

09-0311-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0311-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

BRIAN HERNDON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

=====

BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
United States Attorney
District of Connecticut

WILLIAM J. NARDINI
SANDRA S. GLOVER (*of counsel*)
Assistant United States Attorneys

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Statement of Jurisdiction

The district court (Dorsey, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 13, 2009. AA 2-4, 15. On January 14, 2009, the defendant filed a timely notice of appeal within the ten days permitted by Fed. R. App. P. 4(b). AA 16. This Court has appellate jurisdiction to review the final judgment of conviction pursuant to 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

1. Did the district court abuse its discretion by permitting the jury to view a handful of the numerous images of child pornography on the defendant's computer, where the content of the images was relevant to proving the defendant's knowing possession of the child pornography, and the court instructed the jury not to let the nature of the case sway their emotions?
2. Did the district court abuse its discretion by allowing the government to introduce evidence that the defendant's computer contained a photograph of his neighbor's daughter sunbathing, where the content, storage location, and timing of access to that photograph tended to show his knowing possession of the child pornography?
3. Did the district court's limited questioning of the defendant unfairly prejudice him, where it was designed to clarify confusing portions of the testimony and did not manifest any judicial bias?
4. Did the defendant waive any challenge to the district court's method of polling the jury – asking whether they agreed with the verdict announced by the foreperson, and then observing all of the jurors nod their assent – and in any event, is his challenge meritless?

5. Did the district court abuse its discretion when instructing the jury on how to evaluate the defendant's trial testimony, where the court largely tracked an instruction that this Court has previously approved in *United States v. Brutus*, 505 F.3d 80 (2d Cir. 2007)?

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Preliminary Statement

After a three-day trial, a jury convicted defendant Brian Herndon of knowingly possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(b). Agents investigating charges placed to a website that distributed child pornography discovered that two payments had been made to the site in the defendant's name, using his charge

card. Investigators confronted the defendant at his house, and he admitted that he had child pornography on his computer. Forensic analysis of his hard drives uncovered thousands of images, including 655 files that the parties agreed were child pornography. The images were carefully organized into folders with graphically descriptive names, interspersed with other folders containing the defendant's other personal files. The defendant testified at trial that he must have been the victim of identity theft; that the files must have been put on his hard drive by the unknown thief; and that he never knew that child pornography was on his computer. The jury rejected this defense, and found him guilty. The court sentenced him to six years in prison.

On appeal, the defendant challenges his conviction. He claims (1) that the district court abused its discretion in permitting the jury to see a handful of the 655 images of child pornography, even though the government bore the burden of proving that he knowingly possessed the child pornography; (2) that the district court abused its discretion in admitting a photograph of the defendant's neighbor sunbathing, even though the content, storage location, and access time of that photograph tended to prove that he had also viewed the child pornography on his computer; (3) that the district court unfairly prejudiced him by asking follow-up questions at the end of his testimony; (4) that the district court erred in polling the jury by asking whether they concurred with the guilty verdict, and then watching them all nod their heads in agreement; and (5) that the court's instruction on how to evaluate the defendant's testimony prejudicially diverged from a model instruction previously approved by this

Court. For the reasons that follow, each claim is meritless. The defendant's conviction should be affirmed.

Statement of the Case

On March 27, 2008, a federal grand jury sitting in New Haven, Connecticut, returned a sealed indictment charging Brian Herndon with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(b). AA 7. The case was assigned to Senior United States District Judge Peter C. Dorsey.

Judge Dorsey presided over a jury trial that began on October 16, 2008. AA 13. On October 21, 2008, the jury returned a guilty verdict. AA 14.

On January 12, 2009, the court sentenced Herndon to 72 months in prison, to be followed by five years of supervised release, as well as a \$100 special assessment. AA 2-3, 15. Judgment entered the following day.

On January 14, 2009, Herndon filed a notice of appeal. AA 16. He is presently serving his sentence.

Statement of Facts

Viewed in the light most favorable to the guilty verdict, the evidence at trial demonstrated that the defendant knowingly possessed child pornography that had been transported in interstate commerce.

The present case grew out of a larger investigation into a website named “illegal.cp,” which was distributing child pornography over the internet. GA 70-71. Acting under an assumed name, Special Agent Victoria Becchina of United States Immigration and Customs Enforcement subscribed to the website for \$79.99, and was granted a 20-day membership that gave her access to thousands of images of child pornography. GA 71-91. The charge showed up on the undercover credit card as a purchase from a sham company named “AdSoft.” GA 79-80. Upon executing a search warrant, investigators learned that the list of charge card purchasers from the sham company included the defendant, Brian Herndon, in Mystic, Connecticut. GA 81-82.

Documentary evidence confirmed that the defendant had subscribed to the illegal.cp website. His charge card statements included two charges to AdSoft for \$79.99, on October 26, 2005, and June 26, 2006. GA 91-94, 889-90. Forensic examination of the defendant’s computer showed that he had received an e-mail from the illegal.cp website confirming his subscription. GA 94-95, 884. That e-mail included links to three websites that contained child pornography. GA 96, 884. The address for one of those sites – “hualama.cjb.net” – had been removed from the defendant’s hard drive using software called Privacy Guardian. GA 322-25, 476-77.

The website – even on the banner page, available to the public – contained images of child pornography. GA 74,

87-88, GX 15, 16.¹ After logging in, visitors were immediately steered to the page for FAQ (“Frequently Asked Questions”), which warned:

Our site is considered to be illegal in all countries. . . .

Even if you ever have any problems with police, you can always say that someone had stolen the information from your credit card and used it. It is very difficult to establish that you are the very person to pay.

GA 885; *see also* GA 77-79.

On November 28, 2007, Special Agents Wing Chau and Jason Dragon went to visit the defendant, who lived alone in an 800-square-foot house, to interview him about his purchases of child pornography. GA 118, 456, 596. After confirming that the defendant had internet access and a charge card ending in -7821 (on which the AdSoft purchases appeared), the agents asked whether he had ever accessed child pornography on the internet. GA 461-63. The defendant’s demeanor immediately changed. GA 463; *see also* GA 130-31. Agent Dragon testified: “His head went down. He turned red, and he admitted to us that he has accessed child pornography on the Internet.” GA 463; *see also* GA 130-31. When asked why he had not admitted

¹ The district court sealed the exhibits containing child pornography. The government has not included them in its appendix, and refers to them by exhibit number.

that at the outset of the conversation, the defendant replied, “It’s me. Why would anybody want to admit that I had this – somebody has this stuff on their computer.” GA 463; *see also* GA 130-31. When one of the agents commented, “It can’t possibly be a million images,” the defendant answered, “Not a million images, they’re just on my computer.” GA 463; *see also* GA 131. He told the agents that the child pornography came from the Ukraine. GA 131-32. The defendant agreed to let the agents seize and examine his two hard drives, which were hooked up to the computer (in his bedroom), which he had built. GA 127, 133, 465-66. As the defendant handed the drives to the agents, he said, “I know I’m fucked for giving you these hard drives.” GA 466; *see also* GA 135.

As discussed in more detail in Part I below, forensic examination of the defendant’s two hard drives uncovered thousands of image files. The defendant stipulated at trial that 655 images were depictions of actual children that had been transported in interstate commerce or produced using materials that had been so transported. GA 505-06. The images were carefully organized into folders with graphically descriptive names, such as “LilUns” and “teen_pix files.” GA 334. Moreover, the list of “Favorites” in the defendant’s web browser included things like “My little sisters,” “underage home,” “Lolita’s kiss,” and “biggest collection of child porn.” GA 292-93. The defendant had also saved a file containing numerous child pornography links such as “Virginsexuallolita.net.” GA 320.

Further, as discussed in detail in Part II below, the government offered evidence showing that child pornography had been accessed on the defendant's computer at around the same time that other files relating personally to the defendant had been accessed.

