

2020 WL 1853186 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Seraphina CHARLEY, Defendant-Appellant.

No. 19-10133.
April 3, 2020.

On Appeal from the United States District Court for the District of Arizona
Hon. Steven P. Logan, District Judge
DC No. 3:18-cr-08135-SPL

Appellant's Opening Brief

[Jon M. Sands](#), Federal Public Defender, [Molly A. Karlin](#), Assistant Federal Public Defender, 850 West Adams Street, Suite 201,
Phoenix, Arizona 85007, (602) 382-2700, molly_karlin@fd.org, for defendant-appellant Seraphina Charley.

***i TABLE OF CONTENTS**

Table of Authorities	v
Introduction	1
Statement of Jurisdiction	4
Statement of Detention Status	5
Statement of the Issues	5
Statement of Facts	6
A. The Incident	6
B. The Indictment	9
C. The 404(b) Notice and the Defense Motion <i>in Limine</i>	9
D. The Trial	12
1. The Government's Case-in-Chief	12
2. The Defense Case	14
3. The Government's Rebuttal Case and the District Court's 404(b) Ruling	23
4. Motion for a Judgment of Acquittal	27
5. The Government's Closing Argument and Charley's Motion for a Mistrial	27
E. The Verdict and Sentencing, and the Government's Notice to Correct the Trial Record	30
Summary of Argument	31
*ii Argument	35
I. Charley Is Entitled to Acquittal on Count 3 Because the Evidence Was Insufficient to Prove She Knew that Making False Statements Was Unlawful	35
A. Standard of Review	35
B. The evidence was insufficient to prove Charley knew that making a false statement was itself unlawful .	36
II. The District Court's Erroneous Admission of "Other Act" Evidence Requires a New Trial	39
A. Standard of Review	39
B. The district court erred in admitting evidence of the Hannah and Hale-Charley incidents because it was irrelevant to any permissible purpose under Rule 404(b)	40
C. Even if admissible under Rule 404(b), the evidence should have been excluded under Rule 403	48
III. The Government's Misconduct in Summation Also Demands a New Trial	52
A. Standard of review	52

B. The prosecutor's closing argument was rife with misstatements, misleading assertions, and improper appeals to convict Charley based on her character	54
1. The prosecutor improperly argued that the "other acts" showed that Charley has a propensity for violence when intoxicated, and falsely told the jury that Charley "was drunk" when Marna and James found her	54
*iii 2. The prosecutor stated, incorrectly, that Charley committed a "completely unprovoked attack" on her sister, Hannah	56
3. As the Government conceded, the prosecutor introduced facts outside the record by stating that Charley falsely told Agent Mulhollen that Begay cut her wrists and then admitted to cutting them herself	58
4. The prosecutor stated that the jury "didn't see any photographs" of Begay with guns and that Charley "never said anything about guns," after obtaining exclusion of those photographs and statements	60
5. The prosecutor manipulated the record in stating that Marna Begay, Tom James, and Arlene Charley did not see red marks around Charley's neck	62
6. The prosecutor introduced facts outside the record and testified for her own case by stating that Begay did not remember the incident	63
C. The prosecutor's misconduct prejudiced Charley and violated due process	66
IV. The District Court's Errors, Considered Cumulatively, Deprived Charley of a Fair Trial	67
A. Standard of review	67
B. The trial errors and the prosecutor's improper argument worked in tandem to undercut Charley's defense	67
V. Remand Is Required as to Standard Condition 8, Which Bars Charley from Communicating or Interacting with Felons, Including Her Brothers	68
A. Standard of review	68
*iv B. The requirement that Charley obtain the probation officer's consent before communicating or interacting with her brothers needlessly burdens her fundamental rights	68
Conclusion	70
Certificate of Compliance	72
Statement of Related Cases	73

*v TABLE OF AUTHORITIES

Cases

 <i>Ajoku v. United States</i> , 572 U.S. 1056 (2014)	37, 38
 <i>Bryan v. United States</i> , 524 U.S. 184 (1998)	37, 38, 39
 <i>Gaither v. United States</i> , 413 F.2d 1061 (D.C. Cir. 1969)	58
<i>Harris v. United States</i> , Nos. 2:16-cv-05606-CAS & 2:12-cr-01085-CAS, 2017 WL 3443207 (C.D. Cal. Aug. 9, 2017)	38
 <i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	36
 <i>Manrique v. United States</i> , 137 S. Ct. 1266 (2017)	5
 <i>Michelson v. United States</i> , 335 U.S. 469 (1948)	49
 <i>Parle v. Runnels</i> , 505 F.3d 922 (9th Cir. 2007)	67
 <i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	37
 <i>Rosenbaum v. Washoe Cty.</i> , 663 F.3d 1071 (9th Cir. 2011)	69
 <i>United States v. Ajoku</i> , 584 F. App'x. 824 (9th Cir. 2014)	38
 <i>United States v. Alcantara-Castillo</i> , 788 F.3d 1186 (9th Cir. 2015)	52, 53, 59, 61
 <i>United States v. Alfonso</i> , 759 F.2d 728 (9th Cir. 1985)	42, 49
*vi <i>United States v. Angle</i> , 761 F. App'x 775 (9th Cir. 2019)	70
 <i>United States v. Bailey</i> , 696 F.3d 794 (9th Cir. 2012)	42, 43, 49
 <i>United States v. Bailleaux</i> , 685 F.2d 1105 (9th Cir. 1982)	41

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

 <i>United States v. Bishop</i> , 959 F.2d 820 (9th Cir. 1992)	36
 <i>United States v. Blueford</i> , 312 F.3d 962 (9th Cir. 2002)	61
 <i>United States v. Brooke</i> , 4 F.3d 1480 (9th Cir. 1993)	51, 54
 <i>United States v. Brown</i> , 327 F.3d 867 (9th Cir. 2003)	51, 56
<i>United States v. Brown</i> , 880 F.2d 1012 (9th Cir. 1989)	45
<i>United States v. Cardenas-Mendoza</i> , 579 F.3d 1024 (9th Cir. 2009) ...	52
 <i>United States v. Carrier</i> , 654 F.2d 559 (9th Cir. 1981)	38
 <i>United States v. Chavez</i> , 204 F.3d 1305 (11th Cir. 2000)	45
 <i>United States v. Commanche</i> , 577 F.3d 1261 (10th Cir. 2009)	46
 <i>United States v. Derington</i> , 229 F.3d 1243 (9th Cir. 2000)	55
 <i>United States v. Diaz</i> , 961 F.2d 1417 (9th Cir. 1992)	52
 <i>United States v. Edwards</i> , 154 F.3d 915 (9th Cir. 1998)	65
<i>United States v. Ferguson</i> , 425 F. App'x 649 (9th Cir. 2011)	46
*vii  <i>United States v. Flores-Chapa</i> , 48 F.3d 156 (5th Cir. 1995) ..	61
 <i>United States v. Frederick</i> , 78 F.3d 1370 (9th Cir. 1996)	67, 68
<i>United States v. Hernandez</i> , 859 F.3d 817 (9th Cir. 2017)	38
 <i>United States v. Hitt</i> , 981 F.2d 422 (9th Cir. 1992)	48
 <i>United States v. Kerr</i> , 981 F.2d 1050 (9th Cir. 1992)	53, 59
 <i>United States v. Kojayan</i> , 8 F.3d 1315 (9th Cir. 1993)	57, 66
 <i>United States v. Levario Quiroz</i> , 854 F.2d 69 (5th Cir. 1988)	50
 <i>United States v. Lozano</i> , 623 F.3d 1055 (9th Cir. 2010)	40
<i>United States v. Lugo</i> , 613 F. App'x 581 (9th Cir. 2015)	56
 <i>United States v. Martinez</i> , 514 F.2d 334 (9th Cir. 1975)	64
<i>United States v. Mendez-Gonzalez</i> , 697 F.3d 1101 (9th Cir. 2012)	67
 <i>United States v. Miller</i> , 874 F.2d 1255 (9th Cir. 1989)	42
<i>United States v. Moore</i> , 612 F.3d 698 (D.C. Cir. 2010)	37
<i>United States v. Morris</i> , 568 F.2d 396 (5th Cir. 1978)	65
<i>United States v. Mousavi</i> , 604 F.3d 1084 (9th Cir. 2010)	38
 <i>United States v. Napulou</i> , 593 F.3d 1041 (9th Cir. 2010)	69
*viii <i>United States v. Navarro</i> , 756 F. App'x 702 (9th Cir. 2018)	70
<i>United States v. Necoechea</i> , 986 F.3d 1273 (9th Cir. 1993)	57
 <i>United States v. Nevils</i> , 598 F.3d 1158 (9th Cir. 2010) (en banc)	36
  <i>United States v. Powell</i> , 587 F.2d 443 (9th Cir. 1978)	42
 <i>United States v. Preston</i> , 873 F.3d 829 (9th Cir. 2017)	40, 48, 57, 67
 <i>United States v. Rangel-Guzman</i> , 752 F.3d 1222 (9th Cir. 2014)	58, 65
 <i>United States v. Ray</i> , 741 F. App'x 452 (9th Cir. 2018)	44
 <i>United States v. Reyes</i> , 577 F.3d 1069 (9th Cir. 2009)	61, 66
 <i>United States v. Richards</i> , 719 F.3d 746 (7th Cir. 2013)	55, 56
 <i>United States v. Rodriguez</i> , 45 F.3d 302 (9th Cir. 1995)	43, 45, 47
<i>United States v. Rodriguez</i> , 880 F.3d 1151 (9th Cir. 2018)	40, 41

