No. 14-30134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL CONNELLY, SR.,

Defendant-Appellant

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

BRIEF OF THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is taken from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. On June 23, 2014, the district court sentenced the defendant and entered final judgment. R. 100; ER III:385-390.[1] Defendant filed a timely notice of appeal. ER III:391-392. This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "ER _:__" refers to the Appellant's Excerpts of Record by volume and page number. "R. __:__" refers, respectively, to the document recorded on the

(continued…)

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it excluded evidence, pursuant to Federal Rule of Evidence 609(b), of the victim's prior convictions that were more than ten years old, and admitted three more recent felony convictions, two of which were for the same type of offense as the excluded convictions.

2. Whether the evidence is sufficient to support defendant's conviction under 18 U.S.C. 1001 for denying during his interview with an Agent of the Federal Bureau of Investigation that he told the victim that she would go to jail if she did not perform oral sex on him.

3. Whether the error in the district court's jury instruction on the willfulness element of 18 U.S.C. 1001 was harmless.

STATEMENT OF THE CASE

1. Procedural History

On May 1, 2013, Michael Connelly, Sr. (Connelly or defendant) was charged in a three-count Indictment in the District of Montana with violating 18

(…continued)
district court docket sheet and page number. "Br._" refers to the pagination set by this Court for appellant's opening brief. "App. __" refers to the pagination set by this Court for appellant's Appendix attached to his opening brief. "Trial Exh. __" refers to the exhibit admitted at trial.

U.S.C. 2242(1) (sexual abuse) and 1153(a) (offenses on Indian territory), 18 U.S.C. 242 (violation of civil rights under color of law), and 18 U.S.C. 1001 (willfully and knowingly making a false statement to a Federal Bureau of Investigation (FBI) Special Agent regarding a matter within the FBI's jurisdiction). ER II:11-14. The Indictment is based on an incident that occurred on September 1, 2012, when defendant, then a Blackfeet Law Enforcement Services police officer, forced a woman, E.J.R.C., to perform oral sex on threat of her going to jail, and subsequently lied about making this threat during an interview with an FBI Agent investigating this assault.

Prior to trial, defendant moved for permission to cross-examine E.J.R.C. regarding several prior convictions, including convictions that were more than ten years old. R. 62. The district court ruled that defendant could cross-examine E.J.R.C. on three felony convictions that were within the ten-year period specified in Rule 609(b) of the Federal Rules of Evidence, but was not permitted to cross-examine her on convictions that were more than ten years old. ER I:1-2.

A two-day trial began on February 18, 2014. After the United States' case-in-chief, defendant moved for an acquittal on Count 3, asserting that the United States had failed to prove that he knowingly made a false statement. ER I:3-5. The United States opposed defendant's motion (ER I:5-7), which the district court

denied. ER I:7-8. At the close of all of the evidence, defendant renewed his motion, which the district court again denied. ER I:10.

On February 20, 2014, the jury convicted defendant on Counts 2 (violation of civil rights) and 3 (false statement), and acquitted him on Count 1 (sexual abuse). ER III:375-378. On June 23, 2014, the district court sentenced defendant, and entered a judgment that imposed 12 months' and 24 months' imprisonment on Counts 2 and 3, respectively, to run concurrently; one year and three years of supervised release on Counts 2 and 3, respectively, to run concurrently; and a $125 assessment. ER III:385-390; R. 100. On July 3, 2014, defendant filed a timely notice of appeal. ER III:391-392.[2]

2. Defendant's Sexual Assault Of E.J.R.C.

Viewed in the light most favorable to the government,[3] the evidence showed the following:

At approximately 4:20 p.m. on September 1, 2012, E.J.R.C. was outside of Ick's Liquor Store, which is located in Browning, Montana, on the Blackfeet Indian Reservation. ER II:108-109, 124, 158. Defendant, an officer with the

[2] On July 31, 2014, the United States filed a notice of a cross-appeal on defendant's sentence. R. 109. On October 29, 2014, the United States filed an unopposed motion to dismiss its cross-appeal, which this Court granted on November 4, 2014.

[3] See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); pp. 22-23, *infra*.

Blackfeet Law Enforcement Services – on duty, in uniform, and driving his unmarked patrol car – arrived outside the liquor store. ER II:110-111, 118-119, 190; App. 46-47, 49, 58; Tr. Exh. 3-4.[4] An individual standing near E.J.R.C. asked defendant for a ride, and defendant refused. ER II:110. E.J.R.C. also said that she needed a ride to the 600 block in Browning; defendant asked E.J.R.C. for the specific location, and she responded. ER II:110-111. Defendant then moved items off the front passenger seat of his car and offered E.J.R.C. a ride, which she accepted. ER II:110-111, 144.

