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APPENDIX A

United States v. Osuba, 67 F.4th 56 (2d Cir. 2023)

United States v. Osuba

United States Court of Appeals for the Second Circuit

February 27, 2023, Argued; April 17, 2023, Decided

No. 20-3322

Reporter
67 F.4th 56 *; 2023 U.S. App. LEXIS 9054 **; 2023 WL 3239496

UNITED STATES OF AMERICA, Appellee, v. MATTHEW R. OSUBA, Defendant-Appellant.

Subsequent History: **[**1]** AMENDED: MAY 4, 2023

Decision reached on appeal by United States v. Osuba, 65 F.4th 92, 2023 U.S. App. LEXIS 14386 (2d Cir. N.Y., Apr. 17, 2023)

Prior History: On Appeal from a Judgment of the United States District Court for the Northern District of New York. A jury convicted Matthew Osuba of violating 18 U.S.C. § 2251(a), which prohibits using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. The jury also convicted Osuba of possessing and distributing child pornography, in violation of 18 U.S.C. § 2252A, based on different images found on his phone. The United States District Court for the Northern District of New York (Thomas J. McAvoy, Judge) sentenced Osuba to 70 years in prison. Osuba argues that the evidence was insufficient to convict him on the production charge, that the district court erred in applying a sentencing enhancement based on a finding that he was a repeat and dangerous offender, and that his sentence was substantively unreasonable. Finding no error, we AFFIRM Osuba's conviction and sentence.

Counsel: CARINA H. SCHOENBERGER, Assistant United States Attorney, for Carla B. Freedman, United States Attorney for the Northern District of New York, Syracuse, NY, for Appellee.

RICHARD D. WILLSTATTER (Theodore S. Green, on the brief), Green & Willstatter, White Plains, NY, for Defendant-Appellant. **[**2]**

Judges: Before: CALABRESI, PARK, and NARDINI, Circuit Judges.

Opinion by: WILLIAM J. NARDINI

Opinion

[*59] WILLIAM J. NARDINI, *Circuit Judge*:

A jury found Matthew Osuba guilty of one count of using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a), (e); one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B); and one count of distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A). The United States District Court for the Northern District of New York (Thomas J. McAvoy, *Judge*) sentenced Osuba to a total of 70 years in prison. Osuba challenges his conviction on the first count, arguing that his conduct—filming himself masturbating toward a clothed, sleeping minor—was not criminal under the statute. He also challenges both the imposition of a sentencing enhancement for repeat and dangerous offenders and the substantive reasonableness of his sentence. Because Osuba took actions designed to depict the minor as the passive recipient of his sexual actions, we conclude, on the particular facts of this case, that there was sufficient evidence for a jury to conclude beyond a reasonable doubt that Osuba used the minor to engage in sexually explicit conduct. **[**3]** We further conclude that the

evidence supported the enhancement and that the sentence was not shockingly high in light of Osuba's conduct. Accordingly, we affirm the judgment of the district court.

I. Background [1]

In August or September 2018, Matthew Osuba was in the living room of his girlfriend's house, talking to someone over Kik Messenger, an instant-messaging app. His girlfriend's seventeen-year-old daughter was sleeping, fully clothed, on the couch in the same room, with her face turned away from him. At some point, Osuba turned on his camera and recorded two short videos. They show him masturbating **[*60]** close to the minor—first sitting or lying near the couch, then standing over the minor and ejaculating toward her. He was "getting off," he later said, to "the image of [the teenage girl] on the couch." Gov't. Ex. 18-C at 2:03. "I came on her," he told the other Kik user, attaching the videos.[2] Gov't. Ex. 18-J at 0:12.

Osuba frequently discussed child abuse on Kik. In one conversation, with Lisbet Fjostad, a woman he met on the app, Osuba claimed to have sexually abused a four-year-old minor, E, on multiple occasions, giving graphic details of his physical contact with her genitalia.[3] **[**4]** In a different Kik conversation, this time with an undercover officer, Osuba recounted yet more abuse of E, again describing the same sort of direct sexual contact. "I mostly do it when she is sleeping," he said. Presentence Investigation Report ¶ 17.

Osuba also used Kik to send Fjostad pornographic images of children. She reported three such images to law enforcement, one of which Osuba claimed showed a child he had abused. When officers, tipped off by Fjostad, searched Osuba's cell phone, they found even more pornographic images of children. Questioned by the police, Osuba described his statements on Kik as mere fantasies and denied having actually abused any children.

Osuba was charged with sexual exploitation of a child by producing a visual depiction in violation of 18 U.S.C. § 2251(a) (Count One, "the production charge"); distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b)(1), and 2256(8)(A) (Count Two); and possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), and 2256(8)(A) (Count Three). After a three-day trial, the jury convicted Osuba on all counts.

Osuba's Presentence Investigation Report (PSR) calculated that his offense conduct and relevant conduct, considered together, merited a total offense level of 43, the highest **[**5]** possible, under the United States Sentencing Guidelines. That calculation included several upward adjustments that Osuba does not challenge on appeal, and one upward adjustment that he does: an enhancement under U.S.S.G. § 4B1.5(b)(1), which adds five levels when the defendant is a repeat and dangerous sexual offender. To establish the pattern of sexual abuse necessary for the enhancement, the PSR relied on the two separate videos underlying Osuba's production conviction. The PSR also noted its conclusion that Osuba had sexually abused E on several occasions.

In addition to Osuba's Kik conversations, the evidence that Osuba abused E included police interviews with E; her brother, B; and their mother, K. Both E and B initially denied having been abused by anyone. But after K raised further concerns, E told the police in a second interview that Osuba had used a sexual device on her. And B, although he at first called the story "a lie," later described a device belonging to Osuba that matched E's description. Osuba told the police that he fantasized about having sex with E but denied

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[1] Unless otherwise specified, we rely on the district court's factual findings, which were in turn adopted from the statement of facts in the Presentence Investigation Report.

[2] Apparently, Osuba's ejaculate just missed the minor's arm.

[3] Pursuant to Federal Rule of Criminal Procedure 49.1(a)(3), we refer to minor victims and their relatives (other than Osuba) by their initials.

having abused her.

Osuba's sentencing memorandum included a copy of a 2018 child protective services report stating that allegations **[**6]** Osuba had sexually abused E were "unsubstantiated," and that the agency had found no credible evidence that a child was abused **[*61]** or maltreated. Sealed App'x 17-18. Osuba claimed that his Kik conversations reflected "fantasies and not actual events." *Id.* at 3.

The district court adopted the factual information and the Guidelines calculation set forth in the PSR. The court found by a preponderance of the evidence that Osuba had "sexually abused multiple minors." App'x 202-03. Osuba's statements on Kik, the court said, "corroborate[d] the sexual abuse of" E. *Id.* at 203. The court also highlighted videos found on Osuba's laptop showing him masturbating into the underwear of his ex-girlfriend's underage daughter, child pornography found on Osuba's devices, and Osuba's internet searches for child pornography. Osuba had not accepted responsibility or expressed remorse, the court concluded, and he was "dangerous to children," "dangerous to [himself]," and "dangerous to the public." *Id.* at 200, 209. Reasoning that the shock of arrest had deterred Osuba "for the present," the court concluded that its job was to deter him "in the future." *Id.* at 200-01. The court sentenced Osuba to 360 months on **[**7]** Count One, 240 months on Count Two, and 240 months on Count Three, to run consecutively for a total of 840 months of imprisonment. Osuba now appeals.

II. Discussion

Osuba challenges the sufficiency of the evidence for his conviction on Count One, arguing that only he (and not the minor) engaged in sexually explicit conduct on the video, and that he therefore did not violate the statute. He also argues that the district court erred in finding that he abused E, and thus in applying the five-level sentencing enhancement. Finally, Osuba contends that his lengthy sentence was substantively unreasonable. We disagree with Osuba on each point.

