UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of November, two thousand twenty-six.

PRESENT:

SUSAN L. CARNEY,
MICHAEL H. PARK,
SARAH A. L. MERRIAM,
Circuit Judges.

United States of America,

Appellee,

v. **22-3133**

Joshua Schohn,

Defendant-Appellant.

FOR APPELLEE: Charles M. Kruly, Assistant United States Attorney *for* Michael DiGiacomo, United States Attorney, Western District of New York, Buffalo, NY.

FOR DEFENDANT-APPELLANT: Joshua Schohn, *pro se*, Otisville, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (Arcara, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Joshua Schohn, proceeding *pro se*, appeals from his judgment of conviction on two counts of production of child pornography in violation of 18 U.S.C. §§ 2251(a), (e), and two counts of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2). The district court denied Schohn's motions to, among other things, dismiss the indictment as insufficient as to the interstate commerce element of the offense and to suppress the digital evidence. *United States v. Schohn*, No. 19-cr-139, 2020 WL 888923 (W.D.N.Y. Jan. 2, 2020); *United States v. Schohn*, No. 19-cr-139, 2020 WL 888278 (W.D.N.Y. Feb. 24, 2020). Schohn opted to proceed to trial *pro se*. The jury convicted Schohn on all

counts, and the district court denied his motions for a new trial or for acquittal. *See United States v. Schohn*, 602 F. Supp. 3d 447, 466 (W.D.N.Y. 2022). The district court principally sentenced Schohn to 360 months' imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Admission and Suppression of Evidence

A. Laptops and Phone Evidence

"When reviewing the grant or denial of a motion to suppress, we apply a *de novo* standard of review of the district court's conclusions of law and a deferential, clear-error standard of review of the district court's findings of fact." *United States v. Smith*, 967 F.3d 198, 204 (2d Cir. 2020). Here, the district court did not err in denying Schohn's motion to suppress the evidence from his electronic devices. "The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Id.* at 205 (alteration omitted) (quoting U.S. Const. amend. IV). When there is probable cause to believe that property contains evidence of a crime and "it is necessary to seize or secure the property immediately to prevent its destruction or disappearance, the Fourth Amendment allows the police to seize or secure the property without a warrant provided that they follow up by applying to a judge for

a warrant to search the property's contents" and "act with diligence to apply for the warrant." *Id.* Whether a delay is reasonable is case specific, and courts consider factors such as "[1] the length of the delay, [2] the importance of the seized property to the defendant, [3] whether the defendant had a reduced property interest in the seized item, and [4] the strength of the state's justification for the delay." *Id.* at 206.

Here, there was probable cause for the police to seize the laptop based on the statements from Keith Kern and Leah Kern-Potter that the devices contained child pornography that they had viewed. Schohn's subsequent confession that there was child pornography further justified the police maintaining possession of the computer while they obtained a warrant. Given those details and the surrounding facts here, the district court did not plainly err in its evaluation of the reasonableness of the delay—and certainly not such that suppression was warranted. *See id.* at 211–13 (determining suppression was not warranted on the facts of the case despite the unreasonable delay).

B. Confession

A defendant waives his challenge on appeal when he "makes an intentional decision not to assert a right or acts intentionally in pursuing, or not pursuing, a particular course of action." *United States v. Lewis*, 125 F.4th 69, 74 (2d Cir. 2025) (cleaned up). "A true waiver 'extinguishes the claim altogether' and 'will negate even plain error

review.'" *Id.* (quoting *United States v. Kon Yu-Leung*, 51 F.3d 1116, 1121–22 (2d Cir. 1995)). Here, Schohn, through counsel, waived any argument that his statement to police was not voluntary by stating that he would not be contesting the admissibility of the statement.

C. Admission of Images and Videos of Child Pornography

"We review a district court's balancing under Rule 403 for abuse of discretion. The decision to admit or exclude evidence will not be overturned unless we conclude that the court acted arbitrarily or irrationally." *United States v. Polouizzi*, 564 F.3d 142, 152 (2d Cir. 2009) (quotation marks omitted). Under that rule, a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. "In limited circumstances, the Government can be required to accept a stipulation by the defendant to a particular fact, rather than present evidence proving the stipulated fact." *Polouizzi*, 564 F.3d at 152.

