

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2009

(Argued: May 19, 2010

Decided: August 3, 2010)

Docket No. 09-1457-cr

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UNITED STATES OF AMERICA,

Appellee,

- v.-

TODD J. BROXMEYER,

Defendant-Appellant.

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Before: JACOBS, Chief Judge, MINER and WESLEY,  
Circuit Judges.

Todd Broxmeyer, convicted in the United States District Court for the Northern District of New York (McAvoy, J.), contests the sufficiency of the evidence as to both the production of child pornography (Counts One and Two) and the transportation of a minor across state lines with the intent to engage in criminal sexual activity (Count Four); he also raises an as-applied challenge to the constitutionality of

1 the statute criminalizing the production of child  
2 pornography. No appeal is taken as to the other counts of  
3 conviction. We agree as to insufficiency; reverse the  
4 convictions on Counts One, Two, and Four; and remand for re-  
5 sentencing. Judge Wesley dissents as to Count Four in a  
6 separate opinion.

7

8 JAMES P. EGAN (Alexander Bunin,  
9 Lisa A. Peebles, on the brief),  
10 Federal Public Defender's  
11 Office, Syracuse, New York, for  
12 Appellant.

13  
14 NATHANIEL J. DORFMAN (Miroslav  
15 Lovric, on the brief), for  
16 Richard S. Hartunian, United  
17 States Attorney's Office for the  
18 Northern District of New York,  
19 Albany, New York, for Appellee.

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22 DENNIS JACOBS, Chief Judge:

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24 Todd Broxmeyer, convicted in the United States District  
25 Court for the Northern District of New York (McAvoy, J.),  
26 challenges the sufficiency of the evidence to support his  
27 convictions for [i] production of child pornography and [ii]  
28 transportation of a minor across state lines with the intent  
29 to engage in criminal sexual activity. He also raises an  
30 as-applied challenge to the statute criminalizing the

1 production of child pornography.

2 Broxmeyer, a 37-year-old field hockey coach, entered  
3 into a sexual relationship (legal under state law) with a  
4 17-year-old player. The two counts alleging production of  
5 child pornography are premised on two photos (one per count)  
6 that the girl took of herself. He was found to have induced  
7 her to produce them; but while there is evidence that he  
8 encouraged her to take photographs of that kind, and that  
9 she took several with his encouragement, there is no  
10 evidence that he encouraged her to take the two photos  
11 specified in the two counts of conviction.

12 The transportation count is premised on the round-trip  
13 travel of a 15-year-old field hockey player from her home in  
14 Pennsylvania to a field hockey practice in New York where  
15 Broxmeyer was coach. He drove her back home, stopping en  
16 route for a sexual encounter with her before crossing the  
17 state line.

18 We agree with Broxmeyer on the sufficiency challenges;  
19 reverse the convictions on Counts One, Two, and Four; and  
20 remand for re-sentencing on the counts of conviction as to  
21 which no appeal was taken (attempted production of child  
22 pornography and possession of child pornography).

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**I**

Broxmeyer was for some years a field hockey coach to girls 14-to-18 years old. During this career, Broxmeyer engaged in sexual relationships with several of his players, some of whom were younger than 18. These relationships involved both physical acts and "sexting" (defined here to mean the exchange of sexually explicit text messages, including photographs, via cell phone).

In September 2008, Broxmeyer was convicted by a jury on all counts of a five-count indictment, of which Counts One, Two, and Four are at issue on this appeal:

- **Counts One and Two:** Production of child pornography, in violation of 18 U.S.C. § 2251(a);
- **Count Three:** Attempted production of child pornography, in violation of 18 U.S.C. § 2251(a), (e);
- **Count Four:** Transportation of a minor across state lines with the intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a); and
- **Count Five:** Possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).<sup>1</sup>

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<sup>1</sup> In addition, Broxmeyer pled guilty to state charges. See Broxmeyer Sentenced on Broome County Charges, Action News, WBNG12, May 20, 2009, available at <http://www.wbng.com>

1           At the close of the government's case-in-chief,  
2 Broxmeyer moved pursuant to Federal Rule of Criminal  
3 Procedure 29(a) for a judgment of acquittal on Counts One,  
4 Two, and Four. The district court denied the motion as to  
5 Count Four and reserved judgment as to Counts One and Two.  
6 A week after his conviction, Broxmeyer moved pursuant to  
7 Federal Rule of Criminal Procedure 29(c) for a judgment of  
8 acquittal on all five Counts or, in the alternative, for a  
9 new trial pursuant to Federal Rule of Criminal Procedure  
10 33(a). By written order dated November 4, 2008, the  
11 district court denied the motion in full.

12           On April 2, 2009, the district court sentenced Broxmeyer  
13 to concurrent terms of 360 months' imprisonment on each of  
14 Counts One, Two, and Three; 480 months on Count Four; and  
15 120 months on Count Five. (The advisory Guidelines sentence  
16 was life imprisonment.)

17           In Point II, we review the sufficiency of the evidence  
18 to support the convictions for production of child  
19 pornography. In Point III, we review sufficiency as to the  
20 transportation Count.

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**II**

Counts One and Two allege that Broxmeyer produced two sexually explicit pictures (one per Count) that a 17-year-old field hockey player took of herself.