A. Sufficiency of the Evidence

We review a challenge to the sufficiency of the evidence supporting a conviction *de novo*. *United States v. Gershman*, 31 F.4th 80, 95 (2d Cir. 2022). A defendant who brings such a challenge "bears a heavy burden." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (citation and internal quotation marks omitted). Because of the strong deference to which jury verdicts are entitled in our justice system, we must "draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury's verdict." *United States v. Willis*, 14 F.4th 170, 181 (2d Cir. 2021). A conviction will stand so long as "*any* rational trier of fact could have found the essential **[**8]** elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Osuba was convicted under 18 U.S.C. § 2251(a), which mandates a minimum 15-year prison term for:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . .[4]

"[S]exually explicit conduct" includes "actual or simulated" "masturbation" and actual or simulated "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(iii), (v).

[*62] The question before us is whether Osuba used the minor to engage in sexually explicit conduct when he filmed himself masturbating

[4] The statute's jurisdictional element further requires that the offender must know or have reason to know that the visual depiction will be transmitted in interstate commerce, be produced using materials that have traveled in interstate commerce, or actually be transmitted using a means or facility of, or a means or facility affecting, interstate commerce. 18 U.S.C. § 2251(a). That element is not disputed here.

toward her.[5] Osuba argues, and the government agrees, that the word "uses" requires the minor, not merely the defendant, to "engage" in sexually explicit activity. Where the parties disagree is whether, here, the minor was so "engaged."

To begin with, we agree with the parties that § 2251(a) requires the minor to engage in the specified conduct. The phrase "[a]ny person who . . . uses . . . any minor to engage in . . . any sexually explicit conduct" might seem, if read in isolation, to require engagement only by "any person," so long as the perpetrator "uses" the minor **[**9]** to have that person engage in the conduct. But the rest of the provision makes clear that, as the Seventh Circuit has held, the minor must also engage in the sexually explicit activity. *See* 18 U.S.C. § 2251(a); *United States v. Howard*, 968 F.3d 717, 721-22 (7th Cir. 2020).

In a statutory list, surrounding words may cabin a particular word's meaning. *McDonnell v. United States*, 579 U.S. 550, 568-69, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016) (*noscitur a sociis*). The other verbs in § 2251(a)'s list ("employs," "persuades," "induces," "entices," and "coerces") all require the minor to engage in sexually explicit conduct. If a friend tells you she respects "any person who persuades a child to eat vegetables," it is the child, not the persuader, who must have polished off the broccoli. Substitute "employs," "induces," "entices," or "coerces" for "persuades" and the result is the same. Reading "uses" in § 2251(a) to allow the explicit conduct to be only that of the defendant or some third party, but not the minor, would give the provision "a jarringly different meaning." *Howard*, 968 F.3d at 722.

What the text of the provision suggests, the rest of the statute confirms. Section 2251(a) was enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 7 (1978). That act targeted the "production[,] . . . receipt, transmission, and possession of child pornography." *United States v. Holston*, 343 F.3d 83, 85 (2d Cir. 2003). Its provisions penalize advertising, § 2251(d)(1); transporting, § 2252(a)(1)(A); receiving or distributing, § 2252(a)(2)(A); selling, § 2252(a)(3)(B); and **[**10]** possessing or accessing, § 2252(a)(4)(B), material involving, in each instance, "the use of a minor engaging in sexually explicit conduct." Statutory interpretation is a "holistic endeavor," and the consistent need for the minor to engage in sexually explicit conduct suggests that § 2251(a) should be read to match its siblings. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988); *see also United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (words should be read in light of "the provisions of the whole law," its "object," and its "policy" (citation and internal quotation marks omitted)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167-69 (2012) (whole-text canon).

This textual question does not, however, end the case. We must also determine whether the minor here did, in fact, "engage in" sexually explicit conduct. 18 U.S.C. § 2251(a). Engagement, of course, can be active or passive. To take an **[*63]** extreme example of the latter, if a defendant raped a drugged, unconscious child, the child would undoubtedly have been engaged in sexual activity, even though only as a "passive participant." *See United States v. Heinrich*, 57 F.4th 154, 159 (3d Cir. 2023). Similarly, because § 2256 defines sexually explicit conduct to include "actual or simulated" activity, if a sleeping child is "used or manipulated in such a manner as to make it *appear* that she is engaging in **[**11]** sexually explicit conduct, then the statute is violated." *United States v. Levy*, 594 F. Supp. 2d 427, 443 (S.D.N.Y. 2009). As the Third Circuit has noted, it would be "absurd" to read the statute "to protect children actively involved in sexually explicit conduct, but not protect children who are passively involved in sexually explicit conduct while sleeping, when they are considerably more vulnerable." *United States v.*

[5] Osuba raises no challenge to the jury instructions, and our review is thus limited to the sufficiency of the evidence.

Finley, 726 F.3d 483, 495 (3d Cir. 2013); *see also United States v. Lohse*, 797 F.3d 515, 520-21 (8th Cir. 2015) (jury could find that the defendant "quite literally used [a sleeping child] as a sexual object").

Given the facts of this case, we hold that a rational jury could have concluded, beyond a reasonable doubt, that Osuba used the minor to engage in sexually explicit conduct. Osuba's sexual activity was wholly directed toward her, in a way that rendered her a participant (albeit a passive one) in that activity. He set up the camera to show her right next to him. He ejaculated toward her, missing her arm only narrowly. He told the Kik user to whom he sent the videos, "I came on her." Gov't. Ex. 18-J at 0:12. He said that he was "getting off" to her presence. Gov't. Ex. 18-C at 2:03. By creating a video depicting a form of "sexually explicit conduct" enumerated in § 2256(2)(A) (here, masturbation), the intended consummation of which was visibly directed **[**12]** toward a minor who was physically present, Osuba crossed the line from "a simple display of adult genitals around a sleeping minor" to showing his victim as "an inanimate body" upon which he was acting sexually. *Lohse*, 797 F.3d at 521.

A recent decision of the Eleventh Circuit supports our holding. In *United States v. Dawson*, the court held that a defendant had used a minor to engage in sexually explicit conduct under § 2251(a) when he filmed himself covertly masturbating next to a clothed and conscious, but apparently oblivious, child. *See United States v. Dawson*, 64 F.4th 1227, 2023 U.S. App. LEXIS 8129, 2023 WL 2781361 (11th Cir. 2023). The child, the court reasoned, "was passively involved in [the defendant's] sexually explicit conduct by serving as the object of [his] sexual desire." 64 F.4th 1227, *Id.* at *8. *Dawson* construed the text of § 2251(a) differently than we do, concluding that "the minor need not be the one engaging in sexually explicit conduct," and that "the minor's passive involvement . . . is sufficient." 64 F.4th 1227, *Id.* at *7. The court read the provision's six verbs as lying on a "spectrum" from those, such as "coerces," that suggest "active engagement" to those, such as "employs" and "uses," that suggest "passive involvement." 64 F.4th 1227, *Id.* at *8. We are not convinced that this is the best reading of the statute, because a person might "coerce" a child's passive engagement, **[**13]** perhaps by drugging her and engaging her in sexually explicit conduct, or "employ" a child's active engagement, perhaps by paying her to participate. But the Eleventh Circuit recognized that, even assuming § 2251(a) "requires the minor to engage in sexually explicit conduct," it was enough that the defendant made the minor "passively engage." 64 F.4th 1227, *Id.* at *8 n.7.

Decisions of the Third and Eighth Circuits point in the same direction. *See Finley*, 726 F.3d at 495 (jury could find a defendant "'use[d]' a minor to engage in **[*64]** sexually explicit conduct without the minor's conscious or active participation"); *Lohse*, 797 F.3d at 520-21 (sleeping child used "as a sexual object"). Although both cases involved physical contact between the defendant and a sleeping minor, our sister circuits recognized that a minor may be used to engage in sexually explicit conduct passively.

Osuba emphasizes that his conduct did not involve physical contact. But physical contact is not a necessary component of passive engagement. A nude, sleeping child has passively engaged in "lascivious exhibition," for example, when someone photographs her genitals without touching her. *See United States v. Wolf*, 890 F.2d 241, 246 (10th Cir. 1989). Even without physical contact, Osuba's conduct was so directed toward the minor that it engaged her, albeit passively, **[**14]** in sexually explicit conduct.