The defendant testified in his own behalf, claiming that he had been a victim of identity theft, GA 578-79, just as the opening FAQ page of the child pornography website advised subscribers to claim, if caught, GA 77-79, 885. He disavowed any knowledge that child pornography was on his computer, GA 554, 593-95. He claimed to have noticed irregular charges for "international transaction fees" on his charge card statements, GA 570, 602, which led him to conduct an "investigation" into who might have stolen his identity – a story that was designed to explain away his e-mail correspondence with the child pornography website and the pornography sites listed in his internet Favorites. GA 579-80, 621-25, 635. The jury rejected his testimony, and returned a guilty verdict.

Summary of Argument

1. The district court did not abuse its discretion by permitting the jury to view a handful of the numerous images of child pornography on the defendant's computer. The government was obligated to prove that the defendant had knowingly possessed the charged images. Contrary to the defendant's representation in his appellate brief, he refused to stipulate to his knowing possession of these materials. The government sought to prove that the defendant was aware of the presence and nature of the

child pornography by, among other things, proving that he could not possibly have missed them given their sheer volume and their location alongside many of his personal folders on his hard drives, that the files had indeed been accessed, and that anyone who viewed these files would have immediately recognized them as child pornography. As this Court held in *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), a district court does not abuse its discretion in admitting the contents of child pornography where a defendant's proffered stipulation is not an adequate substitute for the original evidence.

The significant probative value of these images was not substantially outweighed by the danger of unfair prejudice. The government showed the jury only a handful of the 655 images that the defendant conceded were child pornography, and displayed them only once during trial with a minimum of commentary. Moreover, the district court instructed the jury at the outset of the trial that the nature of the case should not sway their emotions.

Even assuming some error in the admission of this evidence, the defendant cannot show a substantial and injurious effect on the outcome of the trial. There was strong evidence of the defendant's guilt, including his admissions to the two agents, documentary evidence of his purchases from the child pornography website, and abundant forensic evidence that the child pornography was carefully organized and had actually been accessed.

2. The district court did not abuse its discretion by allowing the government to introduce evidence that the

defendant's computer contained a photograph of his neighbor's daughter sunbathing. The defendant squarely contested his knowing possession of child pornography. It was therefore highly probative for the government to show that only *nine minutes* before an image of child pornography was accessed on the defendant's hard drive, someone had accessed a photograph of the defendant's neighbor. That photo had been taken with the same camera used to photograph the defendant's dog and house, and had been saved in a folder (named after the neighbor) that was close to folders containing child pornography. Considered together, the content, storage location, and timing of access to that photograph tended to show that it was the defendant who had accessed both images. In any event, any hypothetical error could not have had a substantial and injurious effect on the verdict, given the strong evidence of the defendant's guilt outlined in Part I.

3. The district court's limited questioning of the defendant, to which the defendant never objected, did not constitute plain error. Rule 614 of the Federal Rules of Evidence expressly provides that a judge "may interrogate witnesses." This Court has recognized that such questioning may be appropriate to clarify ambiguities in testimony, and to elucidate issues that the jury must consider. Here, the judge's questions did not betray any belief about the defendant's guilt or convert the judge into an advocate for the prosecution. The judge's questions – taking up only five and a half of the 132 pages dedicated to the defendant's testimony – were aimed at clarifying the defendant's confusing testimony about whether and when he noticed the child pornography charges on his account,

and how he claimed that his credit union handled a fraud claim that he purportedly filed. The jury could not have perceived this limited questioning as biased. Moreover, the court instructed the jury not to infer that its questions indicated any view on the merits. Accordingly, there was no plain error in the judge's questioning.

4. The district court adequately polled the jury by asking whether they agreed with the guilty verdict announced by the foreperson, and then observing all of the jurors nod their assent. First, any objection to this procedure was waived when the judge said he had observed each juror respond to his inquiry, and defense counsel agreed with the court's question whether this was "okay." Second, even if the claim were preserved, it would still be meritless. A judge has broad discretion to select a method for polling the jury in accordance with Rule 31(d) of the Federal Rules of Criminal Procedure. Although some courts have expressed a preference for asking jurors to confirm their verdict aloud and sequentially, there is no requirement that such a procedure be followed. The method adopted by the district court here served both purposes of Rule 31(d) – it ensured the unanimity of the verdict without being coercive. The district court's choice of methods was not an abuse of discretion.

5. The district court did not abuse its discretion when instructing the jury on how to evaluate the defendant's testimony. The court largely tracked an instruction that this Court approved in *United States v. Gaines*, 457 F.3d 238, 249 & n.9 (2d Cir. 2006), and *United States v. Brutus*, 505 F.3d 80, 88 & n.7 (2d Cir. 2007), and avoided the flaws in

instructions rejected in those two cases. It did not instruct the jury that the defendant had a “motive to testify falsely,” that it should “scrutinize the defendant’s testimony with care,” or even that the defendant had a “deep personal interest” in the outcome of the case. Instead, the court instructed:

In a criminal case, the defendant has no duty to testify or come forward with any other evidence. He may, of course, choose to take the witness stand on his own behalf. *A defendant has a personal interest in the outcome of the case.* As with any witness, you may take such an interest into account in evaluating the credibility of the defendant as a witness. You should evaluate and examine his testimony as you would the testimony of any witness with an interest in the outcome of the case.

GA 812 (emphasis added). The only perceptible difference between the instruction given and the instruction approved in *Gaines* and *Brutus* is the italicized sentence. There is nothing erroneous or misleading about stating that a defendant has a personal interest in a case, because that concept is already implicit in the final sentence (which the Court has twice approved), which permits the jury to treat the defendant like “any witness with an interest in the outcome of the case.” Even assuming *arguendo* that the instruction was erroneous, any error would have been harmless given the complete implausibility of the defendant’s testimony and the abundant evidence of his guilt.

Argument

- I. The district court did not abuse its discretion by permitting the jury to view a handful of the numerous images of child pornography on the defendant's computer, where the content of the images was relevant to proving the defendant's knowing possession of the child pornography, and the court instructed the jury not to let the nature of the case sway their emotions.**

A. Relevant facts

At trial, the parties stipulated that images depicting actual individuals under the age of 18 were contained in Government Exhibits ("GX") 3 (655 images), 4 (a short compilation of 13 videos, which the jury was shown), 4A (the full-length version of the 13 videos), and 5 (two full-length videos not included in other exhibits). GA 505-06.

Out of the 655 images of child pornography, the government showed the jury no more than ten, marked GX 3A-J. They were displayed to the jury only once during the trial, on a projection screen that was arranged so that the public could not view the images (which were under seal). GA 489. The still photos and videos were published to the jury during the testimony of an agent. Each image was shown with minimal accompanying commentary by the witness, focusing mainly on the location on the hard drive where they had been found. GA 491-98. Earlier, when describing the folders located on the hard drive, the forensic agent had listed the folder name, the number and

type of files located, and the general nature of those files. For example, the “LilUns” folder contained over 17,000 images, which the agent refrained from describing in graphic detail. Instead, he merely described them as “similar” to files that had previously been described as being of “prepubescent minor children engaged in sexually explicit behavior; some are minor to minor, adult to minor,” and in some of which the children were wearing no clothes. GA 327-35. Contrary to the defendant’s claim in his appellate brief, Def. Br. at 7, this general testimony about the contents of the defendant’s hard drives was squarely approved by the district court, GA 328-32.

B. Governing law and standard of review

The defendant was charged with violating 18 U.S.C. § 2252A(a)(5)(b), for “knowingly possessing” child pornography that had been transported in interstate commerce or created using materials that had been so transported.

Rule 403 of the Federal Rules of Evidence provides that “[a]lthough relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury” (Emphasis added). A district court’s evidentiary rulings are reviewed for abuse of discretion. *United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009). “[W]hen reviewing a Rule 403 ruling,” an appellate court “must review the evidence maximizing its probative value and minimizing its prejudicial effect.” *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002) (internal

quotation marks omitted). “Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence’s probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational.” *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *see also United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (reversal of evidentiary ruling is warranted only if manifestly erroneous).