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

 <i>United States v. Sanchez</i> , 176 F.3d 1214 (9th Cir. 1999)	59
 <i>United States v. Sanchez</i> , 659 F.3d 1252 (9th Cir. 2011)	59
 <i>United States v. Sanders</i> , 964 F.2d 295 (4th Cir. 1992)	46
 <i>United States v. Schuler</i> , 813 F.2d 978 (9th Cir. 1987)	57
 <i>United States v. Soltero</i> , 510 F.3d 858 (9th Cir. 2007)	68
*ix  <i>United States v. Vazquez-Hernandez</i> , 849 F.3d 1219 (9th Cir. 2017)	35, 36
 <i>United States v. Vizcarra-Martinez</i> , 66 F.3d 1006 (9th Cir. 1995) ..	42, 50
<i>United States v. Wiggan</i> , 700 F.3d 1204 (9th Cir. 2012)	48
 <i>United States v. Wolf Child</i> , 699 F.3d 1082 (9th Cir. 2012)	68, 69
Statutes & Rules	
 18 U.S.C. § 1001	37
 18 U.S.C. § 1001(a)(2)	9, 31, 36
18 U.S.C. § 1035	37
18 U.S.C. § 113(a)(3)	9
18 U.S.C. § 113(a)(6)	9
18 U.S.C. § 1153	9
18 U.S.C. § 3231	4
 18 U.S.C. § 3742	4
28 U.S.C. § 1291	4
FED. R. APP. P. 4(b)(1)(A)(i)	4
FED. R. APP. P. 4(b)(2)	5
FED. R. CRIM. P. 29	27
FED. R. EVID. 403	21, 22, 48
FED. R. EVID. 404	24
FED. R. EVID. 404(a)(2)	11
FED. R. EVID. 404(a)(2)(B)	19
FED. R. EVID. 404(b)	<i>passim</i>
FED. R. EVID. 404(b)(1)	41
*x FED. R. EVID. 404(b)(2)	41
Other Authorities	
CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 22B	49
FEDERAL PRACTICE AND PROCEDURE § 5266 (2d ed. 2019) ...	
KENNETH S. BROUN ET AL., 1 MCCORMICK ON EVIDENCE § 190 (7th ed. 2016)	44

***1 INTRODUCTION**

The assault trial of Seraphina Charley involved a single question: whether Charley acted in self defense when she hit her boyfriend, Merle Begay, in the head with a piece of rebar. Charley detailed on the stand how Begay, who was extremely intoxicated, blocked her exit from his bedroom, held her down on the bed with his hand on her neck, and tried to tie her up with a rope before she hit him with the rebar. She testified that Begay had attacked her on at least three prior occasions in just the last week, at various times choking her, dragging her across the ground, and trying to prevent her from leaving his house. Witnesses to the aftermath of these incidents confirmed that she had a black eye, a bloody lip, and red hand marks on her neck. Charley testified that, given this recent history, she feared for her life when she hit Begay.

Begay did not testify.

The Government charged Charley with knowingly and willfully making a false statement by lying at the scene to the FBI about her identity and who injured Begay. But the Government was required to prove not only that Charley knowingly lied (which she admitted), but that she did so while knowing that lying was itself unlawful. No evidence *2 supported this element of the offense, and the insufficiency entitles Charley to an acquittal on that count.

Charley's conviction on the two related assault counts rests on a fundamental legal error combined with repeated misconduct by the prosecution in summation and rebuttal. Over Charley's [Rule 404\(b\)](#) objection, the district court permitted extrinsic evidence of two prior specific instances in which Charley became aggressive after drinking. For the first incident, Charley's stepmother, Roberta Hale-Charley, claimed that Charley kicked the door and yelled profanities because she was mad that Hale-Charley was slow answering the door. For the second, Charley's sister, Hannah Charley, described a fight that she (Hannah) had provoked in which Charley [wound](#) up hitting Hannah in the head with a coffee cup. The responding officer also testified about Hannah's injuries, and the district court admitted photographs of Hannah's injured finger and stitches on her temple.

This was error, as neither of these acts were relevant to prove Charley's identity (which was not at issue), her motive (which had nothing to do with Hannah or Hale-Charley), or her intent (whether she was defending herself) for hitting Begay. Rather, these acts showed that *3 Charley “tends to get intoxicated and hit people in the head, unprovoked, as an aggressor”-as the Government candidly stated. This propensity evidence is precisely what [Rule 404\(b\)](#) forbids.

Even if these specific acts were admissible under [Rule 404\(b\)](#), the prejudice to Charley and risk of misleading and confusing the jury substantially outweighed any marginal probative value. This was particularly true since the prosecutor told the jury in closing to infer from these incidents that Charley “gets violent when she drinks.”

The prosecutor's argument that the other acts were reflective of Charley's character was not the only instance of misconduct in summation. The prosecutor also repeatedly misrepresented the record, referenced extra-record facts, implied that she had personal knowledge of information not offered, and suggested that Charley was lying about defending herself based on an absence of corroborating evidence, where the defense had attempted to introduce that evidence but the district court excluded it. All of these misstatements and misrepresentations damaged Charley's credibility regarding the only issue in the case: whether she acted in self-defense. Separately and together, and *4 cumulatively with the erroneous admission of the “other act” evidence, these false representations compel a new trial.

Finally, the district court imposed a standard supervised release condition that requires Charley to obtain the probation officer's permission before communicating or interacting with felons. Two of her brothers may be felons. Remand is required for the district court to carve out an exception or explain the need for substantially burdening Charley's family relationships.

For these reasons, the judgment of conviction should be vacated, a judgment of acquittal entered on Count 3, and the case remanded for retrial on the remaining counts. At a minimum, Charley should be resentenced on Standard Condition 8.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to [18 U.S.C. § 3231](#). This Court's jurisdiction arises under [28 U.S.C. § 1291](#) and  [18 U.S.C. § 3742](#). The district court entered its final judgment on April 10, 2019. ER493. Charley timely noticed this appeal the following day. ER498; see [FED. R. APP. P. 4\(b\)\(1\)\(A\)\(i\)](#). An amended judgment, altered solely to *5 correct a clerical error in the statutes of conviction, issued on April 26, 2019. ER500.¹

STATEMENT OF DETENTION STATUS

Charley is in custody pursuant to the judgment imposed in the district court below. Her projected release date is December 30, 2023.