Osuba also argues that we are breaking with the Seventh Circuit, which in *Howard* vacated a conviction under § 2251(a) for masturbating over a sleeping child. *See Howard*, 968 F.3d 717. We agree with *Howard* that the minor must engage in the sexually explicit conduct. We part ways on the bottom line because we address a question *Howard* did not reach, explaining not only that the minor

must engage in sexually explicit conduct, but also how the minor may do so. In *Howard*, the government's sole argument was that the statute required only the defendant, not the minor, to engage in the proscribed conduct. *See* Appellant's Br. at 16-28, *United States v. Howard*, 968 F.3d 717 (2020) (No. 19-1005). Having rejected this "sexual object" theory, the Seventh Circuit declined to consider alternatives. *See Howard*, 968 F.3d at 723 ("The government staked its entire case for conviction on a mistaken interpretation of the statute."). But the court acknowledged that different legal arguments might have saved the government. *See id.* at 723 n.3 (noting that the defendant appeared to touch his penis to the minor's lips, which might have constituted engaging the minor in oral sex, had the government presented such a theory). Whether the Seventh Circuit would have agreed with the argument presented by the government **[**15]** in our case, and upon which we now rely, we do not know. But we take a step *Howard* did not, holding that on the facts of this case, the minor's passive involvement as the intended recipient of Osuba's actions suffices to constitute her "engage[ment]" under § 2251(a). *Cf. Howard*, 968 F.3d at 722 (requiring "some action by the offender to cause the *minor*'s direct engagement in sexually explicit conduct").

Like the *Howard* court, Osuba worries that the government's reading would make a criminal out of someone who filmed himself engaged in sexual activity while children can be heard playing outside, or even while merely thinking about children, were he to later confess that the children played a central role in his sexual experience. *See id.* at 721 (positing similar hypotheticals). But the text of the statute forecloses such interpretations. The "visual depiction" must be "of" the sexually explicit conduct in which the minor engages (regardless of whether that engagement is active or passive on the part of the minor). 18 U.S.C. § 2251(a). That element was satisfied here.

Osuba also argues that his conduct cannot have fallen within § 2251(a) because the child was clothed. But that argument proves too much. On Osuba's theory, someone who filmed himself engaging **[**16]** in oral sex with a clothed and sleeping child would not have used the child to engage in sexual activity—a result that defies the plain text of the statute. *See Howard*, 968 F.3d at 723 n.3.

[*65] We note, moreover, that our holding is a narrow one. Although we conclude that Osuba's conduct sufficed under § 2251(a), sufficiency of the evidence determinations necessarily turn on the specific facts of each case. We do not purport to delineate every set of acts that will satisfy the statute.

B. The Sentencing Enhancement

"We review the reasonableness of a district court's sentence under a deferential abuse of discretion standard." *United States v. Hernandez*, 604 F.3d 48, 52 (2d Cir. 2010). This review "encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). A district court commits procedural error when it fails to properly calculate the Guidelines range or rests its sentence on a clearly erroneous finding of fact. *Id.* at 190. The district court must find facts relevant to a sentencing enhancement by a preponderance of the evidence. *United States v. Mi Sun Cho*, 713 F.3d 716, 722 (2d Cir. 2013).

We review unpreserved objections for plain error. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see Davis v. United States*, 140 S. Ct. 1060, 1061, 206 L. Ed. 2d 371 (2020). Osuba therefore must establish that "(1) there is an error; **[**17]** (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [his] substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial

proceedings." *United States v. Marcus*, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) (cleaned up).[6] When considering the first and second prongs—whether there has been error at all, and whether that error was obvious—with respect to factual findings, we ask whether the district court "clearly erred." *United States v. Tulsiram*, 815 F.3d 114, 120 (2d Cir. 2016). Under this deferential standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety," we "may not reverse" even if we are "convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). A finding of clear error is warranted only when "we are left with the definite and firm conviction that a mistake has been committed." *United States v. Mattis*, 963 F.3d 285, 291 (2d Cir. 2020).

Section 4B1.5(b)(1) of the U.S. Sentencing Guidelines provides that when "the defendant's instant offense of conviction is **[*66]** a covered sex crime . . . and the defendant engaged in a pattern of activity involving prohibited sexual conduct," the court should **[**18]** add five levels to the previously calculated offense level.[7] A defendant has engaged in the necessary pattern of activity if "on at least two separate occasions, [he] engaged in prohibited sexual conduct with a minor." U.S.S.G. § 4B1.5 application n.4(B)(i).[8] At least one of those acts "can be the crime of conviction." *United States v. Broxmeyer*, 699 F.3d 265, 286 (2d Cir. 2012). The district court found that Osuba had engaged in prohibited sexual conduct with a minor on at least two occasions: the conduct underlying Count One and the abuse of E.

The district court did not clearly err in finding that Osuba sexually abused E. Several pieces of evidence supported that finding. Osuba admitted to investigators that he fantasized about having sex with E. Over Kik, he gave Lisbet Fjostad graphic details of his abuse (which she passed on to investigators). E confirmed Osuba's claims when she told investigators about episodes of sexual contact with Osuba, the details of which tracked Osuba's messages to Fjostad. And E's brother partially corroborated E's statements when he described Osuba's use of a device that matched the description given by E.

The countervailing evidence to which Osuba points is insufficient to demonstrate clear error. It is true that E initially told interviewers **[**19]** that no one had ever touched her inappropriately, and that B initially described the story of the device as "a lie." But it is hardly surprising that young children would be reluctant to describe sexual abuse when first asked about it. And in any event, the mere presence of evidence pointing in both directions does not establish clear error, because when "there are two permissible views of the evidence, the district court's choice between them cannot be deemed clearly erroneous." *United States v. Ruggiero*, 100 F.3d 284, 291 (2d Cir. 1996)

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[6] Some of our cases have suggested that a "relaxed" plain error standard is appropriate in sentencing appeals, in certain circumstances, such as where the defendant lacked prior notice that the district court would impose a certain condition of supervised release. *See United States v. Sofsky*, 287 F.3d 122, 125-26 (2d Cir. 2002). We have applied the relaxed standard in some cases, *see, e.g.*, *United States v. Haverkamp*, 958 F.3d 145, 149 (2d Cir. 2020), but not others, *see, e.g.*, *Broxmeyer*, 699 F.3d at 279, and have "questioned" whether it is appropriate in every appeal involving an unpreserved sentencing objection, *United States v. Ramos*, 979 F.3d 994, 998 n.2 (2d Cir. 2020). We have noted (albeit in a summary order) that it is not clear whether our relaxed practice survived the Supreme Court's decision in *Davis*, 140 S. Ct. at 1061-62, which relied on the language of Fed. R. Crim. P. 52(b). *United States v. Belfon*, No. 21-1444, 2023 U.S. App. LEXIS 5167, 2023 WL 2342688, at *2 n.4 (2d Cir. Mar. 3, 2023) (summary order). We need not explore the issue further because no matter what flavor of plain error review might apply, Osuba's claims fail.

[7] A "covered sex crime" includes a violation of 18 U.S.C. § 2251(a). U.S.S.G. § 4B1.5 application n.2.

[8] "[P]rohibited sexual conduct" includes offenses under chapters 117, 109A, and 110 of Title 18; it also includes state offenses and other conduct that would have fallen under those chapters had it taken place in an area under federal jurisdiction. U.S.S.G. § 4B1.5 application n.4(A); 18 U.S.C. § 2426(b)(1). Osuba does not dispute that had he abused E as the district court found, that abuse would have constituted prohibited sexual conduct.

(citation and internal quotation marks omitted).

Osuba also argues that when a child sexual abuse case turns on the relative credibility of the accuser and the accused, the factfinder is required to vigorously examine the testimony and other evidence—scrutiny he claims was lacking here. But the cases on which Osuba relies largely involve claims that a defense lawyer was ineffective in failing to vigorously challenge inculpatory evidence at trial. *See, e.g.*, *Gersten v. Senkowski*, 426 F.3d 588, 608 (2d Cir. 2005). The standards they set out do not apply to the district court's evaluation of the facts at sentencing.[9] **[*67]** There is a single standard of review for such factfinding: clear error. Because sufficient evidence supported the district court's finding that Osuba **[**20]** abused E, we cannot form a "definite and firm conviction" that the district court erred.[10] *Mattis*, 963 F.3d at 291.

