C.A. No. 21-10230

D. Ct. No. CR-19-01033-PHX-SMB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE LORENZO BLACKSHIRE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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Date Submitted via ECF: February 27, 2023

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III. INTRODUCTION AND SUMMARY OF ARGUMENT

Domestic violence is "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Davis v. Washington*, 547 U.S. 813, 833 (2006). "When this occurs, the Confrontation Clause gives the criminal a windfall." *Id*. Defendant sought to reap that windfall here. After beating his intimate partner, C.S., and threatening future harm if she contacted the police, Defendant arranged for her non-appearance at his trial for assaulting her on September 11-12, 2018. That attack was particularly brutal—it landed C.S. in the emergency room, and caused substantial swelling and bruising to her face and head.

Defendant was determined to stop C.S. from testifying about it. In jail recordings, he admitted "I already got all this taken care of" and "we already discussed the whole fucking not showing up to court thing." (1-ER-127.) He instructed others to ensure C.S.'s silence, directing one intermediary to tell her to "play dumb" and "[n]ot show up"—and commanding another "to find her" and "make sure she does not fuckin'" testify. (1-ER-128–31.)

When C.S. did not appear at trial, the district court admitted C.S.'s law enforcement interviews in which she described the attack. (3-ER-363.) The jury also heard testimony from the medical providers who examined C.S. after the assault; saw photos of C.S.'s battered head; listened to Defendant's recorded jail statements; and heard additional witnesses. The jury convicted Defendant of assault resulting in

serious bodily injury and related crimes, and the court sentenced him to 96 months' imprisonment. (1-ER-3–7.) The judgment and sentence should be affirmed.

First, the district court correctly ruled that Defendant engaged in forfeiture-by-wrongdoing—"procuring or coercing silence from witnesses and victims," *Davis*, 547 U.S. at 833—and properly admitted C.S.'s law enforcement interviews under that exception. (1-ER-363.) The forfeiture exception is codified in Fed. R. Evid. 804(b)(6), which permits admission of hearsay against a party who intentionally and "wrongfully" caused the declarant's unavailability. Defendant openly admitted his intent to silence C.S. in his jail statements. (1-ER-127–31.) And ample evidence supported the court's conclusion that Defendant wrongfully caused C.S.'s silence, including his admission that he had arranged her non-appearance, his instructions to third parties to prevail upon her not to testify, and his history of violence and threats against her. On this record, admission of C.S.'s law enforcement interviews should be affirmed. Alternatively, any error was harmless because the jury heard compelling and powerful additional evidence of guilt. That evidence included the testimony of medical professionals and Defendant's jail admissions, which showed consciousness of guilt—proof "second only to a confession in terms of probative value." *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995).

Second, the district court properly exercised its discretion by admitting the assault history that C.S. provided to Nurse Jill Rable, a forensic nurse examiner,

under Fed. R. Evid. 803(4). Nurse Rable's medical examination, diagnosis, and development of a plan of treatment and aftercare for C.S.—conducted in the setting of a medical examination room—provided strong objective indicia that C.S. explained the genesis of her injuries for purposes of diagnosis and treatment. Moreover, C.S.'s statements were not "testimonial" under the Confrontation Clause. While Nurse Rable's examination had both medical and forensic purposes, it primarily occurred to diagnose and treat C.S., and attend to her safety and wellbeing. It also lacked the formality that often accompanies testimonial statements. The statements were properly admitted; alternatively, any error was harmless.

Third, Defendant's assertion that the district court improperly denied his Rule 29 motion on kidnapping fails. That claim is moot because the jury acquitted him of that charge. Moreover, the court did not plainly error by submitting Defendant's requested lesser-included charge of unlawful imprisonment to the jury. Defendant's jury instruction tracked the elements of the Arizona statutes on which it was based, and overwhelming evidence supported Defendant's conviction.

Fourth, the district court properly exercised its discretion by adopting sentencing adjustments for obstruction of justice and strangulation, or attempted obstruction and strangulation. The district court should be affirmed.

IV. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction under 18 U.S.C. § 3231 because Defendant was charged with federal crimes. (1-ER-142.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291 based on the district court's August 13, 2021 final judgment. (1-ER-3–7.)

C. Timeliness of Appeal

Defendant timely appealed on August 18, 2021. (4-ER-592); Fed. R. App. P. 4(b).

D. Bail Status

Defendant is in custody, serving his sentence, and is expected to be released on April 26, 2026.

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[1] CR refers to the Clerk's Record, followed by the document number(s). ER refers to the Excerpts of Record, and SER refers to the Supplemental Excerpts of Record. ER and SER cites are preceded by the applicable volume number and followed by the relevant page number(s). PSR refers to the Presentence Investigation Report, which Defendant submitted under seal.

Defendant has filed an Unopposed Motion to File Physical/Documentary Evidence (DktEntry 18). In the motion, Defendant seeks to submit four copies of a USB drive, each of which contains a set of 36 trial exhibits that were admitted or shared with the jury. These materials are cited here as "TE," followed by the pertinent exhibit number. For the Court's convenience, and with no objection from Defendant, the United States has reproduced a handful of these materials in its SER.

V. ISSUES PRESENTED

A. Whether the district court properly admitted C.S.'s interviews with law enforcement under the forfeiture-by-wrongdoing exception, where Defendant admitted that he had already "taken care of" his victim's non-appearance and enlisted others to ensure that "she does not fuckin'" testify, and C.S. had good reason to fear Defendant based on his past violence and threats against her.

B. Whether the district court properly admitted C.S.'s statements to Nurse Rable describing Defendant's assault, where C.S. provided that information during a medical examination and the nurse provided treatment and aftercare instructions.

C. Whether Defendant's appeal from the denial of his Rule 29 motion on kidnapping is moot, where the jury acquitted him on that charge; alternatively, whether the district court plainly erred by submitting the lesser-included offense of unlawful imprisonment to the jury, where the evidence amply supported his conviction for that crime.

D. Whether the district court abused its discretion by applying sentencing adjustments for: (1) obstruction or attempted obstruction of justice, where Defendant engaged in repeated efforts to stifle C.S.'s testimony; and (2) strangulation or attempted strangulation, where Defendant put C.S. in a chokehold twice, C.S. indicated to Nurse Rable that she had been strangled, and C.S. had signs and symptoms consistent with strangulation.

VI. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

In August 2019, the grand jury indicted Defendant on four counts: (1) Assault Resulting in Serious Bodily Injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6); (2) Assault Resulting in Substantial Bodily Injury of an Intimate Partner, in violation of 18 U.S.C. §§ 1153 and 113(a)(7); (3) Assault of an Intimate Partner by Strangulation, in violation of 18 U.S.C. §§ 1153 and 113(a)(8); and (4) Kidnapping, in violation of 18 U.S.C. §§ 1153 and 1201. (1-ER-142–143.)

After a three-day trial, the jury convicted Defendant of: Counts 1 and 2; a lesser included offense of Count 3, Simple Assault, in violation of 18 U.S.C. § 1153 and 113(a)(5); and a lesser included offense of Count 4, Unlawful Imprisonment, in violation of 18 U.S.C. § 1153 and Ariz. Rev. Stat. § 13-1303(A). (3-ER-527–30.) The district court sentenced Defendant to 96 months' imprisonment and 36 months' supervised release. (1-ER-3–7.)

B. Statement of Facts

1. Defendant Attacked C.S. on September 11-12, 2018.

At trial, the jury heard witness testimony and victim statements regarding the following:

In 2018, Defendant and C.S. lived together on the Salt River Pima-Maricopa Indian Community, and had been dating for three years. (2-ER-271–72; SER-51.)

On September 11, 2018, Defendant visited his neighbor Delwin Ochoa to ask for money for a shared utility bill. (2-ER-273–74, 2-ER-343–44). After Defendant left, C.S. came over, and Ochoa could hear Defendant yelling at her "hurry the fuck up, you fuckin' stupid." (2-ER-275.) C.S. did not look injured. (2-ER-276–77.)

After, as C.S. and Defendant walked home, Defendant made a fist, put it under C.S.'s chin, and "shoved [her] face back." (SER-41). C.S. started yelling and told him not to hit her. (SER-41). Defendant pushed C.S. and C.S. pushed back. (SER-42.) Defendant hit C.S. in the back of her head, pushed her to the ground, and started punching her. (SER-42; *see* 2-ER-304 ("He punched me all over my head and the sides. . . . He slapped me and threw me to the ground.").)

C.S. tried to get away, "but he wouldn't let [her] leave[.]" (SER-43; *see* SER-25.) Defendant then grabbed C.S.'s neck from behind, put her in a chokehold, and pulled her by the neck about 10 feet to the trailer. (SER-43–44; *see* SER-36; 2-ER-304–07; 3-ER-378–79, 381–82; PSR ¶ 6.)[2] C.S. went into another room and tried to find a working phone to call the police. (SER-44.) She asked Defendant if he had thrown her purse somewhere and he started slapping her. (SER-44–45.)

[2] When interviewed by Det. Daniels on September 12, 2018, and during her examination by Nurse Rable on September 13, 2018, C.S. stated that Defendant "dragged me inside." (SER-43; 2-ER-304–05.) However, when interviewed by Det. Owens on September 13, 2018, C.S. said that she agreed to walk inside after Defendant dragged her to the trailer. (SER-36.)

At this point, C.S. told Defendant she didn't want to be with him anymore; he responded by throwing her to the ground and punching her again. (SER-45–46; SER-36 ("and then we were fighting in this back room and um then he threw me down to the ground and I just laid on the ground the whole time").) Defendant punched her "20 or more" times. (SER-45; *see* SER-25, 29; 3-ER-438.) She put her arms up to try to protect her head. (SER-45; 2-ER-305 ("I had my arms up over my face and head and he was hitting my head to the ground over and over.").)