Defendant did not drive E.J.R.C. to the 600 block. ER II:112. Instead, he drove down Main Street past the turn to get to the 600 block to an area called Depot Coulee. ER II:112; App. 47. Depot Coulee is approximately three-quarters of a mile from Ick's store in an isolated, secluded area on the Blackfeet Indian Reservation. ER II:112-113, 119, 158. When defendant stopped at Depot Coulee,

[4] Trial Exhibits 3 and 4 are recorded interviews of defendant by FBI Agents Brian Kimball and Stacey Smiedala, respectively, which were played at trial. No transcripts of either recording were offered at trial. Defendant prepared unofficial transcripts of the two recordings that are submitted as an Appendix to his brief. Defendant's transcript of the interview by Agent Kimball (Trial Exhibit 3) includes communications that were *not* played to the jury. Trial Exhibit 3 did *not* include the brief exchanges between Agent Kimball and defendant when he agreed to take a polygraph examination or defendant's identifying information (*e.g.*, address, date of birth, etc.). Contemporaneously with the filing of this brief, we have filed a motion to submit to this Court a copy of the original recordings of Trial Exhibits 3 and 4.

he asked E.J.R.C. if she could see another car ahead of them; she replied she did not see anything. ER II:113.

Defendant placed the car in park, held E.J.R.C.'s hair with his hand, and started kissing her. ER II:113, 132, 142. E.J.R.C., who had drunk approximately four cans of "black can" beer earlier in the day, asked defendant for some gum, stating that her mouth tasted like a black can. ER II:96, 113, 133. The only gum defendant had was in his mouth, and he gave it to E.J.R.C. by mouth. ER II:113. She split the gum in half, and put half in her hand and half back in her mouth. ER II:113, 134, 140-141. When defendant started kissing E.J.R.C. she did not resist, but she became uncomfortable as time went on. ER II:114-115. E.J.R.C. felt "trapped, because there was nowhere [she] was going to run." ER II:114. She asked for defendant's gum because she knew defendant was a police officer, that he had more authority than she did, and she "needed some kind of evidence, because [she] knew what [the defendant] was doing was not okay." ER II:114, 141.

After kissing E.J.R.C., defendant sat back, unzipped his uniform pants, and withdrew his penis. ER II:115; App. 47, 59; Tr. Exh. 3-4. There was no prior discussion about this act: E.J.R.C. did not suggest or ask that defendant do this, nor did she help him in any way. ER II:119. When he removed his penis from his pants, defendant threatened E.J.R.C. by saying that she needed to perform oral sex

or she would go to jail. ER II:115-116, 118, 134; see ER II:100. E.J.R.C. was fearful at that time. ER II:116, 141. She did not believe defendant's comment was a joke. ER II:118. She decided that performing oral sex was better than going to jail. ER II:119, 125. E.J.R.C. would not have performed oral sex on defendant but for his abuse of his power and his threat of sending her to jail if she did not do so. ER II:116, 125, 134, 141.

E.J.R.C. performed oral sex on defendant while he held her head, and he ejaculated while his penis was in her mouth. ER II:120, 142. E.J.R.C. "felt violated" and was extremely upset by defendant's assault. ER II:120, 124. E.J.R.C. spit out defendant's semen in her hand because she feared no one would believe her – rather than a police officer – if she did not have some evidence. ER II:120, 134.

After the sexual assault, defendant started the car and drove back towards the populated area of town. ER II:121. E.J.R.C. asked to be let out at the first house where she knew someone lived – which was at 1402 Mountain Chief Road, where her stepson lived. ER II:121, 135, 225. Defendant drove away after dropping her off at that address. ER II:122.

E.J.R.C.'s stepson was not at home when she unexpectedly arrived, but other people were at the house. ER II:121-122, 225. E.J.R.C. asked the others to call 911, but no one helped her; she ended up calling 911 herself with her own cell

phone. ER II:121-122. After she called 911, defendant, who heard a report of an assault at 1402 Mountain Chief Road over the patrol car radio, drove back in front of the home. ER II:122; App. 48-49; Tr. Exh. 3. E.J.R.C. was outside the house and defendant, while remaining in his car, twice motioned for her to come over to his car. ER II:122; App. 48-49. E.J.R.C. refused, and defendant drove away. ER II:122-123. No other law enforcement officer came to 1402 Mountain Chief Road. ER II:123. An ambulance with two Emergency Medical Technicians (EMTs) arrived and took E.J.R.C. to the Blackfeet Community Hospital. ER II:58-59, 61, 68-69.

3. E.J.R.C.'s Post-Assault Statements

The EMTs and hospital medical staff who spoke with E.J.R.C. stated that she was visibly shaking, upset, and crying (or near crying). ER II:59, 61, 63, 70-71. Medical staff members described E.J.R.C.'s emotional state as "hysterical," "in a lot of anguish," "very upset," and "really distraught." ER II:61, 71, 85, 95. E.J.R.C. also was "coherent," and responded promptly to the treating nurse's questions. ER II:86, 96. E.J.R.C. told an EMT and medical staff members that she had the assailant's semen and gum. ER II:61, 67, 70-71, 97. E.J.R.C. told the treating nurse that the assailant had taken her to Depot Coulee and told her she had to perform oral sex or go to jail. ER II:70-71, 100.