As a fallback, Osuba argues that the district court abused its discretion by failing to hold an evidentiary hearing on the factual findings in the PSR. But a full-blown evidentiary hearing is not always required to resolve factual disputes at sentencing; the district court has discretion to determine the form and extent of any contested factfinding procedure. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). It is enough if the defendant has "some opportunity to rebut the Government's allegations," and Osuba availed himself of just such an opportunity when he vigorously disputed the PSR's findings in his sentencing memorandum. *United States v. Phillips*, 431 F.3d 86, 93 (2d Cir. 2005) (internal quotation marks omitted).

Osuba's final argument is that the district court erred by not specifying the state or federal statutes that criminalized his alleged abuse of E. We are not persuaded. In *Phillips*, we held that to "justify the application of § 4B1.5(b), the district court must explicitly state which statutory offenses constitute the 'prohibited sexual conduct.'" 431 F.3d at 94. Without specificity, we explained, the Court might be unable to determine "whether the conduct was prohibited by law and covered by **[**21]** § 4B1.5(b)." *Id.* The *Phillips* Court was especially concerned because the case involved juvenile sex crimes, an area in which the category of covered offenses is "nuanced." *Id.* Here, neither the PSR nor the district court specified the state or federal statutes that Osuba violated. Osuba did not object in the district court, and our review is thus for plain error. *See Broxmeyer*, 699 F.3d at 279 (plain error review applies to forfeited procedural challenge to fact-finding at sentencing).

Osuba cannot meet this standard. The district court's failure to cite specific statutory provisions did not affect the outcome of the proceedings, and thus did not affect Osuba's substantial rights. The concern that motivated the *Phillips* Court—the

[9] Osuba also points to *Pavel v. Hollins*, in which we noted certain "indicia of false allegations" in child abuse cases described in publicly available guidelines of the American Academy of Child and Adolescent Psychiatry, including (1) that a parent first suggested to a third party that her children were being abused, (2) that the allegedly abused child was a pre-schooler, and (3) that there was an ongoing custody battle between the parent who raised the suggestion of abuse and the parent accused of abusing the child. 261 F.3d 210, 226 & n.19 (2d Cir. 2001). Those are, of course, factors that a party might raise to the factfinder, but we have never required district courts to recite every potentially relevant factor when making factual findings, especially when those findings are adopted from a PSR. *See United States v. Watkins*, 667 F.3d 254, 266 (2d Cir. 2012) (when a district court adopts the factual findings of a defendant's PSR it "is not required explicitly to provide any further analysis").

[10] Osuba also argues that the PSR included an erroneous finding that because he created two videos of himself masturbating while his minor victim slept, those two videos could count as separate occasions to satisfy § 4B1.5(b). Because we hold that the district court did not err in finding that Osuba abused E, we need not reach this argument.

The sufficiency of that finding also means we need not reach Osuba's arguments concerning his alleged abuse of two other children. Although the PSR included evidence that Osuba had sexually abused two minors in addition to E, its application of § 4B1.5(b)(1) was predicated solely on the conduct covered by Count One and the abuse of E. The district court referenced evidence concerning the two other children when discussing the enhancement, but its express adoption of the Guidelines calculation in the PSR leaves some ambiguity about the extent of the court's findings. Because we affirm on the basis of Osuba's offense conduct plus his abuse of E, we need not consider the evidence concerning other children.

complexity of statutes governing sex crimes by juveniles—is absent here, as the uncharged conduct was plainly prohibited by New York law, which defines first-degree sexual abuse to include "sexual contact" with someone "less than eleven years old." N.Y. Penal Law § 130.65(3).[11]

[*68] C. Substantive Reasonableness

Having determined that there was no procedural error, we must "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). A sentence is substantively unreasonable when it "cannot be located **[**22]** within the range of permissible decisions," because it is "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Cavera*, 550 F.3d at 190 (first quotation); *United States v. Martinez*, 991 F.3d 347, 359 (2d Cir. 2021) (second quotation). Substantive challenges are assessed based on "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts." *Cavera*, 550 F.3d at 190.

Osuba received a within-Guidelines, statutory-maximum sentence of 70 years of imprisonment. That sentence, though undoubtedly severe, falls within the range of sentences we have upheld in child pornography cases—particularly those involving defendants who sexually molest children. In *United States v. Brown*, 843 F.3d 74 (2d Cir. 2016), for example, we upheld a 60-year sentence for three counts of production and two counts of possession of child pornography. As in *Brown*, Osuba had repeated sexual contact with at least one minor victim, and the fact that a victim was "asleep when some of the . . . videos were taken of [her] does not . . . make [the defendant's] conduct any less serious." *Id.* at 84.

Osuba points to a case in which an offender received a shorter sentence for sex crimes that were, in Osuba's view, graver than those at issue here. *See United States v. Muzio*, 966 F.3d 61 (2d Cir. 2020) (thirty-five-year **[**23]** sentence where defendant manipulated at least fourteen minor girls into producing child pornography). But even setting aside the inherent difficulty of comparing such divergent criminal conduct, these judgments are chiefly committed to the district court's considerable discretion. *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008) (noting that "even experienced district judges may reasonably differ" over sentencing, and "[r]arely, if ever, do the pertinent facts dictate one and only one appropriate sentence"). We see no indication that the district court overstepped the mark here.

Osuba also challenges the district court's balancing of the sentencing factors set out in 18 U.S.C. § 3553(a). But on this point he simply repeats an argument we have already rejected: that the district court erred in finding that he had abused E. And in any event, the district court explained that a 70-year sentence was necessary because Osuba was a "danger to minors and the public in general both for hands-on offenses and possession and distribution of child pornography." App'x 209. The court acknowledged that Osuba had apologized—"You say you're sorry . . . . I believe that you believe that"—but made a factual finding that Osuba had not recognized the wrongfulness of **[**24]** his conduct or expressed remorse before his statement at sentencing. *Id.* at 199, 209. More important, the court concluded that above all else, its sentence needed to protect the public, deter Osuba, and deter others. *See Cavera*, 550 F.3d at 189 ("[W]e will not substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case.").

III. Conclusion

In sum, we hold as follows:

[11] "Sexual contact" includes "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party." N.Y. Penal Law § 130.00(3).

[*69] 1. There was sufficient evidence for a rational jury to conclude, beyond a reasonable doubt, that Osuba "use[d]" a minor "to engage in . . . sexually explicit conduct" under 18 U.S.C. § 2251(a) when he filmed himself masturbating near the victim, directed his conduct toward her, and framed the visual depiction to show that she was a passive participant in his sexual activity.

2. The district court did not clearly err in applying the five-level repeat-and-dangerous-offender enhancement because sufficient evidence supported the finding that Osuba abused E.

3. Osuba's sentence was substantively reasonable.

We therefore **AFFIRM** the judgment of the district court.

APPENDIX B

District Court's Decision and Order on motion to dismiss
July 19, 2019, NDNY Dkt. 33

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:18-CR-344**

MATTHEW OSUBA,

Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Matthew Osuba is charged in a three count indictment with sexual exploitation of a child in violation of 18 U.S.C. §§ 2251 (a) and (e) (Count 1); distribution of child pornography in violation of 18 U.S.C. §§2252 A(a)(2)(A), 2252A(b)(1), and 2256(8)(A) (Count 2); and possession of child pornography involving one or more prepubescent minors and minors who had not attained 12 years of age in violation of 18 U.S.C. §§2252 A(a)(5)(B), 2252A(b)(2), and 2256(8)(A) (Count 3). He moves to dismiss the indictment or, alternatively, for a bill of particulars. Dkt. Nos. 19, 20. The government opposes the motions, Dkt. No. 27, and the defendant has filed a reply. Dkt. # 28. The Court has elected to decide the motions without oral argument.