Defendant stopped hitting C.S. for a few seconds to ask yes or no questions. (SER-29, 46.) When C.S. tried to say more, he struck her and told her to "shut up and answer the next question" and asked "[w]hy do you make me hit you?" (SER-29–30.)

C.S. tried "to get outside so somebody could hear me yelling," but Defendant "wouldn't let me out[.]" (SER-47.) She attempted crawling out the front door, but Defendant "put his arm around my [neck] – like again and pulled me back inside." (SER-21; *see* SER-36–37, 47; 2-ER-306–07.)[3] He told C.S. "You're not going anywhere. You're not getting out there." (SER-21–22; *see* SER-37.)

Defendant kicked C.S.'s ribs twice and stepped on her chest. (SER-32, 47–48; 2-ER-304–05; *see* TE 8 at 8:20-8:45; USB#4.) Four months before, Defendant had fractured C.S.'s ribs in another assault; C.S. remembered "it took like a month

[3] C.S. made a chokehold gesture when recounting this. (TE 4 at 0:49-0:54; USB#6.)

and a half for [that] to stop hurting," and "I didn't want to feel that again. So I begged him to stop." (SER-32; *see* SER-47–48.)

Defendant stopped punching and kicking, but would not let C.S. up. (SER-48). He told her, "Don't move—don't move" and "quit crying[.]" (SER-48.) Defendant threatened that if C.S. called the police, "I already know what's going to happen to me, because he's made threats before, like, because I had called the cops before on him." (SER-30; *see* 2-ER-306 ("don't get up, he will find me and my family").) Defendant went into another room while C.S. remained on the floor. (SER-49). C.S. planned to leave but fell asleep. (SER-49.)

The next morning, C.S. woke up dizzy. (SER-50.) Defendant kicked her and said, "I don't fuckin' like you right now." (SER-37, 50.) C.S. started looking for her shoes and Defendant asked if she was leaving. (SER-37.) C.S. said she was only going outside. (SER-37.) C.S. then left, walked "real fast" to a neighbor's house, and called 911. (SER-37–38, 50.)

2. Defendant Inflicted Multiple Head Injuries on C.S.

a. HonorHealth Emergency Room Examination

Salt River Police Department Detective Nicholas Daniels responded to C.S.'s 911 call and found her at the neighbor's house. (3-ER-419.) He and other officers could not find Defendant. (3-ER-420, 427.)

Salt River Fire Department paramedics arrived and took C.S. to HonorHealth Osborn. (3-ER-399, 420–21, 430, 432–35.) Dr. Brittany Seroy saw C.S. in the hospital's emergency room "for evaluation status post assault." (3-ER-439.) Dr. Seroy noted "patient states that she was assaulted by her boyfriend last night around 2100 [9:00 p.m.], and then again this morning before calling EMS." (3-ER-438.) She had been "hit in the face and extremities . . . with a closed fist multiple times." (3-ER-438.) C.S. complained of "headache, neck pain, facial pain, left arm pain, and some current dizziness." (3-ER-439–40.)

Dr. Seroy found that C.S. had soft tissue injury with visible swelling across and on both sides of her head: the left side, by the temple and side of her skull; the right forehead; the right cheek; and above the right eye. (2-ER-284–86, 3-ER-441–42, 445.) She had tenderness over her nose and through several neck vertebrae. (3-ER-442–43.) She had a large contusion, or bruise, on her left upper arm; contusions on her right thigh and above her left knee; and an abrasion on her right knee. (3-ER-443.) A CT scan showed that her nose was broken on both sides. (2-ER-284–85; 3-ER-445; PSR ¶ 9.)

Dr. Seroy treated C.S. with 1,000 milligrams of Tylenol and prescribed antibiotics and ibuprofen. (3-ER-447, 459.) She noted that C.S. had a safe place to stay—a hotel arranged by a social worker. (*See* 3-ER-447.) Dr. Seroy recommended follow up with primary care and an ear, nose, and throat specialist. (3-ER-459.)

Detective Daniels used his bodycam to record a hospital bedside interview with C.S., and he took photographs showing swelling and bruising on C.S.'s face. (3-ER-421–23, 427–30; SER-11–18, 40–52; TEs 8-9, 19-22.) Two photos are illustrative:

(SER-11–18; TEs 21-22.)

b. HonorHealth Forensic Nurse Examination.

The next day, C.S. was evaluated by HonorHealth Forensic Nursing Manager Jill Rable at the Scottsdale Family Advocacy Center, after being taken there by Salt River Police Detective Julian Owens. (2-ER-294, 300, 329.) Nurse Rable is employed at HonorHealth, where she "oversee[s] a group of 30 nurses who do medical forensic exams and care for patients." (2-ER-296.) She is board certified as an advanced practice forensic nurse and sexual assault nurse examiner, and "has specialized training to provide comprehensive care to trauma patients following an assault." (2-ER-295.)

Nurse Rable testified that when a patient comes to her group for an exam, "the role of the nurse is to do a head-to-toe physical exam and determine, based on their complaints of what has happened, . . . a plan of care and what really needs to be done medically for that patient based on what they've described." (2-ER-297.) During the exam, the nurse obtains a medical history from the patient, which addresses "why they came today, both acutely, and then long term[.]" (2-ER-298.) In exams involving domestic violence, medical history also involves identifying the assailant, which helps ensure the patient's return to a safe environment. (2-ER-298–99, 307–08.) During the exam, the nurse collects forensic evidence if appropriate. (2-ER-297–99; Op. Br. at 13.)

Nurse Rable obtained C.S.'s consent to perform a medical forensic examination, provide treatment, collect evidence, and photograph injuries. (2-ER-303.) C.S. also consented to the release of Nurse Rable's examination report to law enforcement. (2-ER-303.)

C.S. reported an "assault history" in which Defendant "punched me all over my head and the sides," "threw me to the ground," and "put me in a choke hold and dragged me inside and stepped on my chest and kicked me[.]" (2-ER-304–05.) C.S. stated that she had raised her arms over her face and head to protect herself, and Defendant "was hitting my head to the ground over and over." (2-ER-305.) She also stated, "All day yesterday I was dizzy and had a headache," and indicted that the front of her neck was "a little sore." (2-ER-305.)

When Nurse Rable asked if she was strangled/suffocated, C.S. responded "Yes. Twice." (2-ER-306). C.S. indicated Defendant used "his arms from behind." (2-ER-307.) C.S. reported symptoms consistent with strangulation, including headache, lightheadedness, dizziness, and throat pain. (2-ER-307.)

Nurse Rable completed a "body map" of C.S.'s injuries, and photographed them. (2-ER-311–35.) The injuries included an abrasion between C.S.'s right ear and right eye; contusions and petechiae (burst capillaries) surrounding her right eye; contusion, petechiae, and discoloration surrounding her left eye; contusion to her left ear and forehead; bruising on both shoulders, with a quote "He's been hitting me, I

covered"; swelling and tenderness in C.S.'s upper back/lower neck area; and a leg abrasion. (2-ER-311–26; TEs 29, 34–55.)

Nurse Rable's diagnosis was "domestic violence by history, physical assault by history, strangulation by history, and minor and moderate physical injury by examination[.]" (2-ER-310.) She reviewed aftercare instructions with C.S. and strangulation warning signs. (2-ER-308, 325–26.)

After the exam, Det. Owens met with C.S. and used his bodycam to record an interview with her. (*See* 2-ER-309, 341–42; TEs 4-5.) He then drove her to the trailer and recorded an on-site interview with her. (2-ER-346; TEs 6-7.)

3. Salt River Police's Repeated Attempts to Contact C.S.

Defendant was charged in tribal court regarding his assault of C.S. (PSR ¶ 59.) In August 2019, a federal grand jury indicted him for the same assault. (1-ER-142–43; PSR ¶ 12.)

Det. Owens repeatedly tried to find C.S. over the next six months. (*See* 2-ER-347–49.) He went to her residence five times, and instructed other officers with the service of subpoenas on two other occasions. (2-ER-347–48.) He issued a "file stop"—an "attempt to locate bulletin" that alerted other law enforcement departments to be on the lookout for C.S. (*See* 2-ER-347.) He solicited assistance from the Mesa Fusion Center and the Salt River Police Department Intelligence Division. (2-ER-348.) He learned C.S. might be living with her grandmother and

tried to contact her there three times. (2-ER-348.) He pursued a lead that she might be at a domestic violence shelter in Mesa, but did not find her. (2-ER-348–49.) In all, he and others made about 14 attempts to locate C.S. (2-ER-348.)

4. Defendant Arranged for C.S.'s Non-Appearance at Trial.

a. December 23, 2019 Jail Call

Salt River Police arrested Defendant on December 1, 2019. (2-ER-265–68.) On December 23, 2019, the magistrate judge held a detention hearing and ordered Defendant detained pending a trial set for February 11, 2020. (4-ER-596–97.)

That day, Defendant called Lucinda Wilson, his then-girlfriend, thanked her "for showing up at court today," and said, "we're going to be just fine." (1-ER-126.) He elaborated: "[F]uck all that shit dude, fuck them, all right, that's on the real right there, because after all guess what? They still need victims. There are no victims. They can't find shit. Fuck them. They are not ever going to find any." (1-ER-127.)

Lucinda asked "How do you know that?," and Defendant referred to one individual that he "would be worried about," but who "can't even be found, not even by me. I don't even know where he's at." (1-ER-127.) Defendant then said, "I already got all this taken care of." (1-ER-127.) He continued: "I already fucking made peace with everybody and shit, everything's fucking cool, and we already discussed the whole fucking not showing up to court thing." (1-ER-127.) Lucinda asked "you're so dumb why you talk about this shit?" (1-ER-127.) Defendant

replied: "[F]uck the courts dude. . . . And I don't even care if the judge even hears this shit, dude, because on the real dude, fuck them." (1-ER-127.)

b. December 29, 2019 Jail Call

A few days later, Defendant called a number where he apparently thought he could reach C.S.; the phone was answered by "Natia," who said, without prompting, "she's not here. You want me to tell her something?" (1-ER-128.) When asked again if "You want me . . . to tell her something or no?," Defendant replied: "[T]ell her I'm in jail for the same shit from before and shit and just, uh, if the Feds get a hold of her, just play dumb" and "[n]ot show up[.]" (1-ER-129.) Natia responded: "I could do it." (1-ER-129.) Defendant referred to C.S. by name on the call. (3-ER-385–86.)

c. January 12, 2020 Jail Visit

During a recorded jail visit with Lucinda Wilson about two weeks later, Defendant mentioned his trial date was coming up, said, "I guess people are gonna be lookin' for her," and asked, "Do you know how to find her?" (1-ER-130.) Lucinda answered, "Probably." (1-ER-130.)