A nurse at the hospital collected samples of the semen on E.J.R.C.'s hands, swabs from E.J.R.C.'s hands and mouth, and the gum that E.J.R.C. had from defendant; the nurse packaged the evidence for shipment to the FBI. ER II:95, 97-98, 100. The semen on E.J.R.C.'s hand and inside her mouth belonged to defendant. ER II:42.

At the hospital, Blackfeet Law Enforcement Officers Matthew Augare and Josh Bird (who is defendant's son-in-law) interviewed E.J.R.C. ER II:101, 240, 244. During that interview, E.J.R.C. was "anxious," and said that she had defendant's gum and semen. ER II:244-245, 256. FBI Agent Brian Kimball also interviewed E.J.R.C. at the hospital. ER II:164. E.J.R.C. told Agent Kimball that defendant told her that she could either perform oral sex on him or go to jail. ER II:164, 169-170.

4. Defendant's Law Enforcement Background And False Statements To FBI Agents

a. Defendant had worked as a law enforcement officer since 1975, excluding 14 years as a tribal prosecutor. App. 61. In the four years prior to this assault, defendant was a prosecutor for the Blackfeet Tribe, and a criminal investigator and police officer for Blackfeet Law Enforcement Services. ER II:153. Agent Kimball had worked professionally with defendant throughout these four years, during which they coordinated cases and shared case information. ER

II:153. Agent Kimball's duties include investigating violent crimes on Indian territory, including sexual assaults. ER II:162-163.

b. Approximately three hours after the assault and after his interview with E.J.R.C., Agent Kimball contacted defendant, who voluntarily agreed to an interview. ER II:162. Officer Augare also was present for the interview. ER II:160. Agent Kimball recorded this conversation. Agent Kimball had Officer Augare present in order to have a witness to defendant's voluntary participation, and to avoid any appearance of impropriety, bias, or favoritism due to his prior working relationship with defendant. ER II:156-157, 160, 170; App. 46.

Prior to his questioning, Agent Kimball advised defendant of his right to counsel, the voluntariness of the interview, and his opportunity to stop the interview at any time. ER II:162. According to Agent Kimball, defendant understood all of his questions throughout the interview. ER II:163-164, 167. During the interview, Agent Kimball and defendant had the following exchange:

> Kimball: At no point and time did you ever say, "You can do this, or you can go to jail."
> The defendant: No. I did not.
>
> * * * * *
>
> Kimball: At no point and time was it ever communicated to her that * * * that she had two options? One's to provide oral sex, and the other was to go to jail.
> The defendant: No. That is not true.

App. 50; Tr. Exh. 3; see ER II:166.

During this interview, defendant admitted that he had oral sex with E.J.R.C., and that he had ejaculated in her mouth. ER II:171. He asserted that their sexual encounter was consensual. App. 51, 53 ("I didn't do anything overt to force her to do anything."). During the interview, defendant voluntarily agreed to provide an oral swab for evidence. App. 53; Tr. Exh. 3. When Agent Kimball asked defendant if he wanted an opportunity to read the consent form, he responded, "No. I pretty much know what they say." App. 53; Tr. Exh. 3.

Agent Kimball believed that defendant knew, based on defendant's professional experience, that there would be evidence of his semen in E.J.R.C.'s mouth. ER II:172. Agent Kimball had worked with defendant on rape cases. ER II:175-176. Agent Kimball stated at trial, "I think he's experienced enough to know, through his experience as a law enforcement officer, that that's a routine collection on an alleged victim, that you swab the mouth for potential biological evidence." ER II:172. Agent Kimball also stated at trial that the best and most common way to account for DNA evidence in a rape case is to "suggest that the encounter was consensual." ER II:176.

c. On December 4, 2012, three months after the sexual assault, the defendant voluntarily participated in an interview conducted by FBI Agent Stacey Smiedala. ER II:185-187. Agent Smiedala began by advising defendant of the voluntary nature of the interview and his opportunity to consult with counsel. ER

II:186. Agent Smiedala's standard procedure, which he followed here, is to ask preliminary questions regarding the subject's biographical and medical history, review the topics for discussion, and then conduct a short, recorded "summary * * * interview." ER II:186-188. Defendant's summary interview was admitted at trial. ER II:188; Tr. Exh. 4.

The recorded portion of the interview with Agent Smiedala included the following exchange:

> Smiedala: Okay so you pulled down your pants?[5]
> The defendant: Yes.
> Smiedala: Now did you at that very moment did you make any comment to [E.J.R.C.]?
> The defendant: I may have made um ... we were still kind of joking around, um, and I made some[] ... not knowing the exact words um something to do with ["Y]ou could go to jail for this["]… me meaning her.
> Smiedala: Okay going to jail for what?
> The defendant: For having sex.
> Smiedala: Okay for having sex or giving a ...
> The defendant: A blow job.
> Smiedala: Giving a blow job. Okay, and I know that's what you had told me earlier. Is that correct?
> The defendant: Yes.
> Smiedala: Okay and I don't expect you to remember the exact wording. Okay?
> The defendant: Yes.
> Smiedala: Now again do you think it was possible at that moment – I mean just possible – that [E.J.R.C.] thought, "Wow, I better give this police officer a blow job, or I could go to jail." Do you think that was possible?