II. BACKGROUND

The government asserts that on August 1, 2018, the National Center for Missing

and Exploited Children ("NCMEC") sent a report to the New York State Police that NCMEC received from Witness 1. In the report, Witness 1 stated she was using the social media application Kik to direct message a user named "LightsaberMaster" with the vanity name "Matt O," who was later identified as the defendant. According to the government, Osuba repeatedly spoke with Witness 1 over Kik about his sexual interest in children. Between August 30 and September 1, 2018, Osuba allegedly sent Witness 1 multiple images of child pornography via Kik, including an image that purportedly depicts a prepubescent girl laying on a bed. The government contends that this image depicts a female child who is not wearing any underwear and her legs are spread apart so that her vagina and anus are exposed. The government contends that the child's vagina and anus are the focal point of the image. Osuba also allegedly sent Witness 1 an image depicting the same prepubescent girl with her vagina and anus exposed.

The government contends that the agents obtained a federal search warrant for a residence where Osuba stayed and executed it on September 18, 2018, seizing various pieces of electronic media. Agents also purportedly went to Osuba's former place of employment where they seized a cellphone from him. It is alleged that Osuba waived his *Miranda* rights and made various statements to agents, including that he received and distributed child pornography via Kik. The government contends that a preview of Osuba's cellphone revealed additional child pornography, including an image of a 1 year old girl wearing a dog collar with a finger inserted in her vagina, which Osuba stated he did not remember saving to his cellphone. The government also alleges that agents located a video Osuba produced of himself masturbating near V-1, a then-17-year-old girl. The government maintains that Osuba initially denied masturbating over V-1, but when an

agent told Osuba that the agent found the video, Osuba admitted that he took that video because he was talking to another Kik user and they thought it would be exciting. According to the government, Osuba stated he made the video sometime in late August or early September 2018 and claimed he did not consider V-1 to be a victim because of her age. The government maintains that Osuba told the agents where he made the video. This video is the basis of the sexual exploitation charge contained in Count 1. Defense counsel, who asserts he viewed the video at the FBI field office in Albany, indicates:

> [T]he video runs for about eight to eleven seconds, and shows Mr. Osuba masturbating some feet[] away from V-1, the alleged 17 year old victim. Throughout the duration of the video recording, V-1 was fast asleep on the couch with her face turned towards the backside of the couch. Throughout the duration of the video recording, V-1's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature was never visible. V-1 was completely oblivious of what Mr. Osuba was doing nor did she wake up at any point during the entire eight to eleven seconds duration of the video. V-1's face was never seen in the video, nor any part of her skin. V-1 was fully clothed. No portion of her unclothed body was visible anywhere in the video. V-1 did not participate in any way at all, with whatever Mr. Osuba was doing. Mr. Osuba did not have any contact whatsoever with V-1. V-1 was fast asleep and was totally unaware of whatever was occurring in the room.

Def. MOL, at 3.

III. DISCUSSION

a. Dismissal of Counts in the Indictment

Defendant moves to dismiss each count in the indictment, arguing that they are facially insufficient and the result of inadequate evidence and improper instructions presented by the government to the grand jury.

1. Dismissal Standard

Federal Rule of Criminal Procedure 12(b)(1) provides: “A party may raise by pretrial

motion any defense, objection, or request that the court can determine *without a trial on the merits*." Fed. R. Crim. P. 12(b)(1)(emphasis added). It is well settled that an indictment need only contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir.1992)("An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events."). Further, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Alfonso,* 143 F.3d 772, 776 (2d Cir.1998) (internal quotation marks omitted). "When the charges in an indictment have stated the elements of the offense and provided even minimal protection against double jeopardy, [the Second Circuit] has repeatedly refused, in the absence of any showing of prejudice, to dismiss charges for lack of specificity." *United States v. Stringer*, 730 F.3d 120, 125 (2d Cir. 2013). "An indictment does not have to specify evidence or details of how the offense was committed." *United States v. Wey*, 2017 WL 237651, *5 (S.D.N.Y. 2017)(citing *United States v. Coffey*, 361 F. Supp. 2d 102, 111 (E.D.N.Y. 2005)).

2. Count 1

Defendant focuses his arguments primarily on Count 1, which charges:

> In or about September 2018, in Ulster County in the Northern District of New York, and elsewhere, the defendant, MATTHEW OSUBA, did use a minor, that is V-1, a then 17 year old minor child whose identity is known to the grand jury, to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, where the visual depictions were produced using materials that had been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, and where such visual depictions were actually transmitted using a means and facility of interstate and foreign commerce and in and affecting such commerce, in violation of Title 18, United States Code, Sections 2251(a) and (e).

Indict., Ct. 1, Dkt. No. 9.

This count contains the elements of a Section 2251(a) sexual exploitation offense in that it alleges that defendant used a minor (V-1) to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct where the visual depictions were produced using materials that had been transported in interstate commerce and where the visual depictions were actually transmitted in interstate commerce. *See* 18 U.S.C. §2251(a)("Any person who . . . uses . . . any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."); *United States v. Valerio*, 765 F. App'x 562,

569, n. 4 (2d Cir. 2019)("Section 2251(a) criminalizes the sexual exploitation of minors for the purpose of producing a visual depiction of such conduct where: (1) the defendant knows or has reason to know that the visual depictions produced therefrom will be transported or transmitted using any means or facility or in or affecting interstate or foreign commerce; (2) the visual depictions were produced or transmitted using materials that have been transported in or affecting interstate or foreign commerce; or (3) such visual depictions are actually transmitted using any means or facility or in or affecting interstate or foreign commerce."); *see also United States v. Davis*, 624 F.3d 508, 514 (2d Cir. 2010)("[W]e agree with the District Court that the first clause of the jurisdictional element of section 2251(a) does not require that the knowledge of interstate transmission be contemporaneous with the substantive offense conduct.").

Moreover, Count 1 fairly informs the defendant of the charge against which he must defend (*i.e.* sexual exploitation of minor to produce a sexually explicit video in violation of 18 U.S.C. § 2251(a)). By alleging the date that the offense allegedly occurred ("In or about September 2018"), and the approximate location of its purported commission ("in Ulster County in the Northern District of New York"), the defendant is able to plead an acquittal or conviction in bar of future prosecutions for the same offense. To the extent that the defendant contends that the precise location of the alleged crime is not apparent from the face of the indictment, that information can be determined by the video which defense counsel has already viewed. This alleviates any concern that the defendant might have to asserting double jeopardy in the future. *See Stavroulakis*, 952 F.2d at 695 ("When an indictment delineates the elements of a charged offense, however concisely, the underlying concerns of proper pleading—notice of the charge to be met and protection

against double jeopardy—may be further promoted by a bill of particulars or pre-trial discovery.")(citing *United States v. McLean*, 528 F.2d 1250, 1257 (2d Cir. 1976)). Thus, the allegations in Count 1 state a facially sufficient 18 U.S.C. § 2251(a) violation.

The defendant argues that the evidence supporting Count 1, the video, is insufficient to support a charge under Sections 2251(a) because Osuba engaged in masturbation a few feet away from V-1; during the video the alleged victim's face, likeness, or other distinguishing characteristics (such as a unique birthmark or other recognizable features) were never visible; V-1 was asleep during the video and therefore was "completely oblivious to what Mr. Osuba was doing;" V-1 was fully clothed with no portion of her unclothed body visible in the video; V-1 did not participate with Osuba as he masturbated; the defendant did not have any physical contact with V-1; and "at no time did V-1 engage in any sexually explicit conduct as defined by statute." Def. MOL, at 3. However, "[i]t is well established that an indictment that is valid on its face may not be dismissed on the ground that it is based on inadequate or insufficient evidence." *United States v. Reynolds*, No. 97-CR-232, 1999 WL 66536, at *3 (D. Conn. Jan. 22, 1999) (collecting cases). "It is not proper to weigh the sufficiency of the evidence underlying the indictment, unless the Government has already made 'a full proffer of the evidence it intends to present at trial.'" *United States v. Budovsky*, No. 13-CR-368, 2015 WL 5602853, at *3 (S.D.N.Y. Sept. 23, 2015). "Simply put, the validity of an indictment is tested by its allegations, not by whether the Government can prove its case." *Coffey*, 361 F. Supp. 2d at 111; s*ee* Def. MOL at 9 ("When testing the sufficiency of the charges in an indictment, 'the indictment must be viewed as a whole and the allegations [therein] must

be accepted as true at this stage in the proceedings.'")(citations omitted).