STATEMENT OF THE ISSUES

I. Whether the evidence was insufficient to sustain Charley's conviction for knowingly and willfully making a false statement to a government agency, where the Government adduced no evidence that Charley knew it was unlawful to lie to federal agents.

II. Whether the district court erred in admitting, under [Rule 404\(b\)](#), extrinsic evidence of two specific wrongful acts that Charley allegedly committed against third parties, where the acts were relevant only to show that Charley has a propensity to become violent when intoxicated.

III. Whether the Government committed misconduct in summation by repeatedly introducing facts not in evidence, misrepresenting the trial record, claiming that evidence the district court had excluded did not exist, and urging the jury to *6 consider the “other act” evidence as demonstrative of Charley's character.

IV. Whether the district court's trial errors and the prosecutor's misconduct, considered cumulatively, deprived Charley of a fair trial.

V. Whether remand is required as to the standard supervised release condition that bars Charley from communicating or interacting with felons without the probation officer's permission, where two of her brothers may be felons.

STATEMENT OF FACTS

A. The Incident.

The following facts are undisputed.

In the early morning of March 6, 2018, Seraphina Charley called 911 to report that her boyfriend, Merle Begay, was bleeding. ER569. Charley was crying. *Id.* She told the dispatcher that she was by herself out at Toyey Junction - a remote area near Steamboat, Arizona on the Navajo reservation (ER234) - and that Begay was “about to die.” ER569. She screamed for help. ER569, 575.

Charley remained on the phone with the dispatcher for about an hour. ER573. Throughout the call, she reported on Begay's condition and begged the paramedics to hurry. ER576. She also said that her name was Hannah Charley, that she was Begay's girlfriend, and that Begay *7 had been hit in the head with a metal pipe by a man who left in an ATV. ER569-70.

At 4:30 a.m. - about an hour after Charley dialed 911 - Navajo police officer Erwin Toddy arrived. ER210, 233-34. Charley identified herself again as Hannah Charley. ER238. She brought Toddy to the bedroom, where Begay lay unconscious on the floor with a towel under his head, covered in blood, next to a piece of rebar. ER211-13, 216, 236, 626-27. There was also blood throughout the house. ER211, 239-40, 623-34.

Navajo Nation criminal investigator Samantha Yazzie and FBI agent Jennifer Mulhollen then arrived. ER605. Under questioning in Mulhollen's SUV, Charley repeated that her name was Hannah Charley and provided a birth date of XX/XX/2001. ER612.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

She explained that she and Begay had been staying at the house alone together for five days. Ex. 15 at 00:32-1:10.² She also stated that she heard Begay argue outside with a man driving an ATV while she remained inside, and that Begay was bleeding and carrying the rebar when he came back in. *Id.* at *8 1:20-1:56, 3:00-4:00, 8:35-9:46. The agents told Charley that her resuscitation efforts helped Begay survive. Ex. 15 at 14:22-44.

Before the agents left, Charley told them that her date of birth was XX/XX/1988 - not XX/XX/2001. ER682, 684. She also offered the names of her parents and their address. ER684. Mulhollen subsequently determined through database checks that Charley's first name was Seraphina - not Hannah - but that the remaining identifying information that Charley had provided (including the corrected birth date) was accurate. ER616-17.

The paramedics intubated Begay and took him to the local hospital. ER223-24. He was then flown to a trauma center, unconscious and extremely intoxicated, with brain, skull, and nasal injuries. ER706, 709, 711, 715. After a couple of days he was able to walk, and three weeks later he was discharged to a rehabilitation facility. ER712, 728-29, 731. He did not testify at trial.

Meanwhile, Toddy arrested Charley for public intoxication and booked her into the Navajo jail. ER560, 774. Around 3 p.m., Mulhollen and Yazzi re-interrogated her at the jail. ER647. Charley stated at the outset that she had lied about her name because she didn't want to be *9 involved. ER343-44. She explained that, in course of the last five days, Begay had kept her hostage, choked her, thrown her in the middle of the road, and hit her. ER344, 349-50. She also told them that Begay had a drinking problem. ER346, 349. Ultimately, she admitted that she hit him with the rebar. ER651.

B. The Indictment.

Charley was 29 years old, a mother of two, and studying to become a dental assistant at the time. ER743; PSR3, 14-15. A month later, in April 2018, the Government charged her with Count 1, assaulting Begay resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6) and 1153; and Count 2, assaulting Begay with a dangerous weapon, in violation of 18 U.S.C. §§ 113(a)(3) and 1153. Dkt. 1. A superseding indictment added Count 3, making a false statement to a government agency - lying about her name and date of birth to FBI agents and telling them that Begay had been assaulted by a male subject - in violation of 18 U.S.C. § 1001(a)(2). ER40. Charley pleaded not guilty on all counts. Dkt. 8, 40.

C. The 404(b) Notice and the Defense Motion in Limine.

Prior to trial, the Government served notice, pursuant to Rule 404(b), of its intent to introduce evidence that Charley “is a heavy *10 drinker” and that she “fight[s] when she is intoxicated.” ER50-51. The Government stated that it would introduce evidence of, among numerous other things, an incident in which Charley “assaulted her sister, [Hannah], by pushing her, punching her and throwing her on the floor,” and hitting her in the head with a coffee cup. ER53.

Charley moved *in limine* to exclude Hannah³ and the remaining six witnesses identified in the notice, as well as “un-noticed ‘other act’ evidence provided by the government in discovery.” ER56-57. She pointed out that the Government had made “no specific attempt to tie any of those acts to any permissible purpose under Rule 404(b),” and that the described incidents “constitute impermissible propensity evidence under Rule 404(b)” whose “probative value is substantially outweighed by the danger of unfair prejudice under Rule 403.” ER58. Admission of these incidents would require a mini-trial “that would detract from the only question at issue in this trial: whether Ms. Charley assaulted Merle Begay on March 6, 2018.” ER65-66.

*11 In response, the Government posited the “hypothesis” that “the defendant's prior acts of violence ... establish the defendant's motive in assaulting the victim, her intent to not only assault the victim, but cause bodily harm[,]” “show her *modus operandi* (or in other words, her identity as the abuser ...),” and “rebut any self-defense claim (which is akin to absence of mistake or lack of accident).” ER68-69. It maintained that the incident involving Hannah was “probative regarding the issue of who the initial aggressor was in the assault against the victim.” ER75. It also asserted that, if Charley introduced evidence of Begay's character, the specific acts it described were admissible in rebuttal. ER71, 75.

For the first time, the Government stated an intent to call Charley's stepmother, Roberta Hale-Charley, regarding “numerous incidents occurring at their home in Gallup[, New Mexico], involving the defendant drinking and causing disturbances.” ER76. Hale-Charley “would testify that the defendant was violent when intoxicated, and was almost always the initial aggressor when it came to fights,” including “one time” that Charley “got in [Hale-Charley's] face and chest-bumped her in a totally unprovoked incident when [Hale-Charley] was using a cane post-surgery.” ER76.

*12 The district court held the motion *in limine* “under advisement ... subject to what happens during the course of trial” and instructed the defense to “make objections to whatever witnesses that the government is trying to use under the 404(b) umbrella.” ER133.

D. The Trial.

1. The Government's Case-in-Chief.

The Government called eight witnesses for its case-in-chief. Navajo police dispatcher Rolene Begay (no relation to Merle Begay) recounted her telephone conversation with Charley. ER564-76. Toddy described his interaction with Charley and his observations of her, Begay, and the state of the house. ER229-43, 529-62. Paramedic Terri Anderson testified regarding Begay's condition upon her arrival. ER205-228. Dr. Sam Safavi-Abbasi, a neurosurgeon, described his observations and treatment of Begay at the trauma center (ER703-35), and Dr. Vincent Cariati, an internist, did likewise with respect to Begay's stay at the rehabilitation center (ER192-203). Safavi-Abbasi also opined that memory loss was not uncommon in patients who suffer severe [head trauma](#). ER729-31, 734.