**A**

Broxmeyer met A.W. in 2005, while he was coaching at a field hockey camp in New England.<sup>2</sup> Over the next few years, and through her senior year in high school, A.W. attended Broxmeyer's practices at field hockey camps across Pennsylvania, New Jersey, and New York.

Beginning in the spring of 2007 (and continuing until his arrest in December 2007), Broxmeyer and A.W.--who was then 17--began a consensual sexual relationship, legal under New York's statutory rape law.<sup>3</sup> The two engaged in sexting as well as physical sex.

They exchanged images as follows. They used their cell

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<sup>2</sup> Pursuant to Federal Rule of Criminal Procedure 49.1(a)(3), the parties refer to the girls (and their parents) by their initials. We will do the same here.

<sup>3</sup> The age of consent under New York law is 17. N.Y. Penal Law § 130.05(3)(a); see also id. §§ 130.25, 130.40. However, for purposes of 18 U.S.C. § 2251, A.W. was a "minor" under federal law during her sexual relationship with Broxmeyer. 18 U.S.C. § 2256(1).

1 phones to take pictures of themselves engaged in sexual acts  
2 with each other. Broxmeyer texted A.W. a picture of his  
3 arousal. Broxmeyer texted A.W. sexually explicit pictures  
4 of other field hockey players, including one of several  
5 girls in their underwear, who were arranged in a pyramid.  
6 Broxmeyer showed A.W. several sexually explicit pictures of  
7 field hockey players that he had saved to an internet photo  
8 album. He challenged A.W. to acquire naked pictures of  
9 other field hockey players, and A.W. obliged. A.W. also  
10 texted Broxmeyer explicit photos of herself. Broxmeyer  
11 never expressly asked A.W. to send him pictures of herself,  
12 but he did tell her that he liked them and that she was  
13 doing something nice by sending them to him.

14 Counts One and Two relate to two photos--one per Count  
15 --that A.W. took of herself and texted to Broxmeyer. The  
16 first ("Photo 1") shows A.W. from the neck down, naked,  
17 touching her private parts. The second ("Photo 2") shows  
18 A.W. using a handheld showerhead to spray water between her  
19 legs. But there is no evidence as to when the two photos at  
20 issue were taken--i.e., produced--or how or whether their  
21 production fits into the series of other communications and  
22 exchanges.

1 **B**

2 The federal statute criminalizing the production of  
3 child pornography, 18 U.S.C. § 2251(a), provides:

4 Any person who employs, uses, persuades, induces,  
5 entices, or coerces any minor to engage in . . .  
6 any sexually explicit conduct for the purpose of  
7 producing any visual depiction of such conduct  
8 . . . shall be punished . . . if such person knows  
9 or has reason to know that such visual depiction  
10 will be transported or transmitted using any means  
11 or facility of interstate or foreign commerce or in  
12 or affecting interstate or foreign commerce  
13 . . . if that visual depiction was produced or  
14 transmitted using materials that have been mailed,  
15 shipped, or transported in or affecting interstate  
16 or foreign commerce by any means . . . . \_

17  
18 Section 2251(a) applies only to the actual *production* of  
19 child pornography; other statutes--not charged in this case  
20 --proscribe distribution. Cf. United States v. Dauray, 215  
21 F.3d 257, 263 (2d Cir. 2000) (explaining that 18 U.S.C.  
22 § 2252(a)(3) prohibits the sale or possession with intent to  
23 sell child pornography and § 2252(a)(2) prohibits the  
24 receipt or distribution of child pornography). To secure a  
25 conviction under § 2251(a), the government must prove beyond  
26 a reasonable doubt that: "(1) the victim was less than 18  
27 years old; (2) the defendant used, employed, persuaded,  
28 induced, enticed, or coerced the minor to take part in  
29 sexually explicit conduct for the purpose of producing a



1 visual depiction of that conduct; and (3) the visual  
2 depiction was produced using materials that had been  
3 transported in interstate or foreign commerce.” United  
4 States v. Malloy, 568 F.3d 166, 169 (4th Cir. 2009).

5 Broxmeyer does not contest the sufficiency of proof as  
6 to the first and third elements: A.W. was 17 when she took  
7 Photos 1 and 2; and the cell phone she used to take them was  
8 made in South Korea. His challenge is to the sufficiency of  
9 the evidence on the second element.

10 “A defendant who challenges the sufficiency of the  
11 evidence to support his conviction bears a heavy burden.”  
12 United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003)  
13 (internal quotation marks omitted). We must consider the  
14 evidence “in the light most favorable to the Government” and  
15 draw “all permissible inferences” in its favor. Id. “[T]he  
16 relevant question is whether, after viewing the evidence in  
17 the light most favorable to the prosecution, any rational  
18 trier of fact could have found the essential elements of the  
19 crime beyond a reasonable doubt.” Jackson v. Virginia, 443  
20 U.S. 307, 319 (1979); see also Jackson, 335 F.3d at 180  
21 (explaining that a judgment of acquittal is proper “only if  
22 the evidence that the defendant committed the crime alleged

1 was nonexistent or meager" (internal quotation marks and  
2 ellipsis omitted)). At the same time, a conviction cannot  
3 stand if it is based on mere speculation or guesswork. See  
4 United States v. Thai, 29 F.3d 785, 818-19 (2d Cir. 1994).