The government has not stated that it has made a full proffer of its evidence in support of Count 1. Thus, the motion can be denied on the ground that Count 1 states a facially sufficient Section 2251(a) charge. Nevertheless, because the defendant argues that the government must necessarily have provided insufficient evidence, and improper instructions, to the grand jury regarding the sexual exploitation charge, the Court will address the sufficiency of the apparent evidence underlying this charge.

Assuming, *arguendo,* that V-1 was asleep during the entire time of the defendant's alleged conduct, kept her face away from the camera, did not actively participate in the defendant's alleged conduct, and did not engage in any lascivious exhibition of her genitals or pubic area, the government may still be able to prove a violation of 18 U.S.C. § 2251(a). Section 2251(a) provides in pertinent part that "[a]ny person who ... uses ... any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e)." 18 U.S.C. § 2251(a). The Court presumes based on the allegations in the indictment ("the defendant . . . did use a minor, that is V-1, a then 17 year old minor child whose identity is known to the grand jury") that the government has evidence other than the subject video that could prove V-1's age at the time of the alleged conduct. "Sexually explicit conduct" is defined as including the "lascivious exhibition of the genitals or pubic area *of any person*." 18 U.S.C. § 2256(2)(A)(v) (emphasis added). Under a plain reading of § 2256(2)(A)(v), it not necessary that the displayed genitalia be that of the child. Here, the defendant's display of his genitals while he masturbated is sufficient evidence supporting this element of the charge. In determining whether a visual depiction is lascivious, the Second Circuit

has cited with approval the factors set forth in *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal.1986), *aff'd sub nom*. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir.1987). *See United States v. Rivera*, 546 F.3d 245, 249 (2d Cir. 2008). The "*Dost* factors" include whether the setting of the visual depiction is sexually suggestive and whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Accepting the government's representation that the defendant videotaped himself masturbating because he was communicating with a person on Kik messenger and the two thought it would be "exciting," the government could establish that the visual depiction was sexually suggestive and designed to elicit a sexual response in the viewer. Additionally, some courts have determined that "the question of lasciviousness is not decided by a bright-line test. Instead, the fact finder must make a totality-of-the-circumstances inquiry that can only be informed through the context of a trial." *United States v. Goodale*, 831 F. Supp. 2d 804, 809–10 (D. Vt. 2011). This totality-of-the-circumstances inquiry can ask whether the minor is portrayed as a sexual object. *Id.* (citing *United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011)(explaining that the jury was instructed to consider the six enumerated *Dost* factors plus the additional factor of "whether the picture portrays the minor as a sexual object.")). Here, the government could establish that V-1 was portrayed as a sexual object in the defendant's video of him masturbating.

The fact that V-1 was asleep and did not actively participate in the defendant's conduct does not necessarily mean that defendant did not violate Section 2251(a). *See United States v. Lohse*, 797 F.3d 515, 521-23 (8th Cir. 2015); *United States v. Finley*, 726 F.3d 483, 494-95 (3d Cir. 2013). In *Lohse*, the Eighth Circuit addressed whether the

District Court erred in denying the defendant's motion for judgment of acquittal on a conviction for producing child pornography in violation of 18 U.S.C. § 2251(a) and (e). *See Lohse*, F.3d at 521-23. The conviction was based upon pictures showing the defendant, Lohse, naked and in a position so that his penis was on or near the face of K.S., a sleeping three-year-old female. *Id.*, at 518. The Eighth Circuit rejected the defendant's argument that the government failed to prove that K.S. was "use[d] to engage in" sexually explicit conduct under §2251(a) because the evidence did not demonstrate that K.S. was an active participant in the sexual conduct and because Lohse did not engage in active sexual conduct with K.S. *Id.* at 521-23. In rejecting this argument, the Eighth Circuit wrote:

> Lohse . . . did not object to the jury instruction explaining that K.S. was "used" if she was photographed or videotaped. Nor did he request that the term "engage in" be defined for the jury. Although he has maintained throughout that the evidence did not support a finding that the conduct was sexually explicit, he claims for the first time on appeal that the evidence was insufficient to prove that K.S. was used to engage in it. If Lohse's argument is that the district court failed to properly instruct the jury, we find no plain error in the instructions. *See United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007) ("[T]he 'use' component 'is fully satisfied for the purposes of the child pornography statute if a child is photographed in order to create pornography.'" (quoting *United States v. Sirois*, 87 F.3d 34, 41 (2d Cir.1996))). If [Lohse's] argument is that the evidence was insufficient because K.S. was merely present when Lohse himself engaged in sexually explicit conduct, we disagree with Lohse's characterization of the images as "a simple display of adult genitals around a sleeping minor." Appellant's Reply Br. 2. We agree with the district court that "a jury might find that [K.S.'s] role in the nine photographs was that of an inanimate body for Lohse to act upon in exhibiting his genitals" and that "a reasonable jury could conclude that Lohse quite literally used K.S. as a sexual object in orchestrating the nine photographs." D. Ct. Order of Jan. 21, 2014, at 11. This is not a case of mere presence, nor could the images be fairly described as "innocent family photos, clinical depictions, or works of art." *Johnson*, 639 F.3d at 439.

> For example, government's exhibit 5 depicts K.S. wearing pajamas and sleeping on a bed. Lohse is naked and straddling the child's head, with his left foot on the floor and his right leg on the bed. Lohse has placed his flaccid penis near the child's cheek or mouth, and he is pulling or holding her hair with his left hand. Government's exhibit 8 again depicts K.S. wearing pajamas and sleeping on a bed. Lohse is naked and almost straddling the child's head. He is facing away from the child and has pushed his penis and scrotum toward his anus with his left hand. His left hand is also pressed against K.S.'s forehead, with his penis placed near K.S.'s left eye. These two images and the other seven in the series constitute evidence from which a reasonable jury could find present three of the factors set forth in the jury instructions, two of which were enumerated in *Dost*: the setting of the images was sexually suggestive; the images were intended to elicit a sexual response in the viewer; and K.S. was portrayed as a sexual object. The evidence was sufficient to allow a reasonable jury to convict Lohse of production of child pornography, as charged in count 1, and thus the district court properly denied Lohse's motion for judgment of acquittal.

Id., at 521–22.

Here, like in *Lohse*, the government could establish that Osuba used V-1 as an inanimate body to act upon in exhibiting his genitals and masturbating for the video camera, and that V-1 was portrayed as the sexual object of the video. Contrary to the defendant's argument, *Lohse* is not distinguishable from the instant case. Inasmuch as the Eighth Circuit did not base its interpretation of Section 2251(a)'s "use" element on the fact that there was some incidental physical contact between Lohse and K.S., the absence of physical contact between Osuba and V-1 in the video does not separate this case from the primary holding of *Lohse.* On the basis of the video, a Section 2251(a) "use" violation can be established even though V-1 was unaware of, and did not actively participate in, Osuba's alleged sexually explicit conduct. *See id.*

In *Finley*, the Third Circuit rejected Defendant Finley's contention that the District Court erred in instructing the jury that a sleeping child can "engage in" sexually explicit

conduct within the context of §2251(a). *Finley*, 726 F.3d at 494-95. The Third Circuit wrote:

> Section 2251(a) pertains to "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to *engage in* ... any sexually explicit conduct." (emphasis added). . . . Finley's focus on the word "engage" is too narrow. Section 2251(a) pertains to a person who "*employs, uses, persuades, induces, entices, or coerces* any minor to engage in ... any sexually explicit conduct." (emphasis added). Congress's utilization of these verbs, especially "uses," indicates that active involvement on the part of a minor is not essential for a conviction under § 2251(a). For example, a perpetrator can "use" a minor to engage in sexually explicit conduct without the minor's conscious or active participation.
>
> Even if the plain language of the statute could be interpreted to support Finley's position, the result of such an interpretation would be absurd and against the obvious policy of the statute. In the only published opinion addressing this issue, the U.S. District Court for the Southern District of New York held that "[a]s a matter both of common sense and public policy, the statute must be construed to protect all children, including those who are unaware of what they are doing or what they are being subjected to, whether because they are sleeping or under the influence of drugs or alcohol or simply because of their age." *United States v. Levy*, 594 F. Supp.2d 427, 443 (S.D.N.Y. 2009). It would be absurd to suppose that Congress intended the statute to protect children actively involved in sexually explicit conduct, but not protect children who are passively involved in sexually explicit conduct while sleeping, when they are considerably more vulnerable.