Here, Schohn argues that the district court should have required the government to accept a stipulation that the images and videos of child pornography were in fact images and videos of child pornography. We conclude that the district court did not abuse its discretion in declining to require the government to accept Schohn's proposed stipulation. *See id.* at 153.

D. Admission of the Masturbation Video

"We review the District Court's decision to admit evidence," including under Rule 414, "for abuse of discretion." *United States v. Spoor*, 904 F.3d 141, 153 (2d Cir. 2018). Rule 414 and the companion Rule 413 "reflect[ ] an exception in prosecutions for sex crimes to the common law practice of excluding propensity evidence." *Id.* at 154. Subject to Rule 403, "Rule 414 provides that in criminal cases involving accusations of child molestation, the district court may 'admit evidence that the defendant committed any other child molestation' for 'any matter to which it is relevant.'" *Id.* (quoting Fed. R. Evid. 414(a)).

The district court did not abuse its discretion in admitting the masturbation video under Rule 414. The case and the video both involve "child molestation," which the Rule defines to include "any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child" and "any conduct prohibited by 18 U.S.C. chapter 110." Fed. R. Evid. 414(d)(2). Both 18 U.S.C. §§ 2251 and 2252A are in chapter 110. And the man in the video "knowingly engage[d] in sexual contact with another person without that other person's permission," where "sexual contact" means "the intentional touching, either directly or through the clothing, of the . . . inner thigh . . . of any person with an intent to abuse . . . or arouse or gratify the sexual desire of any person," which is criminal

conduct prohibited under chapter 109A. 18 U.S.C. §§ 2244(b), 2246(3). There was evidence that the man in the video was Schohn (including Kern-Potter's identification, Schohn's statement that he had filmed a situation consistent with the video, and by the video being found on Schohn's laptop) and that the girl in the video was a child. The video thus satisfied Rule 414's requirements.

"Although Rule 414 modifies the ban on character evidence otherwise applicable under Rule 404, it does not follow that propensity evidence relative to child molestation is always admissible." *Spoor*, 904 F.3d at 154. "The district court retains discretion, however, to determine the probative value of this inference and to weigh whether the prior act evidence will be unfairly prejudicial." *Id.* Here, there was no abuse of discretion in the district court's balancing of these considerations. The court appropriately concluded that the video went to Schohn's alleged sexual gratification from children, which was directly relevant to Schohn's intent in filming the other videos.

E. Investigator Lombardi's Testimony

"A district court has broad discretion in deciding whether to admit expert testimony, and the exercise of that discretion will not be disturbed unless it is manifestly erroneous." *United States v. Boles*, 914 F.3d 95, 110 (2d Cir. 2019) (quotation marks omitted). "As long as a law enforcement official's expert testimony complies with the

standards that govern the admissibility of such evidence, it need not be excluded." *United States v. Cruz*, 363 F.3d 187, 193 (2d Cir. 2004). But "[d]istrict courts must be especially vigilant in evaluating the admissibility of expert testimony where, as here, a law enforcement official is called on to testify as a fact witness but also functions as an expert for the government." *Id.* at 194. Such testimony "poses a particular risk of prejudice because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at trial." *Id.* (quotation marks omitted).

Here, there was no manifest error in the district court's admission of Lombardi's expert testimony as to forensic methods, metadata, and the unlikelihood of evidence fabrication. Further, Lombardi did not opine on the "criminal nature" of the activity such that his testimony was unduly prejudicial.

F. Modification of Evidence

Schohn contends on appeal that certain videos were altered or tampered with, and thus inauthentic. The failure to raise an argument in the district court "deprives the district court of the opportunity to correct its putative error," so we "deem the argument forfeited and review only for plain error." *United States v. Dennis*, 132 F.4th 214, 235 (2d Cir. 2025). "The testimony of a witness with knowledge that a matter is what it is

claimed to be is sufficient to satisfy" the standard for authenticity. *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007). Here, ample evidence was presented by the witnesses as to the authenticity of the various videos presented as evidence, there was no plain error by the district court in allowing the admission of the videos, and the jury was entitled to believe the witnesses' testimony as to the authenticity of the evidence.