6 **C**

7 The decisive question here is whether the prosecution  
8 proved beyond a reasonable doubt that Broxmeyer persuaded,  
9 induced, or enticed A.W. to take Photos 1 and 2. The terms  
10 "persuade," "induce," and "entice" are not defined in  
11 § 2251(a), but they are "words of common usage that have  
12 plain and ordinary meanings," United States v. Gagliardi,  
13 506 F.3d 140, 147 (2d Cir. 2007), and we look to the  
14 dictionary for their common definitions, see VIP of Berlin,  
15 LLC v. Town of Berlin, 593 F.3d 179, 187 (2d Cir. 2010).  
16 "Persuade," "induce," and "entice" are in effect synonyms.  
17 See The Random House Dictionary of the English Language 1076  
18 (unabridged ed. 1971). The idea conveyed is of one person  
19 "lead[ing] or mov[ing]" another "by persuasion or influence,  
20 as to some action, state of mind, etc." or "to bring about,  
21 produce, or cause." Id. at 726 (defining "induce"); see  
22 also id. at 476 (defining "entice" as "to draw on by

1 exciting hope or desire; allure"); id. at 1076 (defining  
2 "persuade" to mean "to prevail on (a person) to do  
3 something, as by advising, urging, etc." or "to induce to  
4 believe; convince").

5         These are words of causation; the statute punishes the  
6 cause when it brings about the effect. Sequence is  
7 therefore critical. The facts of this case require us to  
8 belabor the obvious: Broxmeyer could only persuade, induce,  
9 or entice A.W. to take Photos 1 and 2 if his persuasion,  
10 inducement, or enticement came *before* she took them.

11 Broxmeyer's counsel failed to present this argument to the  
12 district court and conceded at oral argument that he raised  
13 it for the first time in his reply brief on appeal.

14 Generally speaking, such arguments are deemed forfeited.

15 See Local 377, RWDSU, UFCW v. 1864 Tenants Ass'n, 533 F.3d  
16 98, 99 (2d Cir. 2008); McCarthy v. S.E.C., 406 F.3d 179, 186  
17 (2d Cir. 2005). However, because "manifest injustice" would  
18 result if we were to invoke that rule here, see McCarthy,  
19 406 F.3d at 186-87, we go to the merits of this contention.

20         All that the record shows on this sequencing point is  
21 that A.W. turned 17 in January 2007; she took Photos 1 and 2  
22 when she was 17; and she began a sexual relationship with

1 Broxmeyer in the spring of 2007. There is nothing to tie  
2 Broxmeyer to Photos 1 and 2 except that he received them  
3 when she transmitted them. His receipt may or may not have  
4 violated § 2252--but that statute was not charged in the  
5 indictment. As to the *production* of Photos 1 and 2--which  
6 *is* charged--there is no evidence that Broxmeyer inspired it.  
7 For all the record evidence shows, Photos 1 and 2 could have  
8 been taken in the early part of 2007, for an audience other  
9 than Broxmeyer, or for A.W. alone; or during the preliminary  
10 stage of their encounter when she was flirting with him on a  
11 basis not yet reciprocated; or later in 2007, while in the  
12 course of her sexual relationship with Broxmeyer. Photos 1  
13 and 2 were taken in one of these three periods, but as to  
14 when--and whether they were taken before or after he  
15 solicited photos of her--one can only guess.

16 The government adduced no evidence on this point. At  
17 trial, the government questioned A.W. at length (she was a  
18 government witness, at least nominally); but she was not  
19 asked when in the sequence of events she took Photos 1 and  
20 2. The jury was left to speculate or guess. See Thai, 29  
21 F.3d at 818-19.

22 As to sequence, the government fudged. It adduced

1 evidence that during the sexual relationship: Broxmeyer took  
2 explicit photographs of the couple having sex; he challenged  
3 A.W. to take naked pictures of other field hockey players;  
4 A.W. and Broxmeyer took sexually explicit pictures of  
5 themselves and sent them to one another while sexting;  
6 Broxmeyer told A.W. that he thought the naked pictures A.W.  
7 sent of herself were "nice" and "hot"; and Broxmeyer made  
8 A.W. feel as though she "did something right" by sending him  
9 naked pictures (either of her or other girls; that is  
10 unclear). The government also relies heavily on A.W.'s  
11 testimony that there were approximately 15 pictures "taken  
12 during the entire time that [she] and Todd Broxmeyer engaged  
13 in any kind of sexual act." Gov't App. at 53. But none of  
14 this evidence is specific to Photos 1 and 2. Some of the  
15 evidence reflects encouragement or incitement by Broxmeyer  
16 that was presumably proscribed by § 2251(a); but there is no  
17 evidence that Photos 1 and 2 were among those taken at his  
18 behest.

19 Our analysis in United States v. Sirois, 87 F.3d 34 (2d  
20 Cir. 1996), is not to the contrary. There, the defendant  
21 himself took the pornographic pictures, and he was convicted  
22 of "using" the minors in violation of § 2251(a). In

1 rejecting the sufficiency challenge in that case, we held  
2 that "a defendant can be found to have 'used' a minor to  
3 produce child pornography if the minor serves as the subject  
4 of the illicit photographs *taken by the defendant.*" Id. at  
5 43 (emphasis added). Here, the photographs were taken by  
6 A.W., not Broxmeyer, and (to repeat) there is no evidence he  
7 induced her to take them.

