14-2710

To Be Argued By:
JUSTIN ANDERSON
RANDALL W. JACKSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-2710

UNITED STATES OF AMERICA,

Appellant,

—v.—

GILBERTO VALLE, also known as Sealed Defendant 1,

Defendant-Appellee,

MICHAEL VANHISE, also known as Sealed Defendant 1,
ROBERT CHRISTOPHER ASCH, also known as Chris,
RICHARD MELTZ, also known as Rick,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Jurisdictional Statement

The United States of America appeals from an order, entered on June 30, 2014, in the United States District Court for the Southern District of New York, by the Honorable Paul G. Gardephe, United States District Judge, vacating a jury's guilty verdict on a charge of kidnapping conspiracy and entering a judgment of acquittal or, in the alternative, ordering

a new trial. The District Court had jurisdiction over this matter pursuant to Title 18, United States Code, Section 3231.

The Government filed a timely notice of appeal on July 28, 2014. The jurisdiction of this Court is invoked pursuant to Title 18, United States Code, Section 3731. The Solicitor General has authorized the prosecution of this appeal.

Statement of the Issues Presented

1. Whether, taken in the light most favorable to the Government, a rational jury could have found the defendant guilty of kidnapping conspiracy, where the evidence established that the defendant (i) communicated with others about abducting and killing women he knew; (ii) confirmed the residences and workplaces of his targets, including through physical surveillance and pretextual meetings; and (iii) researched the means and methods of executing the kidnappings.

2. Whether a new trial should have been granted based on the District Court's embrace of a fact-based defense that was presented to and rejected by the jury.

3. Whether arguments presented to the jury in summation warrant a new trial when those arguments were supported by the record, drew no objection at trial, and did not improperly vouch for witnesses, refer to evidence outside the record, or appeal to an improper basis for conviction.

Statement of the Case

A. Procedural History

Indictment 12 Cr. 847 (PGG) (the "Indictment") was filed on November 15, 2012, in two counts arising from Valle's plan to kidnap and torture at least five women and his use of a restricted database in support of that plot. (A. 42-45).[1] Count One charged Valle with kidnapping conspiracy, in violation of Title 18, United States Code, Section 1201(c). Count Two charged Valle with the unauthorized access of a restricted federal database, in violation of Title 18, United States Code, Section 1030(a)(2)(B).

Valle's trial commenced on February 25, 2013, and ended on March 12, 2013, when the jury found him guilty of both counts of the Indictment. (Tr. 1695). At the close of the Government's case and at the end of the trial, Valle moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (Tr. 1308, 1438). The Court reserved judgment. (Tr. 1322, 1438).

On June 17, 2013, Valle submitted briefing in support of his motions for a judgment of acquittal on Counts One and Two and, in the alternative, for a new trial, pursuant to Rules 29 and 33. (A. 24-25). In an order entered on June 30, 2014, Judge Gardephe granted Valle's motion for acquittal on Count One,

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[1] "A." refers to the appendix filed with this brief; "Tr." refers to the trial transcript; and "GX" refers to a Government exhibit admitted at trial, most of which are reproduced in the appendix.

conditionally granted the new-trial motion on Count One, and denied both motions on Count Two. (A. 870-946).

B. Statement of Facts

1. The Offense Conduct

During a ten-month period in 2012, Valle plotted to kidnap and torture women. The women Valle targeted were not strangers—they were his wife, one of her colleagues, two of his friends from college, and a teenager studying at the high school where Valle had once been a student. Rather than proceed alone, Valle enlisted support from three like-minded men whom he met on a website that packaged brutality and torture as a source of pleasure. These men advised and encouraged Valle in his kidnapping plans, and they told him that they wanted to be a part of the contemplated kidnappings.

Valle also made preparations to kidnap: he confirmed where his targets lived and worked, contacting them by mail, conducting physical surveillance, and arranging pretextual meetings; he researched the formula for home-made chloroform, a well-known incapacitating agent, and sent that formula to an accomplice; he also sought out information about restraining victims and read news accounts describing the investigation and capture of kidnappers; and most egregiously, he illegally reviewed information in a law-enforcement database about his intended targets.

Valle was arrested before he was able to carry out any of the planned kidnappings.

2. The Trial

At trial the Government established the following facts principally through the testimony of Valle's wife and his other targets, records of Valle's communications with his co-conspirators, the results of a forensic analysis of computers he used, and testimony describing Valle's post-arrest statements. The defense responded to this evidence by asking the jury to believe all of this activity amounted to a sick fantasy that had no basis in reality. The jury rejected that defense by returning guilty verdicts on both counts of the Indictment.

a. Valle's Background

After attending Archbishop Molloy High School ("Archbishop Molloy") in Queens, New York, and the University of Maryland, in College Park, Maryland, Valle joined the New York City Police Department ("NYPD") in 2006. (Tr. 205-06). He served as an officer with the NYPD for six years prior to his arrest in 2012. (Tr. 156). As a member of the police department, Valle received extensive training in the use of force, was entrusted with access to weapons, and could access police databases containing restricted information about citizens. (Tr. 914-47, 992-94, 975-86; GX 610-14).

Valle met his future wife, Kathleen Mangan, on a dating website in 2009. (Tr. 150). They dated, had a baby daughter, and married. (Tr. 150-51). In 2012,

Valle, his wife, and their infant child lived together in a Queens apartment—where Valle began to target specific women, including his wife, for kidnapping and torture. (Tr. 150-51, 418-652, 1030-34; GX 401-43).

b. Valle's Targets

Valle identified five women as targets of his kidnapping plot: Mangan, Alisa Friscia, Kimberly Sauer, Andria Noble, and Kristen Ponticelli. Valle had a personal connection to each of these women. (Tr. 180, 241-45, 271-73, 332-33, 905; GX 401-43).

When Valle met Mangan, she worked as a teacher in the New York City public schools. (Tr. 184-85). Mangan stopped working in June 2011 and, after their daughter was born, stayed home to take care of the baby and run the household she and Valle shared. (Tr. 146). Mangan lived in Queens with Valle until September 2012, when she discovered Valle's communications about kidnapping and murdering her and other women. (Tr. 177-87).

Friscia was a fellow teacher with Mangan during the 2009-10 school year. (Tr. 904). Friscia occasionally socialized with Mangan outside of work and knew that Mangan dated a police officer. (Tr. 905-06). Aside from including him as one of her 1,100 "friends" on Facebook.com, Friscia had no independent relationship with Valle. (Tr. 905, 912-13).

Sauer, a Maryland resident, attended college with Valle. (Tr. 267, 272). Valle visited Sauer right after college in 2006, but then did not see her again for the next six years. (Tr. 281-83). Sauer and Valle re-

mained in touch, but infrequently, exchanging only 10 to 15 text messages per year. (Tr. 272-73).

Noble, a prosecutor living in Ohio, also attended college with Valle.[2] (Tr. 239-42). For the first year after college, Noble remained in somewhat frequent contact with Valle through email, Facebook.com, and text messages. (Tr. 247). After that, Valle sporadically contacted Noble, typically sending her messages through Facebook.com. (Tr. 243). Prior to the trial, Noble last saw Valle in 2007. (Tr. 242).

Ponticelli graduated from Archbishop Molloy, Valle's alma mater, in 2012, after playing on the school's softball team. (Tr. 413). She had never met Valle. (Tr. 413).

c. Valle's Co-Conspirators

Valle plotted to kidnap one or more of his targets with three men—Michael Van Hise, Dale Bolinger, and Aly Khan—each of whom he met in an online forum called the Dark Fetish Network (the "DFN").

Van Hise, a New Jersey resident, communicated with Valle from January to May 2012 about kidnapping women. (GX 430-34). The principal target of their discussions was Friscia, who lived in Manhattan and was therefore a convenient target. (GX 432 (Valle noting that "[i]t's a short drive" from Manhat-

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[2] Noble was known in college by her maiden name, Condez. (Tr. 651).

tan to New Jersey, where Van Hise lived)).[3] In a separate trial that concluded on March 14, 2014, a jury found Van Hise guilty of conspiracy to commit kidnapping. (Docket Entry 277 in 12 Cr. 847 (PGG)). Van Hise awaits sentencing by Judge Gardephe.

Khan, whose true identity remains unknown, appears to have been a resident of India or Pakistan. (Tr. 1030-34; GX 401-43). In emails sent between January and July 2012, Khan boasted that he was experienced in abduction, torture, and murder; and he assured Valle that kidnapping and killing a woman could be done successfully. (GX 404).

Bolinger, who used the names "Moody Blues" and "Christopher Collins" when online, resided in the United Kingdom and claimed to have kidnapped and murdered women in the past. (GX 402). In July and August 2012, he promised to guide Valle through a kidnapping and help ensure that Valle did not get caught. (GX 404). In a prosecution brought by U.K. authorities, Bolinger was found guilty of various offenses arising from his plot to kidnap and kill a teenager, and he was sentenced to nine years' imprisonment. Anthony Bond, *NHS nurse dubbed 'the Canterbury Cannibal' jailed after plotting to behead and eat teenage girl*, The Daily Mirror, Sept. 25, 2014, http://www.mirror.co.uk/news/uk-news/nhs-nurse-dubbed-the-canterbury-4322213#ixzz3EpNCLbrk.

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[3] Van Hise did, in fact, live in New Jersey, just as he had told Valle. (Tr. 430).

d. Valle's Communications with his Co-Conspirators

Using email and instant messaging services, Valle and his co-conspirators discussed in detail the logistics of kidnapping women and using violence—including rape, torture, and murder—against them. (Tr. 418-652, 1030-34, 1364; GX 401-43). Significant portions of those communications are described below.

i. Van Hise

In his conversations with Van Hise, Valle agreed to kidnap a woman and bring her to Van Hise in exchange for money. (GX 430-32). As early as January 2012, Van Hise and Valle discussed the terms of their agreement, with Van Hise asking whether installment payments were acceptable and whether he could see pictures of potential kidnapping targets. (GX 430). Valle responded, "Cash only upon delivery, and yes . . . these 4 are Alisa, she is 28." (GX 430). Valle then transmitted several photographs of Friscia, and Van Hise said that he "like[d] alisa." (GX 430). This exchange of emails followed:

> Valle: "Then it sounds like Alisa is doomed!"
>
> Van Hise: "cool great also can you save her for me. and once i get her from you shes mine right?"
>
> Valle: "yep she is all yours . . . . she is around 5'5", 115 pounds. nice slender build. takes good care of herself."

> Van Hise: "even better im gonna enjoy her"
>
> Valle: "her family is not from the area, and she is a teacher and has the week of Feb 20 off. I can kidnap her then, it will be awhile before anyone realizes she is missing."
>
> Van Hise: "i dont have the money right now but soon as do will let you know also how much are you asking?"
>
> Valle: $4,000 . . . and yes, what will you do with her?

(GX 430). Valle and Van Hise then discussed raping Friscia, with Valle volunteering "I really don't mind if she experiences pain and suffering. I will sleep like a baby." (GX 140).

After a month passed without Van Hise confirming his ability to pay Valle's fee for Friscia, Valle sent Van Hise a number of photographs of woman as alternative targets, including one of Nobel. (GX 431, 432). After considering the options Valle presented, Van Hise decided that he still wanted to have Friscia kidnapped, saying "i definitly want her and how much again im sorry to ask but i dont rememeber." (GX 432). Valle responded, "$5,000 and she is all yours." (GX 432). Likely recognizing that the price had been only $4,000 a month earlier, Van Hise asked, "could we do 4[?]" (GX 835). Defending the higher price, Valle responded "[I]'m putting my neck on the line here …. if something goes wrong some how i am in deep shit. $5,000 and you need to make

sure that she is not found. She will definitely make the news." (GX 432). Van Hise acquiesced to the higher price but asked again whether Valle "would . . . do a payment plan or [require payment] full up front." (GX 432). Valle again said that "full payment [was] due at delivery." (GX 432).

Valle also told Van Hise that Friscia "may be knocked out" for a period after her abduction because he did not "know how long the solvent . . . will last." (GX 432). Around this time, Valle had researched how to make and administer chloroform to render someone unconscious. (GX 1000, 1003). Describing the day of the kidnapping, Valle said it would be "absolutely amazing to watch her come out of her school and follow her without her knowing. All the while we both know that her days of freedom are limited." (GX 432). Valle concluded this communication with Van Hise by again justifying the price he wanted, saying "$5,000 I think is very fair." (GX 432).

Two months later, in late April 2014, Valle checked in with Van Hise, offering a new target named Veronica. (GX 433, 434). Van Hise expressed interest, but after Valle quoted a price of $10,000, there appears to have been no further online communication between them before their respective arrests. (GX 434).

ii. Khan

Around the same time Valle entered into negotiations with Van Hise, January 2012, he also began communicating with Khan about his plans to kidnap and torture women. (GX 417-29). Initially, they dis-

cussed the possibility of "getting a girl to" Khan in India, so that Khan could "slaughter" her. (GX 417). Khan boasted that he had "killed few goat to see what happens to the animal and how its done. I fo[u]nd it easy. Its just to use some arm power to lay it down, tie it a little and cut its throat. But girls or women are not cooperative like animals." (GX 417). Valle suggested deceiving Mangan, whom he referred to as his "girlfriend" and later "Kathleen," into travelling to India so that Khan could "kill her." (GX 417). Valle said that he would "love to suspend her upside down by her feet . . . and tie her hands behind her back . . . and watch as she struggles." (GX 417).