*13 Begay's mother, Rosine Begay, stated that she lives with and takes care of Begay, and that Begay was “unable to do the things he used to.” ER578-83. Forensic scientist Erin Daniel testified that the mixture of DNA from the lip of a vodka bottle found at the scene matched both Begay and Charley. ER594. She also confirmed that the blood on Charley's hands and on the end of the rebar was Begay's. ER592-95.

Mulhollen described her investigation and search of the scene with Yazzie. ER601, 605-610, 618-43, 664-81. The Government played an edited recording of Charley's interrogation in the SUV. Ex. 15; *see* ER340 (complete transcript). The Government also asked about, and had Mulhollen read, the portions of a transcript of the subsequent interrogation at the jail in which Charley admitted that there had been no fight with a man in an ATV, and that she hit Begay three times in the back of the head with the rebar. ER624-57; *see* ER340-404.

Midway through the interview - after Charley had admitted her true name and that she hit Begay - Yazzie informed her:

C.I. YAZZIE: Okay. Seraphina, the more and more we go on with this interview and the more and more that you lie to us, you're getting more and more in trouble, okay, because both of us are federal agents. And it is -

*14 MS. CHARLEY: I'm not lying.

C.I. YAZZIE: - a crime to lie to us.

MS. CHARLEY: I'm not lying.

C.I. YAZZIE: Okay. So you can be charged with that, with lying to us.

ER369 (Exhibit 18, marked but not admitted).

2. The Defense Case.

Charley did not dispute that she had lied, that she hit Begay, or that he was seriously injured as a result. ER186-90, 278-79. She asserted that she hit him in self-defense, out of fear of imminent harm or death. ER 186-190, 277-91.

Charley was the defense's first witness. ER742-834. She testified that she knew Begay through his brother, who was her long-term romantic partner and is the father of her children. ER743-44. She had known Begay for twelve years, and they had been dating for six months at the time of the incident. ER743-45.

On the night of March 5 and into the morning of March 6, 2018, she and Begay were watching a movie and drinking vodka in his bedroom at his house in Toyey, Arizona. ER746-48. She did not drink that much, but Begay became “[v]ery intoxicated.” ER747. He got angry - she suspected, *15 because she told him that she wanted to leave. ER747. He made threats “[t]hat he knew a lot of people and not to test him.” ER754. He cursed at her and blocked the door. ER748.

A vehicle drove up. ER748. Begay threw a chain around his neck, put a hand knife in his pocket, and went outside, telling her “not to move.” ER748-49. He then “[came] storming in - he seemed really upset, like he just wanted to hit someone with the chain.” ER749.

Charley repeated that she wanted to go home. *Id.* But Begay threw her down on the bed, putting his elbow on her chest and his hand around her neck. ER750. She was scared; she “thought [she] was never going to leave.” ER752.

Begay started to tear her shirt and her bra, and he took her sweatpants off. *Id.* “I tried to fight back and wobble around to get out of it, but he was just too strong for me,” she testified. *Id.* She laid there, scared and unable to move as he got up and put the knife from his pocket on the shelf behind him. ER753.

He then grabbed a rope and “tried tying [her] arm, [her] right wrist.” *Id.* “I was trying to fight my way out. I tried not to have him grab my other wrist because I didn't want both my hands to be tied *16 together.... I thought he was going to tie me up,” she explained. *Id.* Then “he stopped, and I unraveled the rope, shook it off my right hand, and I stood still as possible because I didn't want him to hurt me anymore. He told me not to move or else.” *Id.* He threw the rope on a shelf. ER778.

But “[i]t just seemed like he was going to grab something else from behind him.” ER754. Turning to her side, she saw “the rebar laying right there on the floor by the mattress.” *Id.* She testified: “I just grabbed it, and I got up as quick as I can and I hit him in the head, in the back of his head,” three times. *Id.* Mere seconds had elapsed between the time he tried to tie her up and when she hit him. ER755. She hit him because, she said, “I was afraid [for] my life, that he was going to hurt me and kill me that night.” ER784; *see* ER785-86.

This was not the first time that Begay attacked her. ER761. She described an incident about a week earlier in the middle of the night when Begay “was getting violent” and tried to prevent her from leaving. ER762. “I found my way out of there in the

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

point of running down the dirt road” *Id.* She sat in the dark with her bags “for a good five minutes” until Begay found her and threw her to the ground. *Id.* Then:

I remember he grabbed a hold of my neck and he wouldn't let go.... I was trying to fight my way and *17 I couldn't. I heard myself choking and I couldn't breathe.... I thought I wasn't going to live. I thought I wasn't going to breathe any more. It took a while for him to let go. I had my hands in the air. I tried to fight back, but I couldn't..... And then finally, he finally let go. I couldn't breathe or anything, and I finally got my breath.

ER762-63.

Charley “got up slowly” and “starting crying.” ER763. She was dizzy. *Id.* “I remember I was trying to look for someone, at least someone could find me, waving, somebody like that could come through and pick me up, so I could wave them down to go back home,” she stated. *Id.*

Begay then grabbed her and “dragged [her] across the road.” ER763. “There were no cars going by or anything. It was dark. And I was trying to tell him, Merle, stop, stop. I was trying to yell. And all the while I was getting dragged across the road.” *Id.* Charley felt a stinging pain on her back from being dragged. ER764.

Begay stopped as a black SUV drove by and tried “to tell that vehicle to just keep going. He was waving his hand to tell the person to just go.” ER765. Charley, meanwhile, tried to wave for them to stop, “but he just threw [her] arm down” so that she couldn't. *Id.* She was shaking and crying. *Id.* The vehicle “slowly dr[o]ve off.” *Id.*

*18 Charley “thought [she] was really going to be left alone in danger that night.” *Id.* But ten minutes later, the car came back. *Id.* A woman was driving, with a man in the passenger seat. *Id.* By this time, Begay was on the other side of the road, walking home, yelling and cursing. ER763, 765-66.

The people in the SUV - later identified as Marna Begay (no relation to Merle Begay) and her brother, Tom James - took her back to their hogan for the night. ER766. The next morning, Marna took Charley to Charley's aunt Arlene's house. ER767.

Marna, James, and Aunt Arlene corroborated Charley's testimony. Marna confirmed that Begay was “holding her down” as he waved them to go, and stated that they went back to pick her up because they were worried “something [didn't] look right.” ER838-39. Charley, who was crying and shaking, told Marna, “he tried to choke me.” ER841-42.

James “didn't look for injuries on her or anything like that, out of respect for her as a female,” and he didn't ask if she was injured because that would have been “inappropriate.” ER884-87. Marna, however, saw that Charley “had a big lip. She had blood on her lips. She had a black eye” ER841; *see* ER845. Neither got “a close look at [Charley's] neck,” *19 but Marna later told her boss that Charley “may have been abused.” ER846, 850. Aunt Arlene testified, repeatedly, that Charley had “a red mark,” “a hand mark[,]” on her neck, and that it “seem[ed] like she had been choked.” ER863-68.

Pursuant to [Rule 404\(a\)\(2\)\(B\)](#), James testified that he had known Begay “pretty much ... [his] whole life,” and that, in his opinion, “when [Begay] consumes alcohol, he becomes very violent.” ER876, 884-85. He also noted that he saw Begay “outside of the courtroom the other day.” ER887.

Charley also described a second violent attack by Begay, also at night, about a week before March 6. ER767-71. They were at Begay's house, and Charley tried to leave. ER767. Begay dragged her across the kitchen floor to the bedroom and threw her on the bed. *Id.*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

Begay's friends arrived and noticed that she was crying. ER767. One of them told Begay “that he shouldn't be hitting a girl or a woman.” ER768. While they were talking, Charley “slipped out, running away from the house” and “down the dirt road[,]” where she stood “hoping that someone would come by.” *Id.* Begay “came running after [her]” and “tackled [her] down.” *Id.*

***20** One of Begay's friends jumped out of his vehicle and told Begay to stop. *Id.* The friend's girlfriend told Charley “to get in the vehicle, and [she] did.” *Id.* They took her back to Gallup. ER769.