Defendant then instructed Lucinda that "I need you to find her" and "make sure she does not fuckin'" testify. (1-ER-130–31.) Despite Lucinda's protestations, he commanded her to shut down C.S.'s testimony. (1-ER-130–31.) Lucinda responded, "I'm pretty sure she knows everything." (1-ER-131.) Defendant replied

he was "fuckin' worried" because "this shit's comin' up," and he insisted: "You got this. I know you got this." (1-ER-131.)

5. The District Court Granted the United States' Motion to Admit Defendant's and C.S.'s Recorded Statements.

Before trial, the United States moved in limine to admit Defendant's jailhouse recordings to show consciousness of guilt. (SER-3–10.) The United States also briefed whether those recordings evidenced "forfeiture-by-wrongdoing," under which the court could admit C.S.'s statements to law enforcement. (SER-6–9.) Defendant responded. (CR 45.)

The district court ruled that the jail recordings would be admitted. (1-ER-100.) The court heard argument on forfeiture, but deferred that issue for trial. (1-ER-116–17, 124.)

At trial, the United States renewed its forfeiture-by-wrongdoing motion. (2-ER-352–53.) Defense counsel argued that the government's inability to locate C.S. predated Defendant's jail conversations, it wasn't clear that Defendant was discussing this case or C.S., and "it doesn't follow that" the conversations were why the government could not find C.S. (2-ER-354.)

In response, the prosecutor observed that Defendant had no other pending cases when he made these calls, and his references to "the Feds" and his trial on the "11th" referred to this case—which had been set for a February 11, 2020 trial. (2-ER-355; *see* 4-ER-596.) Defendant referred to C.S. by name on one call, and

discussed her ex-boyfriend, Jeremy, on another. (2-ER-355.) And Defendant had engaged in "affirmative action" to silence C.S.: "[H]e's acknowledging that he already has made that action in the first call [where] he's actually saying, I already have done this. . . . She's not coming to court." (2-ER-357.) Defendant also enlisted Natia and Lucinda to ensure C.S.'s non-appearance. (2-ER-357.)

The district court granted the motion the next morning:

> I spent some [] time rereading some of the cases, and based on the evidence presented [including the jail recordings] the Court finds that the government has produced sufficient evidence to demonstrate by a preponderance of the evidence that [Defendant] acted intentionally to cause the victim's unavailability, both directly by his statements when he indicated he's taking care of it, or he has taken care of it, and indirectly by his directions to other people.

(3-ER-363.)

At trial, the jury heard Defendant's recorded jail conversations. (2-ER-349–352, 3-ER-369, 383–388; TEs 11, 13 and 15; USB#1-3.) The jury also viewed C.S.'s September 12, 2018 interview with Det. Daniels (3-ER-420–23; TE 8; USB#4), and her two September 13, 2018 interviews with Det. Owens (3-ER-372–76; TEs 4 and 6; USB#6, 8). The jury temporarily received transcripts while the recordings played. (*See* 1-ER-127–31; SER 2, 19–52.)

The jury also heard from several witnesses, including Det. Daniels, Det. Owens, Dr. Seroy, Dr. Jason Low (a radiologist who reviewed C.S.'s imaging at the hospital), Nurse Rable, Delwin Ochoa, a crisis intervention worker, and a domestic

violence victim advocate. (2-ER-262–352, 3-ER-369–460.) The evidence included several photographs of C.S.'s injuries taken by Det. Daniels at the hospital (3-ER-427–30; SER-11–18; TEs 19-22), and the body map and corresponding photographs taken by Nurse Rable (2-ER-311–26; TEs 29, 34-55).

6. The District Court Denied Defendant's Rule 29 Motion.

After the United States rested, Defense counsel moved for judgment of acquittal under Fed. R. Crim. P. 29. (3-ER-461.) In response, the prosecutor argued that the jury had heard powerful evidence on all counts and was "entitled to draw all reasonable inferences, including the fact that a 6 foot-1, 200-pound man broke this woman's nose in two places, as well as the extreme physical pain [he inflicted] at the time of the event[.]" (3-ER-461.) In addition, Defendant threatened C.S. "that you know what's going to happen if you call the police. He was pulling her into the trailer. She was trying to run" and "he wouldn't let her leave the trailer." (3-ER-462.) The court denied the Rule 29 motion. (3-ER-462.)

The jury convicted Defendant of Count 1, Assault Resulting in Serious Bodily Injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6); Count 2, Assault Resulting in Substantial Bodily Injury of an Intimate Partner, in violation of 18 U.S.C. §§ 1153 and 113(a)(7); a lesser included offense of Count 3, Simple Assault, in violation of 18 U.S.C. § 1153 and 113(a)(5); and a lesser included offense of Count 4, Unlawful

Imprisonment, in violation of 18 U.S.C. § 1153 and Ariz. Rev. Stat. § 13-1303(A). (3-ER-527-30.)

7. The Court Highlighted Defendant's History of Violence at Sentencing.

At sentencing, the district court overruled Defendant's objection to adjustments for obstruction of justice and strangulation. (4-ER-552–53.) The court calculated an offense level of 26 and a criminal history category of II, yielding a Guidelines range of 70-87 months. (4-ER-553.) The court "var[ied] upwards slightly" to 96 months based on the § 3553(a) sentencing factors. (4-ER-479.) The court noted Defendant's history of violent crime and arrests for "domestic violence calls where the victim was either uncooperative or didn't want to help." (4-ER-579.) The court imposed concurrent sentences of 96 months on Count 1, 60 months on Count 2, six months on Count 3, and 18 months on Count 4. (1-ER-3–7.)

VII. ARGUMENTS

A. The District Court Correctly Found that Defendant Engaged in Forfeiture by Wrongdoing.

1. Standard of Review

In *Reynolds v. United States,* the Supreme Court held that the question of wrongful procurement of a witness's non-availability is one of fact for the trial court, and the trial court's determination "should not be disturbed unless the error is manifest." 98 U.S. 145, 159 (1878). In *United States v. Cazares*, 788 F.3d 956, 972 (9th Cir. 2015), this Court stated that it reviews de novo the district court's resolution of Confrontation Clause claims and construction of the hearsay rules, "but review[s] for abuse of discretion the court's determination to admit hearsay evidence."

This Court reviews district court factual determinations for clear error, *United States v. Whittemore*, 776 F.3d 1074, 1077 (9th Cir. 2015), and should "accept the district court's factual finding that a defendant procured the absence of a witness unless the finding is clearly erroneous." *United States v. Montague*, 421 F.3d 1099, 1101-02 (10th Cir. 2005) (quotations and citation omitted).

2. Argument

a. The District Court's Admission of C.S.'s Statements Under the Forfeiture Exception Should Be Affirmed.

The Confrontation Clause ordinarily bars testimonial hearsay statements of a witness who does not appear at trial absent a prior opportunity for cross-

examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). But where—as here—the defendant "seek[s] to undermine the judicial process by procuring or coercing silence from witnesses and victims," the Supreme Court has long recognized a "forfeiture-by-wrongdoing" exception to the Confrontation Clause. *Davis*, 547 U.S. at 833. The exception "extinguishes confrontation claims on essentially equitable grounds." *Id*. It is rooted in the "maxim that a defendant should not be permitted to benefit from his own wrong"—that is, from "conduct *designed* to prevent a witness from testifying." *Giles v. California*, 554 U.S. 353, 365 (2008).

Fed. R. Evid. 804(b)(6) "codifies" the exception. *Giles*, 554 U.S. at 367. The rule states that if a witness is unavailable, "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result," is admissible. Fed. R. Evid. 804(b)(6). The rule "permits the introduction of a testimonial statement by an unavailable witness if the preponderance of the evidence shows that 'the witness is absent by [the defendant's] own wrongful procurement.'" *Carlson v. Attorney Gen. of Cal.*, 791 F.3d 1003, 1009 (9th Cir. 2015) (quoting *Reynolds*, 98 U.S. at 158).

The district court found that the United States had "demonstrate[d] by a preponderance of the evidence that [Defendant] acted intentionally to cause [C.S.'s] unavailability, both directly by his statements when he indicated he's taking care of

it, or he has taken care of it, and indirectly by his directions to other people." (3-ER-363.) The court's findings should be affirmed for several reasons.

First, the district court did not "ignore" Rule 804(b)(6)'s "legal test." (Op. Br. at 24.) The court ruled after reviewing the parties' briefing, hearing argument before and during trial, listening to Defendant's jail recordings, and re-reviewing the case law. (*See* SER-3–9; CR 45; 1-ER-116–17, 124; 2-ER-352–57; 3-ER-363.) The United States' motion identified Fed. R. Evid. 804(b)(6) and discussed *Giles*, *Davis*, *Crawford*, *Carlson*, *Cazares*, and *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014). (*See* SER-3–8.) The court applied the correct burden—preponderance of the evidence. (3-ER-363.) The court did not "ignore" the legal test.