Valle suggested that he could "have her there the week of February 20." (GX 417). Pointing out a flaw in this proposal, Khan asked, "will some body her parents not miss her … will they not question you when you fall back to your country[?]" (GX 417). Valle agreed, "[I] will have to figure that out . . . . [S]he will be missed for sure." (GX 417). Khan observed that he did not "want to go to jail." (GX 417).

Valle then asked whether Khan could come to the United States to participate in the kidnapping-murder, which Valle thought could take place in the "middle of nowhere" in Pennsylvania. (GX 417). Khan recognized difficulties with that proposal as well, saying "wow..US.? travel laws are difficult man. How can I come[?]" (GX 417). Valle and Khan were unable to resolve the logistical challenges during that conversation.

On January 25, 2012, Valle and Khan continued their discussion of kidnapping, raping and killing

Mangan. (GX 418). Khan again requested that Valle deceive Mangan into travelling to India or Pakistan. (GX 418). Valle said he could not, which prompted Khan to declare, "[I] am serious about it .. so donot think im joiking and wasting mytime . . . may be later you can bring her." (GX 418). Valle responded, "I really wish I could." (GX 418). Recognizing that a trip to South Asia was unlikely, Khan asked "Do you have courage to do her there??" (GX 418). Valle responded "not alone." (GX 418). Khan asked, "[W]hy cant you do them alone[?]. Its dam easy." (GX 418). Valle said "maybe you can talk me into it." (GX 418).

Later, Khan chastised Valle, telling him to "get some courage man." (GX 418). The following exchange then took place:

> Khan: "I think you are not for real .. otherwise they would not be living"
>
> Khan: "you are not realy interested in slaughetring them"
>
> Valle: "maybe one day"
>
> Khan: "you are wasting time buddy. I am for real not fantasy."
>
> Valle: "i am just afraid of getting caught"
>
> Valle: "if i were guaranteed to get away with it, i would do it"

(GX 418). Khan reassured Valle, saying all "you need [is] a plan." (GX 418). Valle reaffirmed his desire to see Mangan "suffer," which led to the following:

> Khan: "ok .. let me ask you one last time before i tell you more. . . . ARE YOU REALLY RAELLY INTO IT. ARE YOU READY TO SLAUGHTER ONE BEING SAFE"
>
> Valle: "yes"
>
> Khan: "ARE YOU SURE?"
>
> Valle: "definitely"
>
> Khan: "so, when you think you can do it . . . how soon can you gather courage[?]"
>
> Valle: "i dont know . . ."
>
> Khan: "get your mind ready .. i will guide you rest"
>
> Valle: "ok"

(GX 418). No firm date was set for a kidnapping, and Valle expressed an interest in kidnapping other women instead of Mangan. (GX 418).

Valle and Khan continued to discuss Valle's plans to carry out a kidnapping. (GX 419-20). On February 9, 2012, Valle told Khan that he had settled on "Andria" (*i.e.*, Nobel) as his victim. (GX 421). Valle boasted that he would be "able to get a stun gun," which he could use to "zap the bitch in her home" and then "tie her up, pack her in a large suitcase and get her to [Valle's] car." (GX 421). Khan urged caution, saying "Not a good idea. You might get attention of her neighbours bro." (GX 421). Recognized the validity of Khan's warning, Valle said, "i know her, they have seen me before." (GX 421). Valle expressed an inter-

est in torturing Nobel, asking "would it be remotely possible to stick her in the oven while she is alive?" (GX 421). The next day, Valle explained his interest in torturing Nobel, saying "its personal with Andria. she will absolutely suffer." (GX 422).

On February 11, 2012, Valle and Khan continued to plot Nobel's kidnapping. (GX 424). Valle said, "Feb 20 is a holiday, so that is my target weekend . . . one extra day before anyone is looking for her." (GX 424). Khan responded, "I wish if I was with you watching her being cooked." (GX 424). Valle again expressed his reluctance to carry out the kidnapping alone, saying "I could use an assistant." (GX 424). Khan responded that it was "better [to] do it alone" because Valle could not "trust too many" people. (GX 424). Consistent with Valle's stated fear of being caught and his perceived need of assistance, Nobel was not abducted on February 20, 2012.

In April and May 2012, Khan checked in periodically with Valle to see how his planned kidnapping of Nobel was progressing.[4] (GX 425-27). Valle reaffirmed his interest in kidnapping Nobel, sending him photographs of Nobel (GX 425), telling him that he was keeping in touch with her" (GX 426-27), sharing his source for home-made chloroform (GX 426, 427), and asking Khan whether he "could come here . . . to

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[4] During these conversations, Khan also reported that he had been ejected from the DFN for posting an inquiry for a "real victim for slaughter" (GX 425) but had registered a new account under a different user name (GX 426).

help out and enjoy Andria with me" (GX 426). In response to Valle's repeated requests for assistance, Khan said, "I wish to come there, but its risky for me." (GX 426).

Khan continued to provide Valle with advice, such as the advisability of "cut[ting] off [a victim's] identifiable parts like hands and feet" to avid apprehension. (GX 426). Valle informed Khan that he was planning to carry out the kidnapping on Thanksgiving.[5] (GX 427).

On July 17, 2012, Valle reported to Khan that he had finally found the on-the-ground accomplice he was searching for, saying "I found someone who is going to help me with Andria" who "shares my passion for inflicting as much pain as possible." (GX 429). This was an apparent reference to Bolinger, who had begun communicating with Valle 12 days earlier.

iii. Bolinger

Starting on July 9, 2012, Valle began to discuss his kidnapping plans with Bolinger, who identified himself as "ChrsC from DFN." (GX 401). Valle told Bolinger that he was "working on grabbing one for thanksgiving," and was looking for help from someone with "experience" because he "definitely need[ed] an assistant." (GX 401). Bolinger responded that he lived "in England but [it was] easy to get to the Big apple." (GX 401).

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[5] Thanksgiving 2012 occurred after Valle's arrest.

Valle identified "Kathleen," referring to his wife, as a possible victim. (GX 401). Providing Bolinger with accurate information about his wife, Valle told him that Mangan was a "teacher" and a "mother" with an "infant . . . girl." (GX 401). Valle also proposed Noble and Sauer as potential victims. (GX 401, 403). Valle accurately described Noble "as about 5'4", 140 pounds," "Portuguese," and employed as a "prosecutor." (GX 401 (referring to "Andria")). In light of Noble's occupation, Valle stated "they will be looking for her right away . . . the abduction will have to be flawless." (GX 401). Valle also provided accurate details about Sauer, telling Bolinger that "she's 27 and she works in media . . . promotions." (GX 402-03 (referring to "Kimberly")).

Valle and Bolinger discussed the equipment each of them had available. (GX 403). Bolinger noted that he had "a very good cleaver" but he did not "think [he] could get it over" to the United States. (GX 403). Valle offered to "get a brand new set of knives." (GX 403). He also told Bolinger, "[T]he chloroform I can make here . . . and I'll buy all the rope from home depot." (GX 403). Valle and Bolinger then discussed eating their kidnapping victim, with Bolinger telling Valle, "Pretty much all of a girl is edible, I personally don't like the intestines, (unless you have the ability to make sausage meat). But you can eat almost all the internal organs." (GX 403). The two then discussed whether the kidnapping would occur over the Thanksgiving or Labor Day holidays, with Bolinger noting that Labor Day would present difficulties because there was "not a lot of time to sort out plane tickets etc." (GX 404). Valle proposed taking the kid-

napping victim to a remote "mountain place" that he was able to use. (GX 404).

Seeking to measure Valle's resolve, Bolinger asked, "You WILL go through with this? I've Been let down before. That's why i tend to work alone." (GX 404). Valle responded, "Yes" and "she will never see it coming." (GX 404). Testing Valle further, Bolinger sent him a photograph of a person he had eaten.[6] (GX 404). Bolinger asked Valle, "Have I shocked you[?]" (GX 404). Valle responded, "not really you seem legit." (GX 404). Later in the conversation, Valle acknowledged that he had high ambitions for the kidnapping, some of which might be beyond his grasp, saying "I just have this whole scenario in my mind I have no idea how its going to pan out." (GX 405). But he reaffirmed that, setting aside any grandiose aspects, "kidnapping her and getting away with it is an absolute truth." (GX 405).

On July 10, 2012, Valle and Bolinger continued their discussion of plans to execute a kidnapping. (GX 407). Valle stated "I am working on a word document . . . a blueprint of everything we will need to carry this out . . . I will send it to you and we will review it and add to it as time goes on." (GX 407). Valle then transmitted a word document to Bolinger in which he had included a photograph of Sauer, a list of items that would be necessary for the kidnapping, and a number of accurate details regarding Sauer,

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[6] The transcript of this conversation as admitted at trial redacted Bolinger's references to having victimized a child in connection with this event.

along with certain obscured or false details. (GX 407, 601). Bolinger stated, "Love to have her address so I can google it! Also duct tape won't last too long if you have to transport her any distance. Stuff her nickers in her mouth, tie it in with the rope, then duct tape over to hold it in." (GX 407). Valle responded, "Ok great." (GX 407). Bolinger asked again, "May I have her address? For Googling using the Map app?" to which Valle responded "not sure her exact address." (GX 407). Reassuring Valle that he was not trying to usurp him, Bolinger stated "Ok, not like I'll get there a day early! You've all the stuff to prep her." (GX 407).

On July 17, 2012, Valle and Bolinger continued to plot the kidnapping of Sauer. (GX 408). Valle told Bolinger that he was "having lunch with Kimberly on Sunday."[7] (GX 407). Urging caution, Bolinger asked, "is this sticking to your normal activities with her . . . be aware you will be a possible suspect when she goes missing . . . Get your alibi in early." (GX 407). Valle responded, "yes of course . . . she will be kidnapped in a couple of months anyway." (GX 407).

Bolinger then asked about Valle's "motivation for torturing the girl," asking "why [Valle] want[ed] her to realize in such a way what is going to happen to her." (GX 407). Valle responded, "I just enjoy the thought of making her suffer that's all. . . . I want her to feel some pain . . . the longer she's alive the better." (GX 407). At a subsequent point in this conversation, Bolinger asked Valle, "Have you got a recipe for chlo-

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[7] This lunch occurred as planned. (Tr. 290-91).

roform?" Valle responded, "I found a website a couple of nights ago," then transmitted a link to a web address that provided instructions on making chloroform. (GX 409).

These conversations resumed two days later on July 19, 2012. (GX 410). Bolinger asked Valle how his meal with Sauer had gone, and Valle responded that he was "meeting her on Sunday." (GX 410). Later in this conversation, Valle again referred to his plan to meet with Sauer, stating that he believed more developed ideas "will come to me Sunday," when he saw her and that he would "be eyeing her from head to toe . . . and licking [his] lips . . . and longing for the day [he] cram[s] a chloroform soaked rag in her face." (GX 410).

After meeting with Sauer in Maryland, Valle reported to Bolinger that Sauer "looked absolutely mouthwatering i could hardly contain myself." (GX 411).

A month later, on August 21, 2012, Valle sent Bolinger an email entitled "Meet Kristen," along with a number of photographs, introducing him to another possible kidnapping victim. (GX 445). Valle referred to Ponticelli as a "MUST HAVE" and described her as "18 years old and apparently a top of the line softball player." (GX 445). Valle explained that he "now ha[d] [his] sights set on this girl" who was "10 years younger than Kim [Sauer]," with a "better body." (GX 445). Bolinger cautioned Valle to "be very careful about making your knowledge of [her] pub[l]ic." (GX 445).

Reflecting further indecision about his choice of victim, Valle told Bolinger on August 25, 2012, that "Andria the prosecutor . . . overall she is the girl i. would most want to eat but she lives around 6 hours away," referring to Nobel. (GX 413).

On September 8, 2012, Valle announced that he had settled on Nobel as his kidnapping victim, saying that he planned to "grab Andria" and that he had "decided on her." (GX 415). Valle also told Bolinger that he had "closed out [his] DFN account" because it would lower the "chance of getting caught I figure." (GX 415).

Valle was arrested the following month before any kidnapping could take place. (A. 3).

e. Valle's Preparations for the Kidnappings

Valle's planning was not limited to his communications in cyberspace; in fact, he took steps in the real world to carry out the kidnappings. First, Valle gathered information about where his targets lived and worked. (Tr. 273, 346-50, 560-84). In an effort to learn their home addresses and establish a relationship of trust, Valle offered to mail two of them—Nobel and Sauer—Policeman's Benevolent Association ("PBA") cards. (Tr. 244, 273, 907-10; GX 110, 439). Valle also used an online-search engine to obtain Ponticelli's address, by googling her name and the word "address." (Tr. 1276; GX 1005A). Valle repeatedly sent text messages to his targets asking for information about their planned moves and for updated employ-

ment information. (Tr. 273, 281, 346-49; GX 436, 439).