Id. The Third Circuit also noted that "[t]wo of our sister courts of appeals, without specifically addressing the issue, have, in published opinions, affirmed convictions under § 2251(a) where the material in question involved sleeping children." *Id.*, at 495, n. 3 (citing *United States v. Vowell*, 516 F.3d 503 (6th Cir. 2008); *United States v. Wolf*, 890 F.2d 241 (10th Cir.1989)). Thus, the Third Circuit concluded that "on the basis of statutory text, public policy, and persuasive case law, we hold that the District Court did not err by instructing the jury that a sleeping child can 'engage in' sexually explicit conduct within the context of § 2251(a)." *Id.* at 495. Here, even assuming that the evidence demonstrates

that V-1 was constantly sleeping while Osuba exhibited his penis for the camera and masturbated, the government can establish a Section 2251(a) violation based on Osuba's use of V-1 to engage in sexually explicit conduct even without V-1's conscious or active participation. *See id.*

Osuba's reliance on *Sirois* does not change this conclusion. In *Sirois*, the Second Circuit held that the "use" element of § 2251 is "fully satisfied ... if a child is photographed in order to create pornography," upholding the District Court's refusal to define the terms "employing, using, or persuading" in § 2251(a) as requiring a defendant to act to manipulate or take advantage of a minor. *Sirois*, 87 F.3d at 41. In reaching this conclusion, the Second Circuit wrote:

> Sirois claims that the government urged the jury to interpret the word "use" too broadly. In its summation, the prosecution analogized [the two minors involved in the sexually explicit pictures] to a vase being photographed; each was "used" to create a visual depiction. Sirois, instead, wanted to define "use" more narrowly, to mean "take some acts which manipulate or take advantage of a minor." The defense argues that, at the very least, any "use" by Sirois must have occurred prior to the photographed sexual activity, since the other activities proscribed by § 2251(a)—enticing, inducing, persuading, coercing—must all happen before the sexual activity.
>
> Sirois also argues that some clarificatory instruction was warranted, especially in view of the recent debate over the meaning of the word "use" in 18 U.S.C. § 924(c), which prohibits "use" of a firearm in certain circumstances. Sirois points to *Bailey v. United States*, 516 U.S. 137, [141], 116 S. Ct. 501, 505, 133 L. Ed.2d 472 (1995), and the Supreme Court holding that under § 924(c), "use" of a firearm entails active employment, not merely possession, of a gun. *See also Smith v. United States*, 508 U.S. 223 113 S. Ct. 2050, 124 L.Ed.2d 138 (1993) (ruling that bartering a gun for drugs constitutes "use" of a firearm under § 924(c)).
>
> Although the word "use" may pose "interpretational difficulties" in certain contexts, *id.*, we do not believe that it creates problems here. As the Supreme Court pointed out in *Bailey*, the "ordinary or natural" meaning of the word "use" can be variously stated as "[t]o convert to one's service," "to employ," "to avail oneself of," and "to

> carry out a purpose or action by means of." 516 U.S. at 143, 116 S. Ct. at 506 (quoting *Smith*, 508 U.S. at 229, 113 S. Ct. at 2050) (internal quotation marks omitted). There is undoubtedly an active component to the notion of "use." But that component is fully satisfied for the purposes of the child pornography statute if a child is photographed in order to create pornography.
>
> ....
>
> Although some of the other actions listed in § 2251(a), such as "enticing, inducing, and persuading" will most often occur before the depicted activity, that is not so of the word "use."....
>
> In short, we believe that the meaning of "use" in § 2251(a) is within the typical juror's everyday understanding of the word.

Sirois, 87 F.3d at 41.

Here, it possible that a jury could conclude that Osuba used V-1's presence on the couch to produce a visual depiction that was sexually suggestive, designed to elicit a sexual response in the viewer, and that portrayed V-1 as the sexual object of the video. This satisfies the broad interpretation of the term "use" in Section 2251(a). *See id.; Lohse*, F.3d at 521-23; *Finley*, 726 F.3d at 494-95; *see also United States v. Wright*, 774 F.3d 1085, 1090 (6th Cir. 2014)(adopting the Second Circuit's interpretation of "use" in holding that this element is "fully satisfied for the purposes of the child pornography statute if a child is photographed in order to create pornography.") (quoting *Sirois*, 87 F.3d at 41); *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007)("Fadl argues first that he did not 'use' a minor to engage in sexual conduct, as that term is employed in the statute, because he had only filmed the minors and did not initiate or solicit their sexual conduct. We find this argument unpersuasive, for we agree with the Court of Appeals for the Second Circuit that the 'use' component 'is fully satisfied for the purposes of the child pornography statute if a child is photographed in order to create pornography.'")(quoting

Sirois, 87 F.3d at 41); *United States v. Vanhorn*, 740 F.3d 1166, 1168 (8th Cir. 2014) (same); *see e.g., Ortiz–Graulau v. United States*, 756 F.3d 12, 19 (1st Cir. 2015)("In enacting 18 U.S.C. § 2251, 'Congress intended a broad ban on the production of child pornography and aimed to prohibit the varied means by which an individual might actively create it.' ... The inclusion of multiple similar verbs in the statute illustrates Congress'[s] intent to reach as broad as possible a range of ways that a defendant might actively be involved in the production of sexually explicit depictions of minors.")(quoting *United States v. Poulin*, 631 F.3d 17, 23 (1st Cir. 2011)).

There is also no merit to Osuba's argument that the government cannot prove beyond a reasonable doubt that his alleged conduct underlying Count 1 was criminal. Assuming, as the defendant argues, that the New York State Office of Children and Family Services issued an "unfounded" report of suspected child abuse or maltreatment based on the conduct underlying Count 1, this determination is of no moment on this motion. The Office of Children and Family Services' report was based upon the investigation of the defendant's local county Child Protective Services ("CPS") office. *See* Def. Ex. 2. A county CPS investigator has significantly less investigative capabilities then the federal government, and there is no indication that the CPS investigator was aware of the video that defendant took of himself masturbating a few feet away from V-1. The "unfounded" report does not establish that the government cannot prove that the defendant violated Section 2251(a). Moreover, the CPS investigator's determination cannot serve as a proper substitute for a jury's determination.

For these reasons, Osuba's motion to dismiss Count 1 for lack of sufficient

evidence is denied.

3. Counts 2 & 3

Defendant asserts that even though Counts 2 and 3 "do contain a little bit more factual allegations then that contained in Count One, Counts Two and Three nevertheless failed to provide sufficient factual allegations to support all the elements of the offense[s] charged." Def. MOL at 14. The Court disagrees.

Count 2 alleges:

> Between on or about August 30, 2018 and on or about September 1, 2018, in Ulster County in the Northern District of New York, and elsewhere, the defendant, MATTHEW OSUBA, did knowingly distribute and attempt to distribute child pornography using a means and facility of interstate and foreign commerce, shipped and transported in and affecting such commerce by any means, including by computer, in that the defendant, using the Internet or cellular service, used a messaging application to send one or more graphic image files depicting a minor or minors engaged in sexually explicit conduct to another user, in violation of Title 18, United States Code, Sections 2252A(a)(2)(A), 2252A(b)(1), and 2256(8)(A).

Indict., Ct. 2, Dkt. No. 9.