Second, the district court's ruling was correct. To establish the required mens rea, the United States had to show that Defendant "intend[ed] that [C.S.] be made unavailable to testify." *Carlson*, 791 F.3d at 1010. Defendant openly admitted this intent in his recorded statements. (3-ER-363; *see* 1-ER-127 ("[G]uess what? They still need victims. There are no victims. They can't find shit. Fuck them. They are not ever going to find any"); 1-ER-127 ("I already got all this taken care of. . . . [W]e already discussed the whole fucking not showing up to court thing."); 1-ER-129 ("[T]ell her . . . if the Feds get a hold of her, just play dumb . . . . Not show up[.]"); 1-ER-130–31 ("I need you to find her" and "make sure she does not fuckin'" testify).

Defendant's admissions also show that he engaged in "wrongful" conduct under Rule 804(b)(6)—satisfying the exception's actus reus. "Wrongdoing" is not defined in the rule, and the conduct the rule proscribes "need not constitute a criminal act." Fed. R. Evid. 804(b)(6), Advisory Committee's Notes. Any use of "coercion, undue influence, or pressure" can suffice. *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002); *see Giles,* 554 U.S. at 360-61 (defendant must have "engaged in conduct *designed* to prevent the witness from testifying," including "us[ing] an intermediary" for that purpose); *Steele v. Taylor*, 684 F.2d 1193, 1201, 1203 (6th Cir. 1982) (wrongful conduct "include[s] persuasion and control," including a defendant's use of "influence and control over [the witness] to induce her not to testify").

The broad scope of eligible "wrongful" conduct reflects the forfeiture exception's rationale "that the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act." *Steele,* 684 F.2d at 1201. "Thus, it is the fact that a defendant's conduct interferes with the interest in having witnesses testify at a public trial that makes the defendant's conduct wrongful." *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000) (defendant wrongfully procured his brother unavailability "by encouraging and influencing [him] not to testify"—specifically, by writing a letter asking him to "kick

back, relax[,] and wait," and instructing him not to "discuss anything of importance" over jail phones); *accord United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir. 2001) (wrongful conduct occurs when the defendant "was involved in, or responsible for, procuring the unavailability of the declarant 'through knowledge, complicity, planning or in any other way'") (citation omitted); *United States v. Jonassen*, 759 F.3d 653, 662 (7th Cir. 2014) (highlighting "tactics rang[ing] from pleas for sympathy to bribes"); *State v. Maestas*, 412 P.3d 79, 88-89 (N.M. 2018) ("the basic question to be answered . . . is simply whether the defendant has actively applied pressure by persuasion, coercion, intimidation, or otherwise, that may interfere with a witness's availability or willingness to testify").

Defendant's wrongful conduct was amply evidenced by the text and context of his recorded jailhouse statements. While awaiting trial, Defendant admitted that "we already discussed the whole fucking not showing up to court thing" (1-ER-127); instructed Natia to tell C.S. "if the Feds get a hold of her, just play dumb" and "[n]ot show up" (1-ER-129); and commanded Lucinda "to find her" and "make sure she does not fuckin'" testify (1-ER-130–31). Defendant did not issue these directives in a vacuum. He had beaten C.S. repeatedly; used force to prevent her from seeking help; and threatened future violence if she tried to contact the police. (*See* Part VI.B.1-2, *supra*; *see also* SER-30; 2-ER-306 (Defendant threatened "he will find me and my family"); PSR ¶ 8 (C.S. "believed he would hurt her if she attempted to

contact law enforcement.").) C.S. had good reason to fear future harm or retaliation. Against this backdrop, Defendant's jailhouse commands were calculated to coerce, pressure, or manipulate C.S. into silence. This is precisely the type of conduct that Rule 804(b)(6) forbids. *See, e.g.*, *Scott*, 284 F.3d at 764; *Steele,* 684 F.2d at 1201; *Hallum*, 606 N.W.2d at 356; *Maestas*, 412 P.3d at 88-89.

Defendant nevertheless asserts that trial-impeding conduct is not "wrongful" if it merely reflects "non-culpable, permissible behaviors," such as "informing a witness of a right to remain silent." (*See* Op. Br. at 34-37.) This ignores the context here: if the speaker's propensity for violence is well known to others, and if that propensity has resulted in a long history of violence and threats against a particular victim, a court may fairly infer that the speaker's command that the victim not testify constitutes coercion, persuasion, pressure, threats, or other conduct that even Defendant agrees is "wrongful." (Op. Br. at 36.)

Defendant's cases involving *non-coercive* requests not to testify are inapposite; none involved a batterer's commands to stop his victim from testifying. (Op. Br. at 36-38); *see, e.g.*, *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-06 (2005) (instruction to employees to follow document retention policies); *United States v. Doss*, 630 F.3d 1181, 1190 n.6 (9th Cir. 2011) (non-coercive appeal to wife to invoke marital privilege); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000) (permitting a witness to make a phone call); *United States v. Farrell*, 126

F.3d 484, 488 (3d Cir. 1997) (non-coercive attempt to persuade co-conspirator to invoke Fifth Amendment). In contrast here, Defendant assaulted and threatened his victim, and then directly and through intermediaries commanded her not to testify. This was not innocuous, non-intimidating messaging. *Cf. Giles*, 554 U.S. at 377 (recognizing that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help"); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 769 (May 2005) ("batterers threaten retaliatory violence in as many as half of all cases").

The record also contains sufficient evidence of a nexus between Defendant's wrongful conduct and C.S.'s non-appearance. (*Cf.* Op. Br. at 33.) Federal courts "construe broadly" the elements of forfeiture-by-wrongdoing, *Cazares*, 788 F.3d at 975, which circumstantial evidence can establish. *Carlson*, 791 F.3d at 1012. Evidence that a defendant had "the means, motive, and opportunity to threaten [the declarant], and did not show anyone else did" is "sufficient to satisfy the preponderance standard." *Johnson*, 767 F.3d at 823 (standard met where there was evidence that incarcerated defendant had a motive to threaten a witness, the timing was suspicious, and the defendant could have passed messages to the outside for others to intimidate the witness). *See also Carlson*, 791 F.3d at 1012-13 (court "could have reasonably inferred on the record before it that Carlson directly participated in securing [his wife and son's] absence" where he kept other family

members from communicating with his wife and was away from home the same nights as his wife and son).[4]

Defendant had "the means, motive, and opportunity to" procure C.S.'s silence here. *Johnson*, 767 F.3d at 823; 1-ER-127–31. His impending trial gave him a motive to ensure that C.S. did not testify. And his jail conversations show that he had the means and opportunity to silence her: He stated that he had already "taken care" of C.S. not coming to court, and he instructed others to find and tell her not to testify. (1-ER-127–31.) He knew where C.S. lived and knew people with whom she associated. (*See* 1-ER-127–31.) Combined with evidence that he had repeatedly beaten and threatened her, his jailhouse admissions support the reasonable inference that he directly or indirectly caused her non-appearance.

While Defendant asserts that the government's inability to locate C.S. undermines any such inference (Op. Br. at 29-31, 43), this argument fails for two reasons. First, in his December 23, 2019 call, he told Lucinda that the government wouldn't be able to produce any victims because "I already got all this taken care

[4] Defendant's referenced cases do not foreclose using circumstantial evidence. (Op. Br. at 33-35.) For example, *State v. Poole*, 232 P.3d 519, 526 (Utah 2010), is a state case that narrowly construes the forfeiture-by-wrongdoing doctrine—an approach at odds with this and other federal courts. *E.g.*, *Cazares*, 788 F.3d at 975; *Carlson*, 791 F.3d at 1011. The district court in *Cazares*, 788 F.3d at 974-75, listed several reasons in support of its ruling, many involving circumstantial evidence. *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), and *United States v. Carlson*, 547 F.2d 1346, 1353, 1358 (8th Cir. 1976), involved evidence of direct threats, but did not preclude the use of circumstantial evidence.

of," "I already fucking made peace with everybody and shit, everything's fucking cool, and we already discussed the whole fucking not showing up to court thing." (1-ER-127.) From these statements, and his record of violence and threats, the court properly inferred that Defendant had coerced or influenced C.S.'s silence.

Second, the district court's task was to measure C.S.'s failure to appear at the time of trial. *See Scott*, 284 F.3d at 765 (rejecting argument that it would have been difficult for the government to prove defendant procured the witness's silence when he had refused to testify at the grand jury eight months earlier; "our task is to measure [the witness's] refusal to testify at [the time of] trial"). After Defendant was detained and his trial date set, he apparently attempted on December 29, 2019 to call C.S. directly when "Natia" answered instead. (*See* 1-ER-128.) Natia asked, without Defendant's prompting, "she's not here. You want me to tell her something?" (1-ER-128.) He replied: "[T]ell her . . . if the Feds get a hold of her, just play dumb" and "[n]ot show up[.]" (1-ER-129.) Natia agreed: "I could do it." (1-ER-129.) Then, during a visit with Lucinda on January 12, 2020, Defendant referenced his trial date and instructed: "I need you to find her" and "make sure she does not fuckin'" testify. (1-ER-130–31.) The court could reasonably infer that Defendant "was involved in, or responsible for, procuring the unavailability of the declarant 'through knowledge, complicity, planning or in any other way[.]'" *Dhinsa*, 243 F.3d at 653-543 (citation omitted).

The district court also properly rejected Defendant's contention that "governmental neglect," rather than his conduct, "was responsible for [C.S.'s] absence." (Op. Br. at 31.) The police diligently obtained recorded statements from C.S. on the morning she called 911 and the next day. (TEs 4-9.) After the case was indicted federally, Det. Owens led a search that involved 14 attempts to find C.S. and interagency efforts (including the "file stop" he initiated, and his use of the Mesa Fusion Center and Salt River Police Intelligence Division). *See* Part VI.B.3, *supra*. Meanwhile, Defendant admitted that he had "already got all this taken care of. . . . [and] discussed the whole fucking not showing up to court thing"; and as his trial date approached, he enlisted the help of two other individuals to find C.S. and prevail upon her to not testify. (1-ER-127–32.) This is a far cry from *Motes v. United States*, 178 U.S. 458, 473–74 (1900) (Op. Br. at 31), where "there was not the slightest" evidence of the defendant's involvement in silencing a witness.