8 To the extent the district court concluded that the jury  
9 could *infer* that A.W. took Photos 1 and 2 at Broxmeyer's  
10 prodding, no such inference was available: The government  
11 presented no evidence bearing on when Photos 1 and 2 were  
12 taken. In a footnote to its decision and order denying  
13 Broxmeyer's post-verdict motion, the district court observed  
14 that "[t]here was testimony at trial that [Broxmeyer] took  
15 photographs while engaging in sexual acts with A.W." Def.'s  
16 App. at 147. This is true, but irrelevant. Neither Photo 1  
17 nor Photo 2 showed Broxmeyer at all. Presumably there is a  
18 reason the government did not premise the § 2251(a) counts  
19 on the photographs that Broxmeyer took of him and A.W.  
20 having sex; but for present purposes, all that matters is  
21 that it did not do so. Whether Broxmeyer took photographs  
22 of A.W. having sex (or, indeed, took sexually explicit

1 photographs of other under-18 girls) has no bearing on the  
2 sole decisive issue of whether he persuaded, induced, or  
3 enticed A.W. to produce Photos 1 and 2.

4 The district court also cited evidence that Broxmeyer  
5 persuaded, induced, or enticed A.W. "*to send sexually*  
6 *explicit pictures of herself to him.*" Def.'s App. at 147  
7 (emphasis added). As we have explained, however, § 2251(a)  
8 applies only to the *production* of child pornography.  
9 Distribution is proscribed by § 2252, which was not charged.  
10 Accordingly, a § 2251(a) conviction cannot be premised on  
11 the fact that Broxmeyer persuaded, induced, or enticed A.W.  
12 *to send* him her pornographic self-portraits.

13 For these reasons, we hold that the government adduced  
14 insufficient evidence on which to sustain a conviction under  
15 18 U.S.C. § 2251(a); accordingly, we reverse the convictions  
16 on Counts One and Two. In light of this holding,  
17 Broxmeyer's as-applied commerce clause challenge to  
18 § 2251(a) has no further bearing on the outcome of this  
19 case. However, because the point was closely briefed by the  
20 parties and studied by the Court, we impart our view, now  
21 dicta, that the argument fails in light of the Supreme  
22 Court's decision in Gonzalez v. Raich, 545 U.S. 1 (2005).

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**III**

Count Four involves Broxmeyer's conviction for transporting then 15-year-old K.M. across state lines for the purpose of engaging in illegal sexual conduct with her.

**A**

K.M. was another of Broxmeyer's field hockey players. She lived in Pennsylvania, but on Saturdays K.M. and a friend would often attend Broxmeyer's practices in Binghamton, New York. Usually, they would be driven to and from practice by K.M.'s father (L.M.), or by the mother of her friend.

Consistent with this pattern, early in December 2007, K.M. told her father that she wanted to attend practice on Saturday, December 8, in New York. Originally, the plan was for L.M. to drive her to practice; she would spend the night at the home of another friend, J.B., who also planned on attending that practice; and L.M. would return to pick up K.M. on the afternoon of Sunday, December 9--he could not pick her up Sunday in the morning because of a prior family commitment. The plan seems to have changed when J.B.'s



1 parents offered to drive K.M. half-way home, to a point  
2 where L.M. would meet them and take K.M. the rest of the way  
3 home.

4 Later that week, Broxmeyer learned that K.M. was coming  
5 to practice and that she would spend the night at J.B.'s  
6 house. Broxmeyer offered to drive K.M. home--from New York  
7 to Pennsylvania--on Sunday morning on his way to a practice  
8 scheduled for later that afternoon in New Jersey. Father  
9 and daughter consented, although L.M. maintained that he  
10 could return to pick up K.M. in New York Sunday in the  
11 afternoon.

12 Events proceeded in accordance with the last of these  
13 three arrangements: L.M. drove K.M. to practice in New York  
14 on Saturday, December 8; K.M. stayed the night at J.B.'s  
15 home; and early Sunday morning, Broxmeyer picked up K.M. to  
16 drive her home to Pennsylvania. Shortly after picking her  
17 up (and before crossing the line from New York to  
18 Pennsylvania), Broxmeyer stopped at a local sports facility  
19 to get some equipment that he needed for his New Jersey  
20 practice. At his request, K.M. went inside to help him  
21 carry the equipment. Once inside, Broxmeyer caused K.M. to  
22 perform oral sex on him.

1 Broxmeyer then drove K.M. from the facility (in New  
2 York) to her home (in Pennsylvania) and told her not to tell  
3 anyone about the oral sex.<sup>4</sup>

4  
5 **B**

6 Title 18, section 2423(a) of the United States Code  
7 provides:

8 A person who knowingly transports an individual who  
9 has not attained the age of 18 years in interstate  
10 . . . commerce . . . with intent that the  
11 individual engage in . . . any sexual activity for  
12 which any person can be charged with a criminal  
13 offense, shall be fined under this title and  
14 imprisoned not less than 10 years or for life.

15  
16 To obtain a conviction under § 2423(a), the government must  
17 prove beyond a reasonable doubt that the defendant: "(1)  
18 knowingly transported a minor across state lines, (2) with  
19 the intent to engage in sexual activity with the minor, and  
20 (3) that the minor was under eighteen at the time of the  
21 offense." United States v. Chambers, 441 F.3d 438, 450 (6th  
22 Cir. 2006).