[5] On the recording, Tr. Exh. 3, Agent Smiedala asks "Okay, so you pulled out your penis?"

> The defendant: It could have run through her mind, but she didn't say anything like that.
> Smiedala: Okay and she gave you, she gave oral sex at that point. Correct?
> The defendant: Yes.
>
> * * * * *
>
> Smiedala: Okay. Alright, and so but the point being is at any point did you threaten her with a gun? Did you tell her if she didn't give you a blow [job] you know you may hurt her in some capacity?
> The defendant: No.
> Smiedala: You only told her you could maybe go to jail if you don't give me a blow job?
> The defendant: Yes.
> Smiedala: Is that correct?
> The defendant: Yes.
>
> * * * * *
>
> Smiedala: Did you physically force [E.J.R.C.] to do these things in any way?
> The defendant: No.
> Smiedala: The bottom line is that you believe that your comment led her to provide oral sex to you correct?
> The defendant: Yes.

App. 59-61, 63; Tr. Exh. 4.

5. E.J.R.C.'s Criminal Record

E.J.R.C. testified at trial that that she has been convicted of three prior felonies – burglary, robbery, and possession of methamphetamine. ER II:116-117, 129-130, 134. She explained that she has had several encounters with law enforcement officers, and it was her experience that she must follow an officer's commands in order to avoid trouble, especially when dealing with law enforcement officers on the Blackfeet Reservation. ER II:116-117, 129-130. E.J.R.C. also

admitted to several arrests, including two arrests by defendant when she was 18 years old, which was approximately 25 years ago. ER II:128, 130.

SUMMARY OF ARGUMENT

This Court should affirm defendant's convictions for violating 18 U.S.C. 242 and 18 U.S.C. 1001.

1. Federal Rule of Evidence 609(b) creates a rebuttable presumption against admission of convictions that are more than ten years old. The district court did not err in its calculation of convictions that were more than ten years old, and it did not abuse its discretion in excluding the victim's convictions that were more than ten years old. *United States* v. *Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999); *United States* v. *Wallace*, 848 F.2d 1464, 1472-1473 (9th Cir. 1988). Defendant has failed to identify how the district court abused its discretion in denying admission of this evidence, particularly when he cross-examined the victim regarding her three felony convictions, two of which were for the same type of offense as the excluded convictions.

2. Viewed in the light most favorable to the government, the evidence is more than sufficient to support defendant's conviction under 18 U.S.C. 1001. Defendant ignores that a rational jury could believe E.J.R.C.'s testimony that he threatened her by saying if she did not perform oral sex, she would go to jail, and that the jury could therefore reasonably conclude that defendant lied when he flatly

denied to FBI Agent Kimball that he made this statement. *United States* v. *Selby*, 557 F.3d 968, 976-977 (9th Cir. 2009). In addition, a rational jury could conclude that defendant admitted to Agent Smiedala that he made this threat, and that this admission was not an inadvertent, mistaken comment, or inconsistent with his other responses.

3. At trial, the jury was instructed – in accordance with then-governing precedent – that in order to find that defendant acted willfully under 18 U.S.C. 1001, the jury did not need to find that defendant knew that his conduct was unlawful. While this instruction was plain error, defendant has not shown that his substantial rights were prejudiced. To succeed on his claim, defendant essentially needs to establish that a rational jury could not conclude that he – a 25-year law enforcement officer who worked closely with the FBI – did not know that lying to the FBI about a federal criminal investigation was unlawful. This Court has held that a lay person cannot credibly argue that he did not know that submitting a false statement to the federal government for reimbursement is a crime. *United States* v. *Awad*, 551 F.3d 930, 941 (9th Cir.), cert. denied, 556 U.S. 1269 (2009). Similarly, defendant cannot credibly argue he did not know that lying to the FBI in an interview during its lawful investigation of his sexual assault was a crime. Accordingly, the court's instruction that the jury need only find that defendant knew that his statement was *untrue* – rather than *unlawful* – was harmless error.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING CROSS-EXAMINATION OF THE VICTIM ON THE BASIS OF CONVICTIONS MORE THAN TEN YEARS OLD

A. Standard Of Review

This Court reviews a district court's interpretation of the Federal Rules of Evidence de novo, and the district court's evidentiary rulings for abuse of discretion. *United States* v. *Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir.), cert. denied, 543 U.S. 1013 (2004); *United States* v. *Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999); *United States* v. *McClintock*, 748 F.2d 1278, 1287 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985). Reversal under the abuse of discretion standard is warranted only when the court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman* v. *Apfel*, 211 F.3d 1172, 1175 (9th Cir.), cert. denied, 531 U.S. 1038 (2000). Even if defendant establishes error, he also must demonstrate that a substantial right has been prejudiced to warrant a new trial. *United States* v. *Portillo*, 699 F.2d 461, 464 (9th Cir. 1982); Fed. R. Evid. 103.