Even if a court abuses its discretion by admitting a particular piece of evidence, the conviction may be vacated only if there has been a violation of a “substantial right,” such that the error was not harmless. *See United States v. Ebbers*, 458 F.3d 110, 123 (2d Cir. 2006). For nonconstitutional errors, a conviction may be reversed only if there was a substantial and injurious effect upon the outcome of the trial. *Kotteakos v. United States*, 328 U.S. 750, 764-65, 776 (1946).

C. Discussion

The defendant argues that the district court should have precluded the government from showing the jury even a small sample of the child pornography on his home computer. Def. Br. 6-7. This argument fails for three related reasons.

First, contrary to his representation on appeal, the defendant did not “offer[] to stipulate that he knowingly possessed” the images in question. Def. Br. 6. The defendant offered to stipulate only to the fact that the images constituted child pornography, which were

authentic and showed victims under 18 years old. GA 11; GA 505-06; 875-79. The following colloquy took place on the first day of trial:

[AUSA] JONGBLOED: Your Honor, can I make the inquiry through the Court, is Mr. Einhorn putting into dispute, the *knowing possession* of the child pornography?

MR. EINHORN: *Of course.*

GA 11 (emphasis added); *see also* GA 61 (defense counsel contesting knowing possession during opening statement); GA 595 (defendant testifies he was unaware of child pornography). In other words, although the defendant was willing to stipulate that the images were child pornography, he would not stipulate that he *knowingly* possessed them.

Second, because the government bore the burden of proving that the defendant *knowingly* possessed child pornography, the jury had to view the contents of at least a few of the seized images. As the government argued before the district court, there was evidence that certain files containing images had been accessed from the defendant's computer. The jury needed to see those images to determine whether, once the defendant looked at those files, he would have known that they were child pornography. GA 12. What the defendant does not seem to grasp is that his defense – that he never knew the images were on his computer – did not free the government of its burden of proving all the elements of the charge. In order

to convict him, the jury had to conclude not only that he knew about the images on his computer, but also that *he knew they constituted child pornography*. GA 816, 821-22 (jury instructions). One way to prove that was to show the images to the jury, and to prove that the defendant had viewed them. His denial about having viewed the images could not strip the government of its ability to offer evidence on each link in the logical chain of proof necessary to prove his guilt.

Indeed, this Court has held that even if a defendant is willing to concede that he possessed child pornography, such a stipulation is “not an adequate substitute” for the images themselves. In *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), this Court held that the district court did not abuse its discretion in allowing the government to introduce images and videos alleged to constitute child pornography, despite the defendant’s offer to stipulate that they were. Each image was shown briefly to the jury, after which a detective testified about the date the image was downloaded or possessed, where it had been obtained, where it was saved on the hard drive, the identity and circumstances of the child depicted, and the date that the defendant had last accessed the file. *Id.* at 149. The Court explained that “[t]he specific nature and content of the images were relevant to the jury’s evaluation of Polizzi’s claim that he did not understand the wrongfulness of receiving and possessing those images.” *Id.* at 153. As in *Polouizzi*, the government here was obliged to prove knowing possession of child pornography. It sought to do so by proving that the images so clearly constituted child pornography that the defendant, after viewing them, could

not have been mistaken about their nature. It is no matter that the *defenses* offered in *Polouizzi* (that the defendant saw but did not understand the nature of the images) and the present case (that the defendant did not see the images) were slightly different. In both cases, the government's mode of *proving the elements* of the crimes was essentially the same.

The Court's holding in *Polouizzi* rests on the settled proposition that a defendant's offer to "stipulate" is relevant to the district court's Rule 403 balancing analysis *only if* the offer is a satisfactory substitute for the Government's evidence. *See Old Chief v. United States*, 519 U.S. 172, 190-92 (1997) (holding that government was obligated to accept stipulation of defendant's felon status); *id.* at 183 n.7 ("our holding is limited to cases involving proof of felon status"). Courts have relied on that rationale to hold that a district court does not abuse its discretion when it allows the jury to view a limited sample of alleged images of child pornography. *See, e.g., United States v. Gantzer*, 810 F.2d 349, 351 (2d Cir. 1987) (holding that district court did not abuse its discretion in admitting obscene photographs, in trial where defendant was charged with mailing obscene material, notwithstanding defendant's offer to stipulate that photos were obscene); *United States v. Campos*, 221 F.3d 1143, 1149 (10th Cir. 2000) (holding that district court did not abuse its discretion in permitting jury to view two photos that defendant allegedly transported via computer, despite his stipulation that they constituted child pornography). Where, as here, the offered stipulation was *not* coextensive with the government's required proof, it would be unfair

to say that, because the defendant offered to stipulate to *some* of what the government needs to prove, the government should be hindered in its ability to satisfy its remaining obligation of proof.

There are compelling reasons for this inveterate principle. The most obvious is that “the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.” *Old Chief*, 519 U.S. at 187 (internal quotation marks omitted). Thus, as the Supreme Court explained,

the accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.

Id. at 189; *see also United States v. Dodds*, 347 F.3d 893, 897-98 (11th Cir. 2003) (affirming where government presented jury with 66 images of child pornography, where defendant was charged with possessing 3,400 images); *United States v. Becht*, 267 F.3d 767, 774 (8th Cir. 2001) (holding that admission of 39 images of child pornography – which was only a small portion of the total that was seized – was proper, since it tended to show that the images actually constituted child pornography, and that the defendant would have known that they were child pornography). Here, it would be unfair to expect the

government to prove the knowing possession element without allowing the jury to evaluate for itself the images of child pornography.

Moreover, as in *Polouizzi*, the district court offered the jury a cautionary instruction at the outset of the case, directing them not to be swayed by the emotional impact of the child pornography:

Now, the nature of the offense, as I tried to explain to you at the outset, is something that probably will strike many of you, if not all of you, as somewhat less than pleasant. It may be offensive. Child pornography is not something that is generally accepted by any matter of means and in – as a matter of fact, it probably is substantially, if not universally, rejected as improper for people to have, to produce, to be – to have in their possession.

However, the fact that that's the situation, and the fact that it may cause an element of repugnance on your part as to the nature of the material that's involved, you must remember that the case is to be decided, not on the emotional basis, not on the basis of some reaction that you have to the propriety of the material, but rather, to decide – you must decide whether the material was pornography, whether it did involve children as defined [in] the statute, and whether it was, in fact, in the possession of the defendant.

GA 41. In sum, the district court did not abuse its discretion when allowing the government to show the jury a very small selection of the numerous images of child pornography that were found on the defendant's computer.

Even assuming *arguendo* that such error occurred (and it did not), any error would have been harmless in light of the other evidence of the defendant's guilt. Two agents testified that the defendant admitted possessing child pornography, GA 130-31, 463, and that when he turned over his hard drives he said he knew he was "fucked," GA 135, 466-67. The defendant's knowing possession of these images was also demonstrated by the sheer volume of child pornography on his computer, its careful organization into folders with graphically descriptive names, GA 327-37, the inclusion of many child pornography websites in his web browser's Favorites menu, GA 288-94, and the fact that both child pornography and photographs taken by the defendant were accessed within hours or even minutes of each other. GA 349-71. His guilt was also established by proof that he had purchased the child pornography over the web: his account had two charges for \$79.99 to AdSoft, the front company for the child pornography service, GA 79-81, 92-94, 889-90; his computer contained an e-mail addressed to his personal account, from the child pornography site with a login name and password, confirming his purchase, GA 94-95, 884; and he had used software to delete a file showing that he had visited a child pornography website, GA 476-77. Given this evidence, there is no chance that any error in letting the jury view the child pornography

could have had a substantial and injurious effect on the verdict. *See Kotteakos*, 328 U.S. at 764-65.

II. The district court did not abuse its discretion by allowing the government to introduce evidence that the defendant's computer contained a photograph of his neighbor's daughter sunbathing, where the content, storage location, and timing of access to that photograph tended to show his knowing possession of the child pornography.