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<sup>4</sup> Receiving oral sex from a 15-year-old--regardless of whether it was consensual--is unlawful under New York state law. See N.Y. Penal Law § 130.40(2) ("A person is guilty of [a] criminal sexual act in the third degree when . . . [b]eing twenty-one years old or more, he or she engages in oral sexual conduct . . . with a person less than seventeen years old.").

1 Relevant to this appeal, § 2423(a) is also violated by  
2 aiding and abetting the transportation of a minor across  
3 state lines. United States v. Holland, 381 F.3d 80, 88 (2d  
4 Cir. 2004); see also 18 U.S.C. § 2(b) (“Whoever willfully  
5 causes an act to be done which if directly performed by him  
6 or another would be an offense against the United States, is  
7 punishable as a principal.”). Thus a defendant who causes a  
8 minor to be transported across state lines can be convicted  
9 under § 2423(a). Holland, 381 F.3d at 88.

10 K.M. took two interstate rides: from Pennsylvania to New  
11 York on Saturday, December 8; and from New York to  
12 Pennsylvania on Sunday, December 9. In denying Broxmeyer’s  
13 motion for a judgment of acquittal on Count Four, the  
14 district court focused only on the first ride, under the  
15 aiding and abetting theory of § 2(b). Def.’s App. at 149  
16 (“[T]here was ample evidence upon which the jury could have  
17 reasonably concluded beyond a reasonable doubt that  
18 [Broxmeyer’s] purpose in having K.M. transported, or *causing*  
19 her to be transported, to New York was to engage in sexual  
20 acts with her.” (emphases added)).

21 We consider both legs of the trip.  
22

1  
2 Pennsylvania to New York. K.M.'s attendance at the  
3 December 8 practice was not brought about by Broxmeyer. She  
4 was going to attend practice that Saturday, as she had done  
5 on prior occasions; her attendance was not contingent on  
6 Broxmeyer's offer to drive her home on December 9. Her  
7 father testified that although it would have been  
8 "difficult" for him to pick up K.M. on the Sunday morning,  
9 "that wouldn't be a big issue as long as [K.M.'s friend]  
10 wouldn't mind keeping [K.M.] to the afternoon. . . . Didn't  
11 seem like there was a big issue with that." Def.'s App. at  
12 86. He had "no reservations" about picking her up on Sunday  
13 afternoon: "I *always* had upon it myself [sic] I was coming  
14 up there in the afternoon [Sunday]." (emphasis added). Id.  
15 at 99, 102. So, he testified, "I was either going to come  
16 all the way [to pick K.M. up] or [Broxmeyer] had offered to  
17 drive her back down." Id. at 100.

18 The record thereby contradicts the government's  
19 contention--advanced without corresponding citations to the  
20 record--that Broxmeyer *caused* K.M. to travel from  
21 Pennsylvania to New York because, absent his offer to do so,

1 she would not have come to his practice that Saturday.<sup>5</sup>

2 The government also contends that L.M. "was unavailable  
3 to retrieve K.M. from New York on the morning of December 9,  
4 2007." Gov't Br. at 49. This is true as far as it goes.  
5 But L.M. testified that he could have picked her up on  
6 Sunday *afternoon*. An afternoon pickup would not have  
7 prevented K.M. from attending the practice: She was planning  
8 on an afternoon return before Broxmeyer offered to save her  
9 father the trip.<sup>6</sup>

10 Accordingly, the Pennsylvania-to-New York trip cannot be

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<sup>5</sup> The government argues, without record citation: "Without Broxmeyer's agreement to transport K.M. back from New York to Pennsylvania on December 9, K.M.'s father would not have brought his daughter to New York on December 8," Gov't Br. at 50; "there was no other mechanism for K.M. to be brought back to Pennsylvania on the morning of December 9," *id.* at 51; "Broxmeyer's commitment [to drive K.M. home on Sunday] 'put in motion' K.M.'s travel from Pennsylvania to New York by persuading her father to bring K.M. to New York on December 8," *id.* at 50; and, "even though Broxmeyer was not behind the wheel on December 8, 2007, he 'caused' [within the meaning of 18 U.S.C. § 2(b)] the transportation of K.M. from Pennsylvania to New York on that date," *id.* at 48.

<sup>6</sup> At oral argument in this Court, the government added another permutation: that when father and daughter left their house in Pennsylvania for the practice in New York on Saturday, they did so *knowing* that Broxmeyer was going to drive K.M. home the following day, and in this way Broxmeyer caused her trip across the state line. This argument conflates causation with knowledge.

1 the basis for Broxmeyer's § 2423(a) conviction.<sup>7</sup>

2  
3 New York to Pennsylvania. On their way from New York to  
4 Pennsylvania, but while still in New York, Broxmeyer had  
5 K.M. perform oral sex on him, in violation of New York law.  
6 The decisive question (disputed by the parties only in the  
7 footnotes in their appellate briefs) is whether a § 2423(a)  
8 conviction can lie where the unlawful sexual act occurs  
9 before the crossing of state lines, and where there is no  
10 evidence of an intent to commit a sexual act when state  
11 lines were crossed. We hold that it cannot.

