No. 16-30013
[NO. CR15-0109JLR, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND LEE FRYBERG, JR.,

Defendant-Appellant.

ANSWERING BRIEF OF UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable James L. Robart
United States District Judge

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PRELIMINARY STATEMENT

Although defendant-appellant Raymond Fryberg, Jr., was subject to a Tulalip tribal court domestic violence protective order since 2002, and in 2012 was convicted in tribal court of violating that order, Fryberg made repeated purchases of firearms. For each purchase, he completed an ATF form 4473 in which he falsely declared he was not subject to a court order restraining him from harassing, stalking, or threatening his child or intimate partner, despite acknowledging awareness of that order during the 2012 prosecution. However, because his tribal protection order had not been entered into the National Instant Criminal Background Check System (NICS) database used to check a firearm purchaser's background, his purchases were permitted.

Fryberg's illegal firearms purchases were discovered when his fifteen-year-old son used one of these firearms to kill several classmates and then himself in a school shooting and the firearm was traced to Fryberg. Agents then learned that Fryberg had purchased the firearm while subject to a qualifying domestic violence protection order that disqualified him from firearm ownership.

Fryberg was charged in six counts with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(8). Throughout the prosecution, although he acknowledged that he had received notice of the protection order, and pleaded no contest to a violation of that order before purchasing the majority of his firearms, Fryberg asserted that he did not know he was prohibited from possessing firearms. Fryberg also claimed he never received notice of the protection order hearing, despite the return of service in the Tulalip tribal court file showing that he had been served. The jury convicted Fryberg of all charges. CR_96.

Although not raised in the district court, Fryberg now claims that 18 U.S.C. § 922(g)(8) is unconstitutional as applied to the facts of this case. He also argues that he was prejudiced by the district court's denial of his change-of-venue motion and that the court made various erroneous evidentiary rulings and instructional errors. Finally, he labels as prosecutorial misconduct the prosecutor's isolated comment in closing argument. None of the issues have merit.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On

January 11, 2016, Fryberg was sentenced and the judgment entered. CR_112, 113; 2ER_62-67.[1] His timely notice of appeal was filed on January 21, 2016. CR_114; 2ER_59.

ISSUES ON APPEAL

I. Is the defendant's "as applied" constitutional challenge to 18 U.S.C. § 922(g)(8) an unpermitted collateral challenge to his domestic violence protection order?

II. Is intermediate scrutiny the correct standard to apply to the defendant's claim that 18 U.S.C. § 922(g)(8) violates his Second Amendment rights?

III. Does 18 U.S.C. § 922(g)(8) as applied to the facts of this case violate Defendant's Second Amendment rights?

IV. Did the district court abuse its discretion when it denied Defendant's change-of-venue motion?

V. Did the district court abuse its discretion when it admitted into evidence photographs of firearms and ammunition and refused to redact the language about custody rights contained in the protection order?

VI. Did the district court's decision to admit into evidence the return of service indicating that the defendant had received notice of the protection order hearing violate the defendant's Confrontation Clause rights?

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[1] "_ER_" refers, by volume and page number, to the Appellant's Excerpts of Record; "CR_" refers, by docket entry number, to the district court clerk's docket; and "SER_" refers, by page number, to the government's Supplemental Excerpts of Record.

VII. Did the district court properly deny the defendant's request for an entrapment by estoppel instruction where the evidence at trial did not support this defense?

VIII. Did the district court properly deny the defendant's request for a supplemental knowledge instruction where the instructions as a whole properly informed the jury of the correct applicable standard?

IX. Did the prosecutor's isolated statement in closing argument violate Defendant's Fifth Amendment rights?

A. If the Court so finds, was that error harmless?

BAIL STATUS OF DEFENDANT

Fryberg is serving his twenty-four-month sentence and has a projected release date of November 11, 2017.

I. STATEMENT OF THE CASE

A. The Charges

Fryberg was charged by complaint with unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g)(8). CR_1. At his detention hearing following arrest, Fryberg claimed he was legally entitled to possess firearms under tribal law and that he was never told he could not possess firearms. SER_8-9. As evidence of that fact, Fryberg pointed to two occasions when he claimed law enforcement officers checked his hunting license and did not inform him he was prohibited from possessing a firearm. SER_9-10. Fryberg's attorney framed the

charge as a technical one, contending that although Fryberg could lawfully possess a firearm, he could not legally purchase one and that the protection order did not inform Fryberg of that fact. SER_8-9, 12-13.

Thereafter, Fryberg was charged with six counts of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(8). CR_29; 2ER_239-238. He proceeded to trial on those charges.

B. The Change-of-Venue Motion

Prior to trial, Fryberg filed a change-of-venue motion, claiming he could not receive a fair trial in the Western District of Washington because of the prejudicial pretrial publicity. CR_43; 4ER_290-306. Essentially, Fryberg argued that the government's press release announcing the charge was designed to influence public perception against him by connecting him to the school shooting his fifteen-year-old son had committed and that prejudice should be presumed as a result. 2ER_290-306.

Denying the motion, the court observed that before voir dire, a defendant establishes the need for a change of venue only if the record demonstrates that the community where the trial is to take place "was

saturated with prejudicial and inflammatory media publicity about the crime" allowing for a presumption of prejudice. 1ER_2-3. Applying the factors relevant to assessing prejudice, the court observed that Fryberg was charged with illegal possession of firearms and not with charges connected to the school shooting, and that although there was "a certain amount of creep" linking Fryberg to his son, most media coverage limited itself to the charges against Fryberg. 1ER_4. The court found that Fryberg's briefing was filled with "soaring constitutional rhetoric and undocumented factual assertions," which the court did not find persuasive either regarding the quantity of publicity or the prejudicial quality of the articles. 1ER_4-5.

The court further noted that the northern division of the district from which the jury venire would be drawn had a population in the millions making it likely the court would be able to impanel a jury that had not been "soaked in prejudicial coverage." 1ER_5. The court observed that although recent media coverage addressed the investigation of the school shooting, most of these articles simply noted that Fryberg would be tried on firearms possession charges, and that the reporting regarding the school shooting had diminished over time.

1ER_6. Finally, the court noted that the media coverage regarding Fryberg's case was generally factual and not highly prejudicial, and that many articles focused on the background-check system, something that was not at issue in the trial. 1ER_6-7.

After the court denied the motion, the defense asked the court to make a separate ruling regarding "the extent to which the government participated in creating an atmosphere which could result in an unfair trial." 1ER_8. In response, the court stated it had thoroughly considered the government's press release before reaching its decision and, as it had observed at the start of the hearing, again noted that some media statements by the defense constituted an attempt to put the defense theory of the case before the press. 1ER_9-10.

C. Court's Ruling on Fryberg's Motion in Limine

The defense filed a pretrial motion in limine seeking to exclude from evidence the "return of service" establishing that Fryberg received notice of the hearing during which the order of protection was entered. CR_59-60; 2ER_156-57. The defense argued the document should be excluded because the officer who served the document was deceased and

that admission of the document therefore would violate Fryberg's Sixth Amendment Confrontation Clause rights. 2ER_278-281.

The court denied that motion finding the document admissible and that Fryberg's Confrontation Clause rights would not be violated as a result. 1ER_13-16. Specifically, the court observed that a testimonial statement is one that has as its principal purpose establishing conduct potentially relevant to a later criminal proceeding. 1ER_14. The mere possibility a record might be used in a later criminal proceeding does not render the record testimonial, and business and public records are generally admissible without violating confrontation rights because such documents are created for "the administration of the entity's affairs" and not to prove a fact at trial. 1ER_14. The court also observed that, although this specific issue was unresolved in this circuit, state courts have held that the "return of service" on a protection order is not testimonial, and introducing such a document into evidence did not violate the Confrontation Clause. 1ER_14.

The court also found the "return of service" was admissible as a public record under Fed. R. Evid. 803(8)(A)(ii) and that the law enforcement exception to Rule 803(8) did not apply to "routine,

non-adversarial matters, or reports that are ministerial, objective, and non-evaluative." 1ER_15. Although a law enforcement officer made the return of service, the court concluded the document was an "objective, non-documented report made in the routine, non-adversarial setting," and observed that the Tulalip Tribal ordinance governing protection orders imposed a legal duty on the officer to serve Fryberg. 1ER_15-16. The court also rejected the claim that the location of service reflected on the return was fictitious, observing that the government had produced photographic evidence proving that the intersection existed. 1ER_16.

D. Jury Selection

The court summoned fifty-one potential jurors. 2ER_169. Based on answers to a case-specific questionnaire, twenty-two jurors were questioned privately. SER_65-67. Nine of these jurors were excused for cause because they could not be fair, SER_85-86, and one juror was excused because he would have a hard time following the law. SER_78-85.

Three jurors (26, 35, and 44) who had been questioned privately served on the jury. SER_87. Fryberg did not challenge these three jurors for cause. SER_68-76. During questioning, Juror 26 stated that

she recalled hearing about the case and only realized she heard a news report when she saw the name. SER_68-70. Juror 35 stated he was aware that the school shooter had obtained the firearm from a relative but did not recall any other details and could be fair and impartial. SER_71-73. Juror 44 indicated Fryberg's name might be associated with the school shooting, but she could not recall details and could be fair and impartial. SER_74-75. The sworn jury was admonished not to discuss the case and not to listen or view any media reports about the case. SER_90-93.

Prior to opening statements, Fryberg renewed the change-of-venue motion. SER_95-96. The court denied the motion noting that the jurors who were aware of the school shooting knew Fryberg was on trial only for possession of a firearm and that the jury had already been instructed to avoid any media. SER_96-97.

E. The Opening Statements

In the opening statement, the prosecutor stated that the FBI had found five firearms in Fryberg's bedroom, "left out in the open, unsecured, at the foot of his bed." 2ER_158. Fryberg objected. 2ER_158. Thereafter, Fryberg made a mistrial motion arguing that the

government's statement about the "unsecured" firearms was irrelevant and highly prejudicial. 2ER_161-62. The court summarily denied the motion, stating that the location and manner of storage was relevant to show the firearms were part of Fryberg's household. 2ER_162-63,

During the defense opening, counsel questioned the validity of the "return of service" document, noting that the officer whose name appeared on the return was the "brother of the person who was asking for the protection order" and claiming that the location where Fryberg was served did not exist. SER_107-108. Counsel then claimed Fryberg was never served with notice of the protection order hearing and that if Fryberg chose to testify, he would tell the jury he would have attended the hearing had he been served with the "papers." SER_108-109. The defense also claimed there was no evidence that Fryberg was served with a copy of the permanent protection order "[e]ver, ever, none, zero." SER_108. According to the defense, when Fryberg stated he was not the subject of a protection order when purchasing firearms, this was because "he did not know that he was [subject to a protection order] and not only did Fryberg not know that, neither did the government." SER_109.