A. Relevant facts

At trial, the government introduced GX 44, which the parties stipulated was a photograph of the defendant's next-door neighbor, taken from the defendant's home. GA 250, 886. The government displayed the photo as part of a powerpoint presentation that showed side-by-side comparisons between metadata associated with different files on the defendant's computer, showing that images of child pornography were accessed at or around the same time that the defendant's other personal files were also accessed. GA 349-71.

These comparisons focused on files that were clearly related to the defendant: a photograph of his house (GX 11A), two personal e-mails unrelated to child pornography (GX 89, 90), a photograph of his neighbor's daughter sunbathing outside her house (GX 44), and a photograph of the defendant's dogs (GX 11B). GA 882-83, 886-88. Based on a forensic examination of the defendant's

computer, an agent testified that, for example, the photograph of the defendant's house had been last accessed at 8:57 p.m. on April 28, 2007, and that an image of child pornography (GX 3F) was accessed only 15 minutes later. GA 350-57. The two e-mails were last accessed within 4-6 hours of child pornography videos, and the dog photo was accessed just two hours before an image of child pornography. GA 358-63, 369-71.

Evidence linked the fifth photo – of the sunbathing neighbor – to the defendant rather than to some hypothetical hacker. First, the parties stipulated that the sunbather was the defendant's neighbor, and that the photo was taken (as was obvious from context) from the defendant's house. GA 250. Second, the file name of the photo reflected the name of the neighbor, and was saved alongside other photos in a folder bearing the neighbor's name, which in turned was stored in the defendant's "My Pictures" folder. GA 364-67. Third, the photograph had been taken with the same Sony digital camera used to take photographs of the defendant's house and dogs. GA 370.

The government also introduced proof that within the span of only *nine minutes*, both the sunbathing photo and an image of child pornography had been accessed. Specifically, the neighbor's photo had been last accessed on October 17, 2007, at 3:06 p.m. GA 365. Nine minutes later – at 3:15 p.m. – the computer had been used to access GX 3G, which was a file stored in the "LilUns" folder, depicting an adult male holding a prepubescent female's face to his penis. GA 367-68.

At the defendant's request, the district court gave a limiting instruction explaining that GX 44 was offered only "to show that the defendant accessed other material on his computer at something of a comparable time" GA 251. The court continued:

[Y]ou should understand that the picture, itself, is of no significance unto itself. It's the timing of the picture, and the fact that the defendant took it that is offered in relation to other evidence, to show that he accessed material on his computer.

So don't attribute any significance to the subject of the picture. It could be a flower. It could be any number of different things that would demonstrate the same purpose, so that you should not have any – attach any significance to the subject of the picture. It's just the fact that the picture was taken and the timing of it, taken by the defendant, that's to be considered as part of the understanding of what the significance of the picture is.

GA 251.

B. Governing law and standard of review

The governing law and standard of review for evidentiary rulings is set forth above in Part I.B.

C. Discussion

The defendant's claim that the photograph of his neighbor's daughter lacked probative value and was highly prejudicial, Def. Br. 8, overlooks the fact that it (like the photos of his dog and his house, and his personal e-mails) was introduced to prove his knowing possession of child pornography – a key fact that he vigorously contested at trial. The defendant claimed that he had no idea that child pornography was on his computer, and that he had never viewed or accessed those files. GA 593-94, 634. Instead, he claimed that some unknown identity thief must have saved the child pornography to his computer. GA 646. The government's evidence regarding photos of his neighbor, his house, and his dogs undercut this defense because it tended to show that the defendant had personally accessed images on his computer that (1) must have been taken by the defendant rather than an unknown identity thief, (2) were stored in close proximity to graphically named folders containing child pornography, and (3) at times that were close to when images of child pornography had also been accessed.

First, the *content* of these non-pornographic images showed that they must have been taken by the defendant rather than some unknown identity thief, to whom the defendant tried to attribute the child pornography. It would have been utterly implausible to imagine that a hypothetical hacker would have taken photographs of the defendant's house and his dogs, and saved them to the defendant's computer. It would have been likewise implausible to think that a third party could have taken

photographs of the defendant's neighbor, apparently looking out the defendant's window, saved those files to the defendant's hard drive, and known the neighbor's name to label the files. The jury had to view these photographs in order to determine that only the defendant would have created and viewed them.

Second, the *storage location* of these non-pornographic images, in close proximity to graphically named folders containing child pornography, demonstrated the implausibility of the defendant's claim that he never noticed the child pornography on his computer. The folder containing photos of the neighbor was stored inside a directory called "My Pictures." GA 365. Right alongside the "My Pictures" directory were other folders that were suggestively named things like "Lil Uns." GA 334-35. The jury was entitled to conclude that the images of child pornography – saved in folders with suggestive names – could not have escaped the defendant's attention, when they were saved right alongside folders that the defendant accessed to view photographs that he had personally created.

Third, the *timing* of when these non-pornographic photos had been accessed strongly tended to show that it was the defendant who was also accessing the child pornography. As noted above, the evidence showed that the other files that were personally associated with the defendant – photographs of his dogs and house, as well as personal e-mails – were being accessed anywhere within 15 minutes to 6 hours of child pornography being accessed on that same computer. Most probative of all was the

neighbor's photograph, which was accessed within nine minutes of child pornography. The fact that someone was accessing files on the defendant's computer that involved his indisputably personal files, as well as images of child pornography, in close succession, was highly probative of the conclusion that it was the same person looking at both sets of files. And because only the defendant would have any plausible reason to be looking at photographs of his house, his dogs, or his neighbor, this evidence was highly probative in disproving the defendant's claim that a mysterious hacker was the one saving and viewing child pornography on his computer.

Any danger of unfair prejudice stemming from the nature of the neighbor's photo was alleviated by the district court's careful limiting instruction. The court instructed the jury not to "attribute any significance to the subject of the picture," because its significance lay in its timing, and having been taken by the defendant, in order to prove what he accessed on his computer. GA 251. In such a straightforward situation, there is "no reason to depart from 'the almost invariable assumption of the law that jurors follow their instructions.'" *Shannon v. United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *United States v. Mercado*, 573 F.3d 138, 142 (2d Cir. 2009); *United States v. Snype*, 441 F.3d 119, 129-30 (2d Cir. 2006).

This is particularly true where the government introduced this evidence in a way that minimized any potential prejudice. The government offered only a single photograph of the neighbor into evidence. *See* GA 886.

Before introducing it, the government sought a sidebar to ensure that its presentation would not run afoul of the court's earlier ruling in limine that permitted introduction of the photo. GA 345. The government then agreed to the defendant's request that the additional 51 images of the neighbor's daughter be referenced simply as "other images," with no mention of their similarity in content. GA 348-49. With the court's permission, the government asked leading questions to minimize the risk of exceeding the bounds of the court's ruling. GA 365-66.

Finally, even assuming hypothetically that the court erred by admitting this evidence, any error could not have had a substantial and injurious effect on the verdict, and so reversal would be unwarranted. As noted in Part I.C above, the defendant's guilt was established by his admissions to the interviewing agents; the sheer volume and organization of the child pornography saved on his computer; the fact that he accessed other personal files at or around the same time as the child pornography; charges to his account from the child pornography provider, and e-mail correspondence confirming his subscription to the website; and his deletion of a file showing that he had visited a child pornography website.

In sum, the district court did not abuse its broad discretion in permitting the government to introduce the photograph of the defendant's neighbor, and any error would have been harmless by any measure.

III. The district court's limited questioning of the defendant did not unfairly prejudice him, where it was designed to clarify confusing portions of the testimony and did not manifest any judicial bias.