B. Rule 609's Requirements For Admissibility

Federal Rule of Evidence 609(a) permits admission of a witness's prior felony conviction, or any conviction for a crime involving dishonesty or a false

statement, that is less than ten years old, subject to the requirements of Federal Rule of Evidence 403. Federal Rule of Evidence 609(b) presumptively bars the admission of convictions that are more than ten years old. A district court may admit a conviction covered by Rule 609(b) only when the court makes specific findings that the probative value "substantially outweighs" its prejudicial effect, and the proponent gives advance notice of its intent to use this evidence. Fed. R. Evid. 609(b)(1)-(2); *Portillo*, 699 F.2d at 463-464 (the balance of probative value versus potential prejudice for Rule 609(a) is less demanding than the analysis of these factors under Rule 609(b)).

The ten-year calculation is based on the date of conviction or the individual's release from confinement, whichever is later. Fed. R. Evid. 609(b). If a witness is subsequently incarcerated due to a parole or probation revocation, that incarceration may toll the ten-year limit of Rule 609(b) in limited circumstances: the revocation must be due to a substantive rather than a technical violation, and the violation must be "substantively related or parallel to the original * * * conviction." *United States* v. *Wallace*, 848 F.2d 1464, 1472 (9th Cir. 1988); *McClintock*, 748 F.2d at 1288-1289 (parole revocation must be based on a substantive violation and "closely parallel[]" the original crime).

In *Wallace*, this Court held that the district court erred in admitting a defendant's heroin trafficking conviction that was more than ten years old based on

defendant's subsequent conviction for perjury, which revoked his parole for the drug conviction and resulted in his incarceration. 848 F.2d at 1472-1473. The Court explained that the perjury conviction was not related to or sufficiently parallel to the drug conviction, and therefore "the revocation of Wallace's parole on the perjury charge does not constitute confinement for the original heroin conviction tolling the ten-year limit of Rule 609(b)." *Ibid.* In contrast, in *McClintock*, the defendant's violation of a substantive term of his probation (not engaging in charitable fund raising) was "directly parallel[]" to his original conviction for mail fraud, which was based on fraudulent charitable fundraising, and therefore required recalculation of the ten-year period. 748 F.2d at 1288. And even if the tolling brings the conviction within the ten-year period, a court must still balance the probative value and prejudicial impact under Rule 403. Fed. R. Evid. 609(a)(1)(A).

C. The District Court's Evidentiary Ruling And Trial Testimony Regarding E.J.R.C.'s Criminal History

On February 13, 2014, the defendant moved for permission to cross-examine E.J.R.C. regarding three felony convictions that occurred within the past ten years: possession of methamphetamine (2013), first degree burglary (March 2002), and second degree robbery (March 2002). The defendant also sought to cross-examine E.J.R.C. about four convictions that were more than ten years old: third degree assault and first degree burglary (January 2000), followed by two revocations of

probation and incarceration; and two convictions for possession of a controlled substance (November 2000 and January 2002). R. 62; ER II:129. The United States opposed introduction of the convictions and associated incarcerations that were more than ten years old. R. 67.

The district court ruled that the defendant could cross-examine E.J.R.C. on three convictions: the burglary and robbery convictions in March 2002, which resulted in E.J.R.C.'s incarceration within the ten-year period, and her drug conviction in 2013. ER I:1-2. The court barred admission of the remaining convictions that were more than ten years old. ER I:1-2. The court explained that E.J.R.C.'s convictions from January 2000, November 2000, and January 2002 (the last of which resulted in only a six-month sentence) were "too remote in time beyond the ten-year window." ER I:2. The court also stated that a revocation based on a technical violation does not affect the ten-year period, and that E.J.R.C.'s probation was revoked for her earlier 2000 conviction based on technical violations of drinking alcohol and not reporting to her probation officer, which do not affect the ten-year calculation. ER I:2. The court stated to defendant's counsel, "I think you've got enough to work with [] the last two to make your point." ER I:2 (the court clarified that it was admitting three convictions); see also ER II:56 (the court allowed defense counsel leeway to ask E.J.R.C. brief questions about other arrests).

Defendant cross-examined E.J.R.C. regarding the three admissible convictions for burglary, robbery, and possession of methamphetamines. ER II:129-130. At trial, E.J.R.C. testified forthrightly about her prior criminal history. See, *e.g.*, ER II:116-117, 125-126 (comparing the Browning jail to other jails she has been in); 130 (acknowledging multiple arrests and stating, "I do have a criminal history"); 142 (when she has been transported in a police car, she has always been in the back seat except this time with defendant).