12 The plain wording of the statute requires that the mens  
13 rea of intent coincide with the actus reus of crossing state  
14 lines.<sup>8</sup> Accord David J. Langum, *Crossing Over the Line*:

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<sup>7</sup> The dissent relies in part on K.M.'s testimony that her parents could not pick her up from practice on Sunday, December 9. Dissenting Op. at 9. But she reached this understanding for the first time only *after* she and her father arrived at the practice on December 8: "Q. When did it come into play that [Broxmeyer] would give you a ride? A. The first time I heard was when we got up there on December 8 . . . ." Def.'s App. at 116. K.M.'s testimony, considered in its entirety and in view of L.M.'s testimony, is too "meager" to sustain a conviction on Count Four. Cf. Jackson, 335 F.3d at 180 (internal quotation marks omitted).

<sup>8</sup> The only relevant actus reus is the crossing of state lines; § 2423(a) is a crime of intent, and a conviction is entirely sustainable even if no underlying criminal sexual

1     Legislating Morality and the Mann Act 4 (Univ. of Chicago  
2     Press 1994) (describing a precursor to § 2423(a) and noting  
3     that "the violation was complete upon the woman's crossing  
4     of the state line if the man *at that time* merely intended  
5     that the purpose of her travel be for any 'immoral  
6     purpose'" (first emphasis added)); cf. Morissette v. United  
7     States, 342 U.S. 246, 251-52 (1952) ("Crime, as a compound  
8     concept, generally constituted only from concurrence of an  
9     evil-meaning mind with an evil-doing hand . . . ."); United  
10    States v. Desena, 287 F.3d 170, 181-82 (2d Cir. 2002)  
11    (rejecting--on the facts--defendant's argument that the  
12    "coincidence of the mens rea and actus reus elements of the  
13    offense" was not proven because the defendant did not know  
14    of the conspiracy to assault until *after* he took the overt  
15    act leading to conspiracy liability).

16           The Eleventh Circuit's decision in United States v.  
17    Hersh, 297 F.3d 1233 (11th Cir. 2002), is consonant with our  
18    reading of the statute. There, the defendant was convicted  
19    of violating 18 U.S.C. § 2423(b), which then punished a

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act ever occurs. Accord United States v. Griffith, 284 F.3d  
338, 351 (2d Cir. 2002) (explaining that a defendant should  
be "on notice that he is [violating § 2423(a)] when he  
transports an individual of any age in interstate commerce  
for the purpose of prostitution").

1 "person who travels in interstate commerce . . . for the  
2 purpose of engaging in any sexual act . . . with a person  
3 under 18 . . . ." Hersh, 297 F.3d at 1245 (quoting the  
4 statute). The court explained, in a passage relevant here,  
5 that "[t]he government was required to prove, and did  
6 establish, that [the defendant] had formed the intent to  
7 engage in sexual activity with a minor *when he crossed state*  
8 *lines.*" Id. at 1246 (emphasis added). Thus, for § 2423(b),  
9 intent was ascertained as of the moment the state line was  
10 crossed. Section 2423(a) operates in the same way.

11 The district court charged the jury consistent with our  
12 reading of the statute. See Tr. at 375, Mar. 11, 2009  
13 (explaining that to convict on Count Four, the jury must  
14 find that the government proved beyond a reasonable doubt  
15 "[f]irst, that the defendant transported an individual  
16 across a state line or border; [s]econd, that the defendant  
17 did so with the intent that the individual engage in sexual  
18 activity . . . .").

## 20 CONCLUSION

21 For the foregoing reasons, we reverse the convictions on  
22 Counts One, Two, and Four, and remand for re-sentencing.



1 WESLEY, *Circuit Judge*, dissenting:  
2

3 I dissent from the majority's holding as to Count 4, in  
4 which Todd Broxmeyer was convicted by a jury of aiding and  
5 abetting the transportation of a 15-year-old girl over state  
6 lines with the intent to engage in unlawful sexual activity  
7 with her.

8 This case illustrates the importance of the  
9 institutional role that we play in a direct appeal  
10 challenging the sufficiency of the evidence supporting a  
11 criminal defendant's conviction. That role requires a  
12 delicate balance. On the one hand, we must respect the  
13 jury's essential place in our criminal justice system; that  
14 respect requires us to defer to a jury's conclusions  
15 regarding the evidence at a trial. In other words, we "may  
16 not usurp the role of the jury by substituting [our] own  
17 determination of the weight of the evidence and the  
18 reasonable inferences to be drawn for that of the jury."  
19 *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010)  
20 (internal quotation marks omitted). On the other hand,  
21 fundamental principles of justice require that a jury's  
22 decision to convict must rest on competent evidence adduced  
23 by the government at trial, and we must be satisfied that  
24 the evidence is capable of establishing the defendant's

1     guilt beyond a reasonable doubt. See *id.* In short, we must  
2     accept a jury's assessment of actual evidence, but not its  
3     speculation, when reviewing the imposition of criminal  
4     sanctions.

5             Based on these principles, I agree with the majority  
6     that there was insufficient evidence to support Broxmeyer's  
7     conviction as to Counts 1 and 2. Vacatur is appropriate  
8     because these Counts relate to two sexually explicit  
9     photographs that A.W. took of herself, and there is *no*  
10    evidence in the record regarding when during the year 2007  
11    those specific images were produced.