Defense counsel also claimed that, on at least thirteen occasions, Fryberg was told by various authorities, including the United States government, that he was not prohibited from purchasing firearms. SER_108. Specifically, the defense referenced three occasions when Fryberg allegedly was stopped by game wardens and that checks to determine if he was permitted to have a weapon came back clear. SER_111. The defense also claimed Fryberg had applied for, and was granted, a concealed weapons permit after a required background check did not disclose anything prohibiting him from possessing a firearm. SER_109-110.

The defense stated that the issue was whether "Fryberg [knew] he was subject to a protection order that prohibited him from having firearms, notwithstanding the fact that the government checked him thoroughly." SER_112. The defense ended by asserting that Fryberg had purchased the various firearms in good faith, believing he was allowed to purchase, maintain, and own them. SER_112.

F. The Evidence at Trial

On August 19, 2002, Jamie Gobin applied in Tulalip Tribal Court for a protection order against Fryberg. SER_130-133. A temporary

order was issued and a hearing set to determine whether a permanent protection order should issue. SER_130-133. Under the tribal court procedures, a petitioner is given two copies of the temporary order, one of which is to be served on the respondent. SER_120. The petitioner is also given a declaration of service to be completed after the respondent is served with the hearing notice. SER_120. On the hearing date, if the court file did not contain this "return of service" as proof of notice, the court would reissue the temporary order and reset the hearing to allow the respondent to be served so that the respondent would have an opportunity to provide information during the hearing. SER_91-93, 123, 145-147, 154-155. The tribal court generally relies on a return of service to establish a respondent has been served. SER_146.

Fryberg's protection order hearing was originally scheduled for August 27, 2002. SER_133. That hearing was rescheduled because the file did not contain a declaration of service indicating Fryberg had been served with notice. SER_133-134. The court then issued a second temporary protection order and set the hearing for September 10, 2002. 2ER_156-57; SER_134-135.

On August 27, 2002, Jamie Gobin's brother-in-law, Officer Jesus Echevarria, served Fryberg with the hearing notice because Fryberg lived in the same neighborhood. 2ER_129-131, 138. Heather Gobin, Jamie Gobin's sister, watched her husband complete the return of service form after he served Fryberg with the temporary protection order and notice of the hearing. 2ER_138-139. That form indicated that Echevarria served Fryberg on August 27, 2002, at 21:07, at the corner of Reuben Shelton Drive and Ellison James. 2ER_155.

On September 10, 2002, Judge Randall Steckell presided over the hearing on Jamie Gobin's protection order request. SER_135-136. Because Fryberg did not appear for the hearing, consistent with his standard procedure, Judge Steckel first reviewed the "return of service" and confirmed Fryberg had received notice of the hearing. SER_153-155. Judge Steckel then issued the permanent protection order after finding Fryberg had received personal service and that Fryberg had committed domestic violence. 2ER_152-154; SER_149, 159. The order directed that Fryberg be restrained from among other things, "causing physical harm, bodily injury, assault . . . harassing, threatening, or stalking" Jamie Gobin and their son. 2ER_152. The

order also restricted Fryberg from coming within one hundred yards of Jamie Gobin's residence, place of employment, or the daycare of their child and precluded him from interfering with Jamie Gobin's custody of the child. 2ER_152; SER_139-141. If Fryberg wanted visitation with the child, he could petition the court. 2ER_152; SER_152-153.

The judge directed the clerk to provide a copy of the order to the Tulalip police who were to serve Fryberg and file a separate return of service. 2ER_153-154; SER_155. The Tulalip tribal court files do not contain a return of service showing that Fryberg was personally served with the permanent order, but do contain a record that the clerk mailed a copy of the order to Fryberg's address. 2ER_153-154; SER_141. The protection order was not filed in Snohomish County. SER_125-126.

On June 29, 2012, Fryberg appeared in Tulalip Tribal Court to quash the warrant for a criminal charge of violating the protection order. SER_211-216. During that hearing, although requesting a copy of the order, Fryberg acknowledged he had been served with a copy about eight or nine years earlier. An audio recording of this portion of

the hearing was played for the jury.[2] Fryberg received a copy of the protection order during the hearing. SER_216-217, 331.

On September 10, 2012, Fryberg entered a no-contest plea to violating the protection order. SER_220-221, 333-335. The presiding judge testified that if Fryberg had claimed that (1) he had not been served with notice of the protection order hearing, (2) he was unaware of the protection order hearing, or (3) he did not have an opportunity to participate at that hearing because he lacked notice, the judge would have stopped the change-of-plea proceedings because he could not accept the plea under those circumstances. SER_224-225.

Following his no-contest plea, Fryberg was sentenced to twelve months of probation, with a requirement that he abide by the protection order conditions. SER_219-228, 336-337. Fryberg was also ordered to pay a fine of $200 in $50 monthly installments beginning on October 15, 2012. SER_337. Fryberg acknowledged the sentence and conditions by signing the judgment and sentence. SER_229, 338. Because Fryberg

[2] By separate motion, the government seeks leave to submit a copy of this audio recording to the Court.

did not pay the required monthly fees, he twice was returned to court in 2013. SER_228-231, 339, 340.

During the trial, a tribal judge explained to the jury that until recently, tribal courts did not have access to the state or federal systems for tracking protection orders. SER_231-233. Tribal courts relied on state courts to enter the orders, something that required that the orders be provided to the state, which did not always occur. SER_231-233.

The evidence also included testimony from a Cabela's employee who explained that a firearms purchase at Cabela's required a purchaser first to complete the questions on an ATF form 4473 at a store-provided computer monitor to determine whether the purchaser was prohibited from purchasing a firearm. SER_171-172, 174, 176-177. Among other things, prospective buyers were asked if they were subject to a court order restraining them from harassing, stalking, or threatening their child or intimate partner or child of the intimate partner. SER_170, 379. A "yes" answer would prohibit a firearms purchase. SER_170. Potential buyers were required to certify their answers on the 4473 form as true and correct by signing the form. SER_171, 380.

Cabela's records showed that Fryberg had purchased the following six firearms after his no contest plea to violating the protection order:

- Thompson/Center .308 caliber rifle on November 12, 2012
- Mossberg 12-gauge shotgun on January 11, 2013
- Beretta, Px4 Storm handgun on January 11, 2013
- BFI, Carbon-15 rifle on March 14, 2013
- DPMS, A-15, rifle on March 21, 2013
- Savage Arms, 93R17, 17 HMR rifle on July 31, 2014.

SER_342-362, 373-376.

Fryberg also had purchased three other firearms. On August 10, 2007, Fryberg purchased a Tikka, T3 lite firearm, from GI Joe's. SER_317-320, 370-372. And after his no contest plea, Fryberg purchased two firearms from Puget Sound Security: a Winchester Model 70, bolt action rifle on March 27, 2013, and a Ruger No. 1A, a single shot rifle on September 18, 2014. SER_363-369. For each firearm purchased from Puget Sound Security, Fryberg answered that he was not the subject of a protection order on the AFT form 4473. SER_363, 365.

Because the parties could not reach a stipulation, the court allowed the government to display the firearms to the jury in the courtroom. SER_264-265. The court found that the government burden of proving possession tipped the balance in favor of showing the firearms to the jury. SER_264.

The court also allowed the government to introduce six photographs taken during the search of Fryberg's house. These photographs showed firearms, the ammunition contained in a gun safe, and a gun case. SER_266-272. The gun safe, located in a downstairs bedroom, contained 12-guage shotgun shells and various other calibers of ammunition, but no firearms. SER_281, 283, 285-293. Although the defense objected to the photograph of the ammunition, the court concluded the evidence related to Fryberg's possession of firearms and the probative value of the photograph outweighed any prejudice. SER_283-284, 300-301. A photograph of Fryberg's bedroom with five firearms and a box for a Beretta Px4 pistol next to the bed was also introduced at trial. SER_278-280, 377.

The jury also heard about the statements Fryberg made to the FBI following his arrest regarding the protection order question found

in the ATF form 4473. SER_316. Fryberg stated he just scanned this question and acknowledged he had been served with the protection order about 13-14 years earlier and was "cool with it." SER_316-317. When asked about his feelings about the protection order, Fryberg stated it was "bullshit." SER_317. Fryberg did not testify or offer any witnesses in his defense. SER_322.

G. The Jury Instructions

Fryberg requested the court give two jury instructions: one regarding entrapment by estoppel, 2ER_72, and the other regarding knowledge. 2ER_70. Fryberg's proposed entrapment by estoppel instruction read:

> For you to return a verdict of not guilty based on the defense of entrapment by estoppel, the defendant must prove the following five factors by a preponderance of the evidence:
>
> First, that one or more agents of the United States government, aware of all the relevant historical facts, affirmatively led the defendant to believe that it was legal for him to possess firearms;
>
> Second, that the defendant relied on this belief; and
>
> Third, that the defendant's reliance was reasonable;
>
> If the defendant proves by a preponderance of the evidence the three elements listed above, then you must find the defendant not guilty.

2ER_72. This request was based on Fryberg's completion of the ATF form 4473. Because there was no evidence Fryberg was affirmatively misled by any government official, the court refused to give the instruction. SER_309-310.

Fryberg's proposed a supplemental "knowledge" instruction read:

> The government must prove beyond a reasonable doubt that at the time the defendant possessed the specified firearm, the defendant was subject to a court order that was issued after a hearing of which the defendant received actual notice and at which the defendant had an opportunity to participate.
>
> If after careful and impartial consideration of all the evidence, you have a reasonable doubt as to whether the Permanent Protection Order was issued after a hearing of which the Defendant received actual notice and at which he had an opportunity, then it will be your duty to find the defendant not guilty.

2ER_70. The court refused to give this instruction because it was repetitive of other instructions.[3] SER_303. The court did, however,

[3] The court's instruction regarding the elements of the offense required the jury to find, as one of the elements, "that the defendant was subject to a court order that (a) was issued after a hearing of which the defendant received actual notice, and at which he had an opportunity to participate . . . ." SER_404, 406, 408, 410, 412, 414.

agree to give the following modified version of a government's proposed knowledge instruction:

> The "knowledge" requirement for the crime of possession of a firearm in violation of Section 922(g)(8) of Title 18, United States Code, applies only to the act of firearm possession. The government need not establish the defendant's knowledge that an order of protection was issued, or prove that the defendant knew his possession of a firearm was in violation of the law.