Defendant cannot directly or through intermediaries influence and manipulate his victim to avoid the "Feds" and refrain from testifying. The district court's finding that Defendant engaged in that wrongful conduct was not clearly erroneous. *See Reynolds,* 98 U.S. at 159; *Montague*, 421 F.3d at 1101-02. The court's admission of C.S.'s statements under the forfeiture exception should be affirmed.

b. Any Error Was Harmless

Alternatively, any error was harmless because the record contained powerful and compelling additional evidence of guilt. Constitutional error is harmless if, based on the remaining trial evidence, the government proves beyond a reasonable doubt the error did not affect the verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (harmless error applies to Confrontation Clause claims).

The evidence overwhelmingly established Defendant's guilt here, even apart from C.S.'s recorded statements. The jury heard Defendant's jailhouse statements—made on three separate occasions—showing his determination to stifle C.S.'s testimony. (1-ER-127–31.) Defendant's admissions provided clear proof of his "consciousness of guilt"—which is "second only to a confession in terms of probative value." *Meling*, 47 F.3d at 1557.

The evidence also included the testimony of C.S. and Defendant's neighbor, Delwin Ochoa, who saw C.S. uninjured at the beginning of the evening of September 11, 2018, and heard Defendant yelling at and degrading C.S. as they left. (2-ER-274–777.) It included the testimony of Dr. Seroy, who examined C.S. in the emergency room after she called 911, and Nurse Rable, who examined C.S. the next day. C.S. identified Defendant as the source of her injuries to both medical providers. (2-ER-303–36; 3-ER-438–47.) Dr. Jason Low, a radiologist, testified about C.S.'s

facial, nose, and soft tissue injuries. (2-ER-279–86.) The jury saw physical evidence, including photographs of C.S.'s battered head and body. (2-ER-311–36; 3-ER-427–30; TEs 19-22, 34-55.)

Given this additional and compelling evidence of guilt, any error was harmless. *See Moses v. Payne*, 555 F.3d 742, 755 (9th Cir. 2009) (where "[t]here was overwhelming evidence" that the defendant caused the victim's injuries, including the defendant's statement and the testimony of a treating physician, any error was harmless).

B. The District Court Properly Admitted C.S.'s Statements to Nurse Rable Under Rule 803(4) and the Confrontation Clause.

1. Standard of Review

This Court reviews evidentiary rulings for abuse of discretion and will "uphold them unless they are 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *United States v. Gadson*, 763 F.3d 1189, 1199 (9th Cir. 2014) (citation omitted). Factual findings—including findings that statements were made for purposes of medical diagnosis or treatment—are reviewed for clear error. *United States v. Lukashov*, 694 F.3d 1107, 1115 (9th Cir. 2012). Confrontation Clause rulings are reviewed de novo. *United States v. Latu*, 46 F.4th 1175, 1179 (9th Cir. 2022).[5]

[5] While Defendant suggests that Fed. R. Evid. 803(4) rulings are partly reviewed de novo (Op. Br. at 44), this Court has squarely held that whether statements were made

2. Argument

a. C.S.'s Statements to Nurse Rable Were Properly Admitted.

i. C.S.'s Statements Fall Under Rule 803(4).

Fed. R. Evid. 803(4) applies to any statement that "is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." Fed. R. Evid. 803(4). This hearsay exception recognizes that statements for medical diagnosis or treatment "are made under circumstances in which the declarant would be particularly unlikely to lie," because the declarant knows that 'a false statement may cause misdiagnosis or mistreatment.'" *United States v. Kootswatewa*, 893 F.3d 1127, 1132 (9th Cir. 2018) (quoting *White v. Illinois*, 502 U.S. 346, 356 (1992)).

To establish admissibility under Rule 803(4), a party may "introduce[e] objective evidence of the context in which the statements were made"—including "testimony provided by the medical professional who conducted the examination." *Kootswatewa*, 893 F.3d at 1133. A nurse's testimony that the victim "made the statements in response to questions posed by a medical professional during a medical examination conducted at a medical facility" provides strong objective evidence that

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for purposes of diagnosis or treatment is a factual determination reviewed for clear error. *United States v. Lukashov*, 694 F.3d 1107, 1115 (9th Cir. 2012).

the victim's statements were for purposes of medical diagnosis and treatment. *Id*. *See also Latu*, 46 F.4th at 1179 (testimony about treatment context supported admission under Rule 803(4)).

Nurse Rable's testimony provided objective evidence of the medical purpose of her exam. Nurse Rable is the forensic nursing manager for HonorHealth. (2-ER-294, 296.)[6] She testified that "the role of" the nurses in her group "is to do a head-to-toe physical exam and determine, based on their complaints of what has happened . . . a plan of care and what really needs to be done medically for that patient on what they've described." (2-ER-297.) "[I]f there is evidence collection during that process, that's part of the . . . forensic nurse's role as well." (2-ER-297).

Nurse Rable testified that the examinations performed by nurses in her group involve eliciting medical history, identifying the patient's injuries and complaints, and developing a plan of care to address remaining medical issues and ensure the patient's safety. (2-ER-298.) Medical history addresses "why they came today," and eliciting medical history "guide[s] what comes next and what's the best plan of care or treatment for that patient." (2-ER-298–99.)

Nurse Rable's development of a plan of care, in turn, involves determining whether the patient "need[s] specialized or continued care," including "further

[6] HonorHealth is a "locally owned, nonprofit, integrated health system" that operates hospitals and medical centers in Phoenix and Scottsdale. *See* https://www.honorhealth.com/company/history (last visited Feb. 26, 2023).

treatment," "medications," instructions regarding "complications that would need further follow up," and patient safety. (2-ER-298.) For domestic violence victims, developing a treatment plan includes considerations of where the victim will be living, because "[t]he patient's safety is a concern" and "[i]f a person has had a violent incident happen, then we need to know that they have somewhere safe to go." (2-ER-299–300.) And knowing the identity of the person who assaulted the patient is critical because "if it's someone that would be in close contact or potentially cause continued harm, it would be important to know if they are going to continue to be in the same environment or have a violent interaction continue." (2-ER-300.) *See United States v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005) (victim's statements to doctor, "including that her live-in boyfriend had caused her injuries, were statements made for the purpose of medical diagnosis or treatment"); *United States. v. John*, 683 F. App'x 589, 593-94 (9th Cir. 2017) (statements to physical therapist about abuser's identity are admissible under Rule 803(4)).

Nurse Rable's testimony also shows that the context in which C.S.'s medical history was taken further supports the admission of C.S.'s statements. The room in which she treated C.S. is "much like a doctor's office." (2-ER-300.) "There is a gynecological type gurney . . . like [one] you would see in the emergency room," a blood pressure machine connected to the wall, an otoscope, a stethoscope, scale, and other examination equipment. (2-ER-301.) This setting provides objective evidence

that the victim's statements were for purposes of medical diagnosis and treatment. *Kootswatewa*, 893 F.3d at 1133.

Nurse Rable conducted a comprehensive examination of C.S.'s physical injuries, including injuries to C.S.'s head, neck, back, arms, and legs. (*See* 2-ER-311–25.) She diagnosed C.S. with "domestic violence by history, physical assault by history, strangulation by history, and minor and moderate physical injury by examination[.]" (2-ER-310.) She developed aftercare instructions and reviewed them with C.S. (2-ER-325–26.) The instructions included information about signs and symptoms "to watch for, and how to care for yourself after you've been strangled"; they included "drink extra fluids, Tylenol, Advil are okay," and a recommendation that C.S. "not stay alone." (2-ER-325.) Nurse Rable explained that C.S. should watch for onset of "neurological symptoms" that would trigger the "need to go back emergently to the hospital" or call 911, including "difficulty breathing, loss of consciousness or passing out, lightheaded, dizzy, one side of their body weak or not, any speech concerns, vision, hearing[.]" (2-ER-325–26.)

Taken together, Nurse Rable's physical examination, diagnosis, and development of a plan of care for C.S.—conducted in the setting of a medical examination room—are strong objective indicia of medical diagnosis and treatment. *Kootswatewa*, 893 F.3d at 1132-33. C.S.'s statements to Nurse Rable that described the assault that led to her injuries were "made . . . in response to questions posed by

a medical professional during a medical examination conducted at a medical facility"—and were therefore admissible under Rule 803(4). *Kootswatewa*, 893 F.3d at 1133. *See id*. at 1132 ("To diagnose and treat K.C.'s injuries, the nurse practitioner first had to find out what happened to her. . . . K.C.'s statements describing the abuse she suffered were made in response," and "satisfied both prongs of Rule 803(4): They were made for purposes of medical diagnosis or treatment and were 'reasonably pertinent' to that subject[.]"). On this record, the district court properly exercised its discretion by admitting these statements under Rule 803(4).

Defendant suggests that the United States needed to prove directly that C.S. understood the medical purpose of Nurse Rable's examination. (Op. Br. at 45-46.). This Court has held that, while the declarant's understanding is an important part of the Rule 803(4) inquiry, the declarant "need not testify about her subjective thought process at the time she made the statements in question. Indeed, the declarant need not testify at all." *Kootswatewa*, 893 F.3d at 1133. The objective evidence—including that the examination was conducted in a medical examination room and resulted in a clinical diagnosis and development of a plan of care—is more than enough to show that the exam was conducted for diagnosis and treatment. *See id*.[7]

[7] The principles discussed in *Kootswatewa* are not limited to minors. (*Cf*. Op. Br. at 48.) Rule 803(4) contains no age limit, and it does not exclude adult victims of domestic violence. *United States v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005) (victim's statements to doctor, "including that her live-in boyfriend had caused her injuries, were statements made for the purpose of medical diagnosis or treatment"); *United*

ii. C.S.'s Statements Were Not "Testimonial."