A. Relevant facts

One of the key pieces of evidence against the defendant was that charges to the child pornography website appeared on his personal charge card. *See, e.g.*, GA 889 (showing 10/26/05 charge to AdSoft of \$79.99); GA 890 (showing same charge on 6/26/06). His defense was that he had been the victim of identity theft, and that the unknown thief had used his charge card and downloaded child pornography to his computer. GA 570-81, 602-46. The government introduced evidence that on the child pornography website, members were advised that they could defend themselves against charges of knowing possession by claiming that their identities had been stolen. GA 77-79, 885.

The government introduced the defendant's charge card statements through Amy Wolber, the branch manager for the Navy Federal Credit Union. She testified that the defendant had three accounts: a Mastercard credit card, a Visa credit card, and a Visa ShareCheck card which was essentially a debit card linked to a checking account. GA 432-34. His ShareCheck account (ending in -7821) had been active from July 2005 through July 2007, and he had lodged only one fraud complaint during that span. GA 434-39. Specifically, in July 2007 the defendant submitted

an online complaint about some gaming charges on his card, which resulted in the credit union automatically cancelling that account. GA 435. On cross-examination, the defense introduced DX 1, which was a letter from a service representative at the credit union, addressed to defense counsel, dated about a month before trial began. It reported that “per Brian Neil Herndon,” his -7821 account had been cancelled in about April 2007, reissued with the same account number, and then cancelled again in July 2007. GA 451, AA 73. It also reported that card records from 2006 had been purged, and were no longer available. Wolber testified that neither statement was correct. When a member lodges a fraud claim, the account is “permanently cancelled. It would never be reactivated with the same number.” GA 452. Likewise, Wolber explained that the 2006 statements were still available – indeed, they were introduced at trial – and that the credit union kept fraud complaints indefinitely. GA 446-47.

The defendant testified on the final day of trial. GA 553-690. He spoke at length about complaints he claimed to have made about transactions on various credit cards, though he was not always clear about which account he was discussing. For example, he claimed that, in December 2005, he noticed that his charge card bills were larger than usual, even though he “wasn’t really using them,” and that they contained international transaction fees. GA 570. According to the defendant, he contacted the Navy Federal Credit Union, which agreed to reimburse him for the charge. GA 571-72. In June 2006, he claimed that the credit union notified him of a possible fraudulent charge

on his credit card, but he was not sure whether he did anything about it at the time. GA 572.

The defendant then testified about his charge card transactions in 2007, and talked about a number of accounts that were in issue. In April 2007, he testified, another charge appeared on his “Visa Sharecheck card” ending in “-7182.” GA 573. (Apparently he was transposing numbers from the -7821 account.) He said that he had gone to the credit union, where he spoke to a woman named Chelsea, who was unable to retrieve his account information from 2006 because it had been purged from the computer system. GA 575-76. He then testified about one of his cards, ending “-7821,” being cancelled on April 18, 2007, and the same credit card being cancelled again later in the year. GA 576, AA 73. He claimed that when he cancelled the card, it was reissued with the same account number but a different expiration date. GA 576. He testified that a fraud watch was placed on that card in May 2007, that it was later cancelled by June 12, 2007, and that a new one was then being sent. GA 576-77. The defendant also claimed that on December 12, 2007, he reported another card, ending in -0507, as having been sent but never received. GA 577.

On cross-examination, the government walked the defendant through his claims to have noticed and reported fraud on his charge cards. The defendant claimed not to have noticed the October 24, 2005, purchase of \$79.99 for AdSoft. GA 602-03. He admitted that he never received a credit for that purchase. GA 603. He then clarified that the AdSoft purchase appeared on a ShareCheck card, which

immediately debited the payment from his account, rather than on a credit card. GA 604. Again apparently transposing numbers, the defendant claimed that a “-7182” card had been cancelled and re-issued with a new expiration date before November 2005, even though his statements did not reflect such a cancellation. GA 606-08. He testified that he began getting more charges of “stuff that [he] didn’t recognize” on his credit cards, until about February 2008. GA 615-16.

The defendant then gave a confusing account of when he claimed to have investigated the source of various charges on his accounts. GA 620-27. He first indicated that he began his “investigation” after the second AdSoft purchase appeared on his card, GA 616-22, but then said that he did so after his “second card was being shown that it had fraud charges on it.” GA 621-22. He now placed that date “after December ‘05.” GA 623. After a few more questions, however, the defendant again claimed that he began his “investigation” after seeing the June 2006 charge on his card. GA 624-25. All in all, the parties’ questioning of the defendant took up 132 pages of transcript.

After multiple re-direct and re-cross examinations, the judge asked several questions, covering only five and a half pages of transcript, about the defendant’s charge cards. The court first asked the defendant to clarify how charges get stopped when he cancels a card, if the bank issues the same account number. GA 685-86. The court then asked the defendant when he received statements containing the \$79 AdSoft purchase. GA 687. When responding to that question, the defendant gratuitously

added the comment that he might not have read the statement at the time. GA 687-88. The court followed up by asking the defendant whether he did not generally review his card statements, to which the defendant replied that he did not always do so. GA 688. The defendant challenges the following exchange:

THE COURT: When did you get the statement reflecting that charge?

THE WITNESS: The – It's electronic statement, and they process them a month after, but that's also saying if I look at it at the same date that they –

THE COURT: Well, are you –

THE WITNESS: – come out.

THE COURT: – suggesting that you do not –

THE WITNESS: It's not paper.

THE COURT: – as a custom or a practice, you don't review what's on your credit card statement?

THE WITNESS: Not always, sir.

THE COURT: You just send them a check, willy nilly. Is that what you're saying?

THE WITNESS: Sir, all my online bills – everything I do online, all my bills, everything, is through those credit cards –

THE COURT: I didn't ask you that.

THE WITNESS: – and there's a long list. I mean, I would have to look through each individual thing to verify if it was right or wrong.

THE COURT: Well, is there any big difficulty in looking down a list of charges against a credit card to make sure that you are properly being charged for whatever appropriate charges you have put against that account?

THE WITNESS: It's not inappropriate. I mean, it – I make a mistake and I don't look at them fully, all the time. I do now.

GA 687-88. The court then asked whether the defendant had received a credit for the \$79 that he was charged on two occasions. GA 688-89. The defendant responded that he was not sure, that the bank does not send him that information, and that he simply took the bank's word that the purchases had been credited. GA 684.

At no point during or after this exchange did the defense object to any of the district court's questions. Nor did the defense *ever* move for a new trial pursuant to Fed. R. Crim. P. 33 – whether based on any purported prejudice that arose from these questions, or for any other reason.

In its final instructions, the court advised the jury not to assume that it held any opinion about the case:

Also, during the course of a trial, I occasionally make comments to the lawyers or ask questions of a witness, or admonish a witness concerning the manner in which he or she responds to a question of the – of counsel. Do not assume from anything I may have said, that I have or intended to suggest that I have any opinion concerning any of the issues in this case. No particular significance should be attached to any question or comment made by me. Except for my instructions to you on the law, you may disregard anything I may have said during the trial in arriving at your own findings as to the facts.

GA 805.

B. Governing law and standard of review

Rule 614(b) of the Federal Rules of Evidence provides that “[t]he court may interrogate witnesses, whether called by itself or by a party.” This Court has explained that in determining whether a trial judge’s conduct deprived a defendant of a fair trial, the role of the appellate court “is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid[;] [r]ather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.” *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985). Reversal for judicial bias is appropriate

only where an examination of the entire record demonstrates that “the jurors have been impressed with the trial judge’s partiality to one side to the point that this became a factor in the determination of the jury.” *United States v. Valenti*, 60 F.3d 941, 946 (2d Cir. 1995) (internal quotation marks omitted); *United States v. Salameh*, 152 F.3d 88, 128 (2d Cir. 1998) (same).

It is well settled that the trial judge “has an active responsibility to insure that issues are clearly presented to the jury.” *Pisani*, 773 F.2d at 403 (citing *United States v. Vega*, 589 F.2d 1147, 1152 (2d Cir. 1978)). “Thus, the questioning of witnesses by a trial judge, if for a proper purpose such as clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings, is well within that responsibility.” *Id.* (citing *United States v. Bronston*, 658 F.2d 920, 930 (2d Cir. 1981)); *see also United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987).