2ER_69. The court found this instruction necessary because the defense had continuously suggested Fryberg did not know he was not permitted to possess a firearm, and the instruction was appropriate to avoid jury confusion. SER_303-305, 321-322.

H. The Closing Arguments

During the government's closing argument, the prosecutor made a single statement addressing the defense theory that Fryberg was not personally served with notice of the protection order hearing. The prosecutor stated without objection:

> Now, conveniently, the defendant, a month later, after Jesus Echevarria passes away, claims for the first time, to any court, and he's been in front of tribal court, that he did not receive notice of the hearing. How convenient is that?

SER_323. When the argument concluded, the court *sua sponte* expressed concern that this statement was not supported by the

evidence presented at trial. SER_324-326. Although the defense did not object during the closing argument, after the court's observation, defense counsel claimed he had intended to make a motion for a mistrial after completion of the argument and suggested the statement violated Fryberg's Fifth Amendment right to silence and was prejudicial. SER_325-26.

To address the comment, the court gave the jury a curative instruction.

> In the course of her closing Ms. Woo was talking about Exhibits 4 and 6. You will have Exhibits 4 and 6 back with you in the jury room.
>
> What she said, and why I wanted to talk to counsel, was a statement about the defendant, Mr. Fryberg has never claimed - - "this is the first time, in any court." You've heard no evidence about that, and consequently, I'm going to tell you to disregard that statement.
>
> There is no factual basis in the record for that, and it transcends argument in that it's trying to tell you a fact, and as you know, the facts have to be spoken here in court or admitted in an exhibit so that both sides have an opportunity to discuss them and rebut them.

SER_327.

After a subsequent recess, the court denied the defense mistrial motion noting that, in Tulalip tribal court, Fryberg had acknowledged

receiving notice of the protection order some eight or nine years earlier and that Judge Steckiel had testified that if there was an issue with notice, he would have reset the hearing. SER_330. Based on that evidence, the court found that it would take creative argument to show that Fryberg's Fifth Amendment rights had been implicated. SER_330.

I. The Verdict and Sentencing

The jury found Fryberg guilty on all six charges. CR_95, 96. On January 11, 2016, the district court sentenced Fryberg to twenty-four months of imprisonment to be followed by three years of supervised release. CR_112, 2ER_62-67.

SUMMARY ARGUMENT

Fryberg argues for the first time on appeal that 18 U.S.C. § 922(g)(8) is unconstitutional "as applied" because the permanent duration of the protective order unfairly infringes on his Second Amendment rights. Properly viewed, however, Fryberg's argument is really a collateral challenge to the underlying protective order, something that he is precluded from doing in a criminal proceeding raising a violation of this statute.

But even if the constitutional question is considered, the statute is not unconstitutional as applied. Congress enacted § 922(g)(8) to reduce domestic gun violence with a recognition that domestic offenders have a high rate of recidivism. The statute, therefore, does not contain an express time limit and, as such, does not unfairly infringe on Fryberg's Second Amendment rights because Fryberg has not shown he is no longer a threat to the petitioner. Moreover, under Tulalip tribal ordinances, Fryberg could have sought a modification or removal of the protection order at any time.

Fryberg's argument regarding the denial of his change-of-venue motion also lacks merit. Fryberg did not demonstrate that the pretrial publicity was so inflammatory and prejudicial that he could not get a fair trial in the Western District of Washington. The media reports generally contained factual information that were not unduly prejudicial, and the voir dire demonstrated that the jury pool was not biased against Fryberg by the media reports.

Fryberg also was not prejudiced by the jury's consideration of the single photograph of the ammunition in the gun or testimony about the manner in which the firearms were discovered in his bedroom. The

ammunition matched the firearms he possessed, and the photographs of the bedroom and ammunition clearly demonstrated that Fryberg was in possession of the firearms placed by his bedside. Because this evidence established an element of the offense, its probative value outweighed any prejudice, and the court did not abuse its discretion by permitting its introduction.

The district court also did not abuse its discretion when it refused to redact the protection order language setting forth restrictions on Fryberg's contact with his child. The jury was aware that the protection order restricted him from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the petitioner and their son. Under the circumstances, the fact that Fryberg's custodial rights were restricted was not prejudicial, and there is little likelihood the jury drew any improper inference from that restriction. But even if the court abused its discretion, given the other evidence of Fryberg's guilt, this evidence did not materially contribute to the jury's verdict and thus was harmless.

Contrary to Fryberg's claims, the return of service was not a "testimonial" document because it was not prepared to prove a fact at a future criminal trial. Rather, it represented a routine ministerial act that was part of Tulalip tribal court procedure in civil domestic violence cases to ensure the respondent had notice and an opportunity to be heard at the protection order hearing. As such, the return of service was properly admitted as a public document under Fed. R. Evid. 803(8)(A), and Fryberg's Confrontation Clause rights were not violated.

There also were no instructional errors. Because there was no evidence that Fryberg was affirmatively misled by any government official into believing he could lawfully possess firearms, Fryberg's proposed entrapment by estoppel instruction was properly excluded. The passive act of approving his background check based on his knowingly false statement did not amount to "affirmative" conduct. The court also properly refused Fryberg's proposed "knowledge" instruction because it was repetitive to another instruction and overly emphasized the knowledge element. Further, the court's modified knowledge instruction properly addressed the defense's repeated assertions

regarding Fryberg's lack of knowledge of the law, assertions that otherwise could have created confusion with the jury.

Finally, Fryberg's Fifth Amendment rights were not violated by the single, isolated comment in the government's closing argument. In any event, given the court's immediate curative instruction, and the strength of the evidence, this comment was harmless beyond a reasonable doubt.

ARGUMENT

I. Title 18, United States Code, Section 922(g)(8) Is Not Unconstitutional as Applied to Fryberg

Although not raised in the district court, Fryberg makes an "as applied" constitutional challenge to 18 U.S.C § 922(g)(8). That claim lacks merit. His argument is an improper collateral challenge to the underlying protective, and in any event, the statute is not unconstitutional as applied to this case.

A. Standard of Review

This Court reviews the constitutionality of a statute *de novo*. *United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013). However constitutional issues not raised at trial are reviewed for plain error. *United States v. Santiago*, 46 F.3d 885, 890 (9th Cir.1995). To merit

reversal, (1) there must be an error, (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute," (3) the error "must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings," and (4) if the first three prongs are satisfied, the Court may remedy the error only if it "seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citations omitted).

B. Fryberg's Constitutional Argument Constitutes an Improper Collateral Attack on the Underlying Protection Order

Both the Supreme Court and this Court have held that collateral attacks on the predicates for Section 922(g) violations are impermissible. Regardless of its label, a review of Fryberg's claim establishes that it is just such an improper collateral challenge.

In *Lewis v. United State*s, 445 U.S. 55 (1980), the Supreme Court concluded that a defendant is not permitted to mount a collateral attack on the underlying conviction in prosecution under 18 U.S.C. § 922(g)(1), the statute prohibiting a felon from possessing a firearm, and that the Constitution did not establish a right to make such a collateral attack.

Id. at 65-67. The issue presented in *Lewis* was whether an uncounseled state conviction obtained in violation of the Sixth Amendment could serve as the predicate conviction. The Court reasoned that the plain language of Section 922(g)(1) did not suggest that Congress intended the statute to apply only to those with convictions not subject to collateral attack. *Id.* at 60. As the Court explained, the "federal gun laws . . . focus not on the reliability, but on the mere fact of conviction . . . in order to keep firearms away from potentially dangerous persons." *Id.* at 67.

Relying on *Lewis*, this Court has held that a defendant may not make a collateral challenge to the underlying protection order in a prosecution for a violation of § 922(g)(8). *United States v. Young*, 458 F.3d 998 (9th Cir. 2006). The *Young* Court observed that the plain language of § 922(g)(8) does not allow for such collateral attacks. *Id.* at 1005. The Court held that "'a criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as a sufficient opportunity for judicial review of the predicate [restraining order proceeding] exists.'" *Id.* at 1005 (quoting *United States v. Afshari*, 426 F.3d 1150, 1157 (9th Cir. 2005)). The *Young* Court observed that

Congress intended § 922(g)(8) to apply to all restraining orders, not only valid ones, and that absent congressional authorization, collateral inquiries into the constitutionality of the state court restraining order proceedings are not allowed. *Id.*

Other circuits addressing this issue are in agreement. *See United States v. Hick*s, 389 F.3d 514, 534 (5th Cir. 2004); *United States v. Baker*, 197 F.3d 211, 216-17 (6th Cir. 1999); *United States v. Wescott*, 576 F.3d 347, 354 (7th Cir. 2009); *United States v. Bena*, 664 F.3d 1180, 1185-86 (8th Cir. 2011); *United States v. Dubose*, 598 F.3d 726, 732-33 (11th Cir. 2010). These courts have adopted the reasoning in *Lewis* and found that there is nothing in the statutory language of § 922(g)(8) that permits a collateral attack of the underlying protection order, or that the statute was meant to apply only to a person subject to a valid protection order.

In that regard, the Tenth Circuit's decision in *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), is particularly instructive. There the defendant was present during the imposition of the Hawaiian Family Court protection order and agreed to the order's indefinite application. At a subsequent hearing, the order was modified to last for

fifty years. The defendant subsequently moved to New Mexico where he was charged with unlawful possession of a firearm in violation of § 922(g)(8). The defense argued that § 922(g)(8) was unconstitutional as applied because the fifty-year duration of the protection order was unreasonable and unfairly infringed on the defendant's Second Amendment rights. *Id.* at 798. The district court agreed finding that the duration of the order was not narrowly tailored to the government interest in reducing domestic violence. *Id.* at 799. The Tenth Circuit reversed finding that the district court improperly had focused on the underlying protection order instead of the challenged statute and that the duration of the protection order was irrelevant to an "as applied" constitutional challenge. *Id.* at 805. The Court noted that if the defendant wanted to challenge the protection order's duration, he should have done so in the Hawaii Family Court. *Id.* at 805. *See also, Dubose*, 598 F.3d at 733 ("if Dubose truly believed that the order was invalid, he should have objected to the court's subject matter jurisdiction before possessing either the firearms or ammunition.")