Second, Valle arranged to meet or at least observe two of his targets in person, not including his wife whose whereabouts Valle already knew, and he scheduled meetings with the targets near their workplaces and homes. (Tr. 289-91, 352-53, 997-98). On one occasion, Valle told Bolinger that he planned to meet Sauer for lunch in Maryland. (GX 410). Valle then drove to Maryland and met with Sauer for lunch with his family. (Tr. 290-91). Afterward, Valle described the meeting to Bolinger and his thoughts of violence as the lunch meeting unfolded. (GX 410). On a separate occasion, Valle conducted physical surveillance of Friscia's home in Manhattan, which he reported to Van Hise. (Tr. 1034; GX 434).

Third, Valle made preparations to carry out the kidnappings. (Tr. 1180-1276). On multiple occasions, Valle researched methods for manufacturing chloroform at home (Tr. 1239; GX 1000), and he shared a chloroform recipe with his co-conspirators. (Tr. 542; GX 604). Valle conducted other research to aid his kidnapping plot, including research on incapacitating victims with chloroform, the use of ropes to restrain victims, the type of rope that was "best" for restraining people, and methods of assaulting a person with a blunt object. (Tr. 1239, 1275; GX 1000, 1001). Valle also attempted to thwart law-enforcement detection by studying other kidnappings and examining how the kidnappers in those cases were caught. He reviewed a number of articles containing details about abducted women, convicted kidnappers, the investi-

gations of those crimes, and the resulting convictions. (Tr. 1197; GX 217, 229, 230, 606).

Fourth, Valle illegally accessed NYPD computer systems to gather information on women who were possible kidnapping targets, including Nobel, Sauer, and a woman named Maureen Hartigan. (Tr. 571-84; GX 615, 616B, 616C, 616E, 617). In an effort to learn more about them, Valle entered these women's names into police databases that contained confidential and restricted personal information, including their dates of birth, social security numbers, driver's license information, and home addresses. (Tr. 570-72, 578-84, 940-43; GX 615, 616B, 616C, 616E, 617). Valle searched for Nobel and Sauer on July 21, 2011, and Hartigan on May 31, 2012. (Tr. 578-84; GX 616B, 616C, 616E).

Valle had been trained that these databases could be accessed only "in the course of a [police officer's] official duties and responsibilities" and that "[t]here were no exceptions to this policy." (Tr. 931, 934, 940-41; GX 612). Valle was further instructed that accessing the databases for "non-work" purposes was a violation of NYPD policy, state and federal law, and that the penalties for doing so included "arrest, prosecution, termination of employment and fines up to $10,000." (Tr. 940-42, 950). There was no serious dispute that Valle lacked a legitimate law enforcement purpose for using the database to research Nobel, Sauer, and Hartigan.

f. The Disruption of the Conspiracy

As the kidnapping conspiracy progressed, Valle's behavior at home grew increasingly abnormal. (Tr. 163). Valle became estranged from his family, and he began spending entire evenings online planning acts of violence with his co-conspirators. (Tr. 163-64; GX 401-43). Valle missed a substantial period of work during this time period. (Tr. 1003-04). Concerned about his behavior, Valle's wife installed software on the computer Valle used, so that she could monitor Valle's online activities; and that software allowed her to discover Valle's plans to kidnap her and other women. (Tr. 174-76, 180-83). After discovering this material, Valle's wife left their home and turned the computer over to the FBI. (Tr. 186-87).

g. The Defense Theory

The defense submitted that Valle's online activities amounted to nothing more than a sexual fantasy carried out on a website devoted to a form of role playing. In support of that position, the defense presented testimony from a paralegal and the administrator of the DFN, contending that the website was used primarily for fantasy purposes and its webpages contained numerous disclaimers to that effect. (Tr. 1357-60, 1366-1421). The defense also argued that Valle's communications with Van Hise, Khan, and Bolinger shared elements in common with Valle's communications with other DFN members who were not alleged to be co-conspirators. Valle urged the jury

to draw the inference that all the communications were equally innocuous.

A retired NYPD officer testified about the use and function of PBA cards, suggesting that there was nothing abnormal about giving them to acquaintances. (Tr. 1423).

Valle chose not to testify. (Tr. 1432).

h. The Jury's Verdict

After two days of deliberations, the jury found Valle guilty of both counts of the Indictment. (Tr. 1685-86).

3. The Post-Trial Motion

Valle subsequently filed motions, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, seeking a judgment of acquittal and, alternatively, a new trial. (A. 24-25). Valle argued that the evidence was insufficient to establish his guilt of Count One, the kidnapping conspiracy, because the Government failed to demonstrate that his communications and actions were in furtherance of a bona fide kidnapping conspiracy rather than part of fantasy role-play. With respect to Count Two, unlawful access to a restricted database, Valle maintained that the offense reached only those who "hack" or break into such databases and not those, like Valle, who merely violated the terms of their access to a database. In the alternative, Valle asked for a new trial on the grounds that the jury's verdict was contrary to the weight of the evidence and the prosecution's summation was improper.

The Government opposed the motions, arguing that Valle's actions were not limited to fantasy communications in cyberspace. (A. 25). Quite to the contrary, the conspiracy targeted real women whom Valle knew, and Valle took steps in the real world—including physical surveillance of his targets—to prepare for the kidnappings. On Count Two, the Government submitted that the statute reached the unauthorized use of a restricted database and not just the use of such a database by an unauthorized person. Opposing the new-trial motion, the Government pointed to Valle's actions outside of cyberspace and other real-world aspects of his plans showing that the jury's verdict was consistent with the weight of the evidence. It also defended the summation as having been fairly drawn from admitted evidence.

On June 30, 2014, Judge Gardephe granted Valle's motion for acquittal on Count One, conditionally granted the new-trial motion on Count One, and denied both motions on Count Two.

Explaining his decision to enter a judgment of acquittal, Judge Gardephe concluded that Valle's communications with his named co-conspirators were most likely nothing more than fantasy. To reach this conclusion, Judge Gardephe found that the Government had "concede[d]" that Valle engaged in "fantasy role-play" with certain members of DFN, and those communications were "substantively indistinguishable from his chats with Van Hise, Aly Khan, and Moody Blues." *United States* v. *Valle*, 301 F.R.D. 53, 60 (S.D.N.Y. 2014). The Government's perceived failure to distinguish Valle's inculpatory communications

from other messages he sent over the Internet—notwithstanding Valle's admission that the DFN contained both "real" and "fantasy" users and that the communications identified by the Government seemed "more serious" to him—left a rational jury incapable of concluding that those communications reflected Valle's actual intent to commit a kidnapping. *Id.* at 62, 78, 84.

As further support for his decision to grant a judgment of acquittal on Count One, Judge Gardephe pointed to the absence of "real-world, non-Internet-based steps" in furtherance of a kidnapping, *id.* at 60, 88-89; the silence of the co-conspirators when planned dates for kidnappings passed without a kidnapping actually taking place, *id.* at 90; the planned kidnapping of multiple victims on the same day, *id.* at 90; and the lies that Valle told his co-conspirators, *id.* at 89. In relying on those grounds, Judge Gardephe either overlooked evidence that was consistent with the jury's verdict or drew inferences from the evidence that favored the defense.

In the alternative, Judge Gardephe conditionally granted a new trial on Count One, pursuant to Rules 29(d)(1) and 33. First, the weight of the evidence, as he evaluated it, ran counter to the jury's verdict because "it is more likely than not the case that all of Valle's Internet communications about kidnapping are fantasy role-play." *Id.* at 104. Second, Judge Gardephe faulted three aspects of the Government's summation that, in this "extraordinary case involving highly inflammatory and emotional subjects," might

have caused "the jury's verdict [to be] the product of unfair prejudice." *Id.* at 105.

Finally, Judge Gardephe rejected Valle's motions as to Count Two, holding that "Valle's conduct falls squarely within the plain language of" the relevant statute. *Id.* at 111.

ARGUMENT

Summary of the Argument

The jury's verdict on Count One was fully supported by the evidence and should not have been disturbed. At trial, Valle never contested that he had engaged in explicit discussions about kidnapping, torturing, and murdering women whom he knew. The question for the jury was whether Valle's argument that those communications were nothing more than fantasy trumped the plain meaning of his words and the corroboration of his criminal intent provided by other evidence introduced at trial. The jury found that it did not and returned a guilty verdict.

Judge Gardephe disagreed. But his disagreement with the jury was premised on (i) a factually erroneous finding of a Government concession that Valle's communications with people other than the named co-conspirators were all fantasy; (ii) the imposition of a legally erroneous burden on the Government to explain how the communications with Valle's named co-conspirators were materially different from his other communications; and (iii) the refusal to draw reasonable inferences in favor of the jury's verdict or

acknowledge the full significance of evidence that weighed in favor of guilt.

Far from being irrational, the jury's verdict was well-supported by the record of Valle's communications, preparations, and post-arrest statements, which demonstrated a genuine intent to kidnap.

Judge Gardephe further erred by granting the alternate relief of a new trial. His decision was based on the same legal and factual errors that caused him to improperly enter a judgment of acquittal. It should therefore be vacated as an abuse of discretion under this Court's precedents. It was equally erroneous for the District Court to suggest in the alternative that a new trial would be warranted based on arguments made by the prosecutors in summation that were supported by the record; drew no objection or reprimand at trial; and did not improperly vouch for witnesses, refer to evidence outside the record, or appeal to an improper basis for conviction.

POINT I

A Judgment of Acquittal Should Not Have Been Entered

A. Applicable Law

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States* v. *Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011); *accord United States* v. *Temple*, 447 F.3d 130, 137 (2d Cir. 2006). A jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States* v. *Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004) (internal quotation marks omitted).

In considering the sufficiency of the evidence supporting a guilty verdict, the evidence must be viewed in the light most favorable to the Government. *See United States* v. *Temple*, 447 F.3d at 136-37. A reviewing court must analyze the pieces of evidence "in conjunction, not in isolation," *United States* v. *Persico*, 645 F.3d 85, 104 (2d Cir. 2011), and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others," *United States* v. *Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999); *accord United States* v. *Persico*, 645 F.3d at 104.

It is not the Government's burden to "disprove every possible hypothesis of innocence." *United States* v. *Abelis*, 146 F.3d 73, 80 (2d Cir. 1998) (internal quotation marks omitted). To the contrary, the Court must "credit[] every inference that the jury might have drawn in favor of the government," *Temple*, 447 F.3d at 136-37 (internal quotation marks omitted), because "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court," *United States* v. *McDermott*, 245 F.3d 133, 137 (2d Cir. 2001). Under this standard, "where either of the two results, a reasonable doubt or no

reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States* v. *Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (internal quotation marks omitted); *see also United States* v. *Guadagna*, 183 F.3d at 129 (A sufficiency challenge does "not provide the trial court with an opportunity to substitute its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury" (internal quotation marks and ellipsis omitted)). This rule applies regardless of "whether the evidence being reviewed is direct or circumstantial." *Persico*, 645 F.3d at 105.

With respect to a conspiracy conviction, such as the one at issue here, the deference accorded a jury's verdict is "especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States* v. *Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (internal quotation marks omitted); *accord, e.g.*, *United States* v. *Snow*, 462 F.3d 55, 68 (2d Cir. 2006). As with the other elements of a conspiracy, "a defendant's knowledge of the conspiracy and his participation in it with criminal intent may be established through circumstantial evidence." *United States* v. *Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

A finding of insufficient evidence is reviewed *de novo*. *See United States* v. *Geibel*, 369 F.3d 682, 689 (2d Cir. 2004).

B. Discussion

1. The Evidence Was Sufficient

The evidence of Valle's participation in a kidnapping conspiracy was fully sufficient. It demonstrated that Valle reached agreement with others over the Internet about particular women targeted for kidnapping and then performed acts in the real world—including physical surveillance and pretextual meetings—to carry out the kidnappings. Valle and his co-conspirators repeatedly stated in their communications that they were serious about the kidnappings that they discussed, and a rational jury was entitled to credit their statements as accurately reflecting their genuine intent. The evidence of Valle's communications about and preparations for kidnapping, as well as his post-arrest admission that his co-conspirators were "serious" about kidnapping, provided a sound basis for the jury to conclude that Valle conspired to commit kidnapping.