Accordingly, while the trial judge must exercise caution to maintain an appearance of impartiality, *Vega*, 589 F.2d at 1153, “questions designed to elucidate testimony are appropriate where they do not ‘betray the court’s belief as to the defendant’s guilt or innocence.’” *United States v. Victoria*, 837 F.2d 50, 54 (2d Cir. 1988) (quoting *DiTommaso*, 817 F.2d at 221).

In the final analysis, “the trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one

side.” *United States v. Filani*, 74 F.3d 378, 385-87 (2d Cir. 1996) (reversing conviction based on court’s questioning of defendant and repeated interruption of defense counsel’s questioning of witnesses). Stated differently, a conviction should be reversed “if [this Court] conclude[s] that the conduct of the trial had so impressed the jury with the trial judge’s partiality to the prosecution that this became a factor in determining the defendant’s guilt[.]” *Pisani*, 773 F.2d at 402; *Filani*, 74 F.3d at 385 (reversal required when point is reached that it appears to jury that judge believes defendant is guilty).

A defendant who fails to object to a district judge’s questions forfeits any appellate claim that those questions demonstrated bias in favor of the government, absent plain error. *Salameh*, 152 F.3d at 128; *United States v. Messina*, 131 F.3d 36, 38-39 (2d Cir. 1997); *Filani*, 74 F.3d at 387; *Vega*, 589 F.3d at 1152-53.

C. Discussion

In his brief, the defendant contends that the district court effectively conducted a second cross-examination of him, after the government had already done so. Yet a closer reading of the trial transcript evinces Judge Dorsey’s unbiased, balanced approach to the proceedings. While the nature of the questions and answers required the court in a few instances to clarify ambiguity and correct perceived misstatements, *see Pisani*, 773 F.2d at 403, at no point did Judge Dorsey overstep his bounds and demonstrate bias in favor of the prosecution.

The first several questions were aimed at clarifying what kind of account had registered the AdSoft charges. GA 685. Previous questioning on this score had left ambiguities. At some points, the account was described as a credit card. GA 570. Later, it was described as a “Sharecheck account,” with testimony that charges were immediately debited from the defendant’s account, GA 604, suggesting that it was actually a debit card rather than a credit card. Given this confusion, it was sensible for the district judge to inquire about the nature of the account. *See Victoria*, 837 F.2d at 54 (holding that judge may ask questions to elucidate testimony). None of these questions suggested the judge’s disbelief of the defendant.

The next several questions were likewise neutral, and clarified the defendant’s claim that after he complained about charges to his account, the bank re-issued his card with the same account number. GA 606-07. The judge was understandably interested in understanding the difference between a change to the account number and a change to the card itself. GA 685-87. The defendant responded that the bank had not changed his account number, but had re-issued his card with a new expiration date. GA 686-87. Again, the judge’s questions are most sensibly understood as an attempt to ensure that the defendant’s otherwise confusing claim was “clearly presented” to the jury. *Pisani*, 773 F.2d at 403.

Only in the middle of this exchange, when the defendant added some commentary that was not responsive to the court’s questions, did the court’s informal style yield questions that were slightly more

pointed. The court asked the defendant when he received statements containing the \$79 AdSoft purchase. GA 687. When the defendant responded, he volunteered the additional comment that he might not have read the statement at the time. GA 687-88. The court replied by asking the defendant whether he did not generally review his card statements, to which the defendant replied that he did not always do so. GA 688. The court's two follow-up questions – whether the defendant “just send[s] them a check, willy nilly,” and whether there is “any big difficulty in looking down a list of charges,” GA 688 – were inartfully phrased, but this short exchange cannot have been understood by the jury as converting the judge from a neutral (though interested) questioner. Even if some of the judge's questions “would have been better left unsaid,” his behavior was not “so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.” *Pisani*, 773 F.2d at 402.

Indeed, any assessment of the jury's likely perception of the court's views must be based on the entire trial record, not just one excerpt. For example, the court asked questions of prosecution witnesses as well. GA 148-49 (asking agent to explain what “downloaded” means); GA 375-76 (asking forensic examiner to clarify what computer information is removed by Privacy Guardian software). The court's follow-up questions sometimes yielded responses that were helpful to the defense. For example, the defense offered testimony from the defendant's Navy supervisor, in an effort to show that the defendant had minimal computer expertise. GA 515. On cross-examination, the government tried to show that the

defendant – whose job was to train other sailors how to launch Tomahawk missiles from a submarine – in fact had sophisticated professional computer skills that were transferable to personal computers. GA 537. As the government pressed the issue, the court intervened *sua sponte* with this line of questions:

THE COURT: So your only knowledge of his computer skills is in a professional capacity within the Navy's use of computers?

THE WITNESS: That's the majority of his training, sir.

THE COURT: Okay. All right.

So what else he might know from Radio Shack about how to put together a PC, you don't have any knowledge of that, one way or the other?

THE WITNESS: Not firsthand, no, sir.

GA 537.

Tellingly, it is apparent that the defense did not, at the time, perceive any of the judge's questions of the defendant to have left the wrong impression with the jury. The defense did not ask a single question on re-direct examination after the judge completed his questions, in an effort to clarify any perceived ambiguities or misperceptions that had been created by the judge's questions. Nor did the defense contemporaneously object

to any of the judge's questions, ask for a sidebar, or even raise the issue in a new trial motion. Indeed, the defense did not move at all for a new trial under Rule 33. Absent any objection in the trial court, it cannot be said that the judge's limited follow-up questioning of the defendant constituted plain error. *See United States v. Gomez*, No. 06-5319-cr, 2009 WL 2902704, at *6 (2d Cir. Sept. 11, 2009) (holding that counsel's failure to air objection in district court underscored the defendant's inability to establish fourth prong of plain-error standard: "The lack of injustice is underlined by the fact that the instructions were not challenged and the issue of the sufficiency was preserved only by a general motion at the close of the government's case" which did not mention the issue raised on appeal); *see also Salameh*, 152 F.3d at 128; *Messina*, 131 F.3d at 38-39; *Filani*, 74 F.3d at 387.

Moreover, the judge instructed the jury not to infer from his questions that he held "any opinion concerning any of the issues in this case." GA 805. There is nothing in the record to overcome the "almost invariable assumption" that the jury followed their instructions. *Shannon*, 512 U.S. at 585; *see Mercado*, 573 F.3d at 142.

IV. The defendant waived any challenge to the district court's method of polling the jury – asking whether they agreed with the verdict announced by the foreperson, and then observing all of the jurors nod their assent – and in any event his challenge is meritless.

A. Relevant facts

After the clerk read aloud the jury's guilty verdict, the judge engaged in the following colloquy with the jury:

THE COURT: Is that your verdict, and so say you all?

JURY: Yes.

THE COURT: All right.

The record will reflect that all of the jurors have answered in the affirmative. Accordingly, the verdict will be accepted and recorded, and a judgment will enter accordingly.

GA 856-57.

As the judge was thanking the jury for their service, defense counsel asked that the jury be polled. The following exchange occurred:

MR. EINHORN: Your Honor, one last thing.

Would Your Honor poll the jury before discharging them?

THE COURT: I have, in effect, polled the jury, Mr. Einhorn, because I asked them if that was their verdict, and so they all [-] I watched, and every one of the jurors nodded in the affirmative. So, therefore, for all intents and purposes, the – a polling took place in that format.

Okay?

MR. EINHORN: Yes, Your Honor.

GA 857.