Charley also testified about a third time that Begay violently attacked her prior to March 6. ER770-71. They were in Begay's bedroom and Begay was on top of her, “holding [her] down,” while she “scream[ed] for help.” ER770. Two of Begay's friends heard her screaming; one - Bryan Martinez - “bang[ed] on the door, [but] the door was locked.” *Id.* Martinez finally “bust[ed] through the door” and yelled at Begay. ER770-71. Charley “sneaked out of the room” and out “the back door where [Martinez's] wife [Gilbertina Jackson] was outside parked in a blue truck.” ER771. Jackson told Charley to get in, Martinez came out, and they drove away with Begay running after them. ER771. They took Charley home with them. *Id.*

Martinez and Jackson corroborated Charley's account. Martinez “told Merle's brother, like hold him back so we can take off, because [Martinez] didn't want this to go any further.” ER857. Charley was “crying and scared.” *Id.*; ER872-73.

***21** Charley testified that these attacks were on her mind when she hit Begay. ER772.

She also testified that she was particularly afraid because Begay had access to weapons. ER779-80. She identified the hand knife on the upper shelf, the lower shelf where Begay had placed the rope, and the chain on the floor in photographs. ER778-80. She also testified that there was a handgun on the top of the dresser. ER780. Defense counsel sought to introduce two photographs of Begay holding a gun, but could not because the district court sustained the Government's [Rule 403](#) objections. ER781, 785; *see* ER415 (Exhibit 224-14) and 416 (Exhibit 224-16).

Charley couldn't bring herself to leave once she saw Begay bleeding. ER755, 772. She gave him CPR and called 911. ER772. She also put a blanket under his head “to try to stop the bleeding” and ran “back and forth to the front door” watching for the ambulance. ER783.

Charley explained that she gave a fake name and said that a third person was responsible because she “knew that the family, the brothers were dangerous,” and she thought his family and friends would find her and hurt her in revenge. ER773-74, 784. She hadn't really slept and was ***22** still in shock when the agents interrogated her at the jail later that day. ER775.

Over defense objections (ER661-65, 786, 804), the Government told the jury of two additional, uncharged instances in which Charley gave a fake name to the authorities. For the first instance, the Government established that Charley falsely stated her name as Colandra Charley when the FBI came to arrest her on May 1, 2018 (ER804)-in plain violation of an earlier ruling holding evidence of that statement inadmissible under [Rule 403](#) (ER665). The Government then played for the jury a jail call, placed on June 22, 2018, in which Charley says to her new boyfriend, regarding the May 1 arrest, “Did you see how I made up my name? ... Damnit, I thought I was gonna get away with it” ER805; Ex. 28-1.⁴ For the second instance, also over an objection, Charley admitted that she lied about her name, date of birth, and social security number to an officer with the Gallup Police Department on February 23, 2018, when he responded to a complaint from her stepmother that she was intoxicated. ER806-07.

***23 3. The Government's Rebuttal Case and the District Court's 404(b) Ruling.**

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

To rebut Charley's testimony that Begay attacked her on March 6, the Government called Navajo corrections officer Jerald King, who booked Charley into jail that morning. ER890. King testified that Charley did not require any emergency medical attention and that he did not see any injuries (ER895), although “[s]he was covered in blood[.]” “[s]o there may have been injuries ... that [he] did not see” (ER901).

After Charley testified in the defense case, the district court ruled that “the door [was] wide open” for the Government to introduce “prior instances involving Merle and the violence of his family” pursuant to [Rule 404\(b\)](#). ER802. When defense counsel objected that the Government's intended 404(b) evidence “goes far beyond Merle Begay's family[.]” the district court instructed the defense to “object to them, and we will rule accordingly.” ER802-03. (It formally denied Charley's motion *in limine* after closing arguments. ER320-21.)

The Government then called Roberta Hale-Charley. The defense unsuccessfully objected, again, that “any specific acts that don't go to acts involving Merle ... would be excluded [under] 404(b).” ER902.

***24** The Government represented that Hale-Charley “is going to talk about Seraphina Charley's character for violence.” ER903. In addition, it argued that the specific act involving Hale-Charley was “clearly relevant on rebuttal in light of their self-defense claim to show intent, show lack of mistake, to rebut self-defense, and that includes individuals other than Merle being the victim.” *Id.*

The defense agreed that it had “opened the door to opinion and reputation character evidence clearly under 404, but not to specific instances under 404(b).... [T]here isn't an exception under 404(b) of opening the door simply because you claim self defense.” *Id.* Moreover, there was “limited probative value of an offense involving other people that would go to her intent with respect to Merle Begay[.]” and the proffered evidence was “highly prejudicial [.]” ER903-04.

The Government insisted that it was entitled to rebut the defense's “specific instances of conduct” with specific instances of its own, and that the events were “similar in nature” because Charley “tends to get intoxicated and hit people in the head, unprovoked, as an aggressor[.]” ER904-05.

***25** The district court overruled the defense objection. ER904-05. It later instructed the jury that this “other act” evidence could be considered “for its bearing, if any, on the question of the defendant's intent, motive, and identity” ER431; *accord* ER252-53.

Hale-Charley described an incident in June 2016, when she was using a cane. ER907. She stated that Charley came home intoxicated and “kept knocking and kicking the front door” while Hale-Charley slowly went to open it. ER908. She said that she told Charley to calm down and turned away, but Charley “came after [her],” asking, “What did you say?” and was “like ready to chest bump” her. ER909. Hale-Charley stated that she “managed to get away from [Charley], close [her] bedroom door,” and call 911, and that she “feared for [her] life.” *Id.* She testified that Charley kept kicking her door during the 911 call and that the 911 operators could hear Charley “yelling profanity.” ER910.

Hale-Charley testified that her opinion “with regard to violence, reputation for violence,” was that “[Charley's] violence was pretty high.” ER912.

Charley's sister, Hannah Charley, described a separate incident on December 30, 2015. ER916. Hannah stated that Charley “got mad” ***26** because Charley wanted to spend time with her, but Hannah was busy. ER917. Hannah said that she “could smell alcohol on [her] sister's breath that day.” ER917-18. Asked what Charley did, Hannah testified, “She didn't really do nothing, it was just talk first. I probably was the one that got her offended, because I basically pushed first.” ER918; *see* ER920 (“Q. And you said that you believed you were actually the one who initiated it? A. Yeah.”). Over the defense's continuing [Rule 403](#)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

and 404(b) objections, Hannah then stated that Charley pushed her and hit her on the side of her head with a mug. ER919-20. Hannah called the police and went to the hospital to get stitches. *Id.*

Gallup police officer Justin Benally testified that he responded to Hannah's call for what "turned out to be a battery, an aggravated battery." ER923-24. He said that Hannah was "holding a bloody towel" to her head, and that there was blood on the floor and "a broken cup." ER924-25. Overruling a defense objection, the district court admitted photographs of Hannah's head injury and an injury to her hand. ER926-28; *see* ER405-09.

***27 4. Motion for a Judgment of Acquittal.**

The defense moved for a judgment of acquittal pursuant to Rule 29 at the close of the Government's case, for the Government's failure to present "sufficient evidence as to any element of any count." ER736-37. She renewed the motion at the close of the evidence. ER932. The district court denied the motions. ER738, 932.

5. The Government's Closing Argument and Charley's Motion for a Mistrial.

In its closing argument, the Government repeated its theme that Charley has a propensity for violence when she drinks. The prosecutor argued:

The defendant put on evidence that the victim has a character for violence. In fact, the defendant testified he gets violent when he drinks.

The evidence really showed that's true for her. The evidence showed that pretty much every incident we heard about, she was intoxicated.

ER274. She then emphasized the testimony of Hale-Charley, Hannah, and Benally regarding the two prior incidents, describing the "scene" of the Hannah incident as "[m]aybe not quite as bloody as this one, but it sounded familiar." ER30.

***28** To further its propensity theme, the prosecutor also stated that Charley "was drunk" when Marna and James picked her up. ER299. James, however, testified that she did not "appear to be intoxicated at all." ER885. Marna said that she could smell alcohol (ER848) but did not say anything about Charley being drunk.