Valle's communications with his co-conspirators, taken at face value, were fully sufficient to establish his intent to join a kidnapping conspiracy. In those communications, Valle identified the women he wanted to kidnap, the torture he wanted to inflict, and how he planned to do it; he also confirmed his desire to make the women suffer and expressed concern about getting caught. For example, Valle told Van Hise that Friscia's "family is not from the area, and she is a teacher and has the week of Feb 20 off. I can kidnap her then, it will be awhile before anyone realizes she is missing." (GX 430). He told Khan that

he wanted to kidnap and torture Nobel, because "its personal with Andria. she will absolutely suffer." (GX 422). Discussing Sauer with Bolinger, Valle said that during their pretextual meeting, he would "be eyeing her from head to toe . . . and licking [his] lips . . . and longing for the day [he] cram[s] a chloroform soaked rag in her face." (GX 410).

Valle urged the jury not to take his communications at face value, but to construe them as part of a fantasy carried out in cyberspace. The jury was entitled to reject that argument for at least six reasons, any of which would have been fully sufficient in its own right to support the jury's determination.

First, it was reasonable to infer from the level of specificity in Valle's communications with his co-conspirators that they reflected an actual intent to commit kidnappings. In those communications, Valle and the named co-conspirators plotted to kidnap real women who Valle actually knew. (GX 401, 403, 404, 418). Mangan testified that she was terrified to see "[o]ur pictures, our real names, ages, heights, weights, occupations" in Valle's communications with his co-conspirators. (Tr. 183). Those communications also contained details about executing the planned kidnappings—including methods to subdue the victims and dispose of their bodies—that reflected the seriousness of their plans. (GX 403, 405, 408, 409).

Valle and his co-conspirators also took very seriously the risks inherent in certain courses of conduct. Khan, for example, counselled Valle against luring Mangan to India because Valle would be "question[ed] . . . when [he flew] back to [his] country"

about her disappearance. (GX 417). Similarly, Bolinger warned Valle that, if he went through with the pretextual meeting with Sauer, which was not within his "normal activities," Valle would "be a possible suspect when she goes missing" so he needed to "[g]et [his] alibi in early." (GX 407). The jury was well within its rights to conclude that this detailed, risk-averse planning was consistent with a real intent to kidnap and inconsistent with a pleasurable fantasy.

Second, Valle and his co-conspirators explicitly assured each other that they were serious about committing a murder-kidnapping. On one occasion, Khan challenged Valle, saying "I think you are not for real . . . otherwise [the victims] would not be living." (GX 418). Valle responded by attributing the delay to his fear of "getting caught," assuring his co-conspirator that "if I were guaranteed to get away with it, I would do it." (GX 418). Similarly, Bolinger challenged Valle by asking, "You WILL go through with this? I've been let down before. That's why I tend to work alone," Valle responded, "Yes."[8] (GX 404).

Third, Valle's haggling with Van Hise over his kidnapping fee provides further evidence of Valle's seriousness of purpose. In one communication Valle argued for a higher—but not "fantastical"—kidnapping fee of $5,000 by saying, "I'm putting my neck on the line here . . . if something goes wrong some how I am in deep shit. $5,000 and you need to

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[8] This exchange took place only three months before Valle's arrest.

make sure that she is not found. She will definitely make the news." (GX 432). After accepting the price, Van Hise asked for a second time whether Valle "would . . . do a payment plan or [require payment in] full up front." (GX 432). Valle again said that "full payment [was] due at delivery." (GX 432). This type of serious negotiation over price is not generally associated with pleasurable recreation; it is not the stuff fantasies are made of. And it was far from irrational for a jury to conclude that people haggle over the terms of payment—including price and time—when they are involved in a serious transaction, not cyberspace fantasies.

Fourth, Valle's preparations to carry out the planned kidnappings constituted cogent proof of his intent. The evidence established that Valle compiled a document entitled "Abducting and Cooking Kimberly: A Blueprint" that included a genuine photograph of Sauer and accurate descriptions of her age, ethnicity, height, marital status, absence of tattoos, and consumption of alcohol and tobacco.[9] (GX 601; Tr. 266-67). It also included a working list of items

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[9] While Valle's "blueprint" obscured certain details about Sauer, such as her actual last name (listing "Shea" instead of Sauer), her place of birth (North Carolina instead of Maryland), and her field of study while in college (journalism instead of communications), those difference were immaterial, and likely furthered Valle's objective of making sure a co-conspirator did not proceed with the kidnapping in his absence. (GX 601; Tr. 266-67).

that Valle was assembling for the kidnapping, such as chloroform, rope, a gag (possibly duct tape), a "[t]arp/plastic bag[]" to "put in the trunk to collect any DNA," and gloves. (GX 601).

Valle obtained residence, work, and other information about several of his targets by conducting physical surveillance of Friscia, offering to send PBA cards as a pretext to obtain home mailing addresses, and traveling out of state to meet with Sauer.[10] (Tr. 272-90, 478-79; GX 408). Valle also obtained a formula for the in-home production of chloroform, a means of incapacitating targets, and he sent that formula to a least one co-conspirator. (GX 409, 604, 1001).

Valle conducted research on methods of subduing and abducting victims and on means of avoiding detection. For example, Valle entered the following search terms into web browsers:

- "how to kidnap someone"
- "most secure bondage"
- "how to knock someone unconscious"
- "how to chloroform a girl"
- "hot to hogtie a girl"
- "how to use chloroform"
- "best rope to tie someone up"

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[10] Valle contemporaneously informed his co-conspirators about his out-of-state travel and how it aided their kidnapping plans. (GX 408).

- "human trafficking how much money"
- "knock someone out blunt object"

(Tr. 1238-43; GX 1000, 1001). In an effort to avoid being caught, Valle researched past kidnappings and reviewed articles describing how investigators had identified the perpetrators. (Tr. 1193-94, 1197; GX 229, 230, 217, 606). A rational jury could conclude that all of this activity confirmed Valle's intent to kidnap.

Fifth, Valle illegally used law enforcement databases to gather information about his targets. Through these databases he obtained personal information stored in the state's motor vehicles, parole, and police databases, as well as national databases. (Tr. 571-72, 936-38). The targets entered into the database overlapped with those discussed in the co-conspirators communications and contained in Valle's blueprint. (Tr. 570-84; GX 615, 616B, 616C, 616E, 617). A jury could reasonably have concluded that Valle would misuse his authority in this manner only if he was seriously contemplating a kidnapping.

Sixth, Valle admitted after his arrest that his communications with his charged co-conspirators were serious and genuine in a way that his conversations with others were not. (Tr. 1031). In fact, he volunteered without prompting the names Moody Blues (*i.e.*, Bolinger) and Aly Khan as the most "serious" of his DFN contacts. (Tr. 1031, 1060). He also said that some DFN members were real, some were there to fantasize, and telling them apart could be "hard." (Tr. 1029). Valle further admitted that he had been

present on the block where Friscia resided during the time of the conspiracy but provided a false explanation for his presence. (Tr. 1034). A rational jury was entitled to credit Valle's admission about the seriousness of his co-conspirators and view Valle's false explanation for his presence near a victim as further proof that he was engaged in pre-kidnapping surveillance.

All of this evidence, evaluated as a whole, provided a firm basis for the jury to reject the defense argument that that the evidence established nothing more than an elaborate web-based fantasy. Indeed, Valle's conversations with the named co-conspirators, standing alone, constituted sufficient evidence of his intent to kidnap, so long as the jury found them credible. The level of detail in the communications, the proclamations of seriousness, Valle's preparations for the kidnapping, his illegal use of a restricted database, and his post-arrest admissions provided the jury with more than sufficient evidence to infer that Valle and a co-conspirator truly intended to commit a kidnapping.

2. The District Court Improperly Required the Government to Defend a Real-Fantasy Dichotomy That Was Never Part of its Case

In reaching the opposite conclusion, Judge Gardephe applied an improper standard that incorporated the defense theory and required the Government to disprove it. Under that standard, "no reasonable juror could find criminal intent and vote to convict unless the Government demonstrated, by proof

beyond a reasonable doubt, that the Van Hise/Aly Khan/Moody Blues chats *differ significantly* from the fantasy chats in content and/or in surrounding circumstances." *United States* v. *Valle*, 301 F.R.D. at 84 (emphasis added). The so-called "fantasy chats" were Valle's communications with other members of the DFN who were not named as co-conspirators by the Government.

a. This Standard Finds No Support in the Record

The factual basis for this standard is rooted in Judge Gardephe's clearly erroneous finding that "[a]t trial, the Government conceded" that certain of "Valle's communications about kidnapping, torturing, raping, murdering, and cannibalizing women are nothing more than fantasy role-play." *Valle*, 301 F.R.D. at 60. The Government never conceded that Valle's online communications with people other than the named co-conspirators were fantasy, and Judge Gardephe identified nothing in the trial record that would have established such a concession. Valle's online communications with people other than the named co-conspirators were simply irrelevant to the Government's case, and the Government did not take a position one way or the other as to whether they constituted genuine planning, puffery, preparatory conversations, role-playing, or something else entirely.[11]

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[11] In summation, the Government rejected this real-fantasy dichotomy, arguing that even if some of

Nevertheless, Judge Gardephe held that "the centerpiece of the Government's case was [FBI] Agent [Corey] Walsh's analysis of Valle's Internet communications, and his division of these communications into two groups: 'real' and fantasy." *Valle*, 301 F.R.D. at 84. That characterization—which proved to be central and essential to Judge Gardephe's ultimate ruling—does not correspond with the limited purpose for which Agent Walsh's testimony was offered.

During his testimony, Agent Walsh briefly explained how the FBI came to focus on Valle's communications with Van Hise, Khan, and Bolinger. (Tr. 423-27). He described his review of Valle's voluminous online communications and his identification of a subset of those communications for further investigation. Agent Walsh did not testify that Valle's communications with people other than the named co-conspirators were "fantasy" emails, nor was he a competent witness to do so. As Judge Gardephe expressly recognized, Agent Walsh had no personal knowledge of the matter, and he was not qualified to testify as an expert on distinguishing Valle's "real" communications from his "fantasy" communications. *See Valle*, 301 F.R.D. at 65 (District Court's observing that Agent Walsh had no "academic or other special-

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Valle's emails contained fictional elements, "common sense tells you, yes, people do engage in discussions that are fictional, about things that they are actually interested in [doing]." (Tr. 1594, 1581 ("[T]he word 'fantasy' has been completely misused and corrupted here.")).

ized training that would have assisted him in distinguishing Internet chats and emails constituting 'real' criminal activity from those reflecting fantasy role-play" and that Walsh "had never read the communications of known kidnappers and was not in a position to know how 'real' kidnappers communicate with each other.").

In fact, Agent Walsh testified that his sorting of the communications was in furtherance of narrowing the investigation, saying that "we focused on three, but the other 21 could have been [real], but we didn't focus on them." (Tr. 673). Agent Walsh also clarified that, while certain communications had been placed in the "fantasy" pile, he never concluded that "every single statement in [those communications was] pure fantasy." (Tr. 824, 827).

The trial record refutes the notion that a real-fantasy dichotomy was ever advanced by the Government, let alone that it was the "centerpiece" of the Government's case. Rather, Agent Walsh's testimony about his review of Valle's online communications was nothing more than a description of a step in the investigative process. On direct examination, the Government did not inquire deeply into Walsh's sorting methodology or its merits. It never argued that the jury could infer that the co-conspirator emails betrayed genuine intent because they differed in tone or content from other messages that Valle sent during the same time period. The Government did not even introduce any of the "fantasy" conversations at trial so that such a comparison could be made.

Those communications were offered by Valle as part of his case. (Tr. 659-61). And to the extent that Agent Walsh's testimony about sorting Valle's communications was the "centerpiece" of anything, it was the defense case, not the Government's. Walsh was cross-examined aggressively on the merits of his sorting, and the similarities between both sets of the communications were a significant component of the defense summation. (Tr. 654-59, 650-718, 1552).

b. This Standard Finds No Support in Precedent

While Valle was certainly entitled to argue that the so-called "fantasy" conversations proved that he had no genuine criminal intent, it is beyond dispute that it was not the Government's burden to "disprove every possible hypothesis of innocence" in order to sustain a guilty verdict. *United States* v. *Abelis*, 146 F.3d at 80 (internal quotation marks omitted); *see also United States* v. *Pavulak*, 700 F.3d 651, 669 (3d Cir. 2012) (rejecting fantasy defense in child enticement case because "even if [fantasy] were one plausible interpretation of the evidence, [the defendant's] contention that the evidence also permits a less sinister conclusion than guilt is not enough to overturn the verdict" (internal quotation marks omitted)); *United States* v. *Dwinells*, 508 F.3d 63, 72-73 (1st Cir. 2007) (affirming child-enticement conviction where fantasy defense was "plausible" and "buttressed by the [defendant's] persistent dodging of suggestions that he and his correspondents meet" but "the government's theory of the case . . . also was plausible" and "[w]hen the record is fairly susceptible of two

competing scenarios, the choice between those scenarios ordinarily is for the jury"). Judge Gardephe committed legal error when he imposed on the Government the burden of disproving a defense theory in order to establish that the evidence of Valle's guilt was sufficient.