B. Governing law and standard of review

The right to poll the jury is not grounded in the Constitution. *United States v. Dotson*, 817 F.2d 1127, 1130 n.1 (5th Cir. 1987). It arises from Rule 31(d) of the Federal Rules of Criminal Procedure, which states that “the court must on a party’s request, or may on its own, poll the jurors individually.” The purpose of Rule 31(d) is to ensure the uncoerced unanimity of jury verdicts. *United States v. Gambino*, 951 F.2d 498, 502 (2d Cir. 1991). The rule is designed to give every juror an opportunity to confirm their agreement with the general verdict returned by the foreperson, and therefore to ensure that the verdict has not been the product of coercion or inducement. *United States v. Jefferson*, 258 F.3d 405, 411 (5th Cir. 2001). “Rule 31(d) requires only that jurors be placed in a

situation (i.e., polling in open court) that allows them to be free of jury-room coercion.” *United States v. Williams*, 990 F.2d 507, 512 (9th Cir. 1993).

A judge’s choice of method for polling the jury is reversible only if it constitutes an abuse of discretion. This Court has explained that “Rule 31(d) entrusts the trial judge with a measure of discretion” in choosing the method for polling the jury. *Gambino*, 951 F.2d at 501; see *United States v. Shepherd*, 576 F.2d 719, 723 n.1 (7th Cir. 1978). “[T]he reasonable exercise of this discretion should be accorded proper deference by a reviewing court.” *Gambino*, 951 F.2d at 501 (quoting *United States v. Brooks*, 420 F.3d 1350, 1353 (D.C. Cir. 1969)).

Moreover, if a party acquiesces in a judge’s choice of a particular method for polling the jury, it waives any objection and appellate review is precluded altogether. “[W]aiver is the ‘intentional relinquishment or abandonment of a known right.’” *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). If a defendant “consciously refrains from objecting as a tactical matter, then that action constitutes a true ‘waiver,’ which will negate even plain error review.” *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) (citing *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991)).

C. Discussion

The defendant here waived any claim that the court failed to poll the jury properly. After defense counsel

requested that the jury be polled, the district judge observed that he had already done so. The judge explained that he had effectively polled the jury by personally observing that “every one of the jurors nodded in the affirmative” in response to his question whether the verdict just returned by the foreperson was, in fact, their verdict. GA 857. After setting forth his view that he had already performed the polling “in that format,” the judge inquired, “Okay?” to which defense counsel responded, “Yes, Your Honor.” *Id.* By responding in the affirmative to the court’s inquiry, as to whether its procedure was “[o]kay,” defense counsel withdrew any objection to the method the court adopted to poll the jury. Any claim about the validity of the court’s method is now foreclosed. *See United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991) (holding that defendant waived his right to appeal a matter on which he withdrew his objection).

Even if this claim had been preserved, the district court did not abuse its discretion in choosing this particular method to poll the jury. Although some courts have suggested that the better practice may be to ask the jurors serially whether they agree with the verdict, Rule 31(d) does not prescribe that or any other particular method. For example, the Fifth Circuit has found no violation of Rule 31(d) where the court polled the jury by asking them to nod their heads, and the defendants did not object to this method. *Dotson*, 817 F.2d at 1130 n.1. Similarly, the Fourth Circuit has found that a district court did not abuse its discretion by polling the jury through a show of hands, and denying the defendant’s subsequent request for a serial poll. *United States v. Carter*, 772 F.2d 66, 67-68 (4th Cir.

1985). The key question is whether the court chose a method that served to “poll the jurors individually” as required by Rule 31(d), in a way that was calculated to achieve the purpose of the rule – that is, to ensure the unanimity of the verdict without being coercive. *See Gambino*, 951 F.2d at 502.

The district court complied with Rule 31(d)’s requirement of an individual poll when it asked whether the jury agreed with the announced verdict, and then observed each juror’s individual response. The court’s contemporaneous observation that “*all of the jurors* have answered in the affirmative,” GA 856 (emphasis added), confirms that the court’s method ensured the unanimity of the verdict. *See Gambino*, 951 F.2d at 502. Indeed, the defendant does not challenge the judge’s factual finding, based on his own observations, that “every one of the jurors nodded in the affirmative.” And there was nothing even slightly coercive about the method adopted by the judge. He asked a simple open-ended question: “Is that your verdict, and so say you all?” GA 856. Because the record clearly demonstrates that the jurors individually indicated their agreement with the verdict, in open court, without any trace of coercion, the defendant’s challenge to the polling method should be rejected as meritless.

V. The district court did not abuse its discretion when instructing the jury on how to evaluate the defendant's trial testimony, where the court largely tracked an instruction that this Court has previously approved in *United States v. Brutus*.

A. Relevant facts

The defendant testified at trial. GA 553-690. The defendant proposed jury instructions regarding how the jury should consider his testimony:

In a criminal case, a Defendant has the constitutional right to remain silent at his trial. No Defendant can be required to testify, but a Defendant can choose to testify, if he so desires. In this case, Mr. Herndon decided to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. You should not disregard or disbelieve his testimony because he is a Defendant in this case.

AA 38.

The Government also proposed a jury instruction on this point:

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the

Government at all times, and the defendant is presumed innocent. In this case, the defendant Brian Herndon did testify and he was subject to cross-examination like any other witness. You should examine and evaluate the testimony just as you would the testimony of any witness with an interest in the outcome of the case.

GA 881.

A charge conference took place off the record. GA 830. During this conference, the government brought to the district court's attention this Court's opinion in *United States v. Brutus*, 505 F.3d 80 (2d Cir. 2007), from which its proposed instruction had been drawn verbatim. GA 830. In light of *Brutus*, specifically footnote 7, the district court formulated the following instruction, which it ultimately provided to the jury:

In a criminal case, the defendant has no duty to testify or come forward with any other evidence. He may, of course, choose to take the witness stand on his own behalf. A defendant has a personal interest in the outcome of the case. As with any other witness, you may take such an interest into account in evaluating the credibility of the defendant as a witness. You should evaluate and examine his testimony as you would the testimony of any witness with an interest in the outcome of the case.

GA 812.

After the jury was charged, they were excused from the courtroom, and the defendant took exception to one sentence in the district court's charge.

MR. EINHORN: Yes, Your Honor. On the – On Your Honor's language on the decision of the accused to testify, I would – I believe Your Honor strayed from the [S]econd [C]ircuit's language in *United States v. Brutus*, and emphasized the personal interest of the defendant overly, in this case, so that would be the basis of my objection.

THE COURT: Well, what's that supposed to mean; that I should not have given that charge?

MR. EINHORN: Well, the charge that the [S]econd [C]ircuit approved in *U.S. v. Brutus* does mention evaluating the defendant's testimony as you would, any witness with an interest in the outcome of the case, which Your Honor gave, but then Your Honor also added the language, "That if a defendant has a personal interest in the outcome of this case," thus, I believe stressing his personal interest in the outcome, more than *Brutus* would have allowed.

THE COURT: Well, what's wrong with that?

MR. EINHORN: Well, I think the second –

THE COURT: He does have a personal interest in the case.

MR. EINHORN: I understand, Your Honor, but I think the [S]econd [C]ircuit's decision in *Brutus* seems to minimizing his –

THE COURT: Well, it may minimize it, it may cast it differently, but it doesn't say that that's improper, and that was not something that was the subject of any challenge in the course of the charge conference. So I'm not going to take that – change that now.

All right.

GA 828-30. The defendant did not object to any other portions of the jury instructions. GA 830.

B. Governing law and standard of review

This Court reviews a preserved challenge to jury instructions *de novo*, and will reverse only if the defendant demonstrates both error and prejudice. *United States v. White*, 552 F.3d 240, 246 (2d Cir. 2009); *see also United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (holding that court will reverse “only where, viewing the charge as a whole, there was a prejudicial error”).

With respect to first question – whether the challenged instruction was erroneous – this Court must determine whether “it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.” *United States v. Pimentel*, 346 F.3d 285, 301 (2d Cir.

2003) (internal quotation marks omitted). This Court does not review portions of the instructions in isolation, but rather considers them in their “entirety to determine whether, on the whole, [they] provided the jury with an intelligible and accurate portrayal of the applicable law.” *United States v. Shamsideen*, 511 F.3d 340, 345 (2d Cir. 2008) (quoting *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001)).