Here, similar to *Young* and *Reese*, Fryberg improperly attacks the underlying protection order rather than the statute. He has pointed to

nothing in the statute that, as applied, produces an unconstitutional result. The plain language of Section 922(g)(8) makes clear it applies to all protection orders and not just ones of a limited duration. The elements of a violation are: (1) that a subject receive actual notice and the right to participate at the hearing in which the order is issued; (2) that the order restrains the defendant from "harassing, stalking, or threatening an intimate partner . . . or child of such intimate partner, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury . . ."; and (3) that the issuing court find that the subject represents a credible threat to the physical safety of the intimate partner or that the order, by its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child. 18 U.S.C. § 922(g)(8).

Those elements were proven in this case.[4] Fryberg received actual notice of the hearing and had the opportunity to participate had he chosen to do so. The order restrains Fryberg from harassing, stalking, or threatening his former intimate partner and their son and restrains

[4] Indeed, Fryberg has not made a sufficiency of the evidence claim, and any such suggestion has now been waived.

him from using, or threatening to use, force against his former intimate partner or their son. In other words, the protection order complies with the statutory requirements. Fryberg's collateral attack on the underlying protection order should not be permitted under the guise of a constitutional claim.

C. Section 922(g)(8) Is Not Unconstitutional as Applied to Fryberg

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court found that the core purpose of the Second Amendment is to give the people the right to keep and bear arms for the purpose of self-defense, stating that the amendment pertained to "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635 (emphasis added). But the Court also emphasized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and then provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill,

or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arm." *Id.* at 626-627. These historical prohibitions are presumptively lawful, and the Court specifically stated that "nothing in [its] opinion should be taken to cast doubt on" such measures. *Id.* at 626.

1. Intermediate Level of Scrutiny Should Apply to Assess Fryberg's Claim

To address his "as applied" constitutional challenge, Fryberg urges this Court to apply a strict scrutiny. He suggests that the statute is only constitutional if the government can show that the statute is "narrowly tailored to achieve a compelling governmental interest." *Abrams v. Johnson*, 521 U.S. 74, 82 (1997). But this standard of scrutiny has not been applied by this or other Courts in this context.

The *Heller* Court did not specify what level of scrutiny should be applied when considering a Second Amendment challenge to a statute. *Id.* at 628-29. The Court did nothing more than caution that a rational basis would not suffice to defeat a Second Amendment challenge. *See Id.* at 661 n.27.

After *Heller*, this Court has consistently applied an intermediate level of scrutiny to consider a defendant's facial and as applied challenges to the constitutionality of 18 U.S.C. § 922(g)(9) making it unlawfully for a person convicted of a domestic violence misdemeanor to possess a firearm. *United States v. Chovan*, 735 F.3d 1127, 1141-42 (9th Cir. 2013). *See also Wilson v. Lynch*, _ F.3d _, 2016 WL 4537376 (9th Cir. 2016).

In *Chovan*, this Court described a two-step process of analyzing Second Amendment claims. Step one is to determine whether the challenged law burdens conduct protected by the Second Amendment. *Id.* at 1136. Step two is to determine the appropriate level of scrutiny. *Id.* In *Chovan*, after finding that § 922(g)(9), which prohibits firearms possession by an individual convicted of a misdemeanor crime of domestic violence, burdens conduct protected by the Second Amendment, the Court concluded that the level of scrutiny to be applied depends on how close the law comes to core Second Amendment rights and the severity of the law's burden on the right. *Id.* at 1138. The Court concluded that the prohibition in § 922(g)(9) did not implicate core Second Amendment rights because this statute regulated firearms

possession by persons convicted of a crime and, therefore, not the actions of law-abiding citizens. *Id.* The Court rejected the argument that § 922(g)(9) resulted in a total prohibition of firearms possession, noting individuals whose convictions were expunged, pardoned, or set aside were exempted. *Id.*

In balancing those two factors, this Court found that the intermediate scrutiny should be applied. This requires the government to show that the objective of the statute is "significant, substantial or important" and that there is a reasonable fit between the challenged statute and this objective. *Id.* at 1139. The Court found that § 922(g)(9) promoted the important governmental interest of keeping firearms from those likely to engage in domestic gun violence and that this interest is substantially related to the broad interest of preventing domestic gun violence. *Id.* at 1139-40.

Chovan's "as applied" challenge related to the fact that his domestic violence conviction occurred some fifteen years earlier, that he had been law-abiding during that intervening time period and was unlikely to recidivate. *Id.* at 1141. Rejecting his constitutional claim, the Court observed that the lack of an intervening domestic violence

arrest or conviction did not prove Chovan was unlikely to commit further acts of domestic violence.[5] *Id.* at 1142. Moreover, the Court found that accepting Chovan's claim would create a substantial exception to the statutory prohibition, and that if Congress had wanted to limit the prohibition to individuals with recent domestic violence convictions, it could have done so rather than enacting a statute providing for a life-time ban. *Id.*

The reasoning in *Chovan* applies in equal force to § 922(g)(8). There are no substantial differences between the statutes that would mandate a different level of scrutiny. Although § 922(g)(8) does not require a criminal conviction per se, nonetheless, it requires a court finding that a protection order is appropriate to prevent future domestic violence after notice and an opportunity to be heard by the respondent. Sections 922(g)(9) and 922(g)(8) each apply to the narrow class of individuals deemed to present a threat of domestic violence to an intimate partner. As such, § 922(g)(8) does not implicate the core rights

[5] Indeed, although it did not lead to an arrest or conviction, the record established an intervening domestic violence call by the victim of Chovan's abuse. *Id.* at 1141.

of "law abiding and responsible citizens" protected by the Second Amendment. *Heller*, 554 U.S. at 635.

Other Circuits that have considered the issue also have applied intermediate scrutiny for constitutional challenges to § 922(g)(8). *See United States v. Reese*, 627 F.3d 792, 802-805 (10th Cir. 2010); *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012). Because these cases are properly decided, and, consistent with *Chovan,* this Court should apply intermediate scrutiny to evaluate Fryberg's Second Amendment claim.

For his claim, Fryberg relies on *Tyler v. Hillsdale Sheriff's Department*, 775 F.3d 308, 326-31 (6th Cir. 2014), the only case holding that strict scrutiny should be applied. But that reliance is now misplaced. On April 21, 2015, the Sixth Circuit granted rehearing en banc and withdrew this opinion. But even if strict scrutiny were applied, the statute here would meet that standard because the statute serves a compelling governmental interest through the least restrictive means of limiting its restrictive reach to those who are subject to a judicially imposed domestic violence protective order.

2. Fryberg's "As Applied" Challenge Lacks Merit

Fryberg claims that his Second Amendment rights are violated because the unlimited duration of the protection order at issue effectively creates a permanent ban of his right to possess firearms. That argument is flawed.

As this, and other courts, have observed, domestic offenders have a high rate of recidivism. *Chovan*, 735 F.3d at 1140; *Reese*, 627 F.3d at 803; *United States v. Skoien*, 614 F.3d 638, 643-44 (7th Cir. 2010) (en banc). Courts have recognized that studies show domestic violence incidents involving a firearm are more likely to cause death or serious injury. *Skoien*, 614 F.3d at 644 (domestic assaults involving firearms are approximately twelve times more likely to result in death than assaults with knives and fists). Where a court deems an individual to present a long-term threat to an intimate partner, it has a duty to issue a protection order addressing that long term threat. *See Reese*, 627 F.3d 795. A protection order of lengthy duration is appropriate and substantially related to the statute's objective because it keeps firearms from domestic offenders and thereby prevents domestic gun violence.

The lack of a time limit in § 922(g)(8) supports the conclusion that Congress meant the statute to apply to all such orders, even ones of permanent duration because of the dynamics of domestic violence. As this Court observed in *Chovan*, to find otherwise would create a substantial exception to the statute. For every prosecution, this would require a court to determine whether a particular protection order is too long in duration. The plain language of the statute indicates that this is not what Congress intended.

Here, before issuing the protection order, the tribal judge found that Fryberg had committed an act of "domestic violence" as defined in RCW 26.50.10. 2ER_152. The judge made the order permanent because it found that "an order less than one year would be insufficient to prevent further acts of violence." 2ER_154. Under these circumstances, the protection order's duration was appropriate and furthered the goals of the statute.

Moreover, although the protection order was permanent, Fryberg retained the right to petition the court at any time to modify its length and its terms. SER_57. Thus, Fryberg was not without recourse to the

unlimited duration of the order. Fryberg simply did not make the effort to modify its terms.

Although he had received copies of the order, Fryberg never contested it or sought to modify it. Indeed, in 2012, Fryberg was found guilty of violating the protection order after a no contest plea and sentenced to comply with its terms as a condition of probation. SER_336-338. While subject to that condition, he then purchased a series of firearms. Given these facts, under either standard of scrutiny, there is nothing about application of § 922(g)(8) to Fryberg that raises any constitutional concern requiring reversal of his conviction.

II. The District Court Properly Refused to Change Venue

Fryberg argues that extensive pretrial publicity biased the jury pool against him and that the district court should have granted his change-of-venue motion. But the record unequivocally establishes that a fair and impartial jury was selected, and the court properly denied Fryberg's motions.

A. Standard of Review

A district court has broad discretion in ruling on a change-of-venue motion, and a denial of a motion will only be reversed for an

abuse of discretion. *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011).

B. The Change-of-Venue Motion Lacked Merit

The Sixth Amendment of the United States Constitution guarantees that, in all criminal prosecutions, the defendant shall enjoy the right to trial by an impartial jury. U.S. Const. amend. VI. The Constitution further provides that the trial shall occur "in the State where the said Crimes have been committed." U.S. Const. art. III, § 2, cl. 3. Change-of-venue motions, therefore, should be granted only in rare circumstances when the right to an impartial jury is compromised by pervasive, prejudicial, and inflammatory pretrial publicity. *Rideau v. Louisana*, 373 U.S. 723, 726 (1963); *Hayes v. Ayers*, 632 F.3d 500, 507-508 (9th Cir. 2011). The defendant bears the burden of establishing a need for a change of venue. *Gallego v. McDaniel*, 124 F.3d 1065, 1071 (9th Cir. 1997). There are two types of prejudice that support a change of venue: presumed or actual. *Daniel v. Woodford*, 428 F.3d 1181, 1211 (9th Cir. 2005). Fryberg has shown neither.