In describing the Hannah incident, the prosecutor represented that Charley had injured Hannah "in a completely unprovoked attack on her sister" (ER275) - contrary to Hannah's testimony that she, not Charley, had initiated the fight (ER918, 920). The defense's contemporaneous objection that the prosecutor's statement "misstates the evidence" was nonetheless overruled. ER275.

The Government had not called Begay to testify. Accordingly, there was no testimony as to whether Begay recalled the night in question. Nonetheless, in rebuttal, the prosecutor stated that "there was testimony in this case that the victim was unable to say what happened the night of the assault. And he had no relevant evidence regarding that night to provide." ER300. The defense's objection that representation misstated the record and constituted vouching was overruled. *Id.* Charley moved ***29** for a mistrial on the same ground after arguments, but the district court denied it. ER319-20.

In rebuttal, the Government called attention to Charley's testimony that Begay had a gun. The prosecutor said, "You didn't see any photographs of guns. The defendant never said anything about any guns. This is being used simply after the fact to try to convince you that she acted in reasonable self-defense." ER295. The jury had not seen this evidence, however, *not* because the evidence did not exist but because the Government had succeeded in obtaining its exclusion: the district court sustained the

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

Government's [Rule 403](#) objection to the introduction of two photographs of Begay with guns (ER781, 785) and also granted the Government's motion *in limine* to exclude Charley's "self-serving" statements to Mulhollen (ER123), which included Charley's statements that Begay had a gun (ER354, 364).

Challenging Charley's testimony that Begay had abused her, the prosecutor claimed in rebuttal, "Marna Begay didn't see marks around her neck. Tom James didn't see red marks around her neck." ER299. But neither had so testified. Rather, both testified that they weren't able to see her neck closely, and Marna stated that Charley had a fat lip, blood *30 on her lips, and a black eye. ER841, 845. Moreover, although Aunt Arlene had repeatedly testified that Charley had "red marks" on her neck (ER865, 867, 868), the prosecutor stated that Aunt Arlene did not see any red marks (ER299).

Finally, the Government pointed in rebuttal to an alleged confession that Charley had never made. It claimed that Charley, in the jailhouse interrogation,

told Special Agent Mulhollen that the victim cut her wrists, and then made it look like she did it to herself. When in fact, when Special Agent Mulhollen drilled down on that, she admitted she lied about that, too, and she had cut her own wrists.

ER293. Both defense counsel objected that no such testimony was in evidence, but both prosecutors asserted that it was. ER293-94. Taking the prosecutors' word, the district court overruled the objection without giving any curative instruction. ER294. After the close of arguments, Charley moved for a mistrial due to the introduction of this extra-record information. ER319-20. The mistrial motion was also denied. ER320.

E. The Verdict and Sentencing, and the Government's Notice to Correct the Trial Record.

The jury found Charley guilty on all three counts. ER322, 447-48.

*31 After the verdict but before sentencing, the Government submitted a notice in which it admitted that it had *not* elicited any testimony about Charley cutting her wrists. ER449. The parties and the district court agreed "that this is an issue that would need to be raised at the Ninth Circuit." ER459.

The district court imposed a top-of-Guidelines sentence of 78 months' incarceration on each of Counts 1 and 2, concurrent to each other and to a 60-month sentence on Count 3, followed by a three-year term of supervised release. ER486-87. It also ordered her to comply with the mandatory and standard conditions of supervised release articulated in General Order 17-18, which includes a condition prohibiting Charley from communicating or interacting with felons without her probation officer's permission. ER487. Judgment was entered on April 10, 2019 (ER493) and amended to correct a clerical error on April 26, 2019 (ER500).

Charley appeals. ER498.

SUMMARY OF ARGUMENT

I. Count 3, the crime of knowingly and willfully making a false statement to federal agents,  [18 U.S.C. § 1001\(a\)\(2\)](#), required the *32 Government to prove not only that Charley knowingly lied, but that she *knew* at the time that lying was itself unlawful. No evidence existed to support that element. The evidence was therefore insufficient to sustain Charley's Count 3 conviction.

II. The district court permitted the Government in its rebuttal case to introduce extrinsic evidence of two "other acts" pursuant to [Rule 404\(b\)](#): (1) an incident in which Charley, while intoxicated, hit her sister Hannah in the head with a coffee cup, as

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

recounted by Hannah and the responding officer, and as illustrated by photographs of Hannah's injuries, and (2) an incident in which Charley, while intoxicated, kicked her stepmother Roberta Hale-Charley's bedroom door while making threats and cursing, as recounted by Hale-Charley. Neither of these incidents was relevant to prove Charley's identity, motive, or intent in hitting Begay - the three purposes for which the district court admitted them - and the Government effectively conceded that it intended to use these "other acts" to show Charley's character. Assuming *arguendo*, however, that these other acts had some probative value, the prejudice to Charley and the risk of confusing and misleading the jury on the sole issue - self-defense - dramatically outweighed it. The erroneous and *33 prejudicial admission of this "other act" evidence may well have affected the jury's verdict, and accordingly demands reversal of the Count 1 and 2 convictions.

III. The prosecutor in summation and rebuttal made numerous improper statements:

She urged that the incidents involving Hannah and Hale-Charley, admitted under Rule 404(b), demonstrate that Charley has a propensity to become violent when she drinks.

She claimed that "there was testimony" that Begay didn't remember the incident, when Begay did not testify and no other witness did or could testify about Begay's memory.

She made statements that contradicted the evidence, including that Charley was drunk on one of the prior nights in which she said that Begay choked her (a witness testified that she was not); that the three witnesses to the aftermath of the choking incident did not see any red marks on Charley's neck (one of the witnesses stated repeatedly that she *did* see red marks, whereas the two other witnesses testified that they didn't get a good look); that the incident involving Hannah was "a completely unprovoked attack" (Hannah testified that she started the *34 fight, not Charley); and that Charley, in the jailhouse interrogation, blamed Begay for cutting her wrists before admitting that she cut her wrists herself (no evidence about any wrist-cutting existed, as the Government later conceded).

Finally, the prosecutor claimed that evidence the Government had succeeded in precluding did not exist. She asked the jury to infer that Charley was lying when she said that Begay had a gun because the jury didn't see any photographs of guns, even though the district court had excluded the photographs, and because Charley didn't tell the FBI about any guns, even though the district court had excluded Charley's statements to that effect.

These misrepresentations were impermissible and unjustifiable. Independently and collectively, they undercut Charley's credibility on the key issue of whether she acted in self-defense, and they entitle Charley to a new trial on Counts 1 and 2.

IV. The district court's error in admitting the "other act" evidence, coupled with the prosecutor's misconduct, eviscerated Charley's credibility and substantially undermined her self-defense claim. *35 Considered cumulatively, these errors violated her right to due process of law and require a new trial.

V. The standard conditions of supervised release include a condition that bars Charley from knowingly communicating or interacting with felons without the probation officer's permission. Because two of Charley's brothers may be felons, remand is required to allow the district court to exempt them or explain why the infringement on her substantial rights is warranted.

ARGUMENT

I. CHARLEY IS ENTITLED TO ACQUITTAL ON COUNT 3 BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE SHE KNEW THAT MAKING FALSE STATEMENTS WAS UNLAWFUL.

A. Standard of Review.

Claims of insufficient evidence to support a jury verdict, and the district court's denial of a motion for judgment of acquittal pursuant to [Rule 29](#), are reviewed de novo.  [United States v. Vazquez-Hernandez](#), 849 F.3d 1219, 1229 (9th Cir. 2017). “Evidence supporting a conviction is sufficient if, ‘viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential *36 elements of the crime beyond a reasonable doubt.’” *Id.* (quoting  [Jackson v. Virginia](#), 443 U.S. 307, 319 (1979)) (emphasis omitted).