Requiring the Government to rebut a defense theory cannot be reconciled with *Jackson*'s "bare rationality" standard, which asks only whether a rational view of the evidence permitted the jury to conclude that the communications reflected criminal intent, not that the messages themselves were different in some way from other messages. *See Jackson* v. *Virginia*, 443 U.S. at 319 (jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original)). There was nothing irrational in the jury's crediting the common-sense proposition that defendants charged with attempting or conspiring to engage in criminal, deviant activity often contemporaneously engage in "fantasy" behavior, be it in the form of consuming illicit pornography, having discussions about fantastic criminal activity, or engaging in realistic discussions about activity a defendant would like to engage in that is similar to the charged conduct.

Here, the jury was to determine whether the co-conspirator communications were credible—that is, when Valle and his co-conspirators said they planned to kidnap, torture, and kill women, did they mean what they said? On sufficiency review, jury determinations on credibility are entitled to particular defer-

ence. *See United States* v. *Truman*, 688 F.3d 129, 140 (2d Cir. 2012) (rejecting the District Court's determination that a witness's testimony was incredible as a matter of law, instructing that "assessing [witness] credibility was the province of a jury properly instructed" and holding that the witness's troubled background, inconsistencies in the witness's testimony, his failure to testify fully, and inferences drawn from the evidence are " 'factors relevant to the weight the jury should accord to the evidence, and do not on this record justify the grant of a judgment of acquittal.' " (*quoting United States* v. *Coté*, 544 F.3d 88, 100 (2d Cir. 2008)).

Deference to the jury's credibility determination does not turn on whether the evidence comes in the form of live testimony or, as here, hearsay statements admitted pursuant to the co-conspirator exception. *See United States* v. *Peters*, 791 F.2d 1270, 1285 (7th Cir. 1986) (observing that "the judge decides the admissibility of the coconspirator hearsay, and the jury then determines the weight and credibility of this evidence as it considers all the evidence in determining whether guilt has been established beyond a reasonable doubt." (internal quotation marks omitted)); *United States* v. *Whitley*, 670 F.2d 617, 621 (5th Cir. 1982) ("The trial court determines whether to admit statements by co-conspirators as non-hearsay under Fed. R. Evid. 801(d)(2)(E). Once admitted, the jury assesses the weight and credibility of such statements, just as it evaluates all evidence."). Insofar as the jury determined that the co-conspirator statements were credible in expressing their true aims, the statements were entitled to greater deference.

But Judge Gardephe's standard did not afford the jury's credibility determination any deference whatsoever. It presumed Valle's communications with his co-conspirators to be *incredible* unless they "differ[ed] significantly" from Valle's communications with people who were not alleged to be co-conspirators. *Valle*, 301 F.R.D. at 84. Not only did that formulation show no deference to the jury's credibility determination, it also required the jury to analyze the evidence through a framework that the jury might very well have rejected (*i.e.*, that there was a real-fantasy dichotomy in the communications) and replaced *Jackson*'s "bare rationality" standard with a "significant difference" requirement that is unmoored from precedent and has no settled meaning in the law. Under this standard, it was irrelevant that the jury's credibility determination might very well have been rational. For that reason alone, it was error to apply the standard.

c. This Standard, Although Improper, Was Met

Even if Judge Gardephe's factually and legally erroneous real-fantasy dichotomy provided an appropriate framework for evaluating the sufficiency of the jury's verdict, that analysis should have resulted in the verdict being upheld because the jury could reasonably conclude that the communications between Valle and his three co-conspirators were materially different from his communications with others.

First, the jury was entitled to credit Valle's post-arrest statement in which he said that the DFN con-

tained both "real" and "fantasy" users and that communications with Khan and Bolinger seemed "more serious" to him.[12] *Valle*, 301 F.R.D. at 78, 97. From that evidence, a rational jury could infer that Valle's communications with those two co-conspirators fell into the "real" category and therefore reflected an actual intent to commit a kidnapping. In his decision, Judge Gardephe did not explain why drawing that inference was impermissible or irrational. The decision stated only, in a conclusory fashion, that it "does not demonstrate that Valle entered into a conspiratorial agreement with these individuals." *Valle*, 301 F.R.D. at 97. This important post-arrest admission supported the jury's verdict and should have been accorded more weight on sufficiency review.

Second, differences in the content of the communications presented another basis for the jury to conclude that Valle's emails with his co-conspirators were "real," even if his emails with other people were "fantasy." While both sets of communications contained references to chloroform, in only the communications with his co-conspirators did Valle transmit an actual formula for making chloroform at home. (GX 409 (responding to the question, "Have you got a

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[12] Valle volunteered that co-conspirators Moody Blues (*i.e.*, Bolinger) and Khan were "more serious" DFN members, without any prompting from the agent, and when asked about Van Hise, Valle remembered him as someone who "was interested in coming to New York to help facilitate" a kidnapping. (Tr. 1031-32, 1060).

recipe for chloroform," Valle stated "I found a website a couple of nights ago" and transmitted a link to the chloroform formula)). Similarly, Valle described actual meetings with his targets only in the communications with his co-conspirators. (GX 410).

The level of detail and the sustained nature of the communications also set apart the two categories of communications. Valle's conversations with Khan, for example, contained a detailed comparison between the killing of a human victim and the slaughtering of a goat, with Khan providing Valle a video recording of a live goat being slaughtered. (Tr. 628-29; GX 419). Valle was also specific about his age preferences for targets, including certain minors, in the conspiratorial communications; this was not, however, a feature of any of the "fantasy communications." (GX 410 (Valle stated, "I prefer them at least in high school," to which his coconspirator responded, "At that age I'd gut em and roast them like a chicken. Then pull the cooked body apart.")). Unlike the "fantasy" communications, the communications with the co-conspirators contained repeated statements by the co-conspirators that they were serious about committing kidnappings. (GX 418 (Khan: "I am for real not fantasy.")).[13]

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[13] At trial, Judge Gardephe barred the prosecutors from introducing evidence that would have allowed them to further establish the reality of the co-conspirator communications. In one of the excluded communications, a co-conspirator stated that he had "met someone" who trafficked in children bought "from drug addicted mothers desperate for a f[i]x . . . Well, allegedly . . . Not sure if he's for real yet."

Judge Gardephe did not address these differences in content or explain why a rational juror could not rely on them to distinguish between "real" and "fantasy" emails.

Third, the jury was entitled to distinguish between the communications by relying on the real-word actions Valle took in furtherance of the objectives described in the co-conspirator communications. The evidence established that, in the co-conspirator communications, Valle discussed kidnapping identifiable women whom Valle knew. Other evidence established that Valle made preparations to kidnap those women that included conducting physical surveillance and pretextual meetings, attempting to obtain the home addresses of his targets, and researching his targets through a confidential law enforcement database. Rather than evaluate the communications in a vacuum, a rational jury could conclude that the co-conspirator communications reflected genuine

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(Tr. 391-93). A co-conspirator's explicit acknowledgment that he needed to determine whether a potential accomplice was being serious or engaging in fantasy provided further support for the Government's position that the co-conspirator communications reflected a genuine intent to kidnap. It was doubly improper for Judge Gardephe to impose this unprecedented burden in his post-trial decision, after preventing the Government from developing a full evidentiary record at trial that would have further supported the distinction between the two sets of communications.

criminal intent because there were additional actions taken to carry out the stated objectives and because they pertained to real-world facts. That corroboration, standing alone, would permit a rational jury to infer that the communications were "real." Likewise, a rational jury could conclude that similar communications that lacked corroboration were "fantasy." Judge Gardephe's analysis overlooks the impact of corroboration on a rational jury's view of the communications.

Fourth, similarities in the content of the "real" and "fantasy" emails did not make all of them fantasy. In concluding otherwise, Judge Gardephe found it significant that the "real" and "fantasy" communications "share the same elements and characteristics." *Valle*, 301 F.R.D. at 84. While it would have been permissible for a jury to conclude that those similarities made both sets of communications fantasy, that conclusion was not required. It would have been equally rational for a jury to conclude that individuals immersed in criminal activity fantasize or boast about their prowess in accomplishing their criminal aims. Drug dealers, for example, have written "rap lyrics" based on actual "knowledge of [a specific] gang and the gang['s] violence." *United States* v. *Applins*, 637 F.3d 59, 79 (2d Cir. 2011). It would hardly be surprising that such lyrics contain both fictional elements and facts drawn from personal experience. That the lyrics contain some amount of fiction does not detract from the reality of the personal experiences that inform the non-fiction elements. Fictional elements simply do not render the criminal accomplishments any less real. So too with Valle. It was en-

tirely rational for the jury to conclude that, in the so-called "fantasy" emails, Valle allowed his bona fide criminal interests to play out in a fictional setting. Judge Gardephe did not explain why it was impermissible to conclude that Valle could both fantasize about kidnapping in some communications, while actually planning to commit a kidnapping in others.

Fifth, the jury could rely on the DFN users' self-identification to distinguish between "real" and "fantasy" communications. Users who exchanged "fantasy" communications with Valle often identified themselves as participants in a role-playing fantasy. For example, Valle communicated with "Christina the Ice Princess," who asked participants to design a fictional character, create a backstory for that character, and complete a questionnaire to establish the character's habits, personality traits, family background, and fetishes. (DX E9). In her communications with Valle, "Gertrude H." asked Valle whether he was interested in "creating a story" around a cast of fictional characters running a sadistic restaurant, and as they communicated, she referred repeatedly to the "story" they were creating together. (DXE11). The same is true of "Chef204," who asked Valle for more information about a potential victim's job situation for "background info for our fantasy with her . . . info that could be used to make a better story line." (DX E14). Similarly, an individual named "Mark" (or "J.K.") sent Valle pictures that he had altered to make it appear as if the women depicted in the original picture were in pain or enduring some sort of torture, and he stated that "[f]antasy and reality are well separated,

there cannot be any fun in actually injuring someone." (DX E8).

Judge Gardephe rejected the Government's self-identification argument, noting that, in fact, "many of Valle's fantasy correspondents never state that they are engaged in fantasy." *Valle*, 301 F.R.D. at 85. But the examples that Judge Gardephe identified—communications with Jackcrow, Tim Chase, Brenda Falcon, sten9979, and Carl Wolfe—do not support his conclusion. Jackcrow, for one, had repeatedly engaged Valle in explicit discussions about writing fictional stories. (DX E6). With respect to the other correspondents whom Judge Gardephe identified, nothing in the record demonstrated that the communications offered by the defense constituted a complete record of Valle's interactions with those individuals. In fact, the record established the opposite—that Valle's communications through the DFN forum had been deleted when he closed his account. (Tr. 439, 536, 652, 840-41). Those missing communications could very well contain the fantasy disclaimers that Judge Gardephe sought. The jury would have been well within its rights to conclude that the defense presented an incomplete set of communications that did not provide a complete picture of Valle's communications with those individuals, including whether they ever told Valle explicitly that they wanted to engage in fantasy.

Judge Gardephe further observed that "the chats that the Government claims reflect true criminal intent also contain numerous references to fantasy." *Valle*, 301 F.R.D. at 86. But Judge Gardephe over-

looked that Valle himself recognized that some of his hopes for the kidnapping were grandiose. Valle told Bolinger, "I just have this whole scenario in my mind I have no idea how its going to pan out." (GX 405). But he reaffirmed that, setting aside any grandiose aspects, "kidnapping her and getting away with it is an absolute truth." (GX 405).

Judge Gardephe's analysis also ignored the context in which the word "fantasy" was used in the conspiratorial conversations. For example, Valle told Bolinger that a potential victim "has 'been one of my favorite victims to fantasize about for almost 10 years now.'" *Valle*, 301 F.R.D. at 73 (quoting GX 402). In his next message, Valle continued: "and she is very low risk, it shouldnt be hard to get away with this." (GX 403). Valle then told his co-conspirator, accurately, that the victim "worked in media . . . promotions." (GX 403; Tr. 289). Later, in the same conversation, Bolinger asked whether Valle would "go through with this," and Valle responded "yes[,] . . . she will never see it coming." (GX 404).

Placed in context, the use of the word "fantasy" in this exchange signified not that the communications were fictional in nature but that kidnapping the victim was something Valle had long aspired to do. He fantasized about it in the same way that a burglar might fantasize about a valuable diamond necklace locked away in a target's home. There was nothing irrational about a jury's determination that, in this conversation, Valle expressed excitement about finally causing harm to a woman he had fantasized about harming for a number of years.

3. Judge Gardephe Failed to View the Evidence in the Light Most Favorable to the Government and Overlooked Evidence that Supported the Jury's Verdict

a. Judge Gardephe Viewed the Evidence Favorably to the Defense

While recognizing that he was required to "credit[] every inference that could have been drawn in the government's favor," *Valle*, 301 F.R.D. at 79, Judge Gardephe repeatedly rejected plausible inferences that supported the Government's case and adopted those that supported the defense case. This crabbed view of the evidence constituted a further error in Judge Gardephe's analysis.