1. Presumed Prejudice Did Not Exist

Presumed prejudice exists when the record demonstrates that the trial was held in a community so saturated with prejudicial and inflammatory media reports about the crime that it can be presumed jurors cannot be impartial. *Hayes,* 632 F.3d at 508. This rarely occurs and is reserved for the extreme case where the defendant shows "a trial atmosphere [is] utterly corrupted by press coverage." *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

Extensive pretrial publicity standing alone is insufficient; rather a due process violation occurs only when the publicity is so inflammatory that it is likely to produce prejudice. *Skilling v. United States*, 561 U.S. 358, 384 (2010). In *Rideau*, for example, the defendant was accused of robbing a bank, kidnapping bank employees, and murdering one person. *Rideau,* 373 U.S. at 724. The crime occurred in a small rural community and gained intense publicity. Prior to trial, Rideau's recorded confession was broadcast three times. *Id.* As a result, the Court found that due process required a change of venue because the potential jurors' repeated exposure to the confession rendered the subsequent trial a mere formality. *Id.* at 726.

Likewise, in *Sheppard v. Maxwell*, 384 U.S. 333 (1986), the Supreme Court found that the negative, inflammatory, and prejudicial publicity preceding the defendant's trial justified a change of venue. Sheppard was accused of murdering his wife, and numerous articles reported Sheppard's refusal to be interviewed following the murder. A re-enactment of the murder was also reported in detail. The media reports highlighted Sheppard's refusal to take a polygraph examination and included editorials suggesting he was the murderer. There were also extensive reports regarding the inquest where Sheppard testified. The media emphasized evidence tending to incriminate Sheppard highlighting details of his marriage and an affair with another woman. Based on this media coverage, the Court found that the extensive inflammatory pretrial publicity along with the "carnival atmosphere" of the trial violated Sheppard's due process rights. *Sheppard*, 384 U.S. at 1520-23.

In *Skilling*, the Supreme Court addressed factors relevant to determining whether pretrial publicly "dim[s] prospects that the trier can judge a case as due process requires, impartially, unswayed by outside influence[.]" 561 U.S. at 379. Skilling was charged with

offenses related to the Enron financial collapse, a case that garnered intense national and local interest. Nonetheless, the Court affirmed the district court's denial of the change-of-venue motion finding that juror exposure, alone, does not create presumptive prejudice. "[P]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Id.* at 380 (emphasis original).

In affirming the denial of Skilling's motion, the Supreme Court considered four factors: (1) the size and characteristics of the community where the crime occurred and the jury pool would be drawn; (2) the quantity and nature of media coverage and whether it contains "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the passage of time between the underlying events and the trial and whether prejudicial media attention had decreased over time; and (4) whether, in hindsight, the jury's verdict undermined any possible pretrial presumption of prejudice. *Id.* at 382-84. Applying these factors, the Court found the extensive pretrial publicity did not justify a change of venue because it did not contain the type of vivid, unforgettable information likely to

produce prejudice, and thus the denial of the motion did not violate Skilling's due process rights. *Id.* at 384, 398-99.

In addition to the *Skilling* factors, this Court has used the following factors to determine whether presumed prejudice exits:

- Whether there was a "barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion";
- Whether the news accounts were primarily factual; and
- Whether the press accounts included inflammatory or prejudicial inadmissible material.

Daniels, 428 F.3d at 1211.

Applying all of these factors establishes that the district court did not abuse its discretion in denying Fryberg's motion. Although Fryberg based his motion on what he characterized as extensive prejudicial pretrial publicity, most media reports included with the motion contained factual information and were not inflammatory. 1ER_4-7. Indeed, many articles addressed the status and operation of the background system for firearms purchases. 1ER_7. This material fell

well short of the type of prejudicial or inflammatory publicity necessary to create a presumption of prejudice.

Moreover, the northern division of the district from which the jury was drawn, had a very large population, a fact which weighed against a presumed prejudice finding and the media interest in the school shooting diminished over time. 1ER_5-6. Thus, based on the totality of the circumstances, it was not an abuse of discretion for the district court to deny Fryberg's change-of-venue motion.

In support of his claim, Fryberg argues that the government's initial press release violated Rule 3.8(f) of the Rules of Professional Conduct. But this argument is irrelevant. Other than his bald assertion, there is nothing in the record to demonstrate that this release caused the extensive publicity. Although it notified the media of the charges against Fryberg, it strains credulity to think the media would not otherwise have learned of the charges given the media attention to the school shooting by Fryberg's son. The public interest in the school shooting would have generated press and public attention to Fryberg's case and its relationship to that shooting, no matter how slight, because he was the source of the firearm his son had used.

Moreover, his claim related to the professional conduct rule lacks merit. The public is entitled to know about cases of public interest, and the release in question contained factual information regarding the charge. The statement in the release about removing firearms from the hands of those who pose the greatest risk to the community was entirely appropriate and accurate because, as noted above, domestic perpetrators pose a substantial risk of committing gun violence. *See Skoien*, 614 F.3d at 643-44. There was nothing inflammatory about the press release.

Moreover, Fryberg offers no authority for the proposition that a violation of the professional conduct rules alone would mandate a change of venue, and such a rule defies logic. Whether a defendant is entitled to a change of venue is based on a finding that because of pretrial publicity, the defendant could not receive a constitutionally-mandated trial by fair and impartial jurors. The cause of the publicity is irrelevant; it is only the resulting prejudice that matters.

2. There Was No Actual Prejudice

Actual prejudice exists where jurors have "demonstrated actual partiality or hostility that could not be laid aside." *Daniel,* 428 F.3d at

1211. A trial court must determine whether the jurors have actual partiality or hostility that cannot be put aside. *Murphy*, 421 U.S. at 800. Jurors are not required to be totally ignorant of the facts and issues involved in a case, and "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "To hold that mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Id.* at 723. Here, the record demonstrates that jury members did not have any actual prejudice against Fryberg and were impartial and unbiased.

Before jury selection, jurors were required to complete a confidential questionnaire which made no mention of the school shooting. 2ER_164-67. Rather, the questions were neutral and asked whether the juror knew of Fryberg; whether they had heard news reports about the case; if they had heard media reports, whether they could base their decision solely on the evidence in the case; if they or a close friend or relative were a Tulalip Tribal member; and if so, could

they base the decision solely on the evidence presented at trial. 2ER_164-67. Any juror who gave a positive answer to any question was examined individually.

Only three seated jurors had heard about Fryberg prior to voir dire. Juror 26 indicated that he had heard news about the case "[q]uite awhile back" but did not know much about it. SER_68-70. Fryberg had no follow up questions and did not challenge him for cause. *Id.*

On his questionnaire Juror 35 indicated that he thought that Fryberg was the person charged with killing his classmates. SER_71-73. But after the court advised him that Fryberg had not shot anyone and was charged only with unlawful firearms possession, the juror explained he only remembered the existence of press coverage but not in much detail, only that it involved a shooting, and that the shooter got the gun from a relative. *Id.* That juror, who stated he could be fair and impartial, was not challenged for cause. *Id.*

Likewise, Juror 44 was familiar with Fryberg's name but admitted she did not remember much of the details of the high school shooting because of the passage of time. SER_74-75. Again, Fryberg did not challenge this juror.

These jurors, along with the other ten jurors, swore to be fair and impartial and base their verdict on the trial evidence. On this record, this Court should find that the district court did not abuse its discretion in denying Fryberg's change-of-venue motion.

III. The District Court's Evidentiary Decisions Did Not Constitute an Abuse of Discretion or Unduly Prejudice Fryberg

Fryberg argues he was denied a fair trial because of the cumulative prejudice from inadmissible evidence. Specifically, he claims the court should not have allowed the jury to view the one photograph of the ammunition recovered from his residence, the one photograph showing unsecured firearms in his bedroom, and the nine firearms he had purchased. Fryberg also argues the language in the protection order prohibiting Fryberg from interfering with the custody of his son and/or removing him from the state should have been redacted from the order before presentation to the jury. These arguments lack merit.

A. Standard of Review

This Court reviews a district court's admission of evidence for abuse of discretion. *United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011).

B. Relevant Evidence Is Admissible

Federal Rule of Evidence 401 states that relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Such evidence is presumed admissible unless otherwise prohibited. Fed. R. Evid. 402. The threshold for relevancy is not strict. *United States v. Miranda-Uriate*, 649 F.2d 1345, 1353 (9th Cir. 1981).

Relevant evidence is admissible unless "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "Unfair prejudice" speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.

*Old Chief v. United State*s, 519 U.S. 172, 180 (1997). As such, unfairly prejudicial evidence is evidence having "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (citation and internal quotation marks omitted). The evidence at issue was not unduly prejudicial.

1. The Photographs of Ammunition and Firearms Were Not Prejudicial

Because Fryberg was charged with unlawful possession of various firearms, the government had the burden of proving that Fryberg knowingly possessed those firearms. The ammunition found in the gun safe at Fryberg's residence made Fryberg's knowing possession of the firearms more likely because the ammunition was the type that could be used with the firearms Fryberg was accused of possessing. The .40 caliber ammunition found in the safe could be used with the Beretta Px4 Storm, the handgun at issue in Count 2. 2ER_236; SER_113-114. The .223 caliber ammunition fit the BFI Model Carbon 15 (Count 3) as well as the DPMS A-15 rifle (Count 4). 2ER_235, 236-37; SER_293. The .308 ammunition could be used with the Thompson/Center .308 rifle (Count 6). 2ER_237. Likewise, the 12-gauge shotgun shells could be used in the Mossberg shotgun (Count 1). 2ER_235. The mere

fact that Fryberg was not charged with unlawfully possessing ammunition does not make the one photograph of ammunition admitted into evidence less probative or overly prejudicial. *Cf. United States v. Gutierrez*, 995 F.2d 169, 172-73 (9th Cir. 1993) (admission of bulletproof vest worn by driver admissible in a firearms case); *United States v. Johnson*, 857 F.2d 500, 501 (8th Cir. 1988) (same).

Moreover, in addition to the one photograph, the evidence regarding the ammunition was limited to testimony concerning the presence of this ammunition in the gun safe and the fact that it could be used with some of the relevant firearms. SER_282-284, 286, 288-292. Indeed, other than baldly asserting that this evidence was prejudicial, Fryberg does not explain why evidence regarding the ammunition was inflammatory. As such, the court did not abuse its discretion in finding the probative value of the evidence outweighed any prejudice.

Similarly, the testimony regarding the firearms found in Fryberg's bedroom was not overly prejudicial. There was testimony that that five firearms were found in a stack at the foot of Fryberg's bed, but this testimony did not reference the unsecured nature of the firearms although that was clear by the location at which they were found.

SER_279-280. The government introduced only one, somewhat blurry photograph of the firearms in the bedroom. SER_377. Contrary to Fryberg's assertion, this photograph does not show either that the firearms were scattered about, or the house in disarray, and is not otherwise prejudicial. SER_377. Moreover, the location of the firearms was probative of ownership. As such, the district court did not abuse its discretion in admitting it.