D. The District Court Did Not Err In Its Calculation Of the Ten-Year Period Or Abuse Its Discretion In Its Rule 609(b) Rulings

Defendant contends that he should have been allowed to cross-examine E.J.R.C. regarding her 2000 and 2002 convictions "[r]egardless of whether [they] fell within Rule 609(b)'s ten year time limit." Br. 30. Contrary to defendant's contention, the district's court's evidentiary ruling is a straightforward application of Rule 609(b)'s requirements.

a. Defendant's nominal challenge to the district court's calculation of the ten-year period for the convictions that are older than ten years, including any parole revocations, should be deemed waived, as it is bereft of any substantive argument. *United States* v. *Wachs*, 520 F. App'x 584, 585 (9th Cir. 2013) (citing *Independent Towers of Wash.* v. *Washington*, 350 F.3d 925, 929-930 (9th Cir. 2003)); Br. 29-30. At best, defendant appears to argue (Br. 29-30) that because E.J.R.C. has a lengthy criminal history, and some sentences overlapped, any and

all arrests and convictions should be admitted. Of course, this assertion has no merit; it is contrary to the plain terms of Rule 609(b). In any event, the district court correctly determined that E.J.R.C.'s probation violations for the 2000 convictions for drinking alcohol and failing to contact her probation officer are not substantive offenses that are parallel to the original convictions, and thus should not be considered in the ten-year calculation. *Wallace*, 848 F.2d at 1472-1473; *McClintock*, 748 F.2d at 1288-1289.

Defendant also refers to E.J.R.C.'s arrests for parole violations in 2007 and 2009, implying that these too should have been permissible bases for cross-examination. Br. 28, 30. Defendant, however, did not specifically argue below that these parole violations, separate from the underlying conviction, were admissible. This Court should therefore decline to address this issue. *United States* v. *Hernandez-Valdovinos*, 352 F.3d 1243, 1248 n.4 (9th Cir. 2003); R. 62:6. Even if considered, arrests for violating parole do not fall within the scope of Rule 609, which addresses impeachment by evidence of criminal convictions.

b. Moreover, defendant cannot show that the district court abused its discretion in determining that the prejudicial impact of the convictions greater than ten years old exceeded any probative value. *Wallace*, 848 F.2d at 1472-1473. The district court permitted defendant to cross-examine E.J.R.C. on three felonies (burglary, robbery, and drug possession), and explained, "[Y]ou've got enough to

work with." ER I:1-2. Defendant had ample opportunity to challenge E.J.R.C.'s credibility and honesty – and did so. ER II:129-130. E.J.R.C. was forthcoming about her multiple prior arrests and convictions. ER II:116-117, 125, 130, 142.

To be sure, E.J.R.C.'s credibility was an essential element of this trial. But that assertion alone does not render all relevant evidence more probative than prejudicial. *Bensimon*, 172 F.3d at 1127. As this Court explained, "the probative value of a prior conviction may *not* be determined by how important the [witness's] credibility is to the opposing party." *Ibid.* And as the Commentary to Rule 609 explains, "[i]t is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances." Quite simply, defendant has not met his burden to show that the district court abused its discretion when it excluded evidence of crimes that were more than ten years old, and two of which (burglary and drug possession) were duplicative of the types of convictions that were admitted. Accordingly, this claim should be rejected.

II

AMPLE EVIDENCE SUPPORTS DEFENDANT'S CONVICTION UNDER 18 U.S.C. 1001

A. Standard Of Review

This Court reviews defendant's challenge to the sufficiency of the evidence to support his conviction in the light most favorable to the United States, to determine whether any rational jury could find the elements of the offense beyond

a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *United States* v. *Wei Lin*, 738 F.3d 1082, 1084 (9th Cir. 2013). "*[A]ll of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. Therefore any conflicts in the evidence must be resolved in favor of the prosecution. *Id.* at 326. Defendant timely challenged the sufficiency of the evidence under Federal Rule of Criminal Procedure 29(a) at the close of the government's case, and at the close of all of the evidence. ER I:3-5, 10.

B. Ample Evidence Supports Defendant's Conviction

Defendant asserts (Br. 33-36) that the evidence is insufficient to support his conviction because "the only evidence that [defendant] lied to Agent Kimball" is an "inadvertent response" that he made in a subsequent interview with FBI Agent Smiedala, and that was inconsistent with his other responses to Agent Smiedala's questions.[6] This claim is without merit.

To establish a violation of 18 U.S.C. 1001, the United States must prove that defendant: "1) made a statement, 2) that was false, and 3) material, 4) with specific

[6] This challenge is distinct from the defendant's challenge under plain error that the jury instruction on willfulness under Section 1001 was incorrect. As we show in argument Argument III, pp. 27-31, *infra*, the error in the court's jury instruction on the willfulness element was harmless.

intent, 5) in a matter within the agency's jurisdiction."[7] *United States* v. *Selby*, 557 F.3d 968, 977 (9th Cir. 2009); *Lin*, 738 F.3d at 1084-1085. Viewed in the light most favorable to the government, the evidence is more than sufficient to sustain defendant's conviction.