For example, the evidence established that Valle and his co-conspirators discussed dates where planned kidnappings might be carried out,[14] but no abductions occurred on those dates, often without comment from Valle or his co-conspirators. *Id.* at 91 (describing them as "vanishing plots"). Judge Gardephe concluded that "the only reasonable inference that can be drawn from the proof concerning the conduct and statements of Valle and his alleged co-conspirators after the date for a scheduled kidnapping had come and gone, is that they understood that no actual kidnapping would take place on scheduled

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[14] Those dates included: February 20, 2012, September 2, 2012 and Thanksgiving Day 2012, the last of which post-dated Valle's arrest.

dates." *Id.* at 90.[15] While Judge Gardephe's inference might have been reasonable, it was far from the only inference that could be rationally drawn from the evidence. Another rational inference is that a tentative kidnapping date was set; an obstacle arose to carrying out the kidnapping on that day, including Valle's fear of getting caught; and then the parties resumed their planning later with a new date or a new victim.

This inference was fully supported by evidence establishing that Van Hise had difficulty obtaining the money he needed to pay Valle for a possible February 20 kidnaping. (Tr. 434 ("I don't have the money right now. But as soon as I do, we'll let you know."), 434-38, 442).[16] Khan, who also discussed with Valle the possibility of carrying out a kidnapping on February 20,

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[15] The defense presented this argument to the jury at trial (Tr. 1553, 1558, 1573, 1574), and the jury rejected it by returning a guilty verdict.

[16] This inference was not undermined by Valle's suggestion of a substitute target for Van Hise (Tr. 442), as the jury could have construed that as an effort to provide Van Hise with a more attractive target that would cause him to move more swiftly in obtaining Valle's fee. It was also incorrect for Judge Gardephe to say that price changes went unnoticed during the course of Valle's negotiations with Van Hise. *Valle*, 301 F.R.D. at 91. In fact, Van Hise and Valle discussed the change in price from $4,000 to $5,000 (Tr. 438), with Van Hise asking that it remain at "four" (Tr. 438) but ultimately agreeing that "$5,000 . . . is very fair" (Tr. 442).

was unable to come to the United States on that date because "travel laws are difficult." (GX 417). A rational jury would have had no trouble relying on Van Hise's inability to pay Valle's kidnapping fee and Khan's inability to travel to the United States as a complete explanation for why a kidnapping did not take place on February 20.

Valle's preoccupation with being apprehended provided an independent explanation for why he did not conduct a kidnapping in February 2012. *See Valle*, 301 F.R.D. at 90 ("Valle expressed concerns about getting caught."). Valle's fear was recognized by his co-conspirators. Khan told Valle to "get some courage man," and Bolinger asked "You WILL go through with this? I've Been let down before." (GX 418, 404). That fear would have provided another rational explanation for there being no kidnapping in February.

It was also rational for the jury to conclude that the kidnapping dates Valle and his co-conspirators set were simply aspirational, intended to focus their minds on the object of the conspiracy, while they continued to plan and make preparations for their eventual kidnapping. A rational jury could have further concluded that the co-conspirators granted Valle flexibility on dates and were reluctant to press him on missing deadlines because it was Valle who actually had to carry out the kidnappings. As Valle said, he was "putting [his] neck on the line here" (GX 432), and therefore was reasonably entitled to alter the precise date of the kidnappings. This evidence supported numerous rational inferences that supported

the jury's verdict, but Judge Gardephe declined to draw them.

The fact that Valle spoke to Van Hise and Khan about committing two different kidnappings on the same day could also be rationally explained. All it indicated was that Valle wanted to put his plan into action on that date and was seeking a reliable partner who could help him execute it. While Van Hise and Khan were unsuitable as on-the-ground partners, although for different reasons, Valle believed he found that partner in Bolinger, and he bragged about it to Khan. (GX 429 ("I found someone who is going to help me with Andria" who "shares my passion for inflicting as much pain as possible.")). Valle and Bolinger discussed the possibility of carrying out a kidnapping on September 2 (another date of the "vanishing plots"), but Bolinger said that it would not leave him "a lot of time to sort out plane tickets etc." (GX 404). They therefore agreed on Thanksgiving, which took place after Valle's arrest.

Far from being inexplicable, the reasons that kidnappings did not occur on February 20, September 2, and Thanksgiving 2012 were rational and well-founded in the record. Judge Gardephe erred by concluding otherwise.

Judge Gardephe also discounted evidence establishing that, in his post-arrest statement, Valle admitted to having been "on Alisa Friscia's block on March 1, 2012," *Valle*, 301 F.R.D. at 78, which was within days of his detailed conversation with Van Hise about abducting Friscia (GX 432 (Feb. 28, 2012)). Making this admission even more powerful,

Valle lied to the agents about the reason for his presence on Friscia's block, claiming that he had been there "to drop his wife off to have lunch with Friscia." *Valle*, 301 F.R.D. at 78. Mangan testified that Valle did no such thing. (Tr. 185-86). A rational jury could infer from that evidence that Valle was present near Friscia's home in order to conduct surveillance in preparation for a kidnapping and later lied in a post-arrest interview about his reasons for being in the vicinity to conceal the fact that he was conducting surveillance of a target.

Judge Gardephe took a far more limited view of what could be rationally inferred from that evidence. In his view, the Government's argument that Valle "'surveilled [the victim]' . . . is not a reasonable inference" and amounted to little more than "speculation" because "[i]t cannot be determined from the evidence offered at trial whether Valle was on [the victim's] block five seconds, five minutes, or five hours." *Valle*, 301 F.R.D. at 93. There was no valid reason to restrict the range of permissible inferences in this fashion. It is far from speculation to conclude that Valle conducted surveillance in light of (i) his discussing the kidnapping of Friscia with Van Hise, (ii) his presence on Friscia's block only a few days after that communication, and (iii) his lying in a post-arrest interview about his reasons for being in the area. Judge Gardephe's concern that there was no evidence in the record about how long Valle was on the target's block does not render the inference of surveillance irration-

al.[17] While proof that Valle had been on the block for an extended period of time would surely have bolstered the inference of surveillance, nothing in precedent or logic required proof of duration for the inference to be rational.

Judge Gardephe also repeatedly drew the pro-defense inference that the lies Valle told his co-conspirators demonstrated that he was not serious about kidnapping any of the specified targets. *E.g.*, *id.* at 102. For example, Judge Gardephe held that "Valle's refusal to provide [Bolinger] with Sauer's address makes sense in the context of fantasy role-play, but makes no sense if this is a real kidnapping conspiracy."[18] *Id.* at 99. That conclusion does not with-

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[17] Friscia, the target of this surveillance, was prepared to testify that she had, on a separate occasion, discovered Valle conducting apparent surveillance on her outside of the school where she worked. (Tr. 518-19). Judge Gardephe, however, prevented Friscia from offering that testimony because it predated by several months Valle's discussions of Friscia with Van Hise. (Tr. 556-57). Judge Gardephe concluded, therefore, that the Government had "not offered evidence that Valle had formed an intent to kidnap" by that point. (Tr. 557). That ruling missed the mark, as Valle's otherwise inexplicable surveillance of Friscia, a short time before he began discussing plans to harm her, was proof itself of his intent to kidnap her.

[18] That Valle had learned this target's home and work address was established by (i) Valle's trade-

stand scrutiny. Precedent abounds with examples of co-conspirators lying to each other about aspects of very real criminal schemes. *See, e.g., United States* v. *Polichemi*, 219 F.3d 698, 707 (7th Cir. 2000) ("The government also introduced evidence . . . that Polichemi and Neal lied to Lauer about the whereabouts of the CHA funds (once again showing that there is no honor among thieves)."). That criminals often tell lies to one another is a fact that the jurors were entitled to rely upon as a matter of simple common sense.

The jurors were also entitled to draw the reasonable inference that Valle did not wish to provide information to his co-conspirators that might enable them to kidnap Valle's victims without Valle's participation. Bolinger suspected as much—that Valle might have refused to share a victim's address to prevent him from acting without Valle by kidnapping the target "a day earl[ier]" than planned. (GX 407). It also allowed Valle to retain control over when and whether a specific victim would be kidnapped. These rational explanations for why Valle would withhold or obscure details regarding his targets were as obvious to a rational jury as they were to Bolinger.

Judge Gardephe also considered Valle's occasional references to a secluded, mountain home as proof that Valle was not serious in his communications

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mark offer of a PBA card (which would have been virtually useless to this non-New York State resident) in order to ascertain his target's residence and (ii) Valle's surveillance of the target's office building. (Tr. 283-84, 289-90; GX 436, 510).

about kidnapping. No evidence at trial established one way or the other whether Valle had access to a secluded cabin, and Judge Gardephe inferred from the absence of evidence that "[Valle] had no secluded cabin 'in the mountains[.]'" *Valle*, 301 F.R.D. at 98. That inference was not only legally improper for being drawn against the Government, it was also poorly founded. Nothing prevented Valle from renting such a cabin, even if he—or a friend or family member—did not own one. It was rational for the jury to conclude that, when Valle referred to a secluded cabin, he meant that he could obtain access to one if needed. Nothing in the record contradicted that inference.

By repeatedly drawing inferences from the evidence that favored the defense, Judge Gardephe did not give the Government's evidence its full measure when gauging sufficiency. That error caused Judge Gardephe to improperly discount rational inferences that supported the jury's verdict.

b. Judge Gardephe Overlooked Compelling Evidence of Guilt

Judge Gardephe also overlooked important components of the Government's case that provided additional support for the jury's verdict.

Most significantly, Judge Gardephe gave short shrift to evidence of Valle's Internet research in preparation for the kidnappings. A forensic examination of Valle's computers showed, among other things, that he searched the Internet for information on the "best rope to tie someone" and then retrieved a webpage entitled "How to tie Someone Up: 5 steps."

(GX 215). The evidence also established that Valle sought out information on the Internet by entering the following search terms: "how to kidnap someone," "most secure bondage," "how to knock someone unconscious," "how do you give chloroform to girls," "how to chloroform a girl," "ho[w] to hogtie a girl," "how to use chloroform," "best rope to tie someone up," "how to abduct a girl," as well as searches for "white slavery," "human trafficking how much money," and "knock someone out blunt object." (Tr. 1238-43; GX 1000, 1001).

While Judge Gardephe acknowledged that Valle conducted this research into restraining, kidnapping, and incapacitating people, *Valle*, 301 F.R.D. at 76, the evidence played no role in his sufficiency analysis. That oversight was erroneous. Evidence of preparation is a well-established means of proving criminal intent. *See, e.g.*, *United States* v. *Matera*, 489 F.3d 115, 119 (2d Cir. 2007) ("The evidence showed elaborate preparations made by Carbonara and others to kill Gravano, including numerous trips to Arizona, assumption of disguises, scouting of the locations where Gravano was likely to be found, and extensive planning of the manner in which the killing would be carried out."). It is perfectly logical to construe a person's researching a technique as an indication that the person seeks to learn that technique and use it.

Here, Valle's research on tying up people, abducting them, and administering chloroform could be reasonably construed as demonstrating his interest in learning how to do those things effectively. It took no leap of reason to infer that Valle wanted to learn

those techniques because he wanted to use them to aid a planned kidnapping. Thus, a rational jury could have concluded that Valle was conducting this research on restraints, abduction, and incapacitation in preparation for carrying out the kidnappings he discussed with his co-conspirators. Judge Gardephe identified no reason, much less a valid one, why this view of the evidence was impermissible. It should have weighed in favor of upholding the verdict.

Similarly, Judge Gardephe saw no significance in Valle's online search for the home address of Ponticelli, one of the targets of the kidnapping conspiracy. *Valle*, 301 F.R.D. at 101. Rather than allow this evidence to weigh in favor of the jury's verdict, Judge Gardephe discounted it because "there is no evidence that Valle and [Bolinger] discuss Kristen Ponticelli again after [Valle's search for her address], or that Valle ever obtained, much less transmitted, information about her location to [Bolinger]." *Id.* But the absence of additional evidence on what, if anything, Valle did after searching for Ponticelli's home address does not deprive the fact that he conducted that search of its evidentiary force—particularly its force with respect to Valle's intent. A jury was entitled to infer that Valle searched for Ponticelli's home address because he actually wanted to know where she lived. That reasonable inference, combined with further evidence that Ponticelli did not have a relationship with Valle that would provide any legitimate reason for his obtaining her address (Tr. 412-14), permitted a jury to conclude that, placed in the context of the co-conspirator communications about Ponticelli, Valle intended to learn where Ponticelli lived

as part of a plan to kidnap her. Uncertainty about whether he ever succeeded in obtaining his target's address does not undermine the validity of that inference, much less cause it to be irrational.