12            But the same cannot be said with respect to Count 4. To  
13    obtain a conviction on this Count, the government was  
14    required to prove beyond a reasonable doubt that: (1)  
15    Broxmeyer transported K.M., or caused her to be transported,  
16    over the Pennsylvania-New York border, (2) while intending  
17    to engage in illegal sexual activity with her, and (3) that  
18    K.M. was less than eighteen years old at the time. See *Op.*  
19    at 19. With respect to the first element, which is the only  
20    one in dispute, the government was permitted to seek a  
21    conviction based on an aiding and abetting theory. See *id.*

22            Our role here is clear: We must assess the evidence

1 regarding why it is that L.M. drove his daughter from  
2 Pennsylvania to New York on the morning of December 8, 2007.<sup>1</sup>  
3 The question for the jury was whether the government proved,  
4 beyond a reasonable doubt, that Broxmeyer caused L.M. to  
5 transport K.M. across state lines by promising to bring her  
6 home to Pennsylvania the next day. The jury answered "yes"  
7 to that question. The only issue for us, then, is whether  
8 there was sufficient evidence to support its conclusion. I  
9 would answer that question in the affirmative.

10 One of the most important portions of L.M.'s testimony  
11 regarding this issue came during his direct examination. I  
12 quote it here in full:

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<sup>1</sup> I agree with the majority that it is appropriate to examine both "legs" of K.M.'s trip on December 8-9, 2007, Op. at 20, and that the government could not satisfy its burden by relying on the evidence relating to her return to Pennsylvania, see *id.* at 22-25. The text of 18 U.S.C. § 2423(a) requires that the requisite *mens rea* be formed at or prior to the time of the transportation in question. The jury could infer from the fact that Broxmeyer forced K.M. to perform oral sex on him as soon as he was alone with her – a circumstance he brought to be by taking her to an empty sports complex on the morning of December 9 – that he caused her to be transported to New York for that purpose. But that inference, which is based on the sequence and proximity of the transportation to the illegal sex act, is not available when the sex act precedes the transportation in question. See Op. at 23. As such, the return leg of K.M.'s trip cannot serve as the basis for defendant's conviction on Count 4.

1 Q What happened on that weekend as far as  
2 your availability to transport [K.M.] back and  
3 forth or [K.M.] not being able to get back and  
4 forth?  
5

6 A Earlier in the week [K.M.] expressed  
7 interest in going up [to New York] for a practice  
8 session, and one of her friends from the team . . .  
9 offered to put her up for the night, so I would  
10 just need to drop her off on Saturday midday after  
11 her other responsibilities. She played for another  
12 club team down in . . . Pennsylvania, called  
13 Excalibur, so she had practice in the morning, and  
14 we came up in the afternoon on that particular day,  
15 but earlier in the week - [K.M.] expressed interest  
16 in coming up, but my issue was really can't [sic]  
17 spend the night because my son, who's 9, was  
18 serving his First Holy Communion on Sunday,  
19 December 9. Actually, it was a practice [for the  
20 Holy Communion ceremony] but it was required and  
21 mandatory for the parents to partake in the service  
22 that morning, so it would be difficult for me to  
23 come up and pick her up in the morning.  
24

25 I said that wouldn't be a big issue as long as  
26 [K.M.'s friend] wouldn't mind keeping you to the  
27 afternoon and I can come up maybe mid to late  
28 afternoon. Didn't seem like there was a big issue  
29 with that. But I guess as things developed in the  
30 course of that week, Todd Broxmeyer offered to,  
31 since he's going to be traveling down to New Jersey  
32 for a Sunday practice, that he could drop [K.M.]  
33 off at home. Again, I believe he lived about five,  
34 ten minutes off of the exit for Pennsylvania  
35 Turnpike downtown exit. It seemed reasonable,  
36 however reluctant that we were.  
37

38 Def.'s App. at 85-87, Tr. at 205-07.

39 The jury could infer from this and other testimony that  
40 "earlier in the week" that began on December 3, 2007, K.M.

1 "expressed interest" in attending practice in New York on  
2 December 8 and spending that night with a friend. *Id.* at  
3 86, Tr. at 206. At the time of the request, L.M. "said" to  
4 K.M. "that wouldn't be a big issue *as long as* [your friend]  
5 wouldn't mind keeping you to the afternoon" on Sunday. *Id.*  
6 (emphasis added). Thus, L.M.'s testimony suggested that he  
7 did *not* immediately agree to take K.M. to the practice and  
8 instead imposed a condition precedent on the trip. And  
9 there was no testimony indicating that this condition was  
10 satisfied at any time, much less in advance of Broxmeyer's  
11 intervening offer to drive K.M. home.

12 Specifically, L.M. went on to testify that, "as things  
13 developed in the course of that week, Todd Broxmeyer offered  
14 to . . . drop [K.M.] off at home" on the day after the  
15 practice. *Id.* L.M. thought that plan "seemed reasonable,  
16 however reluctant that we were." *Id.* at 86-87, Tr. at 206-  
17 07. L.M.'s "reluctan[ce]" did not arise out of distrust for  
18 Broxmeyer. Instead, L.M. expressed "a lot of reluctance"  
19 because the trip to New York would be too disruptive during  
20 the course of what was already going to be a busy weekend  
21 for the family. *Id.* at 88, Tr. at 208. He recalled asking  
22 K.M., "do you really want to do this, do you really need to

1 go up there?" *Id.* This initial reluctance supports the  
2 inference that L.M. had not decided to drive K.M. to  
3 practice before Broxmeyer offered to drive her home.  
4 Indeed, L.M.'s reluctance suggests a possibility that is  
5 ignored by the majority: He might have declined to take her  
6 to New York altogether in the absence of Broxmeyer's offer.

