indictment.

**CONCLUSION**

For the foregoing reasons, this Court should enter judgments of acquittal as to Counts One through Three and Nine through Eleven.

Respectfully Submitted,

/s JENNIFER BONJEAN  
*Attorney for Robert Kelly*

Bonjean Law Group, PLLC  
750 Lexington Ave., 9th Fl.  
New York, New York 10022  
718-875-1850



**CERTIFICATE OF SERVICE**

I, JENNIFER BONJEAN, an attorney licensed to practice law in the State of Illinois, hereby certifies that she filed the attached Rule 29(c) Motion on November 15, 2022, by filing the motion via the Northern District of Illinois Electronic Filing System. The government and other parties were automatically served via ECF.

/s/JENNIFER BONJEAN