Valle also researched prior kidnappings by entering the names of kidnapping victims, including Sierra Lamar, a young woman who had been abducted and murdered. (GX 229). In the course of his research, Valle viewed a news article that referenced the Sierra Lamar case, contained a photograph of Lamar, and had the headline "Man Arrested in Disappearance of Sierra Lamar Probably Killed Her Like Everyone Suspected." (GX 230). Valle also conducted research on a convicted sex offender named Mark Rounds. (Tr. 1194). The evidence established that Valle had entered "'Mark Rounds' guilty" in a search engine and then retrieved a webpage entitled "Mark Allen Rounds—Florid Sexual Offender . . . lascivious molestation victim 12-15 years old offender 18 or older." (GX 217, 606). A reasonable jury could construe Valle's inquiries into the arrests of other kidnappers as another step he took in preparation for the kidnappings. It was reasonable to infer that Valle was interested in the account of how those kidnappers were caught so that he could learn from their experiences and avoid apprehension when he carried out his own kidnappings. Judge Gardephe, however, did not give this evidence any weight whatsoever.[19]

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[19] Likewise, Judge Gardephe accorded no evidentiary weight to Valle's Internet research on such topics as "white slavery" and "how to cook a human," or

Judge Gardephe also did not accord much weight to Valle's decision to violate NYPD regulations, as well as federal law, by accessing a restricted database to obtain information useful to a kidnapping. At trial, witnesses testified that Valle was instructed repeatedly that he was prohibited from accessing NYPD systems for non-official purposes, and that the penalties for doing so included the possibility of "arrest, prosecution, termination of employment and fines up to $10,000." (Tr. 940-42). It was further established that, in 2011 and 2012, Valle accessed restricted systems to conduct queries on several of the women that he discussed targeting with his co-conspirators. (Tr. 578-84).

While Judge Gardephe observed that these facts were established at trial, he set aside their evidentiary value because "[t]here is no evidence . . . that Valle used any information obtained from these searches in furtherance of the alleged kidnapping conspiracy, or that he told his alleged co-conspirators that he had conducted these searches or had access to

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that Valle retrieved numerous images of dead bodies. (GX 218-19, 227, 240). To the contrary, Valle's interest in these materials presented the jury with insight into Valle's mental state during the time period of the conspiracy. It was entirely reasonable to infer that someone with these kidnapping-related interests would be more likely to commit a kidnapping than someone who did not have those interests. Judge Gardephe was wrong to accord this evidence no value whatsoever.

such information." *Valle*, 301 F.R.D. at 77. The value of this evidence did not turn, however, on whether other evidence established that Valle (i) used the information he obtained or (ii) communicated it to his co-conspirators.

First, Judge Gardephe conflated the absence of evidence of a use or communication with evidence of the absence of use or communication. That is improper when conducting sufficiency review. The jury was not required to conclude that Valle obtained nothing useful from his unlawful database search simply because no specific evidence showed what notes Valle might have taken or facts he might have memorized after reviewing the records pertaining to his target. Juries are permitted to infer that people take deliberate action for a reason and that someone viewing confidential records about a kidnapping target gained something useful from his improper access to information about her. During the trial, Judge Gardephe recognized the probative force of the evidence, observing that "a reasonable jury could conclude that [the database searches] were part and parcel of Valle's efforts to maintain information concerning the home addresses of the alleged kidnap targets." (Tr. 554). It is not clear why this inference was no longer reasonable at the time the post-trial motions were decided.

Second, even if Valle did not gain anything useful from his unlawful search, the mere fact that he undertook the search is powerful evidence in its own right. A rational jury was fully capable of concluding that only a person who was serious about conducting a kidnapping would risk his continued employment

and place himself in jeopardy of criminal prosecution by accessing a restricted database. The jury was entitled to infer that Valle would take such risks only if he had a genuine intent to kidnap. This evidence bore directly on Valle's intent—in full support of the jury's verdict. Again, contrary to his post-trial ruling, Judge Gardephe recognized that this inference was permissible when he ruled the evidence admissible at trial. (Tr. 555 ("In accessing the databases, Valle was exposing himself to criminal and administrative penalties, a high price to pay for furthering an alleged sexually violent fantasy.")).

Third, it was equally wrong for Judge Gardephe to dismiss the significance of Valle's unlawful database search because it took place "more than six months before Valle suggested to Khan that Noble be kidnapped." *Valle*, 301 F.R.D. at 97. To adopt that position, Judge Gardephe had to conclude that only one sequence of events was possible: first, Valle joined the conspiracy; second, he selected his targets. But there is no reason why the jury had to embrace that view. It was entirely rational for the jury to conclude instead that Valle entered the kidnapping conspiracy with kidnapping targets already in mind. Indeed, the record established that Valle had harbored a desire to kidnap certain targets long prior to joining the conspiracy, and Judge Gardephe recognized that fact during the trial. (Tr. 553 ("[T]here is strong evidence that Mr. Valle had a long-term interest in kidnapping, murdering, and eating Sauer and Noble."), 460, 496, 504, 553, 637). It was also established that Valle recognized his need for assistance in conducting the kidnappings. (Tr. 627-28, 641). Valle's efforts to gath-

er information on his own prior to entering the conspiracy bore on Valle's intent and on his reasons for entering the conspiracy. The jury could have concluded that Valle identified his targets, realized he needed assistance to carry out a kidnapping, and then sought out co-conspirators on the DFN so that he could kidnap his previously-identified targets and perhaps others.

Even if Judge Gardephe's "conspiracy first, targets second" scenario was compelled by the evidence, this Court has refused to discount evidence simply because it "precedes the date of the inception of the conspiracy," when it tends to establish that a co-conspirator took action toward accomplishing the conspiracy's objective. *See United States* v. *Diaz*, 878 F.2d 608, 616 (2d Cir. 1989). Thus, Valle's search for personal information about a subsequently-named target of the kidnapping conspiracy bore directly on his intent to enter the kidnapping conspiracy in the first place. Judge Gardephe never considered this rational interpretation of the evidence, but should have because it supported the jury's verdict.

Indeed, Judge Gardephe's discounting of this evidence ignored the unique dangers posed by conspiracy offenses. It is a basic premise of criminal law that a conspiracy "poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'" *United States* v. *Jimenez Recio*, 537

U.S. 270, 275 (2003) (quoting *Callanan* v. *United States*, 364 U.S. 587, 593-94 (1961); *see also United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915) (conspiracy "sometimes quite outweigh[s], in injury to the public, the mere commission of the contemplated crime"). By joining with other like-minded individuals to discuss the kidnapping of real victims, and by providing those individuals with primarily accurate details about his victims, Valle set in motion a chain of events that is precisely the harm of joint criminal activity.[20]

POINT II

A New Trial Is Not Warranted

A. Applicable Law

Rule 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Motions for a new trial are "disfavored," *United States* v. *Gambino*, 59 F.3d 353, 364 (2d Cir. 1995), and should be granted only when "let-

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[20] Separately, Judge Gardephe's repeated references to the absence of a "concrete step," *see, e.g, Valle*, 301 F.R.D. at 88-89, suggest that he was holding the Government to a higher burden of proof than is recognized in conspiracy law. *See, e.g., Iannelli* v. *United States*, 420 U.S. 770, 786 n.17 (1975) (overt act required in conspiracy offenses "can be innocent in nature, provided it furthers the purpose of the conspiracy.").

ting a guilty verdict stand would be a manifest injustice." *United States* v. *Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013). Accordingly, district courts "must . . . exercise Rule 33 authority sparingly and in the most extraordinary circumstances." *United States* v. *Cote*, 544 F.3d 88, 101 (2d Cir. 2008) (internal quotation marks omitted).

When a Rule 33 motion is based on perceived inadequacies in the proof of guilt, the district court "may weigh the evidence and credibility of witnesses." *United States* v. *Coté*, 544 F.3d at 101. It must be careful, however, not to "wholly usurp[ ] the role of the jury," *United States* v. *Ferguson*, 246 F.3d 129, 133-34 (2d Cir. 2001), because it "long has been [this Court's] rule that trial courts must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). For a district court to "intrude" on the jury's determination, it must demonstrate "exceptional circumstances," such as "testimony [that] is patently incredible or defies physical realities." *United States* v. *Ferguson*, 246 F.3d at 133-34 (internal quotation marks omitted).

Likewise, alleged prosecutorial misconduct in summation can require a new trial "only in the rare case in which improper statements—viewed against the entire argument to the jury—can be said to have deprived the defendant of a fair trial." *United States* v. *Caracappa*, 614 F.3d 30, 41 (2d Cir. 2010); *see also United States* v. *Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002). Vigorous advocacy does not constitute misconduct, as both prosecutors and defense attorneys "are

generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence." *United States* v. *Tocco*, 135 F.3d 116, 130 (2d Cir. 1998). Further, "[t]he government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States* v. *Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993) (internal quotation marks omitted). As "summations—and particularly rebuttal summations—are not detached expositions" and "frequently require improvisation, courts will not lightly infer that every remark is intended to carry its most dangerous meaning." *United States* v. *Farhane*, 634 F.3d 127, 167 (2d Cir. 2011) (internal quotation marks omitted). Courts must also consider the challenged comments "'in the context of the entire trial.'" *Miranda* v. *Bennett*, 322 F.3d 171, 180 (2d Cir. 2003) (quoting *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 639 (1974)).

The grant of a new trial is reviewed for abuse of discretion, which occurs if a district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *United States* v. *Bell*, 584 F.3d 478, 483 (2d Cir. 2009) (internal quotation marks omitted).

B. Discussion

1. The Weight of the Evidence Supports the Jury's Verdict

Judge Gardephe's conclusion that a guilty verdict ran counter to the weight of the evidence is premised

on legal and factual errors that constitute an abuse of discretion.

Judge Gardephe ordered a new trial because "the *balance* of the evidence . . . favors the Defendant." *Valle*, 301 F.R.D. at 104 (emphasis added). But that is not the relevant legal standard. It is not for the reviewing court to conduct a *de novo* re-balancing of the evidence and decide what it would have done as a jury of one. This Court has long cautioned trial judges that they must generally "defer to the jury's resolution of the weight of the evidence" when considering new-trial motions pursuant to Rule 33. *United States* v. *Sanchez*, 969 F.2d at 1414. Under that standard, a judge may set aside evidence that "is patently incredible or defies physical realities" and then consider if what remains causes the jury's verdict to run counter to the weight of the evidence, *Ferguson*, 246 F.3d at 133-34, but a court may not engage in a wholesale re-balancing, as if the trial had been to a judge rather than the jury, and reach its own decision about what the "correct" verdict should have been. Rule 33 does not permit a trial court to order a new trial simply because it disagrees with the jury's weighing of *competent* evidence.

By applying a standard that allowed the court to substitute its view of the evidence for that of the jury, Judge Gardephe "wholly usurp[ed] the role of the jury," *Ferguson*, 246 F.3d at 133-34. Repeatedly, Judge Gardephe elected to adopt an improperly constrained view of the evidence that ran counter to the jury's determination. As described in greater detail above, Judge Gardephe discounted the probative value of

several categories of evidence, notwithstanding the support that this evidence provided for the jury's verdict. This evidence included Valle's post-arrest statement, where he acknowledged that there were real and fantasy members of DFN and that his co-conspirators were among the "more serious" members; Valle's research and preparations, including his possession of a formula for chloroform, his efforts to obtain personal information about his targets, and his creation of a kidnapping "blueprint" on his computer; and Valle's decision to break the law by using a restricted database to profile his victims, knowing that it could cost him his job and expose him to federal prosecution.

Similarly, Judge Gardephe rejected numerous rational inferences that favored guilt, including that Valle was present near the home of a target in order to conduct surveillance; Valle refused to provide details to co-conspirators about his targets because he wanted to preserve his necessary role in the kidnapping; and that Valle researched some of his targets prior to communicating with his co-conspirators because he had identified his targets before joining the conspiracy. Judge Gardephe discounted that evidence and rejected those inferences without identifying any failing in them analogous to "testimony [that] is patently incredible or defies physical realities." *Ferguson*, 246 F.3d at 133-34 (internal quotation marks omitted). In the absence of such "exceptional circumstances," *id.*, it was impermissible for Judge Gardephe to set aside the jury's view of the evidence in favor of his own. *See, e.g.*, *Coté*, 544 F.3d at 102 (reversing new trial grant where district court "sub-

stituted its own layman's view . . . for the jury's assessment of the evidence" and "failed to examine the entire case"). So long as the evidence and inferences embraced by the jury were credible and plausible, Judge Gardephe was bound to accept them when examining the weight of the evidence.

Judge Gardephe also repeatedly viewed pieces of evidence in isolation, rather than in context of the entire evidentiary record. For example, Judge Gardephe concluded that Valle's illegal database search, standing alone, did "not demonstrate that he had the specific intent to actually kidnap Andria Noble," *Valle*, 301 F.R.D. at 97, but he did not consider whether that search, in conjunction with the conduct and statements that followed, had anything to say about Valle's intent to kidnap.