Defendant's argument ignores the fundamental fact that his flat denial that he threatened E.J.R.C. that she would go to jail if she did not perform oral sex is directly contrary to E.J.R.C.'s testimony that he did, in fact, make that threat. ER II:115-116, 118, 134; pp. 6-7, 10-11, *supra*. A rational jury could easily have concluded that E.J.R.C. was telling the truth when she said that defendant coerced her to perform oral sex by threatening she would go to jail if she refused. A rational jury also could conclude that defendant – an experienced law enforcement officer – fully understood Agent Kimball when Kimball twice asked him whether he told E.J.R.C. she must perform oral sex or she would go to jail and defendant, clearly and unequivocally, twice denied he made the statement. See *Selby*, 557 F.3d at 976-978; *Lin*, 738 F.3d at 1084-1085; ER II:166; p. 10, *supra*.

Furthermore, defendant's acquittal of the sexual abuse charge (18 U.S.C. 2242(1)) is not, as he suggests (Br. 34), a sufficient basis on which to conclude that

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[7] As discussed below, see pp. 27-28, *infra*, the United States also must show that the defendant knew giving a false statement was unlawful, but he need not know the specific statutory basis. See *Bryan* v. *United States*, 524 U.S. 184, 191 (1998).

a rational jury could *not* convict him for making a false statement. Defendant ignores that the jury also convicted him of violating 18 U.S.C. 242. To do so, the jury had to find that defendant abused his position as a law enforcement officer, and coerced E.J.R.C. to perform sex by threatening her that she would otherwise go to jail. ER II:125; ER III:314; App. 62 (defendant admitted he abused his authority).

Defendant acknowledges (Br. 35) that he informed Agent Smiedala that he told E.J.R.C. that she "could maybe go to jail if you don't give me a blow job." Defendant argues, however, that this was an "inadvertent" mistake and inconsistent with his other responses. Br. 35-36. In fact, E.J.R.C.'s testimony alone is sufficient to support the verdict. *United States* v. *Gudino*, 432 F.2d 433, 434 (9th Cir. 1970) (jury's reliance on one witness's testimony and implicit credibility determination are sufficient to support conviction). And whether the defendant's admission to Agent Smiedala was inadvertent or inconsistent with his other responses was a question for the jury to decide. Defendant's assertion is belied by the actual dialogue when he not only admits making the comment, but confirms it. See p. 13, *supra*. In addition, Agent Smiedala twice distinguished defendant's failure to use or threaten physical harm if E.J.R.C. did not perform oral sex, which defendant denied, from his threat of going to jail, which he admitted. See p. 13,

supra; Tr. Exh. 4. Viewing the evidence in the light most favorable to the government, it is more than sufficient to uphold the jury's verdict.

Moreover, this conclusion is entirely consistent with this Court's decisions upholding convictions under 18 U.S.C. 1001. In *Lin*, for example, this Court held that there was sufficient evidence for a rational jury to convict the defendant for violating Section 1001, and to reject the defendant's assertion that he did not fully understand – based on a faulty translation and vague terms – the federal officer's twice-repeated question of whether the defendant had an "identification document." 738 F.3d at 1084-1085; see also *United States* v. *Chung*, 659 F.3d 815, 830-831 (9th Cir. 2011) (a rational jury could reasonably infer the defendant gave a false statement regarding his alleged permission to possess classified documents, when the alleged source could "not recall" giving the employee such permission and other evidence established a policy against permanent possession), cert. denied, 132 S. Ct. 1951 (2012).

Accordingly, the Court should reject defendant's contention that the evidence is insufficient to support his conviction for violating 18 U.S.C. 1001.

III

THE FLAWED JURY INSTRUCTION ON THE "WILLFULNESS" ELEMENT OF 18 U.S.C. 1001 DID NOT VIOLATE DEFENDANT'S SUBSTANTIAL RIGHTS

A. Standard Of Review

A challenge that a jury instruction misstated the elements of an offense that is raised for the first time on appeal – as defendant has done here – is reviewed for plain error. *United States* v. *Anderson*, 741 F.3d 938, 945 (9th Cir. 2013), cert. denied, 134 S. Ct. 1562 (2014); *United States* v. *Kilbride*, 584 F.3d 1240, 1247 (9th Cir. 2009); Fed. R. Crim. P. 52(b).

B. Defendant Did Not Establish That The Flawed Instruction Violated His Substantial Rights

Defendant asserts (Br. 36-39) that the district court did not correctly define "willful[]" conduct under 18 U.S.C. 1001, and that this error was the basis for his conviction, which should now be dismissed. While the United States concedes that the jury instruction was erroneous, defendant has failed to show that his substantial rights were affected by this error. His plain error argument therefore fails.