As stated above, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117. Count 2 contains the elements of a violation of Sections 2252A(a)(2)(A), 2252A(b)(1), and 2256(8)(A), and fairly informs the defendant of the charge against which he must defend. Moreover, the government asserts that Count 2 "only charges images that the defendant distributed via Kik between August 30 and September 1, 2018. Those images are described in the complaint and were made available for defense counsel's review. The government will

provide the defendant with redacted copies of his Kik chats with Witness 1 during that timeframe in which he distributed child pornography." Gov. MOL at 7-8. This pretrial discovery, in combination with the allegations in Count 2, enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *See Stavroulakis*, 952 F.2d at 695. Accordingly, there is no basis to dismiss Count 2 for legal insufficiency.

Count 3 alleges:

> On or about September 18, 2018, in Ulster County in the Northern District of New York, the defendant, MATTHEW OSUBA, did knowingly possess material that contained one or more images of child pornography that had been shipped and transported using a means and facility of interstate and foreign commerce, and in and affecting such commerce by any means, including by computer, and that was produced using materials that had been shipped and transported in and affecting such commerce by any means, that is a Samsung cellphone, model SMJJ337A, serial number R28K51 0ZXFH, manufactured outside the state of New York, which contained numerous graphic image and video files of one or more minors engaged in sexually explicit conduct, in violation of Title 18, United States Code, Sections 2252A(a)(5)(B), 2252A(b)(2), and 2256(8)(A). This violation involved images of child pornography involving one or more prepubescent minors and minors who had not attained 12 years of age, in violation Title 18, United States Code, Section 2252A(b)(2).

Indict., Ct. 3, Dkt. No. 9.

This count contains the elements of a violation of Sections 2252A(a)(5)(B), 2252A(b)(2), and 2256(8)(A), and fairly informs the defendant of the charge against which he must defend. Moreover, the government asserts that "Count 3 charges the defendant with possessing child pornography on his cellphone on September 18, 2018. The child pornography found on the defendant's cellphone was also made available for defense counsel's review." Gov. MOL, at 9. This pretrial discovery, in combination with the allegations in Count 3, enables the defendant to plead an acquittal or conviction in bar of

future prosecutions for the same offense. *See Stavroulakis*, 952 F.2d at 695. Accordingly, the Court finds no basis to dismiss Count 3 for legal insufficiency.

4. Grand Jury Presentation

Based on his contention that the evidence from the video is insufficient to support the charge in Count 1, the defendant asserts that the government must necessarily have failed to present sufficient evidence to the grand jury and/or improperly instructed the grand jury on the statutory elements of a violation of 18 U.S.C. §§ 2251(a) and (e). The defendant argues that Count 1 "should be dismissed for improper presentation of evidence and improper grand jury instructions," and Counts 2 and 3 "should likewise be dismissed because, even though those counts contain certain factual allegations, it [*sic*] nonetheless lacks sufficient factual allegations to support all of the elements of the offenses charged." Def. MOL at 19. In the alternative to dismissal, the defendant requests that the Court order the government to produce to the Court and to defense counsel a copy of all transcripts related to the grand jury proceedings in this case. The defendant's motion in this regard must be denied.

"[A] presumption of regularity attaches to any indictment valid on its face and returned by a duly constituted grand jury." *United States v. Stern*, No. 03 CR. 81 (MBM), 2003 WL 22743897, at *3 (S.D.N.Y. Nov. 20, 2003)(citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). "[A]bsent any indication of government impropriety that would defeat that presumption, . . . this court has no roving commission to inspect grand jury minutes, and will not fashion one." *Id.* (citations omitted). Moreover, "a review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." *United States v. Smith*, 105 F. Supp. 3d 255, 260 (W.D.N.Y. 2015) (citing

United States v. Torres, 901 F.2d 205, 233 (2d Cir. 1990)).

For the reasons discussed above, the indictment in this matter is valid on its face in all respects. Further, and also for reasons discussed above, there appears to be sufficient evidence for the grand jury to return an indictment on each of the counts alleged in the indictment. Thus, there is no basis for the defendant's assertion of impropriety before the grand jury and, consequently, no basis to dismiss the indictment, for the Court to review the grand jury transcripts, or order production of the grand jury transcripts to defense counsel.

b. Motion for a Bill of Particulars (Dkt. # 20)

The defendant seeks a bill of particulars requiring the government to particularize the allegations and the government's evidence for each count.[1] Under Federal Rule of Criminal Procedure 7(f), a district court may require the government to file a bill of particulars when it is necessary to explain the nature of the charges against the defendant, to allow him to prepare for trial, and to prevent unfair surprise. *See United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987)(*per curiam*). The decision to grant a request for a bill of particulars is within the Court's discretion. *Id.* "Courts are only required to grant a bill of particulars 'where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.'" *United States v.*

[1]Regarding Count 1, the defendant seeks: a description of the visual depiction; the location where the visual depiction was produced; an explanation of how the visual depiction fits the definition of sexually explicit conduct; and an explanation of how the government has identified the victim. With respect to Counts 2 and 3, the defendant seeks: an identification of all visual depictions involved; an explanation of how the visual depictions qualify as sexually explicit conduct; proof that the defendant knowingly distributed child pornography using a messaging application; proof that the defendant knowingly possessed child pornography; whether the visual depiction is an actual minor engaged in sexually explicit conduct; and an explanation of how the government determined that the visual depictions involved in Count 3 include images of prepubescent children.

Raniere, No. 18-CR-2041 (NGG/VMS), 2019 WL 1903365, at *25 (E.D.N.Y. Apr. 29, 2019)(quoting *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004) (citation and quotation marks omitted)). "This standard turns on whether the information sought is necessary, not whether it is helpful." *Id.* (citation and quotation marks omitted). "In making this determination, 'the court must examine the totality of the information [already] available to the defendant—through the indictment, affirmations, and general pre-trial discovery.'" *Id.* (quoting *United States v. Bin Laden*, 92 F. Supp. 2d 225, 233 (S.D.N.Y. 2000) and citing *Bortnovsky*, 820 F.2d at 574 ("Generally, if the information sought by [the] defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required.")). A bill of particulars is not meant to serve as "a general investigative tool, a discovery device or a means to compel the government to disclose evidence or witnesses to be offered prior to trial." *United States v. Gibson*, 175 F. Supp. 2d 532, 537 (S.D.N.Y. 2001); see *United States v. Kang*, No. 04-CR-87 (ILG), 2006 WL 208882, at *1 (E.D.N.Y. Jan. 25, 2006)(A bill of particulars is not meant to enable a defendant to "obtain a preview of ... the government's evidence before trial," or "to learn the legal theory upon which the government will proceed."). The defendant bears the burden of showing that the information sought is necessary and that he will be prejudiced without it. *Raniere*, 2019 WL 1903365, at *25 (citation quotation marks omitted).

As evident from the defendant's memorandum of law, defense counsel has had the opportunity to review the video that forms the basis of the charge in Count 1. Moreover, the government asserts that the images that form the bases of the charges in Counts 2 and 3 were made available for defense counsel's review. The Court accepts the government's representation that this involved all of the images forming the bases of

Counts 2 and 3. Further, the government contends that it will provide the defendant with redacted copies of his Kik chats with Witness 1 during the timeframe in which defendant purportedly distributed child pornography as alleged in Count 2.

The government's provision of the opportunity to review this evidence, and the expected provision of redacted copies of the of the Kik chats, is sufficient to explain the nature of the charges against the defendant, to allow the defendant to prepare for trial, and to prevent unfair surprise. Based upon the allegations in the indictment, the discovery already provided, and the discovery that will be provided, the defendant fails to demonstrate that he is unable to determine the nature of the charges leveled against him. Thus, his motion for a bill of particulars is denied.

IV. CONCLUSION

For the reasons set forth above, the defendant's motions to dismiss the indictment, Dkt. No. 19, and for a bill of particulars, Dkt. No. 20, are **DENIED**.

IT IS SO ORDERED.

Dated: July 19, 2019

Thomas J. McAvoy
Senior, U.S. District Judge