Likewise, Judge Gardephe considered only the content of the co-conspirator emails when deciding whether they reflected a genuine intent to kidnap. *See Valle*, 301 F.R.D. at 104 (The co-conspirator communications "are replete with the same false, fictitious, and fantastical elements seen in the chats that the Government concedes are fantasy"). But Judge Gardephe did not place those communications in the context of (i) Valle's admission that some DFN members were real and that Khan and Bolinger were among the "more serious"; (ii) Valle's preparations—including surveillance and drafting a blueprint—to kidnap the targets named in the communications; (iii) Valle's insistence in those communications that he was serious about carrying out the kidnappings but afraid of being caught; and (iv) Valle's contemporane-

ous electronic searches for information on how to render a person unconscious, the related use of blunt objects and chloroform, and the physical address of Ponticelli. It was error to view the evidence in this piecemeal fashion. *See United States* v. *Bell*, 584 F.3d at 485 (reversing new trial grant where district court "made findings of fact on specific matters and did not appear to review the record as a whole."). Judge Gardephe should have viewed the evidence as a whole when determining its weight.

Judge Gardephe further erred—both factually and legally—by requiring the Government to provide proof of a real-fantasy dichotomy that was never part of its case. As discussed above, an agent testified that he separated Valle's communications with other DFN members into real and fantasy categories so that he could focus his investigation on those that were most likely to be real. But the Government never claimed that all the communications in the fantasy category were, in fact, fantasy. It was therefore factually incorrect for Judge Gardephe to find that the Government "concede[d]" that the communications that were not with the three co-conspirators were "overwhelmingly fantasy role-play." *Valle*, 301 F.R.D. at 104. That error infected both the sufficiency and new-trial analysis. The Government should not have been required to explain how Valle's other DFN-related communications factored, or did not factor, into his plans; its burden was to establish through all the evidence that the communications with at least one of the named co-conspirators reflected a genuine agreement to commit a kidnapping.

Even if the Government had conceded that Valle's communications with DFN members other than Van Hise, Khan, and Bolinger were nothing more than fantasy, that concession did not impose a burden on the Government to draw out differences *in content* between those and the co-conspirator communications. The communications could have been—and were—distinguished by extrinsic factors, most prominently Valle's post-arrest statements about the seriousness of his co-conspirators' intent. This Court has recognized in a number of contexts that a statement, the text of which is open to multiple interpretations, takes on clearer meaning when evaluated against the surrounding events and circumstances. *See, e.g.*, *NLRB* v. *New York Univ. Medical Ctr.*, 702 F.2d 284, 290 (2d Cir. 1983) (holding that "the statement 'we mean business' in context seemingly refers to the prior discussion of the need for defending employee rights vigorously" and not "retributive rage" against employer). Judge Gardephe should have applied that principle here and not held the Government to distinguish the two categories of communications based on content alone.[21]

Judge Gardephe's decision is further impaired by a series of factual errors. In addition to the errors underlying the real-false dichotomy (including that

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[21] Even if a content-based distinction was required, the Government satisfied that requirement by drawing out distinctions between the two categories of communications, as described above in Point I.B.2.c.

the Government ever conceded the point), Judge Gardephe also held that Valle took "no concrete steps . . . toward kidnapping anyone." *Valle*, 301 F.R.D. at 88-89. But that finding ignores the concrete step of surveillance—in New York's Upper East Side and in a Maryland suburb—that Valle took with respect to two of his victims (Tr. 288-90, 1033-34), as well as his using PBA cards to obtain addresses and establish relationships of trust (Tr. 284, 907-08).

Judge Gardephe also supported his decision with the factual finding that "alleged agreements to kidnap specific women on specific days come to naught without inquiry, explanation, or comment." *Valle*, 301 F.R.D. at 104. But that finding overlooks evidence that (i) Van Hise was unable to obtain the required payment, (ii) Khan was unable to travel to the United States at all, and (iii) Bolinger was unable to arrive in September because the notice was too short. (Tr. 434-38, 442, 455, 628; GX 417, 404). It also overlooked evidence of Valle's reluctance to do the kidnapping alone (Tr. 627-28), his fear of being caught (Tr. 438, 614), and the co-conspirators' frustration with Valle for not following through on his plans promptly (Tr. 629-30).[22]

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[22] The finding also overlooked that the communications admitted at trial were not likely to be a complete record of all the discussions between Valle and his co-conspirators. The evidence established that Valle's communications with his co-conspirators over the DFN had been erased and were therefore unavailable at trial. (Tr. 652, 840-41). It was reasonable

The legal and factual errors in Judge Gardephe's review of the weight of the evidence caused him to improperly set aside a guilty verdict that "was amply justified" by cogent evidence and plausible inferences. *Coté*, 544 F.3d at 104. In light of these errors, it was an abuse of discretion to order a new trial.

2. There Was Nothing Improper about the Summation Arguments

Judge Gardephe's apparent alternate ground for ordering a new trial is equally unsustainable.[23] In his decision, Judge Gardephe identified three areas of the Government's summation that he considered improper: (i) relying on the testimony of Valle's wife to establish whether the kidnaping plot was real or fantasy; (ii) emphasizing the abnormality of Valle's alleged fantasies; and (iii) commenting on Valle's status as a police officer. These arguments were proper; but even if they were not, they fall far short of providing a basis for a new trial.

At trial, none of these arguments drew objection from the defense or spontaneous rebuke from the

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to infer that Valle and his co-conspirators continued to communicate through the online forum where they first met and those communications might have provided additional insight into their plans.

[23] In his decision, Judge Gardephe noted that a new trial could be warranted based on improper argument in summation that might have caused "the jury's verdict [to be] the product of unfair prejudice." *Valle*, 301 F.R.D. at 105.

judge. (Tr. 1531, 1579, 1581, 1612, 1615, 1616, 1517, 1578, 1608).[24] In the absence of a timely objection, relief for improper summation argument is only appropriate where the argument constituted a "flagrant abuse." *United States* v. *Zichettello*, 208 F.3d 72, 103 (2d Cir. 2000). Nothing identified by Judge Gardephe comes anywhere close to that level. The absence of objection is particularly telling here, as this trial was vigorously contested, with defense counsel lodging numerous objections throughout the trial, including during summation. That the argument did not strike defense counsel or the District Court as improper when it was made reflects the remote chance that it resulted in any unfair prejudice to Valle, much less the "substantial prejudice" normally required to obtain a new trial. *United States* v. *Elias*, 285 F.3d 183, 190 (2d Cir. 2002). It is equally significant that the three identified arguments do not fall within the categories of improper summation that have most troubled this Court, such as vouching for witnesses, referring to evidence outside the record, and commenting on the possible consequences of failing to convict. *See, e.g.*, *United States* v. *Certified Envtl. Servs.*, 753 F.3d 72, 94-95 (2d Cir. 2014).

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[24] In all of the relevant passages, there was only one defense objection, which was lodged when the prosecution stated that Valle was "walking around New York City every single day with a loaded weapon." (Tr. 1578). The basis for the objection is not in the record, and it was overruled by Judge Gardephe.

Indeed, it is far from clear that the prosecution arguments identified by Judge Gardephe were even improper.

First, the Government's reference to Mangan's reaction to the kidnapping communications was brief, taking up less than half a page in a summation that spanned 28 transcript pages (Tr. 1514-42); was not emphasized in the main summation or even mentioned in rebuttal summation; and did not dwell on any sensational aspect of the case. In its entirety, the argument went as follows:

> Look at the way his wife, the person who knew him best reacted when she read his words, when she saw his images and when she learned of his plans for havoc and violence. What was her response? Did she say, oh, that's just my husband getting into some crazy stuff? No. She took her baby and fled. She got out as fast as she could. She got out of there because this was not a sick joke. This was not just pornography. These were real plans for violence.

(Tr. 1531). Judge Gardephe took a dim view of the argument because "it presented a risk that the jury would improperly decide the critical question of criminal intent based, at least in part, on Mangan's evaluation of Valle's intent." *Valle*, 301 F.R.D. at 107. In reaching that conclusion, Judge Gardephe relied on out-of-circuit precedent, not acknowledging that this Court has recognized that "there is no theoretical prohibition against allowing lay witnesses to give

their opinions as to the mental states of others." *United States* v. *Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992); *accord United States* v. *Garcia*, 291 F.3d 127, 141 (2d Cir. 2002); *United States* v. *Guzzino*, 810 F.2d 687, 699 (7th Cir. 1987) ("[L]ay opinion testimony as to the mental state of another is indeed competent under [Rule 701]" and "is therefore neither conclusively nor presumptively inadmissible."); *United States* v. *Locke*, 643 F.3d 235, 239 (7th Cir. 2011) (same).

Lay witnesses may offer such an opinion when it is (i) rationally based on personal perceptions; (ii) helpful to determining a fact in issue; and (iii) not the product of expert knowledge. *United States* v. *Rea*, 958 F.2d at 1215; *see, e.g.*, *Bohannon* v. *Pegelow*, 652 F.2d 729, 731 (7th Cir. 1981) (affirming lay opinion testimony from eye witness that arrest was result of racial bias). Here, Mangan's testimony was based on her three-year-long relationship with Valle, during which she personally observed his methods of communication. (Tr. 150). She had a sound basis to gauge whether Valle's communications were serious or not because she had communicated with him about a variety of subjects over a significant period of time. (Tr. 155, 156, 163). The opinion of someone in such a situation would aid a jury in determining whether the communications at issue were typical of Valle's style of fantasy communications or more consistent with his manner of communicating serious information.

There was nothing inherently improper in presenting this argument to the jury, as it was based on

personal observation, helpful to the jury, and not reliant on expert knowledge. *See Rea*, 958 F.2d at 1215. Insofar as it violated an evidentiary ruling, Judge Gardephe would have been well within his rights to instruct the prosecutor to terminate the argument and move on. But he did not give that instruction, which suggests that not even he, let alone the prosecutor (or defense counsel who did not object), viewed the argument as improper at the time it was made.

Second, responding to the defense argument that Valle's communications and actions amounted to sexual fantasies of the sort people commonly have (Tr. 1561-62), the Government urged the jury to reject that false equivalency. In rebuttal, the prosecution emphasized that these so-called fantasies were "disturb[ing]," "not . . . OK," "not normal," and "not [about] sex." *Valle*, 301 F.R.D. at 107-08. In his post-trial decision, Judge Gardephe faulted the prosecution for violating his instructions not to argue whether "Valle's sexual interest were 'okay' or 'not okay.'" *Id.* at 107. But that is not a fair critique of this line of argument. Rather than attacking Valle as a sexual deviant, this argument disputed the very premise that Valle's communications were about a sex-based fantasy rather than a real plan to kidnap and murder his victims.

As Judge Gardephe recognized at the end of the trial, the prosecutor's argument was a fair response to defense counsel attempts in her summation "to minimize the significance of [Valle's] sadistic fantasies." (Tr. 1624). At the time, Judge Gardephe considered it "appropriate rebuttal" for the Government "to

argue to the jury that those sadistic fantasies, in essence, can't be minimized, can't be ignored in the context of this case in the sense that they might be revealing as to the defendant's true intent." (Tr. 1642). In essence, the prosecutor urged the jury to reject the very premise that Valle's communications could be dismissed as something innocuous as fantasy.

Judge Gardephe did not explain what caused his view of this argument to change between the time of the trial and the issuance of his post-trial decision, but the fact that the argument could be construed—by Judge Gardephe no less—as entirely appropriate demonstrates that this argument was not improper. Because "courts will not lightly infer that every remark [in summation] is intended to carry its most dangerous meaning," *United States* v. *Farhane*, 634 F.3d at 167 (internal quotation marks omitted), Judge Gardephe should not have inferred that these comments were intended as a slur against Valle rather than a fair response to the very idea that Valle's kidnapping conspiracy was simply role-playing fantasy.

Third, the Government's reference to Valle's employment as a police officer was not improper. While Judge Gardephe feared that these comments might cause the jury to hold Valle "to a higher standard because he is a police officer," *Valle*, 301 F.R.D. at 108, that was not the purpose of the argument. As even Judge Gardephe recognized, "Valle's possession of a gun, handcuffs, and a police badge . . . could have proven useful in a kidnapping. Moreover, Valle used his status as an NYPD officer to query NYPD data-

bases for information about women who were alleged kidnapping targets." *Id.* at 108 n.60. Those permissible bases for raising Valle's employment fully justified the Government's argument, and there is no basis to conclude that some other, improper purpose was advanced through the argument.

Even if the latter two arguments were improper, Judge Gardephe's instructions to the jury were sufficient to remedy any risk of substantial unfairness. Prior to deliberations, Judge Gardephe reminded the jury that it could not (i) hold Valle's deviant sexual interests against him (Tr. 1641); or (ii) subject Valle to a heightened standard of conduct because he was a police officer (Tr. 1631). Insofar as Judge Gardephe expressed concern that the jury might disregard those instructions, *Valle*, 301 F.R.D. at 109, that concern was not well founded in light of the long-recognized rule that "[a]bsent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." *United States* v. *Downing*, 297 F.3d 52, 59 (2d Cir. 2002). There was no basis to deviate from that presumption here.

CONCLUSION

The District Court's order setting aside the jury's verdict on Count One should be vacated, and the case remanded to the District Court solely for the imposition of sentence.

Dated: New York, New York
November 12, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 19,936 words in this brief, which was authorized by this Court's November 4, 2014 Order.

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