“The defendant who successfully challenges a conviction for insufficiency of the evidence is entitled not only to a reversal of his conviction but also to an order directing the district court to enter a judgment of acquittal with respect to that conviction.”  [United States v. Bishop](#), 959 F.2d 820, 828 (9th Cir. 1992), *overruled on other grounds by*  [United States v. Nevils](#), 598 F.3d 1158 (9th Cir. 2010) (en banc).

B. The evidence was insufficient to prove Charley knew that making a false statement was itself unlawful.

To obtain a conviction for knowingly and willfully making a false statement, the Government must prove not only that the defendant knowingly lied, but also that she *knew* that lying to federal agents was itself unlawful. The Government failed to make that showing.

 [18 U.S.C. § 1001\(a\)\(2\)](#) provides a criminal penalty for “knowingly and *willfully* ... mak[ing] any materially false, fictitious, or fraudulent statement or representation” to a federal agent.  [§ 1001\(a\)\(2\)](#) (emphasis added). “[I]n order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’”  *37 [Bryan v. United States](#), 524 U.S. 184, 191-92 (1998) (quoting  [Ratzlaf v. United States](#), 510 U.S. 135, 137 (1994)). Section  [§ 1001](#) is no exception, as the Solicitor General conceded before the Supreme Court. Brief for the United States in Opposition at *13, 15,  [Ajoku v. United States](#), 572 U.S. 1056 (2014) (No. 13-7264), 2014 WL 1571930 (arguing “that the general criminal-law interpretation of ‘willfully’ articulated in *Bryan* should govern in the context of  [Sections 1001 and 1035](#)[.]” and that both sections “should be interpreted to require proof that the defendant knew his conduct was unlawful”); *see also* [United States v. Moore](#), 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“For some regulatory offenses - particularly statutes like  [§ 1001](#) that proscribe only ‘willful’ conduct - the Supreme Court has recognized an ignorance-of-law or mistake-of-law defense, or has required affirmative proof of the defendant's knowledge that his or her conduct was unlawful.”)..

Given this concession, the Supreme Court in *Ajoku* granted, vacated, and remanded convictions under [§ 1035](#) - which is worded identically to  [§ 1001](#) - for the failure to articulate correctly the willfulness requirement in the jury instructions.  [Ajoku](#), 572 U.S. 1056. *38 This Court then reversed and remanded for a new trial.  [United States v. Ajoku](#), 584 F. App'x. 824 (9th Cir. 2014) (unpublished).⁵

“The [*Bryan*] Court held that defendants were adequately protected by reserving criminal punishment only for those who know that their actions are illegal.” [United States v. Mousavi](#), 604 F.3d 1084, 1093 (9th Cir. 2010). Thus, although willfulness does not require the defendant to know precisely what law she is breaking, it does require her to know that making a false statement

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

is itself unlawful, as distinct from her conduct with respect to the separate crime of assault. See  *Bryan*, 524 U.S. at 189-91, 193-96; cf. *United States v. Hernandez*, 859 F.3d 817, 822-23 (9th Cir. 2017) (“[A] person cannot be convicted of one crime on the basis of an intent to commit another.”).

The Government adduced no evidence Charley knew that lying was unlawful when she lied to Mulhollen at the scene early in the morning of March 6. Although she admitted that she lied about her name multiple *39 times on the morning of March 6, and on other occasions, to both the FBI and local law enforcement, none of those instances or any other evidence demonstrated an awareness as of the morning of March 6 that lying to federal agents was a crime.

The FBI's subsequent interrogation at the jail strongly supports this conclusion. During that second interrogation - *after* Charley admitted her true name and birthdate, and that she, and not an unidentified male, hit Begay with the rebar - the agents informed her that it was a crime to lie. ER369. Had the agents believed that Charley was already aware that making false statements to them was unlawful, they would have had no need to inform her.

Because the evidence was insufficient to prove that Charley “acted with knowledge that [her] conduct was unlawful,”  *Bryan*, 524 U.S. at 192, her Count 3 conviction must be reversed and a judgment of acquittal entered.

II. THE DISTRICT COURT'S ERRONEOUS ADMISSION OF “OTHER ACT” EVIDENCE REQUIRES A NEW TRIAL.

A. Standard of Review.

“Evidentiary rulings admitting evidence of other acts under [Federal Rule of Evidence 404\(b\)](#) are reviewed for an abuse of discretion, but *40 whether the evidence of other acts is relevant to the crime charged is reviewed de novo.” *United States v. Rodriguez*, 880 F.3d 1151, 1167 (9th Cir. 2018) (citation omitted).

“Even where 404(b) evidence falls within a permitted purpose, it should be excluded, under [Rule 403](#), if the court finds that its probative value is substantially outweighed by a danger of unfair prejudice.”  *United States v. Preston*, 873 F.3d 829, 840 (9th Cir. 2017). The admission of evidence under [Rule 403](#) is reviewed for an abuse of discretion.  *United States v. Lozano*, 623 F.3d 1055, 1060 (9th Cir. 2010).

B. The district court erred in admitting evidence of the Hannah and Hale-Charley incidents because it was irrelevant to any permissible purpose under [Rule 404\(b\)](#).

Over Charley's repeated objections, the district court admitted evidence of two “other acts” by Charley: (1) the incident involving her stepmother, Hale-Charley, and (2) the incident involving her sister, Hannah. Contrary to the district court's ruling, this evidence was irrelevant to her intent, motive, and identity in hitting Begay on March 6, or for any other permissible purpose under [Rule 404\(b\)](#). Instead, it telegraphed to the jury that she has a propensity for violence when she drinks, and that she acted in accordance when she hit Begay - exactly *41 the inference that 404(b) forbids. The district court's admission of this irrelevant and grossly prejudicial evidence necessitates a new trial.

“Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.” [FED. R. EVID. 404\(b\)\(1\)](#). Such evidence is admissible only where it

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

serves another purpose, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” [FED. R. EVID. 404\(b\)\(2\)](#).

“The use of such evidence must be narrowly circumscribed and limited” due to “the danger that defendants will be convicted because they have previously committed a serious criminal offense rather than because the Government has introduced evidence sufficient to prove beyond a reasonable doubt that they are guilty of the offense for which they are being tried.”  [United States v. Bailleaux](#), 685 F.2d 1105, 1109 (9th Cir. 1982). Accordingly, an extrinsic act is *not* admissible under [Rule 404\(b\)](#) unless it tends to prove the permissible purpose in a way that is “supported by some propensity-free chain of reasoning.” [Rodriguez](#), 880 F.3d at 1168 (citation omitted). Furthermore, the evidence must be excluded unless it “tends to prove a material point” at issue.

 *42 [United States v. Bailey](#), 696 F.3d 794, 799 (9th Cir. 2012); see   [United States v. Powell](#), 587 F.2d 443, 448 (9th Cir. 1978) (“[T]he evidence of other crimes must be relevant to prove an issue in the case.”).

When the Government seeks to use the other acts to prove intent, identity, modus operandi, or absence of mistake or accident, those acts also must be “similar to the crime charged.”  [United States v. Miller](#), 874 F.2d 1255, 1269 (9th Cir. 1989); see also  [United States v. Vizcarra-Martinez](#), 66 F.3d 1006, 1014 (9th Cir. 1995) (“The greater is the dissimilarity of the two offenses, the more tenuous is the relevance.”) (citation omitted). “This is true because, if the prior act is not similar, it does not tell the jury anything about what the defendant intended to do in his later action - unless, of course, one argues (impermissibly) that the prior act establishes that the defendant has criminal propensities.”  [Miller](#), 874 F.2d at 1269.

“The burden of showing that such evidence meets the[] requirements of relevance rests with the government; the government must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from other acts evidence.”  [United States v. Alfonso](#), 759 F.2d 728, 739 (9th Cir. 1985) (citation omitted).