Confrontation Clause protections apply only to "testimonial" statements. *Ohio v. Clark*, 576 U.S. 237, 243-44 (2015). Testimonial statements resemble "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. Examples include affidavits, depositions, prior testimony, or police interrogation. *United States v. Esparza*, 791 F.3d 1067, 1071-72 (9th Cir. 2015).

To assess if statements are "testimonial," the Court asks whether the statements: (1) "result[ed] from questioning, 'the primary purpose of [which was] to establish or prove past events potentially relevant to later criminal prosecution'"; and (2) are "'functionally identical to live, in-court testimony' 'made for the purpose of establishing or proving some fact' at trial." *Latu*, 46 F.4th at 1180-83 (citations omitted). That a statement is made in a medical context is "highly relevant" to the primary purpose analysis. *Id.* at 1181.

States. v. John, 683 F. App'x 589, 593-94 (9th Cir. 2017) (adult victim's statements admissible under Rule 803(4) when necessary for treatment purposes); *cf. United States v. Joe*, 8 F.3d 1488, 1494 (10th Cir. 1993) ("the identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children").

C.S.'s statements to Nurse Rable were not testimonial because they had the primary purpose of securing appropriate care and ensuring C.S.'s ongoing and future safety. As shown above, C.S.'s statements were admissible under Rule 803(4) because they were made for purposes of medical diagnosis or treatment. The Supreme Court has recognized that "standard rules of hearsay, designed to identify some statements as reliable, [are] relevant" to the primary purpose inquiry. *Michigan v. Bryant*, 562 U.S. 344, 358-59 (2011). *See Latu*, 46 F. 4th at 1181 (statements admissible under Rule 803(4) "are likely to be non-testimonial") (quoting *Bryant*, 562 U.S. at 362 n.9).

Nurse Rable's evaluation of C.S. occurred just over 24 hours after C.S. had called 911. (2-ER-300, 329; 3-ER-419.) C.S. had visible injuries, including swelling, bruising, lacerations, and abrasions. (2-ER-311–35.) Nurse Rable asked C.S. about how she was injured to better understand the type and severity of injuries from which she was still suffering, evaluate and effectively treat those injuries, and ensure C.S.'s wellbeing and safety. (*See* 2-ER-297–300, 303–11.) In this context, C.S.'s statements to Nurse Rable were not "testimonial."

Moreover, C.S.'s description "lacked the formality that often accompanies testimonial statements." *Latu*, 46 F.4th at 1182. While Nurse Rable used a form when inputting information from C.S., most of C.S.'s quoted remarks reflected her description of the "assault history"—that is, her account of what had happened. (2-

ER-303–05.) And as this Court has recognized, such "past-tense statements are not per se testimonial. Information about past events can have the primary purpose of informing future action"—including development of a plan of care and protection from present or ongoing threats. *Latu*, 46 F.4th at 1182.

Defendant's assertions to the contrary are unavailing. While Defendant suggests that C.S.'s discussion of the assault with Nurse Rable could have not had a primary medical purpose because C.S. had been treated by an emergency room doctor (Op. Br. at 47), no rule limits patients to seeing only one treater—and Nurse Rable is specially trained in "provid[ing] comprehensive care to trauma patients following an assault." (2-ER-295.)

And several courts disagree with the notion—advanced by Defendant—that signing a consent form allowing a nurse to share evidence with law enforcement necessarily renders a victim's statements testimonial. (Op. Br. at 46); *Pham v. Kirkpatrick*, 711 F. App'x 67, 69-70 (2d Cir. 2018); *Dorsey v. Cook*, 677 F. App'x 265, 266-67 (6th Cir. 2017); *cf. United States v. Lane*, 857 F. App'x 372, 373 (9th Cir. 2021) ("[M]ere knowledge that the persons performing the examinations may also be looking for 'evidence' or 'DNA' does not negate the diagnosis/treatment aspect of the victims' statements.").

Moreover, Defendant's reliance on cases finding forensic nurses essentially interchangeable with law enforcement should be rejected. (Op. Br. at 44-47). *See,*

e.g., *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009) (the sexual assault or "SANE" nurse "was acting in cooperation with or for the police" and her questioning "was not for the purpose of resolving a problem"); *Medina v. State*, 143 P.3d 471, 476 (Nev. 2006) (the SANE nurse in that case "was a police operative"); *State v. Cannon*, 254 S.W.3d 287, 303-06 (Tenn. 2008) (the SANE nurse described her examination "as an 'investigation,'" and a police detective questioned the victim "along with" the nurse); *United States v. Gardinier*, 65 M.J. 60, 65-66 (C.A.A.F. 2007) (nurse asked the victim about to tell her "what you talked about with Ken the policeman"); *United States v. Bordeaux*, 400 F.3d 548, 555-56 (8th Cir. 2005) ("[t]he formality of [the victim's] questioning and the government involvement in it [were] undisputed").

Here, in contrast, Nurse Rable's medical examination of C.S. included a diagnosis of C.S.'s current condition and development a plan of treatment and aftercare. (2-ER-310, 325–26.) The examination was performed by a nurse employed by HonorHealth with "specialized training to provide comprehensive care to trauma patients following an assault." (2-ER-295.) The police did not participate in Nurse Rable's medical examination; *after* the examination ended at 10:40 a.m., Det. Owens met with C.S. and interviewed her. (*See* Op. Br. at 15; 2-ER-309, 341–42; TEs 4-5.) Nurse Rable was not a "police operative."

C.S.'s statements to Nurse Rable describing the origin of her physical injuries were non-testimonial. The district court properly admitted them.

b. Admission of C.S.'s Statements Was Harmless.

Alternatively, admission of C.S.'s statements to Nurse Rable was harmless beyond a reasonable doubt. *United States v. Benamor*, 937 F.3d 1182, 1190-91 (9th Cir. 2019). Her statements to Nurse Rable regarding how the assault occurred and who perpetrated the assault were almost entirely cumulative of the video-recorded statements that she gave to Dets. Daniels and Owens, and the statements she made to Dr. Seroy in the emergency room. Moreover, C.S.'s description of how the assault occurred and the injuries she suffered was corroborated by extensive physical evidence, including Det. Daniels' and Nurse Rable's photographs of her injuries. *See Medina v. Williams*, 565 F. App'x 644, 645-46 (9th Cir. 2014) (admission of victim's statements to nurse was harmless; the testimony was cumulative of the victim statements to another witness, and was corroborated by physical evidence, including photos of injuries). To the extent C.S.'s statements to Nurse Rable discussed strangulation, the jury acquitted Defendant of the strangulation acts in Count 3 of the indictment.

The trial record contained powerful additional evidence—including three recorded jail conversations that evinced Defendant's consciousness of guilt and efforts to silence his victim. Given the multiple, consistent accounts of the assault

admitted at trial, and proof of Defendant's consciousness of guilt, admitting C.S.'s description of the assault to Nurse Rable was harmless.

C. Defendant's Kidnapping Acquittal Moots His Appeal from the Denial of His Rule 29 Motion on that Charge, and His Unlawful Imprisonment Conviction Should Be Affirmed.

1. Standard of Review

This Court reviews the denial of an evidence sufficiency challenge de novo, applying a two-step analysis. *United States v. Bachmeier*, 8 F.4th 1059, 1062 (9th Cir. 2021). First, the Court "construe[s] the evidence 'in the light most favorable to the prosecution.'" *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). If the record "'supports conflicting inferences' a reviewing court 'must presume…the [jury] resolved any such conflicts in the favor of the prosecution, and must defer to that resolution.'" *Id.* (quoting *Jackson*, 443 U.S. at 326). Second, the Court determines if the evidence viewed in the light most favorable to the prosecution "is adequate to allow '*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson*, 443 U.S. at 319). Reversal occurs only in "rare" instances. *Id.* at 1164-65.

Ordinarily, this Court reviews the formulation of jury instructions for abuse of discretion, and reviews de novo whether those instructions correctly state the elements of the offense and adequately cover Defendant's theory of the case. *United*

States v. Lonich, 23 F.4th 881, 898 (9th Cir. 2022). But where, as here, Defendant fails to object to the instruction below, the Court reviews for plain error. *Id.* Under plain-error review, reversal is warranted only if the district court committed: (1) an error; (2) that is "plain"; and (3) that prejudices substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). *See United States v. Kaplan*, 836 F.3d 1199, 1215 (9th Cir. 2016) ("Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that they prejudiced the defendant.") (internal quotations and citations omitted). If the first three requirements are met, this Court has "*discretion* to remedy the error" "only if" a fourth requirement is satisfied, *Puckett v. United States*, 556 U.S. 129, 135 (2009)—that is, only if (4) the Court concludes that the error seriously effected "the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

"Reversal on the basis of plain error is an exceptional remedy and an improper jury instruction rarely justifies reversal of a conviction for plain error." *United States v. Ching Tang Lo*, 447 F.3d 1212, 1228 (9th Cir. 2006).

2. Argument

a. Defendant's Rule 29 Objection on Kidnapping Is Moot.

Defendant's appeal of the denial of his Rule 29 motion on the kidnapping count is moot because the jury *acquitted* him of that charge. (3-ER-527–530.) By acquitting Defendant, the jury did the same work that granting a Rule 29 motion

would have done—it rendered a judgment of acquittal for Defendant on kidnapping. The jury agreed that the evidence did not support kidnapping. Accordingly, the verdict rendered moot any appeal concerning the sufficiency of the evidence on that charge. *See United States v. White*, 810 F.3d 212, 229 n.5 (4th Cir. 2016) (where the jury convicted on a lesser-included offense, defendant's appeal regarding his Rule 29 motion was "almost nearly moot"); *United States v. Partida*, 385 F.3d 546, 560 n.10 (5th Cir. 2004) (rejecting sufficiency-of-the-evidence claim as moot where defendant was acquitted of the count at issue).

b. The Lesser-Included Charge Properly Went to the Jury.