If the Court concludes that the jury instructions were erroneous, it must then turn to the question of prejudice. When a defendant claims that an error in the jury instructions undermined a constitutionally protected right – here, the presumption of innocence safeguarded by the Fifth Amendment – the question is whether “it was harmless beyond a reasonable doubt.” *Brutus*, 505 F.3d at 88-89 (quoting *Chapman v. California*, 386 U.S. 18, 24). “Where, as here, the error was preserved, the burden of establishing harmlessness is on the government.” *Brutus*, 505 F.3d at 89.

C. Discussion

The district court properly instructed the jury regarding how it should consider the defendant’s testimony. When describing how a defendant’s testimony should be evaluated by a jury, this Court has acknowledged that two propositions are clear:

[A] testifying defendant in a criminal trial has a personal interest in its outcome that is as deep as it is obvious. . . . [and] by testifying, the defendant

places his credibility directly in issue, and his interest in the outcome may properly be considered by the jury in determining how much, if any, of his testimony to believe.

United States v. Gaines, 457 F.3d 238, 244 (2d Cir. 2006). In *Gaines*, the Court found constitutional error in the following instruction that went beyond those two core propositions:

Obviously, the defendant has a deep personal interest in the result of his prosecution. *This interest creates a motive for false testimony* and, therefore, the defendant's testimony should be scrutinized and weighed with care.

Id. (emphasis added). The problem with this instruction, the Court held, is that telling the jury “that the defendant has a motive to testify falsely undermines the presumption of innocence.” *Id.* at 246. The Court explained that “there is an important distinction between a ‘motive to lie’ instruction” (which impermissibly assumes the defendant’s guilt) “and an instruction that a defendant has a deep personal interest in the case” (which does not rest on such an assumption). *Id.* Without reaching the question, the Court also expressed “concerns” about a charge that a defendant has a “*deep* personal interest” in the case, when that statement is juxtaposed with an instruction that the defendant’s testimony should be “scrutinized and weighed with care.” *Id.* at 247 (emphasis added). The Court concluded that “in future cases, district courts should not instruct juries to the effect that a testifying defendant has

a deep personal interest in the case.” *Id.* at 249. The Court suggested that if a defendant has testified, the general charge concerning witness credibility can be modified “to tell the jury to evaluate the defendant’s testimony in the same way it judges the testimony of other witnesses.” *Id.* In the event that a district court thought it appropriate to have “an additional free-standing charge on the defendant’s testimony,” the Court “suggest[ed] as an example” a stripped-down version of the charge given in *Gaines*:

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and [the defendant] is presumed innocent. In this case, [the defendant] did testify and he was subject to cross-examination like any other witness. You should examine and evaluate the testimony just as you would the testimony of any witness with an interest in the outcome of the case.

Id. at 249 n.9.

One year after *Gaines*, this Court in *Brutus* found error in another jury instruction that highlighted the defendant’s “deep personal interest” in the case, “which is possessed by no other witness,” and which “creates a motive to testify falsely.” 505 F.3d at 85. The court in *Brutus* had instructed the jury as follows:

A defendant who does testify on her own behalf obviously has a *deep personal interest* in the outcome of her prosecution. It's fair to say that the interest which a defendant has in the outcome of the case is an interest which is *possessed by no other witness*. And such an interest creates a *motive to testify falsely*.

And in appraising the credibility of a defendant who testified on her own behalf, you may take that into consideration. However, and I want to say that with as much force as I can muster, it by no means follows simply because a person has a *vital interest* in the outcome of her trial that she is not capable of telling a truthful and straightforward story. The defendant's *vital interest* in the outcome of her case is not inconsistent with her ability to tell the truth. It's for you to decide what extent[,] if at all, her interest in the outcome of this trial has affected the color of her testimony.

Id. at 85 (emphasis added). As in *Gaines*, this Court cautioned "that if the defendant has testified, the charge should tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses." 505 F.3d at 88. Although the *Brutus* jury had not been instructed (as in *Gaines*) that it should "carefully scrutinize the defendant's testimony," this Court held that the instruction still undermined the presumption of innocence. *Id.* at 87-88. Again, the Court referred district courts to the Seventh Circuit's pattern instruction, or the stripped-down version of the *Gaines* instruction. *Id.* at 88.

The instruction given by the district court in Herndon's case contained none of the vices identified by the Court in *Gaines* and *Brutus*, and did not undermine the presumption of innocence. The court here did not instruct the jury that the defendant had a "motive to testify falsely," that it should "scrutinize the defendant's testimony with care," or even that the defendant had a "deep personal interest" in the outcome of the case. Those are the statements that, in the view of the *Gaines* and *Brutus* courts, impermissibly assumed the defendant's guilt.

Indeed, the district court's instructions closely tracked the suggested pattern instruction in footnote 7 of *Brutus*. The only difference was the district court's inclusion of this additional sentence: "A defendant has a personal interest in the outcome of the case." GA 812. That statement, however, is already implicit in the final sentence of the instruction approved in *Gaines* and *Brutus*: "You should examine and evaluate the testimony just as you would the testimony of *any witness with an interest in the outcome of the case.*" 505 F.3d at 88 n.7 (emphasis added). Unlike *Gaines* and *Brutus*, the district court here did not state that the defendant has a "*deep* personal interest," or make any other statement that would suggest that the defendant's stake in the outcome was somehow greater than that of any other interested witness. The absence of any such comparison that invited heightened scrutiny of the defendant's testimony, as opposed to the testimony of other witnesses, avoids the flaw that infected the instructions in *Gaines* and *Brutus*. The district court did not "mislead[] the jury as to the correct legal standard," or "[in]adequately inform the jury on the law," *Pimentel*,

346 F.3d at 301, simply because it unpacked language that was already implicit in the last sentence of the stripped-down instruction approved in *Gaines* and *Brutus*. Given a district court's broad discretion to choose the particular language for a jury instruction, there was no error here. See *United States v. Quinones*, 511 F.3d 289, 315 (2d Cir. 2007) (stating that defendant "'does not have the right to dictate the precise language of a jury instruction'") (quoting *United States v. Imran*, 964 F.2d 1313, 1317 (2d Cir. 1992)), *cert. denied*, 129 S. Ct. 252 (2008).

Even assuming some error in the district court's instructions, it would be harmless beyond a reasonable doubt. For one thing, the defendant's claims were inherently implausible, and so it could not have made any difference how closely the jury was invited to scrutinize his testimony. In order to believe the defendant's version of events, the jury would have been required to accept among other things that (1) he had been the victim of identity theft, (2) the identity thief had decided to buy child pornography with the defendant's charge card, (3) the thief decided to store and view the pornography *on the defendant's computer*, (4) and the defendant never noticed folders with graphic names like "LilUns" that contained 17,000 images, even though they were right next to other folders on his hard drive, such as "My Pictures," that he accessed, sometimes only minutes apart. Moreover, his claim of identity theft rang especially hollow in light of how closely it tracked the cover story suggested on the FAQ page of the "illegal.cp" website, which is the first screen he would have encountered after logging in. GA 74, 77-79.

Moreover, the evidence of the defendant's guilt, quite apart from his incredible testimony, was strong. As noted above, his guilt was demonstrated by his admissions that he possessed child pornography, the volume and organization of his child pornography collection, the e-mails documenting his charge card purchases of child pornography, his purging of a child pornography site, and his accessing personal files alongside child pornography files. Any marginal error in the jury instructions was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 6, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script that reads "William J. Nardini".

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

Jonathan Schaefer
Law Student Intern

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,593 words, exclusive of the Table of Contents, Table of Authorities, and Addendum.

A handwritten signature in cursive script that reads "William J. Nardini".

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

ADDENDUM

Fed. R. Crim. P. 31. Jury Verdict

....

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

18 U.S.C. § 2252A(a)(5)(B). Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

...

(5) either—

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

...

shall be punished as provided in subsection (b).