2. The Language of the Order of Protection

The district court denied Fryberg's motion to redact that language from the protection order restraining Fryberg from coming within one hundred yards of his child, interfering with custody of the child, or taking the child out of the state. This information was not unduly prejudicial, and the court did not an abuse of discretion when it denied the request to redact.

To return a guilty verdict for the offenses with which Fryberg was charged, the jury needed to find, as an element, that Fryberg was restrained by court order from harassing, stalking, or threatening an intimate partner or child of the intimate partner. 2ER_152. The government also had to prove the protection order prohibited Fryberg

from the use, attempted use, or threatened use of physical force against the intimate partner or child. *See* 18 U.S.C. § 922(g)(8).

Fryberg did not object to the language of the protection order stating that the tribal court had found Fryberg had committed an act of domestic violence and restraining him from "causing physical harm, bodily injury, assault, including sexual assault, and from molesting harassing, threatening or stalking" Gobin and their one-year-old son. 2ER_152. Even if this Court concludes the language regarding custody was irrelevant, it is difficult to imagine how the language regarding child custody was any more prejudicial than the language the defense did not (and could not) challenge.

3. There Was No Cumulative Prejudice

Fryberg argues that the above-referenced evidence was rendered more prejudicial because jurors were aware of his connection to the school shooting by his son. But this argument presumes undue prejudice where there was none.

First, during trial, there was no mention of the school shooting. The evidence focused exclusively on whether Fryberg was served with notice of the protection order hearing and his purchase and possession

of firearms. There was no discussion regarding the school shooting during the general voir dire. The only reference was during the private questioning of individual jurors. Only three of the empaneled jurors recognized Fryberg's name and were aware of the connection between him and the shooting, and all jurors were instructed to decide the case based only on the trial evidence.

Second, even if the district court erred in admitting the two photographs and the referenced portion of the protection order, that error was surely harmless. Reversal of a verdict for such nonconstitutional errors is appropriate "only if it is more probable than not that the erroneous admission of the evidence materially affected the jurors' verdict." *United States v. Arambula-Ruiz*, 987 F.2d 599, 605 (9th Cir. 1993) (internal quotations omitted). Given the strength of the evidence on the critical issues, that standard is not met here. The complained of evidence simply did not materially affect the jurors' verdict.

IV. The Court Properly Admitted the Return of Service

Fryberg argues that the "return of service" was inadmissible as a public document under Federal Rule of Evidence 803(8) and that the

document was "testimonial" thereby violating his Confrontation Clause rights. Both arguments lack merit.

A. Standard of Review

This Court reviews a district court's ruling on the Confrontation Clause claim and the court's construction of the hearsay rules *de novo*. *United States v. Torralba-Mendi*a, 784 F.3d 652, 664 (9th Cir. 2015). In all other respects, the admission of evidence under a hearsay exception is reviewed for an abuse of discretion. *Id.*

B. The Return of Service Is Not a "Testimonial" Document Barred by the Confrontation Clause

The Confrontation Clause guarantees a defendant's right to confront those who "bear witness" against him. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Therefore, the Confrontation Clause bars the use of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross examination." *Id.* at 53-54. The Court defined a "testimonial statement" as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (quoting, 2 North American Dictionary of English Language (1828)).

Core testimonial statements are those "taken by the police in the course of interrogations" which are anticipated for use at a later criminal trial. *Id.* at 51-53. Such core statements are those "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Id.* at 51-52. The Supreme Court defined such testimonial statements to include "affidavits, custodial examinations, [or] prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 51-52.

In *Davis v. Washington*, 547 U.S. 813 (2006), addressing statements made to a 9-1-1 operator during an ongoing emergency, the Court adopted a "primary purpose test" for determining whether a statement was "testimonial" and barred by the Sixth Amendment. The Court held that statements will be deemed "testimonial," and subject to the Confrontation clause, if the "primary purpose of the interrogation was to establish or prove past facts potentially relevant to a criminal prosecution." *Id.* Although the statements had relevance in a subsequent criminal prosecution, the Court concluded that because the

statements were made to resolve an ongoing emergency and not to establish past fact, the victim's statements to the 9-1-1 operator were not "testimonial," and the admission of these statements did not violate the Confrontation Clause. *Id.* at 822.

The primary purpose test requires a court to consider "all of the relevant circumstances." *Michigan v. Bryant*, 562 U.S. 344, 369 (2011). Relevant factors include whether the statement falls within the "standard rules of hearsay, designed to identify some statements as reliable." *Ohio v. Clark*, _ U.S. _, 135 S. Ct. 2173, 2180 (2015). But the focus remains on the purpose for which the statement is made. Therefore, "the question is whether, in light of all of the circumstances, viewed objectively, the 'primary purpose' of the . . . [statement is] to 'creat[e] an out of court substitute for trial testimony.'" *Id.* (quoting *Bryant*, 562 U.S. at 358). Applying this standard, the Court has stated that business and public records are non-testimonial and "generally admissible absent confrontation . . . because . . . [they are] created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

Similarly, in *Dowdell v. United States*, 221 U.S. 325 (1911), a case cited with approval in *Davis*, 547 U.S. at 825, the Court found that statements by a lower court certifying a defendant's presence during trial, his opportunity to enter a plea, and the fact he did not plead guilty did not violate of the Confrontation Clause. Certifying certain matters in accordance with court practice "involved no inquiry into the guilt or innocence of the accused; it was only a method which the court saw fit to adopt to make more complete the record of the proceedings in the court below, which it was called upon to review." *Dowdell*, 221 U.S. at 331.

This Court has applied this primary purpose test in several cases involving documents maintained in an alien's A-file and repeatedly has held such documents do not implicate the Confrontation Clause because the documents were not created for use at a later criminal trial. *See, e.g., United States v. Rojas-Pedroza*, 716 F.3d 1253, 1267 (9th Cir. 2013). In *Rojas-Pedronza,* this Court held that the Warrant of Removal, Notice of Intent/Decision to Reinstate Prior Order, and the Immigration Judge's Order contained in the defendant's A-file were not testimonial. *Id.* at 1268-69. The "mere possibility" that such a document might be

used in a later criminal proceeding does not render it testimonial. *Id.* at 1267. Applying an objective test, this Court concluded the primary purpose of those documents was to record the movement of aliens and to ensure compliance with deportation orders, not to prove facts at a later criminal trial. *Id.*

Similarly, in *United States v. Albino-Loe*, 747 F.3d, 1206 (9th Cir. 2014), this Court considered whether a Notice to Appear was a testimonial document. That document and the Warrant of Removal were admitted at the defendant's trial for being a deported alien found in the United States. The Notice to Appear, which is the document used to commence removal proceedings, contained allegations that the defendant was not a United States citizen. *Id.* at 1210. Following the reasoning of *Rojas-Pedroz*a, this Court held that the statements in the Notice to Appear were not "testimonial statements" because the document was created for use in an immigration proceeding and not for use at a later criminal trial. *Id.* at 1210-1211. The Notice to Appear was simply a charging document not intended to prove any fact and the mere fact it was prepared in anticipation of an immigration proceeding is irrelevant to its admissibility. *Id.*

More recently, this Court found that the Record of Deportable/Inadmissible Alien Form I-213 was not "testimonial" and that its admission in a criminal trial did not violate the Confrontation Clause. *United States v. Torralba-Mendia*, 784 F.3d 652, 666 (9th Cir. 2015). In so holding, this Court again focused on the purpose for creating the document noting that such public documents were created in the course of non-adversarial duties as part of the administration of the agency's affairs, not for the purpose of proving some fact at trial. *Id.*

In another context, this Court held that a penitentiary packet containing four judgments of convictions and the defendant's photograph and fingerprints was non-testimonial and, therefore, not subject to the Confrontation Clause. *United States v. Weiland*, 420 F.3d 1062, 1068 (9th Cir. 2005). Similarly, the *Weiland* Court found that the record unit manager's certification was not barred by the Confrontation Clause, reasoning that although the certificate may have been prepared for purposes of litigation, given its routine nature, it was not testimonial. This Court characterized the certification as "'routine cataloguing of an unambiguous factual matter.'" *Id.* at 1077 (quoting *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005).

Applying the analysis contained in these various analogous cases, it is clear that the Return of Service at issue here was not testimonial. Its function was to record that the respondent had notice of a hearing, something that is administrative in nature. Moreover, although this Court has yet to consider this issue, state courts that have addressed it have concluded that the return of service in a domestic violence protection order case is non-testimonial and admissible to prove the respondent had been served with papers. *See, e.g., Gaines v. State*, 999 N.E.2d 999 (2013); *State v. Copeland*, 306 P.2d 610 (2013).

In *Gaines*, an Indiana Court of Appeals considered whether the sheriff's return of service, indicating that notice of the temporary protection order and hearing was personally served on the defendant, was properly admitted during a trial charging the defendant with violating that order. The court found that admission of the return of service did not violate the Confrontation Clause because the document was not created to establish or prove some fact at trial. *Id.* at 1003.

Similarly, in *Copeland*, 306 P.2d 610 (2013), applying the primary purpose test, the Oregon Supreme Court concluded that a certificate of service was not testimonial because its purpose was to ensure that the

defendant received notice. The fact that it was foreseeable that the certificate might be used to provide notice in a later criminal prosecution did not undermine the primary and predominate administrative reason for the certificate. *Id.* at 846.

The reasoning of these cases is persuasive and is consistent with this Court's decisions regarding A-file documents. The return of service maintained in the Tulalip tribal court file is no different than the documents contained in an alien's A-file, which this Court has found to be non-testimonial. Like the Notice to Appear that this Court deemed non-testimonial in *Abino-Loe*, the return of service was a routine document generated to ensure compliance with the tribal code and tribal court procedure in the civil protection proceeding. SER_55. The document simply confirmed that Fryberg was provided notice of the protection order hearing, and it was intended to be used by the tribal judge to ensure notice had been provided. If there was no proof that Fryberg had received notice, the judge would not have proceeded with the hearing. SER_146-147. The critical inquiry is the purpose for the document at the time it was made. Here, Officer Echevarria did not prepare the Return of Service for use in a future criminal trial; rather,

he did so to comply with a requirement in a civil protection order proceeding. As with the A-file documents, that the return of service might later be used in a criminal trial does not undermine the administrative purpose of the document. Thus, under the primary purpose test, the return of service is not testimonial and its admission at trial was not barred by the Confrontation Clause. As this Court observed in *Bahena-Cardenas*, 411 F.3d at 1075, the notations on A-file documents indicating the alien has been deported are not testimonial; so too is the notation that Fryberg was served.