7 On or about December 7, 2007 – *i.e.*, "[t]he day before"  
8 the practice – Broxmeyer contacted L.M. to "confirm[]" that  
9 he would drive K.M. home on December 9. *Id.*; see also *id.*  
10 at 99, Tr. at 219 (L.M. testifying on cross-examination that  
11 the "[transportation] issue was days before" and that he  
12 spoke with Broxmeyer "a couple days before going up [to New  
13 York]"). The existence of this "confirmed" plan takes on  
14 added significance in light of L.M.'s testimony that he  
15 would "never drop off [his] daughter if [he] didn't know  
16 when and where she was going to be to and from." *Id.* at 99,  
17 Tr. at 219. The jury was entitled to believe L.M.'s  
18 assertion and apply it to the facts about which he was  
19 testifying. In the absence of the plan with Broxmeyer,  
20 according to L.M., he would "never" have taken K.M. to New  
21 York. Put another way, it was *because of* Broxmeyer's  
22 "confirmed" offer of a return trip that L.M. agreed to drive

1 K.M. to the practice. Therefore, a rational fact finder  
2 could conclude that Broxmeyer's offer to drive K.M. home  
3 caused L.M. to decide to bring her to New York on December  
4 8. While L.M.'s testimony may not compel this result, our  
5 role does not permit us to resolve competing inferences  
6 supported by the record. The jury has already done that,  
7 and it has resolved them against Broxmeyer.

8 In an attempt to support its contrary holding, the  
9 majority takes selective quotations from L.M.'s testimony  
10 and asserts that K.M. "was going to attend practice [in New  
11 York] that Saturday, as she had done on prior occasions; her  
12 attendance was not contingent on Broxmeyer's offer to drive  
13 her home on December 9." Op. at 20. The common thread that  
14 unites each of the quotes cited by the majority is L.M.'s  
15 recollection that he was confident at the time that he would  
16 have been able to pick K.M. up on Sunday. See *id.* at 20-21.  
17 The majority infers from L.M.'s confidence – as it must,  
18 because there was no testimony to this effect – that it was  
19 inevitable from the time K.M. first made the request that  
20 L.M. was going to take her to New York. However, the jury  
21 was not obligated to adopt this mode of analysis, and the  
22 majority improperly draws inferences against the government

1 in relying on it.

2 The testimony quoted in the majority opinion that most  
3 supports its position that L.M. decided to take the trip  
4 before Broxmeyer's offer of return transportation was  
5 elicited during the cross-examination of L.M.:

6 Q When did the plan change from the [parents  
7 of K.M.'s friend] giving your daughter a ride back  
8 home to Mr. Broxmeyer?  
9

10 A Again, that was such - in passing I was  
11 either going to come all the way up or Todd had  
12 offered to drive her back down.  
13

14 Def.'s App. at 100, Tr. at 220.

15 Even assuming, *arguendo*, that this testimony tended to  
16 establish that L.M.'s decision to drive K.M. to New York  
17 "was not contingent on Broxmeyer's offer to drive her home  
18 on December 9," Op. at 20, nothing required the jury to  
19 accept this response from L.M., or any other portion of his  
20 testimony, at face value. See *United States v. Frampton*,  
21 382 F.3d 213, 221 (2d Cir. 2004). For any number of  
22 reasons, a rational juror might reject this father's  
23 recollection of his approach to that weekend, which was  
24 presented at trial from an *ex post* perspective that was  
25 likely tainted by hindsight bias resulting from the events  
26 that ultimately transpired.





1           In sum, the contrast between the majority's treatment of  
2 the sufficiency issues in this appeal lays bare the flaws in  
3 its analysis of Count 4. With respect to Counts 1 and 2,  
4 there was *no evidence* regarding when the two sexually  
5 explicit photographs at issue were produced. As a result,  
6 the jury could only speculate as to whether Broxmeyer caused  
7 A.W. to produce those photos. Therefore, I agree that the  
8 conviction as to Counts 1 and 2 must be vacated.

9           With respect to Count 4, however, the majority has  
10 invaded the province of the jury to cast aside the evidence  
11 supporting its verdict. Based on the evidence relating to  
12 the sequence of events, L.M.'s initial "reluctance" about  
13 the trip, K.M.'s testimony that her parents "couldn't" pick  
14 her up in New York, and the timing of L.M.'s communications  
15 with Broxmeyer, the jury was entitled to infer that it was  
16 Broxmeyer's offer to drive K.M. home that caused L.M. to  
17 drive her to New York.

18           While the government's case was not ironclad, it is an  
19 extraordinary thing to set aside a jury's verdict. We must  
20 exercise that power sparingly, especially in the highly  
21 fact-intensive context of questions relating to causation.  
22 With respect to Count 4, it is unnecessary to disturb the  
23 jury's verdict. Therefore, I dissent.