Defendant's claim that the lesser-included charge of unlawful imprisonment "never should have gone to the jury" lacks merit. (Op. Br. at 50.) Even if the district court had granted Defendant's Rule 29 motion on kidnapping, it still could have submitted the lesser included offense to the jury, because the evidence was clearly sufficient to support a conviction on that offense. *United States v. Wood*, 207 F.3d 1222, 1226 (10th Cir. 2000) ("On a defendant's motion for acquittal, if the evidence is sufficient to sustain a conviction on the lesser but not the greater offense, the judge may submit only the lesser charge to the jury."); *United States v. LoRusso*, 695 F.2d 45, 52 (2d Cir. 1982) (district courts have broad authority to submit lesser-included offenses to the jury under Fed. R. Crim. P. 31(c)).

When considering a Rule 29 motion, the district court should consider "not only whether the evidence [is] sufficient to sustain a conviction of the offense charged, but also whether it would be sufficient to sustain a conviction on a lesser included offense." *Wood*, 207 F.3d at 1229. The district court committed no sufficiency-of-the-evidence error by submitting the lesser-included offense to the jury, as discussed below.[8]

c. The District Court Did Not Plainly Err By Adopting the Jury Charge for Unlawful Imprisonment that Defendant Requested.

Two years after Defendant's trial, this Court held that in determining whether a defendant charged with assault could also be convicted of kidnapping under 18 U.S.C. § 1201(a)(2), courts should consider the four factors identified in *Gov't of the Virgin Islands v. Berry*, 604 F.2d 221, 224 (3d Cir. 1979). *United States v. Jackson*, 24 F.4th 1308, 1314 (9th Cir. 2022). The *Berry* factors are: "(1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation

[8] Defendant notes that a lesser-included offense may be a state-defined offense pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13. (Op. Br. at 58-59.) He makes no argument that the Arizona-defined offense of unlawful imprisonment was improperly submitted to the jury under the Act. (Op. Br., *passim*.) The United States has found no Ninth Circuit cases holding that the crime is not subject to assimilation. In all events, arguments "not raised clearly and distinctly in the opening brief" are waived. *McKay v. Ingleson,* 558 F.3d 888, 891 n. 5 (9th Cir. 2009).

or detention created a significant danger to the victim independent of that posed by the separate offense." *Jackson*, 24 F.4th at 1312 (quoting *Berry*, 604 F.2d at 227).

Defendant argues for the first time on appeal that a jury instruction on kidnapping that anticipated *Jackson* "would have guided [the] jury's deliberations" on the lesser-included offense instruction that Defendant had crafted. (Op. Br. at 58.) But the district court did not err, let alone plainly err, by adopting the instruction on the lesser-included offense that Defendant requested.

i. *There Was No Error*.

Before trial, Defendant asked the district court to include unlawful imprisonment as a lesser included offense of his federal kidnapping charge. (1-ER-132, 136–138). Over the United States' objection, the court gave the requested instruction. (3-ER-465–67, 483–84.) As Defendant admits, the instruction tracked Ariz. Rev. Stat. §§ 13-1301 and 13-1303(a), and Ariz. Rev. Model Jury Instructions 13.031 (2019). (Op. Br. at 58-59.) Accordingly, it "correctly state[d] the elements of the offense" of unlawful imprisonment under Arizona law. *Lonich*, 23 F.4th at 898; Ariz. Rev. Stat. §§ 13-1301 and 13-1303(a). Additionally, because Defendant requested the instruction, it "adequately cover[ed] [his] theory of the case." *Lonich*, 23 F.4th at 898. The court committed no error by adopting the instruction, which Defendant sought and which faithfully tracked the statute's text.

ii. *Any Error Was Not "Plain."*

An error is plain when it is "so clear-cut, so obvious, [that] a competent district judge should be able to avoid it without benefit of objection." *United States v. Sanders*, 421 F.3d 1044, 1051 (9th Cir. 2005). And even if it were error not to include the *Berry* factors in the kidnapping instruction, Defendant points to no authority showing that the district court somehow erred by giving Defendant's requested unlawful imprisonment instruction without cross-referencing the *Berry* factors. The United States has not found any such authority. Given the lack of authority, any error was not "clear-cut" or "obvious."

And it is not plain or obvious that the concerns animating *Jackson* apply to Arizona's crime of unlawful imprisonment. *Jackson*'s adoption of the *Berry* factors was driven by this Court's concern about the risks of converting a simple assault into federal kidnapping—a felony punishable by potential lifetime imprisonment. *Jackson*, 24 F.4th at 1312; 18 U.S.C. § 1201(a). To ensure that the life-eligible crime of kidnapping "requires more than a transitory holding" but rather reflects "the 'essence of the crime of kidnaping,'" *Jackson* held that the *Berry* factors must be considered to determine whether the charged conduct constitutes kidnapping. *Id*. at 1312-14 (quoting *Chatwin v. United States*, 326 U.S. 455, 464 (1946)). Yet Arizona's crime of unlawful imprisonment is a class 6 felony—the state's lowest felony classification—and is subject to a statutory maximum of two years'

imprisonment. Ariz. Rev. Stat. §§ 13-1303(C), 13-702(D); PSR ¶ 91. *Jackson*'s rationale—the need to avoid transforming simple assault cases into felonies involving possible life sentences—has no bearing on the lesser-included offense charged here.

iii. *No Error Affected Defendant's Substantial Rights.*

Defendant also cannot meet the third plain-error prong—he cannot show substantial prejudice because he did not face a reasonable probability of acquittal had the jury received a *Jackson* instruction. *United States v. Michell*, --- F.4th ---, 2023 WL 2004601, at *3 (9th Cir. Feb. 15, 2023). Unlawful imprisonment under Ariz. Rev. Stat. § 13-1303(a) "occurs when a person knowingly restrains another person"; the focus of the crime "is solely on the restraint of the victim." *State v. Braidick*, 295 P.3d 455, 458 (Ariz. Ct. App. 2013). The trial evidence was more than enough to show unlawful imprisonment—that Defendant knowingly restrained C.S.—even if the *Berry* factors were considered.

The first *Berry* factor, the duration of the restraint, supports the verdict. Unlike in *Jackson*, where the assault took roughly six or seven minutes, 24 F.4th at 1310, Defendant's attack on C.S. started at around 8:00 p.m. on September 11, 2018, and its initial violent phase lasted about one hour. (2-ER-304.) Defendant punched, kicked, and stomped on C.S., prevented her from leaving, dragged her back in when she tried to leave, and threatened additional violence if she tried to flee and seek

help. (*See* SER-21–22, 25, 30; SER-37, 42–43, 47.) The jury could have easily found from this evidence that Defendant knowingly restrained C.S. from about 8:00 p.m. to 9:00 p.m.—and it could have fairly inferred that Defendant kept her confined until she broke free of his control (backed by force and threats), left him and called 911 the next day. (*See* SER-37–38, 50.) Even if viewed as lasting only from 8:00 p.m. to 9:00 p.m., the detention persisted far longer than the brief period in *Jackson. Cf. Com. v. Boyd*, 897 N.E.2d 71, 75-76 (Mass. App. 2008) (affirming kidnapping and assault convictions where, during a span of over 40 minutes, defendant threw victim to the floor, choked her, held a knife to her face, threatened her, and berated her); *State v. Traversie*, 877 N.W.2d 327, 331 n.2. (S.D. 2016) (confinement of less than 30 minutes supported conviction); *State v. Lewis*, 84 A.3d 1238, 1240-41 (Conn. App. 2014) (evidence sufficient where defendant punched victim and violently prevented her from fleeing).

The second and third *Berry* factors also support Defendant's conviction. Viewed in the light most favorable to the verdict, Defendant's use of force and his threats of further violence were calculated to isolate C.S. and prevent her from seeking help. C.S.'s detention in the trailer lasted longer than those moments when Defendant was punching, kicking or stomping on her. The period of her detention was not inherent in the separate offense of assault.

And by using force and threats to prevent C.S. from seeking help, Defendant created a significant danger independent of that posed by his assault—satisfying the fourth *Berry* factor. He prolonged the period that she was at risk of violence, and prevented her from obtaining immediate medical treatment, thereby placing her in additional danger. Under the liberal Rule 29 standard, the evidence was more than sufficient to support the verdict—and Defendant's assertion that a *Jackson* instruction would have somehow precluded his unlawful imprisonment conviction lacks merit. (*Cf.* Op. Br. at 58.)

For the same reasons, the district court correctly denied Defendant's Rule 29 motion on the kidnapping charge (assuming that issue is not moot). (*See* Op. Br. at 55-58.) The trial evidence shows that the duration of the confinement in this case was far longer than the six-to-seven minutes in *Jackson*, satisfying the first *Berry* factor. The second and third factors were satisfied because Defendant's use of force and his threats of further violence were calculated to isolate C.S.; her detention lasted longer than those moments when Defendant was striking or kicking her; and the long period of her detention was not inherent in the separate offense of assault. And the heightened risk of danger to C.S.'s health and safety posed by the prolonged period of the detention satisfied the fourth *Berry* factor.

Defendant's contrary cases are inapposite. (Op. Br. at 56-57.) In *United States v. Corralez*, 61 M.J. 737 (2005), the kidnapping charges involved two five-minute

periods—times far shorter than that involved here. 61 M.J. at 747-48. In *Berry*, the victim was "alone with uninvolved third parties" who could have helped him, and was then robbed at a beach. 604 F.2d at 224, 228. Here, Defendant assaulted C.S. in the confined space of a trailer for at least an hour; C.S. was not left with third parties who could have helped. In *Weber v. State*, 547 A.2d 948, 959 (Del. 1998), the victim escaped and then returned to detain the defendant; here, C.S. didn't detain Defendant—he knocked her to the ground, punched her, and twice placed her in a chokehold when she tried to run. The jury's verdict should be affirmed.