Fryberg attempts to avoid this analysis by noting that Officer Echevarria was Gobin's brother-in-law, thereby suggesting that Echevarria had a motive to misrepresent whether Fryberg was actually served. But that is irrelevant to the inquiry. As this Court has observed, the "'relevant inquiry is not the subjective or actual purpose of the individual involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from individuals' statements and actions and the circumstances in which the encounter occurred." *Rojas-Pedroza*, 716 F.3d at 1267. Viewed objectively, a reasonable officer would have served Fryberg to

comply with the legal requirements of the civil protection order proceeding, not to prove a fact for some possible unanticipated future criminal proceeding.

C. The Return of Service Was Also Admissible as a Public Document

Fryberg also argues that the Return of Service was hearsay and, therefore, improperly admitted under Fed. R. Evid. 803(8) because (1) it was not a matter that was "observed" while under a legal duty to report, and (2) it involved an assertion by a law enforcement officer. Many of the reasons why this document did not violate the Confrontation Clause also demonstrate why this argument fails.

Federal Rule of Evidence 803(8) provides that the following evidence is not hearsay:

> [a] record or statement of a public office if:
>
> (A) it sets out:
>
> (i) the office's activities;
>
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>
> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

The application of this rule turns on whether the record describes "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Fed. R. Evid. 803(8)(B). The rule does exclude, in criminal cases, "matters observed by police officers and other law enforcement personnel." *Id.* But as the rule's legislative history makes clear, this exclusion does not suggest that observations made by law enforcement officers are not as reliable as observations by other public officials but rather because of the adversarial nature of the confrontation between the police and the defendant in criminal cases. *See* 1974 U.S. Code Cong. & Admin. News 7051, 7064. Consistent with this purpose, this Court has applied this "law enforcement exception" to "observations made by law enforcement officials at the scene of a crime or the apprehension of an accused." *United States v. Wilme*r, 799 F.2d 495, 501 (9th Cir. 1986). It is not applied to "records of routine non-adversarial matters" made in a non-adversarial setting. *United States v. Orozco*, 590 F.2d. 789, 796 (9th Cir. 1979). Thus, to

determine whether the exception applies, this Court looks to the purpose of the exception. *Id*.

In *United States v. Gilbert*, 774 F.2d 962, 965 (9th Cir. 1985), this Court found that a finger print card describing where the fingerprint was found was admissible under Rule 803(8), characterizing the recording of a fingerprint as a routine, ministerial, objective, and non-evaluative act. Similarly, this Court has held that a warrant of deportation was admissible under the Rule because verifying removal of an alien is not made at the scene of a crime or during apprehension or in an adversarial setting. *United States v. Lopez*, 762 F.3d 852, 861 (9th Cir. 2014). Like the return of service at issue, warrant of deportation with notation that the defendant was deported was a "ministerial, objective observation, which was inherently reliable because of the government's need to keep accurate records of the movement of aliens." *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980). *See also United States v. Wilmer*, 799 F.2d 495, 500-501 (9th Cir. 1986) (calibration report to a breathalyzer machine admissible under Rule 803(8) because it was the type of routine and non-adversarial record).

This Court has held that a United States Marshal's receipt indicating a prisoner had been delivered to a facility was admissible as a public record under Rule 803(8) in a prosecution for escape. *See United States v. Wilson*, 690 F.2d 1267, 1275 (9th Cir. 1982). Likewise, the First Circuit has held that a United States Marshal's return of service proving the defendant was served with an injunction was admissible under Rule 803(8). *See United States v. Union Nacional de Trabajodores*, 576 F.2d 388 (1st Cir. 1978). Rejecting the argument that the maker's status as a law enforcement officer mattered, the First Circuit noted that "[a] sheriff or marshal reporting the service of process is not reporting in the capacity of a police observer at the scene of a crime, nor is he ordinarily connected with the case in a law enforcement capacity." *Id.* at 391. The Court further observed that, at common law, a sheriff's return was admissible under the official records exception to the hearsay rule, and nothing suggested that Congress meant to curtail that rule. *Id.* at 390-91.

Here, the return of service was not completed as part of a criminal investigation. Rather, it was completed as part of a civil protection proceeding in compliance with tribal court procedure. There was

nothing adversarial about serving Fryberg notice. Further, the act involved no exercise of discretion or judgment. Officer Echevarria simply gave Fryberg a copy of the Temporary Order of Protection with notice of the hearing. He then recorded that fact on the return of service and filed it with the court. In short, he merely documented that he had carried out a legal duty. This ministerial act was no different than the United States Marshal's Service return this Court found admissible in *Wilson* or the certification of records this Court approved in *Weiland*.

Fryberg suggests that even if this document is admissible under Rule 803(8)(B), the circumstances surrounding its creation make it unreliable. Fryberg suggests that Officer Echevarria was biased because he was related to the petitioner of the protection order and, despite the evidence in the record to the contrary, persists in the claim that the intersection where Officer Echevarria served Fryberg does not exist. These arguments are baseless.

Although Officer Echevarria was related to the petitioner, there is no other evidence to suggest that this law enforcement officer had any

reason to fabricate serving Fryberg. Absent evidence showing otherwise, Fryberg's argument about bias should be rejected.

Fryberg's argument about the existence of the intersection is equally baseless. The location written on the Return of Service is "Corner of Reuben Shelton Drive + Ellison James." To establish its existence, the government introduced photographs of this intersection, SER_385-387; a Thomas Guide map, SER_312-313, 388-90; the testimony of an agent who drove to the area, SER_312; and the testimony of the Heather Gobin, who lived in the neighborhood and was familiar with the intersection, 2ER_139. There was also evidence that at the time of the return of service, Fryberg lived in the neighborhood where the intersection is located. In short, the record contains nothing that supports Fryberg's argument the Return of Service was unreliable.

For all of these reasons, this Court should deny Fryberg's challenge to the admissibility of the return of service. The district court did not abuse its discretion in admitting it.

V. The District Court Properly Denied Fryberg's Requested Jury Instructions.

Fryberg claims the district court erred when it refused to give his proposed entrapment by estoppel instruction and his supplemental knowledge instruction. These arguments lack merit.

A. Standard of Review

The standard of review for jury instruction error varies based on the nature of the alleged error. *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014). The language and formulation of the jury instructions are reviewed for an abuse of discretion. *Id.* The relevant inquiry is whether the jury instructions as a whole are misleading or inadequate to guide a jury's deliberation. *United States v. Moe*, 781 F.3d 1120, 1127 (9th Cir. 2015). A district court is afforded substantial latitude so long as the instructions fairly and adequately address the elements of the charge, the issues presented, and the theory of defense. *Id.* A district court need not give an instruction in the precise language proposed by the defense. *United States v. Hayes*, 794 F.2d. 1348, 1351 (9th Cir. 1986).

"A criminal defendant has a constitutional right to have the jury instructed according to his theory of the case, provided that the

requested instruction is supported by law and has some foundation in the evidence." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011). Whether a jury instruction is supported by law is reviewed *de novo*. *United States v. Anguiano-Morfin*, 713 F.3d 1208, 1209 (9th Cir. 2013). An abuse of discretion standard applies where the instruction was denied because of an inadequate factual basis. *Cortes*, 757 F.3d at 857.

B. The Proposed Entrapment by Estoppel Instruction Was Not Supported by the Record.

Entrapment by estoppel occurs when a government official mistakenly informs a defendant that certain conduct is legal thereby affirmatively leading the defendant to violate the law. *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010). A defendant has the burden of proving this defense. *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004).

To establish this defense, a defendant must show that "(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) [the defendant] relied on the false

information, and (5) that [the defendant's] reliance was reasonable." *Schafer*, 625 F.3d at 637 (quoting *Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004). To establish this defense, a defendant must do more than show that a government official made "vague or even contradictory statements." *Raley v. Ohio*, 360 U.S. 423, 438 (1959). Rather, he must show the official affirmatively misled him and that it was reasonable to rely on the misrepresentation. *Schafer*, 625 F.3d at 637. A defendant's reliance is reasonable if "a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir.1970). *See also United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir.1991).

This Court has held that a defendant is entitled to an entrapment by estoppel defense where the evidence established he had truthfully answered all of the questions on the ATF Form 4473 and was advised he could still purchase a firearm. *Batterjee*, 361 F.3d at 1217-18. Likewise, in *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987), this Court held that a convicted felon could "not be prosecuted for purchasing a firearm when a federally licensed firearm dealer told him

it was legal for him to make the purchase" after the disclosure of the relevant facts. 829 F.2d at 774. In contrast, this Court rejected defendant's entrapment by estoppel claim were there was "no evidence in the record that [the government agent] expressly told [defendant] that it was lawful for him to purchase the firearms." *Brebner,* 951 F.2d at 1025.

Fryberg argues he was entitled to assert this defense because federal firearms licensees allowed him to take possession of the firearms after conducting a background check through the NCIC system. However, Fryberg did not contend that he was affirmatively misled by any government official that he could lawfully possess a firearm. More importantly, given that he purchased all but one of the firearms after pleading no contest to violating the protection order, and was sentenced to comply with the order's conditions, Fryberg's answer to this question on the ATF form 4473 knowingly false. This alone disqualifies him from relying on this defense. These facts establish that the district court properly refused to give an entrapment by estoppel instruction.

C. The Instructions on "Knowledge" Were Proper and Not Confusing

Fryberg argues that the jury instructions regarding "knowledge" created confusion about what the jury needed to find in order to convict and that this confusion would have been avoided had his proposed instruction been given. Contrary to the defense arguments, however, the instructions regarding intent were clear and concise and properly set forth the elements the jury was required to find to return a guilty verdict.

At trial, Fryberg's defense theory was that the government failed to prove he received actual notice regarding the hearing where the permanent protection order was imposed. SER_108-109. During the trial, the defense repeatedly suggested there was no evidence Fryberg ever received notice of the hearing or a copy of the final protection order. SER_108, 158. Further, Fryberg claimed that when he purchased the firearms, he was unaware that he was subject to a protection order and in good faith believed that he was allowed to purchase and possess firearms. SER_109-112.

In formulating the jury instructions, the district court correctly described the elements the jury was required to find to return a guilty

verdict. The "to convict" instructions tracked the language of 18 U.S.C. § 922(g)(8) and clearly informed the jury that it had to find, beyond a reasonable doubt, that Fryberg had received actual notice of, and the opportunity to participate at, the hearing where the protection order was issued. SER_404, 406, 408, 410, 412.