II. Sufficiency of the Evidence

"We review a sufficiency of the evidence challenge without deference to the district court." *United States v. Belloisi*, 164 F.4th 232, 235 (2d Cir. 2026). The Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and the weight of the evidence." *Id.* (alteration omitted). The Court "will uphold a conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quotation marks omitted).

A. Production of Child Pornography, 18 U.S.C. § 2251(a)

To convict a defendant of production of child pornography under § 2251(a), the government must prove that:

> (1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually

> explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce.

United States v. Broxmeyer, 616 F.3d 120, 124 (2d Cir. 2010).

Here, Elements One and Three were clearly met for both Counts One and Two: the victims were then six and eight years old; and the videos were filmed in Pennsylvania using a laptop manufactured in China and brought to New York.

As to the second element, the jury was entitled to believe that the victims were "used." We have held that "a defendant can be found to have 'used' a minor to produce child pornography if the minor serves as the subject of the illicit photographs taken by the defendant." *Id.* at 126 (emphasis omitted). And the definition of sexually explicit conduct includes "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

Here, both videos showed the genitals of the victims and were surreptitiously filmed in a bathroom setting (which we have observed can be a "subject of sexual fantasy," *Spoor*, 904 F.3d at 149). There was ample extrinsic evidence of Schohn's intent in creating the videos, including his titling of a clip taken from one video "goddamn" and his devices containing over 5,000 images and videos of child pornography. The jury was entitled to find that the videos constituted a "lascivious exhibition." *Id.* at 149–150

(observing that, in assessing whether a video is lascivious, a jury may consider "extrinsic evidence of [the defendant's] intent in making the videos"). The jury was further entitled to weigh the evidence and discount Schohn's testimony that the videos were either inadvertent or planted. *See Belloisi*, 164 F.4th at 235.

B. Possession of Child Pornography, 18 U.S.C. § 2252A

To convict a defendant of possessing child pornography, the government must prove that the defendant "knowingly possesse[d] . . . any . . . material that contains an image of child pornography 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." 18 U.S.C. § 2252A(a)(5)(B). Schohn disputes whether he knowingly possessed the child pornography. The jury, however, was entitled to disbelieve Schohn's theory that the files were planted, and instead believe the other evidence—Kern-Potter's testimony of what she found and witnessed, Schohn's confession to downloading material and saving it on the devices where the state police found it, and Investigator Lombardi's testimony that the files could not have been downloaded during the period between Schohn leaving his home and the devices being turned over to the police. *See Belloisi*, 164 F.4th at 235.

III. Remaining Arguments

A. Prosecutorial Misconduct

Schohn's argument that the prosecutor improperly opined that a video was of him is without merit. "[R]eversal on the basis of improper prosecutorial statements during summation is warranted only when the statements, viewed against the entire argument before the jury, deprived the defendant of a fair trial." *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994) (quotation marks omitted). "[B]oth the prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments, provided they do not misstate the evidence, refer to facts not in evidence, or express counsel's personal belief as to guilt or innocence." *United States v. Smith*, 778 F.2d 925, 929 (2d Cir. 1985) (quotation marks omitted). Comments that do not "manipulate or misstate the evidence" or "implicate other specific rights of the accused" do not warrant reversal. *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). Here, the government's statement was supported by Kern-Potter's identification of Schohn in the video, Schohn's statement that he had filmed a situation consistent with the video, and the video being found on Schohn's laptop. Therefore, the comment did not violate Schohn's rights.

B. Jury Instructions

Because Schohn "challenges the adequacy of the jury instructions" "for the first time on appeal, we review for plain error." *United States v. Miller*, 954 F.3d 551, 557 (2d Cir. 2020). The district court did not plainly err in instructing the jury that it may rely on common sense as part of reaching its decision. When "an alleged charging error goes to the burden of proof, we will reverse a conviction if there is a reasonable likelihood that the jury understood the instructions to permit a guilty verdict based on less than proof beyond a reasonable doubt." *United States v. Shamsideen*, 511 F.3d 340, 345 (2d Cir. 2008) (quotation marks omitted). Here, Schohn contends that the instruction that the jurors could use their "own common sense and experience" altered that standard. Gov't App'x at 722. However, "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences," and there was otherwise no error in the instruction. *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008).

We have considered all of Schohn's arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court