For similar reasons, any error in the jury instructions was harmless, because a jury that heard the *Berry* factors in relation to a charge of kidnapping would have had more than sufficient evidence to find Defendant guilty of the lesser included offense of unlawful imprisonment. This is because the evidence showed that Defendant repeatedly prevented C.S. from leaving and threatened additional violence if she tried to seek help. (SER-21–22, 25, 30; SER-37, 42–43, 47.) Defendant cannot show prejudice, and any error was harmless.

iv. *This Is Not an "Exceptional" Case.*

Nor can Defendant overcome the high hurdle of demonstrating entitlement to discretionary relief under the fourth plain-error prong. The Court should not exercise that discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. Such relief should be

exercised "sparingly," *Jones v. United States*, 527 U.S. 373, 389 (1999), and reserved for "exceptional circumstances." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The use of a jury instruction that Defendant requested—and that accurately reflected Arizona law—is not an error that requires exceptional relief. Defendant never asked the court to incorporate the *Berry* factors into his instruction. The verdict was supported by ample evidence. Reversal is not warranted to protect the fairness, integrity, and public reputation of these proceedings.

Defendant's suggestion that "a *Jackson*-type instruction" should be given whenever Arizona unlawful imprisonment is charged as a lesser-included offense of kidnapping should be rejected. (Op. Br. at 60.) As discussed above, *Jackson*'s rationale—the need to avoid transforming simple assault cases into felonies involving possible life sentences—has no bearing on Defendant's conviction for unlawful imprisonment, which is punishable by a statutory maximum of two years' imprisonment. Ariz. Rev. Stat. §§ 13-1303(C), 13-702(D). Moreover, Arizona's offense is defined in the Arizona Revised Statutes, and the instruction that Defendant proposed tracked the Arizona legislature's definition of that crime. The Court should not accept Defendant's invitation to redefine the Arizona offense here.

D. The District Court Properly Exercised its Discretion by Applying Obstruction of Justice and Strangulation Adjustments at Sentencing.

1. Standard of Review

The district court's application of the Sentencing Guidelines to the facts of a case is reviewed for abuse of discretion. *United States v. Gagarin*, 950 F.3d 596, 606 (9th Cir. 2020). The court's factual findings are reviewed for clear error, and sufficient record evidence must support a sentencing adjustment. *United States v. Harrington*, 946 F.3d 485, 487 (9th Cir. 2019).

2. Argument

a. The Court Properly Applied the Obstruction Adjustment.

The district court's 2-level obstruction adjustment should be affirmed because a preponderance of evidence showed that Defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice." U.S.S.G. § 3C1.1. *See United States v. Watts*, 519 U.S. 148, 156 (1997) (preponderance of the evidence standard at sentencing "generally satisfies due process"). At a minimum, Defendant tried to obstruct by threatening, intimidating or otherwise influencing C.S. not to testify. *United States v. Sayetsitty*, 107 F.3d 1405, 1410 (9th Cir. 1997) ("a showing of attempt is sufficient to warrant the two-level increase").

To qualify as attempt to obstruct, Defendant did not need to threaten C.S.; he need only have attempted to influence her, directly or through third parties. *United States v. Perez*, 962 F.3d 420, 451-52 (9th Cir. 2020) (third-party communications

can suffice); *United States v. Kurt*, 532 F. App'x 723, 726-27 (9th Cir. 2013) (affirming enhancement for attempted obstruction where defendant contacted a third party); *United States v. Fleming*, 667 F.3d 1098, 1109-10 (10th Cir. 2011) ("[T]o qualify as an attempt to obstruct justice, '[a] defendant need not actually threaten the witness; he need only attempt to influence the[ ] [witness].' A defendant can attempt to influence a witness indirectly by asking a third party to threaten or communicate with the witness.") (citation omitted).

And while "clear and direct threats" support the adjustment, district courts may "draw inferences from context" and consider the speaker's history of violent conduct, including violence directed against the witness. *United States v. Archer*, 671 F.3d 149, 167 (2d. Cir. 2011) ("intent to deter cooperation with the government is sufficient"); *see United States v. Shoulberg*, 895 F.2d 882, 883-84 (2d Cir. 1990) (affirming adjustment where a drug dealer with a violent history known to all parties asked for a potential witness's address).

Defendant told a third party that he had talked to the victim about not coming to trial—in other words, he had made a *willful* effort to keep C.S. from testifying. (1-ER-127.) His later instructions to Natia and Lucinda to find C.S.—and tell her not to testify—were additional, willful efforts to obstruct justice. (1-ER-128–31). The context of these communications is critical: Defendant's relationship with C.S. was marred by repeated acts of domestic violence and threats of harm if C.S. ever

sought help (SER-30; 2-ER-306)—and the specter of future violence hung over Defendant's efforts to prevent her from testifying. (PSR ¶ 8.) On these facts, the court committed no error by applying the obstruction adjustment.

Defendant's contrary assertions miss the mark. While the prosecutor remarked at sentencing that Defendant's statement to Lucinda that "they can't force her to go" was "true," Defendant's reliance on that comment ignores its context. (Op. Br. at 40, 42, 63.) The prosecutor described Defendant's recorded conversation with Lucinda on January 12, 2020 as follows: "He's trying to instruct the person he's calling to make sure that [C.S.] doesn't appear, basically. [T]hey can't force her to go. Yes, obviously, that's a true statement, they can't force her to go, but within the context of the conversation, that has more meaning than just what was presented." (4-ER-550.) The context included Defendant confirming with Lucinda that she knew how to find C.S., and his statements "I need you to find her" and "make sure she does not fuckin' [testify]." (1-ER-130–31.)

Defendant's efforts to silence C.S. are nothing like the statements involved in *United States v. Emmert*, 9 F.3d 699, 704-05 (8th Cir. 1993)—where a defendant told a government witness, just outside the courtroom, to "stay strong" and "be quiet." (Op. Br. at 63-64.) The court found these comments were "somewhat ambiguous" and "not so plainly obstructive as to warrant" an obstruction adjustment.

9 F.3d at 705. *Emmert* is inapt: It contains no indication that the defendant had a long history of inflicting physical harm on the witness.

Nor is this case like *United States v. Castro-Ponce*, 770 F.3d 819, 822-23 (9th Cir. 2014) (Op. Br. at 64), where the district court failed to make specific findings to support an adjustment for perjury. If *Castro-Ponce* requires specific findings in this non-perjury case, the district court made such findings. At trial, the court found the United States had "produced sufficient evidence to demonstrate by a preponderance of the evidence that [Defendant] acted intentionally to cause the victim's unavailability, both directly by his statements when he indicated he's taking care of it, or he has taken care of it, and indirectly by his directions to other people." (3-ER-363.) And at sentencing, the court overruled Defendant's objection to the obstruction adjustment (4-ER-552) and "adopt[ed] the facts as set forth in the presentence report in support of the guideline calculations and the reasons for the sentence." (4-ER-583.) *See United v. Ahmed*, 621 F. App'x 459, 460 (9th Cir. 2015) ("The district court expressly adopted the factual findings of the presentence report (PSR), which satisfies the requirement that it make factual findings.") (citing *United States v. Gadson,* 763 F.3d 1189, 1220 (9th Cir. 2014)). The PSR, in turn, summarized Defendant's jail conversations and found that he "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice when

[he] attempted to indirectly influence a witness by instructing others tell her not to appear[.]" (PSR ¶¶ 15-17, 20.) The obstruction adjustment should be affirmed.

b. The Court Properly Applied the Strangulation Adjustment.

Defendant incorrectly asserts that his acquittal on Assault of an Intimate Partner by Strangulation and the lesser included offense of Assault by Striking foreclosed the district court's application of a 3-level sentencing adjustment for strangulation under U.S.S.G. § 2A2.2(b)(4). (Op. Br. at 64-65.) But "[a] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Watts*, 519 U.S. at 157.

The district court did not abuse its discretion by applying the strangulation adjustment. 18 U.S.C. § 113(b)(4) defines "strangling" as "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." U.S.S.G. § 2A2.2(b)(4), Application Note 1 (adopting definition from 18 U.S.C. § 113(b)(4)). C.S. told the police Defendant had grabbed her by the neck, put her in a chokehold, and dragged her about ten feet—and then choked her again when she tried to escape. (SER-21, 36–37, 43; 3-ER-378–79.) In the emergency room, on September 12, 2018, Dr. Seroy found C.S. "positive" for, among other things, neck

pain, dizziness, and headaches—and C.S. had tenderness through several neck vertebrae. (3-ER-440, 42–43.)

The next morning, C.S. reported to Nurse Rable symptoms consistent with strangulation—including headache, lightheadedness, dizziness, and throat and neck pain. (2-ER-305, 307.) C.S. stated that Defendant "put me in a choke hold and dragged me inside and stepped on my chest and kicked me[.]" (2-ER-304–05.) When Nurse Rable asked C.S. if she had been strangled/suffocated, C.S. answered, "Yes. Twice." (2-ER-306). Nurse Rable's diagnosis included "strangulation by history" (2-ER-310), and she reviewed aftercare instructions with C.S. that included strangulation warning signs. (2-ER-308, 325–26.)

Based on this evidence, the district court properly exercised its discretion—and Defendant's sentence should be affirmed.[9]

[9] Defendant's assertion that acquitted conduct cannot be used to enhance his sentence under the Fifth and Sixth Amendments is foreclosed by *United States v. Watts*, 519 U.S. 148, 156-57 (1997), and *United States v. Mercado*, 474 F.3d 654, 655-58 (9th Cir. 2007). (Op. Br. at 66-68.)

VIII. CONCLUSION

For all these reasons, the judgment of conviction and sentence should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, no related cases are pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 21-10230

9th Cir. Case Number(s) *21-10230*

I am the attorney or self-represented party.

[ ] the attached brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

This brief contains 13,691 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1 (opening, answering, must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

February 27, 2023
Date

s/ Peter S. Kozinets
PETER S. KOZINETS
Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2023, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Peter S. Kozinets
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