Given the clarity of the court's instructions as to elements of the offense, the district court properly declined to give Fryberg's proposed instruction number 3 which stated in relevant part:

> If after careful and impartial consideration of all the evidence, you have a reasonable doubt as to whether the Permanent Protection Order was issued after a hearing of which the Defendant received actual notice and at which he had an opportunity to participate, then it will be your duty to find the defendant not guilty.

2ER_70. This instruction is nothing more than a restatement of the elements instruction and, as the district court reasoned, would unduly emphasize the "actual notice" element. 1ER_36.

Further, the court's instruction No. 23 did not confuse or mislead the jury about what was needed to convict him. It clarified that the jury only needed to find that Fryberg knowingly possessed a firearm and not that he knew he was the subject of a protection order or the reason why his possession of the firearm was unlawful. 2ER_69. Moreover, a

modified version of the government's proposed "knowledge" instruction was necessary to assist the jury in focusing on what it needed to find Fryberg knew in order to convict. 1ER_37. The district court determined that this instruction was necessary in the face of Fryberg's repeated assertions that he never received a copy of the actual protection order. Unlike notice of the hearing, receiving a copy of the final order is irrelevant to the question of whether a defendant violated of Section 922(g)(8). 1ER_36-37. Instruction No. 23 clarified this point and was not duplicative of another instruction and thus did not unduly emphasize a point made in another instruction. As such, giving instruction 23 was not an abuse of discretion.

VI. The Government's Closing Argument Did Not Violate Fryberg's Fifth Amendment Rights

Pointing to the prosecutor's isolated statement during closing argument that Fryberg never denied being served with notice of the protection order hearing until after Officer Echevarria's death, the defense now argues that this statement constituted an improper comment on Fryberg's Fifth Amendment right to silence and shifted the burden of proof. A review of the record establishes that this was not the case and, in any event, even if error, it was harmless.

A. Standard of Review

This Court reviews *de novo* whether a prosecutor's comment violates a defendant's Fifth Amendment right to silence. *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001). "If there was an improper comment on a defendant's right to silence at trial, violating the Fifth Amendment privilege against self-incrimination," this Court applies a harmless error review. *Id.* A constitutional error may be disregarded only if it is harmless beyond a reasonable doubt. *Id.* A district court's decision to deny a mistrial based upon an improper comment in closing argument is reviewed for an abuse of discretion. *United States v. Berry*, 683 F.3d 1015, 1020 (9th Cir. 2012). Finally, although the defense made a motion for a mistrial after the district court raised the issue *sua sponte*, no objection was made during the argument itself. Thus, in actuality this claim should be reviewed only for plain error. *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1132 (9th Cir. 2005). But regardless of the standard applied, reversal is not warranted.

B. The Prosecutor's Comment Did Not Improperly Shift the Burden of Proof

Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). *See also In re Winship*, 397 U.S. 358, 362 (1970) ("[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt.").

In *United States v. Vaandering*, 50 F.3d 696, 701-792 (9th Cir. 1995), this Court found that comments intended to highlight the weakness of a defendant's case do not shift the burden of proof where the prosecutor does not argue that a failure to explain requires a guilty verdict. As this Court observed, "'[i]t is a common practice for one side to challenge the other to explain to the jury uncomfortable facts and inference.'" *Id.* quoting *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991). In *United States v. Cabrera*, 201 F.3d 1243, 1249-50 (9th Cir. 2000), this Court found that a prosecutor's comment about a

defendant's failure to produce evidence to corroborate his testimony did not improperly shift the burden of proof.

Here, like *Cabrera* and *Vaandering*, the prosecutor's comment was an attack on the nature of the defense. It did point out the obvious fact that a person who had not been served would normally have raised the issue, particularly in a proceeding when facing a criminal charge involving the particular order. The comment did not state or even imply that Fryberg had an obligation to come forward with evidence to prove his innocence. More importantly, this comment came after the jury was instructed that the government had the burden of proof and after the government affirmatively embraced that burden in its closing argument. CR_124 at 86. Given the context in which the comment was made, it cannot be deemed to have shifted the burden of proof to Fryberg.

C. The Prosecutor's Statement Did Not Violate Fryberg's Fifth Amendment Rights

The Fifth Amendment right to silence contains an implicit assurance "that silence will carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). "Due process requires that defendants be able to exercise their constitutional right to remain silent and not be penalized

at trial for doing so." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1280-81 (9thCir. 1992).

Here, although inartfully worded, the prosecutor's statement was directed at pointing out an obvious weakness in the defense. As the district court correctly noted, the comment did not directly implicate Fryberg's Fifth Amendment rights. 1ER_58. The comment merely highlighted the reasonable inference to be drawn from the evidence. Specifically, if Fryberg had not been served with notice of the protection order hearing as the defense attempted to claim, he surely would have raised that fact when he appeared in court to face the criminal charge of violating the protection order.

D. The Comment Was Harmless and Did Not Contribute to the Verdict

Even if the prosecutor's comment could be construed as a comment on Fryberg's exercise of his Fifth Amendment rights, it was harmless. Under the harmless error standard, this Court must determine whether, absent the prosecutor's comment, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. *United States v. Hastings*, 461 U.S. 499, 510-11 (1983). Some errors "infect the entire trial process, and necessarily render a trial

fundamentally unfair," such that automatic reversal is warranted. *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks and citations omitted). Most constitutional errors, however, do not rise to that level and instead do not require reversal if "the court[is] able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The burden of proving a constitutional error was harmless rests on the government. *United States v. Lopez*, 500 F.3d 840, 845 (9th Cir. 2006).

When considering whether a prosecutor's reference to a defendant's Fifth Amendment right to silence was prejudicial, this Court considers (1) the extent of the comment made, (2) whether an inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence of guilt, as well as the length of jury deliberations. *Id.* at 845-46. "Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case." *Id.* (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001). This Court also considers whether the district court gave a timely curative instruction. *United States v. Espinosa*, 827 F.2d 604, 616 (9th Cir.1987) ("[W]here the prosecutorial

comment was a single isolated statement, where it did not stress any reference to guilt, and where it was followed by curative instructions, we have been reluctant to reverse.")

Here, the government's single comment during the closing argument was harmless beyond a reasonable doubt. The statement at issue was an isolated comment. The comment used four lines of the transcript in what amounts to twenty pages of argument. This subject was not mentioned in the remainder of the argument. The statement amounted to a rhetorical question designed to highlight and undermine Fryberg's claim that he had not been personally served with notice of the hearing, despite his acknowledgment of the order and no contest plea to violating its terms. *See United States v. Kessi*, 868 F.2d 1097, 1106 (9th Cir. 1989) (a prosecutor may call attention to a defendant's failure to present exculpatory evidence so long as he does not comment on the decision not to testify.)

Moreover, the evidence of Fryberg's guilt was overwhelming. Fryberg did not contest that he had purchased and possessed the various firearms at issue. And the government produced strong evidence that he received actual notice of the protection order hearing,

including the Return of Service. 2ER_155. The evidence established that the location of service noted on the return was down the street from Fryberg's residence. 2ER_155. Further, Heather Gobin, Echevarria's wife, testified that she had told her husband he needed to serve Fryberg, that she saw him leave the house to do so, and that when he returned a short time later, he completed the return of service. 2ER_138.

The government also introduced an audio recording of the June 2012, Tulalip tribal court hearing where Fryberg sought to quash the warrant for violating the protection order. Fryberg can be heard admitting he had "been served" eight or nine years earlier. The jury could reasonably infer he meant being served with notice of the hearing given that there was no record that he was personally served with the order. Further, the judge testified that during the criminal prosecution for violating the order, Fryberg did not raise the lack of notice of the protection order hearing as a defense. SER_225-226, 242. Further, during his no-contest plea, Fryberg acknowledged the validity of the protection order. SER_334. Consequently, the evidence of Fryberg's guilt was strong.

The length of the deliberations also weighs in favor of finding the error was harmless. The jury deliberated approximately one day, a relatively brief deliberation given the six counts and the amount of evidence introduced at trial.

Finally, Fryberg did not object during the argument. Rather, the court raised the issue after the argument ended and immediately gave the following curative instruction:

> Mr. Fryberg has never claimed – "this is the first time, in any court." You've heard no evidence about that, and, consequently, I'm going to tell you to disregard that statement.
>
> There is no factual basis in the records for that, and it transcends argument in that it's trying to tell you a fact, and as you know, the facts have to be spoken here in court or admitted in an exhibit so both sides have an opportunity to discuss them and to rebut them.
>
> I'm directing you that, in your deliberations and in your fact-finding, you should disregard the statement, that, quote, claims for the first time to any court, because you have no evidence in regards to that.

1ER_55.

This curative instruction was timely. It was given shortly after the completion of the government's closing argument and jurors are presumed to follow the court's instructions. *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995). Therefore, the jury should be

presumed to have disregarded the single comment thereby eliminating any prejudice. Simply put, the prosecutor's isolated comment simply did not infect the entire trial and thereby undermine the verdict. Any error here was no doubt harmless beyond a reasonable doubt.

VII. The District Court Properly Denied Fryberg's Mistrial Motion

Fryberg's final argument is that the district court erred by denying mistrial motion made after the government's closing arguments. The district court did not err.

A. Standard of Review

The denial of a mistrial motion is reviewed for an abuse of discretion. *See United States v. Chapman*, 524 F.3d 1073, 1081-82 (9th Cir. 2008).

B. The Denial of the Mistrial Motion Was Not an Abuse of Discretion

"The trial judge has broad discretion in controlling closing argument, and improprieties in counsel's arguments to the jury do not constitute reversible error unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge." *United States v. Navarro*, 608 F.3d 529, 535-36

(9th Cir. 2010). Here, the denial of the mistrial motion was not an abuse of discretion. As noted, the comment was isolated and the court gave a curative instruction to ensure that any prejudice was neutralized. There was nothing inflammatory or insidious about the comment. In context of the entire closing argument, this isolated comment simply was so prejudicial as to impact the jury's verdict. Under the circumstances herein, it was not an abuse of discretion to deny the motion for a mistrial.

CONCLUSION

For the foregoing reasons, Fryberg's convictions should be affirmed.

DATED this 15th day of September, 2016.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the United States is not aware of any related cases which should be considered with this matter.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a Century Schoolbook typeface of 14 points, and contains 16,984 words.

Dated this 15th day of September, 2016.

/s/ *Bruce Miyake*
BRUCE MIYAKE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2016, I electronically filed the foregoing Answering Brief of the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 15th day of September, 2016.

/s/ Elisa G. Skinner
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