1. The jury instruction for Count 3 (18 U.S.C. 1001) stated that the United States needed to prove, *inter alia*, that "the defendant acted willfully; that is, he acted deliberately and with knowledge that the statement was untrue." ER III:383. The instructions further stated that the United States did *not* need to prove "that the defendant knew that his acts or omissions were unlawful." ER III:384. While

these instructions were a correct statement of the law at the time they were given, the United States concedes that the second quoted statement is no longer correct, and therefore is plain error. See U.S. Br. In Opp. at *11, *Ajoku* v. *United States*, No. 13-7264, 2014 WL 1571930 (S. Ct. Mar. 10, 2014) (Solicitor General concedes that "willfully" under 18 U.S.C. 1001 requires proof that the defendant knew his conduct was unlawful).

2. The elements for relief under plain error review are well-established. A defendant has the burden to show: (1) an error; (2) that was plain; and (3) that affected the defendant's substantial rights. *United States* v. *Marcus*, 560 U.S. 258, 262 (2010); *United States* v. *Johnson*, 520 U.S. 461, 467 (1997). Moreover, even when these three elements are met, a court may grant relief only if the error also seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Ibid.*; *United States* v. *Javan*, 383 F. App'x 596, 599 (9th Cir. 2010). To show that his substantial rights are affected, a defendant must show "a reasonable probability that the error affected the outcome of the trial." *Marcus*, 560 U.S. at 262.

3. This Court has held on several occasions that even when a jury instruction on a "willfulness" element erroneously failed to instruct the jury that it needed to find the defendant knew his conduct was unlawful, relief was not warranted due to the harmless nature of the error. See, *e.g.*, *Javan*, 383 F. App'x at 600; *United States* v. *Berry*, 683 F.3d 1015, 1021-1022 (9th Cir. 2012); *United*

States v. *Awad*, 551 F.3d 930, 938-941 (9th Cir.), cert. denied, 556 U.S. 1269 (2009); *United States* v. *Henderson*, 243 F.3d 1168, 1173 (9th Cir. 2001). In *Awad*, for example, this Court held that one reason that the erroneous instruction was harmless was that "no reasonable person could have thought [the charged conduct was] lawful." 551 F.3d at 941 (defendant submitted bills to the federal government for services that were not rendered; "in common parlance, theft"). Similarly, in *Javan*, this Court, relying on *Awad*, held that the defendant "cannot credibly assert that she did not know it was illegal to defraud health insurers." 383 F.3d at 600.

4. That is the case here. The defendant – an experienced police officer and former tribal prosecutor – cannot credibly maintain that he did not know it is unlawful to lie to the FBI about an official investigation into the sexual abuse of an individual by an on-duty police officer. Cf. *United States* v. *Guadalupe*, 402 F.3d 409, 411, 413 (3d Cir. 2005) (in finding sufficient evidence to support a conviction under 18 U.S.C. 1512(b)(3), the court considered defendant's "position [deputy warden of operations] and experience in prison administration" to conclude he "knew or should have known that the beating" of an inmate was a federal civil rights violation and that an officer who witnessed the beating might speak with federal investigators), cert. denied, 547 U.S. 1123 (2006). Indeed, in other cases, this Court has held that *lay* persons cannot reasonably argue that they did not know

lying to the federal government by submitting false statements for payment was unlawful. *Javan*, 383 F. App'x at 600; *Awad*, 551 F.3d at 941; see also *United States* v. *Starnes*, 583 F.3d 196, 212-213 (3d Cir. 2009) (defendant's past experience as a contractor overseeing asbestos abatement was a factor in establishing his knowledge that submitting false air quality reports to a federal agency was unlawful). Accordingly, any suggestion that the defendant did not know that his statement to Agent Kimball was unlawful is unworthy of credence.

5. Defendant nevertheless asserts (Br. 39) that the erroneous instruction affected his substantial rights because "the only evidence Connelly lied to Agent Kimball came in the form of his response to a single question that came in the middle of his second interview with Agent Smiedala." As explained above in Argument II, pp. 22-26, *supra*, ample evidence establishes that defendant falsely stated to Agent Kimball that he never "told E.J.R.C. that she needed to perform oral sex to avoid going to jail," as charged in Count 3 of the Indictment. ER II:13. In convicting defendant on Count 3, the jury necessarily found that he knew his statement to Agent Kimball was *untrue*. ER III:315-316. In these circumstances, it is unrealistic to think that the verdict on Count 3 would have been any different, had the jury also been required to find that the defendant knew that statement was *unlawful*. Cf. *United States* v. *Doe*, 705 F.3d 1134, 1148 (9th Cir. 2013) (the strength of the government's case is a factor in concluding the defendant did not

show his substantial rights were affected by an erroneous instruction). In any event, it cannot reasonably be said that the erroneous jury instruction in this case "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 262 (citation omitted).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that the United States is not aware of any related cases pending in this Court.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: December 4, 2014

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief Of The United States As Appellee:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 7,100 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: December 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, by filing the foregoing Brief Of The United States As Appellee with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, I caused to be served a true and correct copy of the foregoing brief. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Levin Eichhorn
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