*43 The Government never explained how its evidence of Charley's prior acts of violence permitted the jury to infer any fact of consequence to the case. Its only explanation was that the other acts would show that Charley “is a heavy drinker” and that she “fight[s] when she is intoxicated.” ER50-51. Indeed, it effectively conceded that it intended to use the “other acts” to demonstrate Charley's character. See, e.g., ER75 (“this assault [on Hannah] would directly rebut any such evidence [regarding Begay's character] by demonstrating similar violent character evidence of the defendant.”). “This, however, is precisely the sort of evidentiary reasoning prohibited by [Rule 404\(b\)](#); it impermissibly allows use of a defendant's extrinsic actions to establish a certain character type in order then to prove that the defendant committed the action in question.”  [United States v. Rodriguez](#), 45 F.3d 302, 307 (9th Cir. 1995).

These acts had no relevance to the three purposes the district court identified or any other permissible purpose under [Rule 404\(b\)](#). First, they were irrelevant to the identity of the person who hit Begay with the rebar on March 6. Charley admitted that she was the one who hit Begay, so identity was not a material issue in the case. See  [Bailey](#), 696 F.3d at 799; *44 ER264 (Government summation) (“The only issue raised here is self-defense.”).

Even if identity *had* been at issue, the acts involving Hannah and Hale-Charley were not sufficiently similar to the events of March 6 to permit their admission for that purpose. The only similarity among the three incidents was that Charley had been drinking, and, as to the Hannah incident, that Charley hit her in the head. But whether a defendant facing assault charges has committed prior assaults cannot establish identity unless the acts are “so nearly identical in method as to earmark them as the handiwork of the accused.” KENNETH S. BROUN ET AL., 1 MCCORMICK ON EVIDENCE § 190 (7th ed. 2016); see, e.g.,  [United States v. Ray](#), 741 F. App'x 452, 453-54 (9th Cir. 2018) (where the defendant was charged with trafficking “by

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

force, threats of force, or coercion,” prior offense that involved use of force, threats of force, and coercion were inadmissible to establish identity or modus operandi; “[i]t is difficult to characterize this as anything other than the sort of propensity evidence that Rule 404(b) precludes”).

Second, these acts were irrelevant to Charley's motive. “The prior wrongful acts must establish a motive to commit the crime charged, not *45 simply a propensity to engage in criminal activity.” *United States v. Brown*, 880 F.2d 1012, 1015 (9th Cir. 1989); see  *Rodriguez*, 45 F.3d at 307 (holding that evidence of a prior fight “would be admissible under Rule 404(b) only if the fight itself, and not [the defendant's] character implied by the fight, provided an independent basis for establishing intent, motive, or purpose in possessing the object a month earlier”).

Here, “[n]o evidence whatsoever links [Begay] to [Charley's] prior acts.” *Brown*, 880 F.2d at 1015. Neither hitting Hannah in the head with a coffee cup - an act which Hannah admitted she provoked (ER918, 920) - nor kicking her stepmother's door and yelling profanities (ER910) suggested any motive for Charley to hit Begay with the rebar. See, e.g., *Brown*, 880 F.2d at 1015 (neither evidence of an instance in which the defendant shot into a third person's home nor of an incident in which he threatened another person at gunpoint was admissible to prove his motive in shooting the victim; rather, both incidents “clearly establish[ed] his propensity for violence” in violation of Rule 404(b));  *United States v. Chavez*, 204 F.3d 1305, 1309, 1316-17 (11th Cir. 2000) (defendant's prior drunken assaults of his wife - the victim - did not *46 establish a motive for the charged drunken assault, for which he claimed self-defense).

Third, the other acts had no bearing on Charley's intent with respect to Begay. “[A] prior assault or battery conviction is immaterial to a self defense claim in a separate incident except to suggest conformity.”  *United States v. Commanche*, 577 F.3d 1261, 1268 (10th Cir. 2009). In *Commanche*, the Tenth Circuit held that evidence that the defendant had “twice been convicted of battering people in the past using a sharp object [once with a box cutter] ha [d] no direct bearing on whether he acted in self-defense in this particular instance[.]” which also involved use of a box cutter. *Id.* Similarly, the Fourth Circuit in  *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992), explained that, “[s]ince Sanders admitted the stabbing and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act. The fact that Sanders had committed an assault on another prisoner and possessed contraband one year earlier had nothing to do with his reason for - his intent in - stabbing Jenkins.”  *Id.* at 298-99; see also, e.g., *United States v. Ferguson*, 425 F. App'x 649, 650-51 (9th Cir. 2011) (citing *Commanche* and *Sanders*) (“For the 1998 *47 conviction [for assault with a semi-automatic weapon] to be relevant [to manslaughter resulting from a fistfight], the jury first needed to draw a prohibited character inference and conclude that Ferguson had a violent propensity which rendered him unlikely to employ self-defense. This is the inference Rule 404(b) aims to keep from the jury.”).

Likewise here, neither the fact that Charley, after drinking, hit her sister with a coffee cup (in a fight that Hannah said she initiated) nor that she kicked her stepmother's door while threatening her and cursing provides any insight into whether Charley intended to hit Begay for reasons other than self-defense. Because the prior incidents themselves had nothing to do with whether Charley acted in self-defense on March 6 against Begay, and demonstrated only Charley's “character implied by the fight[s],” they were inadmissible to prove her intent.  *Rodriguez*, 45 F.3d at 307.

As the evidence of both prior acts was irrelevant to any permissible purpose under Rule 404(b), the district court abused its discretion in admitting it. The Court should grant Charley a new trial.

***48 C. Even if admissible under Rule 404(b), the evidence should have been excluded under Rule 403.**

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

Even if the Court concludes that the “other act” evidence was admissible under [Rule 404\(b\)](#), it should nonetheless reverse because the prejudice to Charley and the risk of confusing the issues and misleading the jury dramatically outweighed any probative value, in violation of [Rule 403](#). See [FED. R. EVID. 403](#).

“[Rule 403](#) is meant to ensure that potentially devastating evidence of little probative value will not reach the jury.” [Preston, 873 F.3d at 841](#) (quotation marks omitted). “Where the [other act] evidence is of very slight (if any) probative value, it’s an abuse of discretion to admit it if there’s even a modest likelihood of unfair prejudice or a small risk of misleading the jury.” *Id.* (quoting [United States v. Wiggan, 700 F.3d 1204, 1213 \(9th Cir. 2012\)](#)) (in turn quoting [United States v. Hitt, 981 F.2d 422, 424 \(9th Cir. 1992\)](#)). As the Supreme Court has explained,

character ... is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

*49 [Michelson v. United States, 335 U.S. 469, 475-76 \(1948\)](#).

To the extent the “other acts” evidence here was relevant, it had limited probative value, which was grossly outweighed by the risk of unfair prejudice, confusing the issues, and misleading the jury. Charley “was not shown to have been arrested or prosecuted” for either of the prior incidents, which “raises questions of probative value, that is, whether that discussion somehow tends to prove that [her] highly ambiguous conduct amounted to commission of the crimes charged here.” [Alfonso, 759 F.2d at 739](#); cf. [Bailey, 696 F.3d at 799-800](#) (evidence of a prior SEC complaint resulting in a settlement without admission of liability was insufficient to demonstrate that the defendant committed the acts alleged in the complaint). The Hannah incident was particularly non-probative - and risked confusing the issues and misleading the jury - since Hannah testified that she was the aggressor, not Charley. ER918, 920; see CHARLES ALAN WRIGHT & ARTHUR R. MILLER, [22B FEDERAL PRACTICE AND PROCEDURE § 5266 \(2d ed. 2019\)](#) (“[W]here the defendant can show that the act never happened or offer proof in mitigation, doing so can distract the jurors from the real issues in the case.”). Whether Charley engaged in self-defense against her sister has *50 no bearing on whether she was forced to defend herself against Begay. See, e.g., [United States v. Levario Quiroz, 854 F.2d 69, 73 \(5th Cir. 1988\)](#) (where defendant was charged with shooting a federal officer and claimed self-defense, evidence of a separate and unrelated shooting also potentially involving self-defense was not relevant under 404(b)).

At the same time, the question of whether Charley’s actions against Hannah were the product of self-defense likely confused and misled the jury as to the sole issue in the case, which was whether she acted in self-defense against Begay. Benally’s testimony about arriving on the scene - when he did not witness the incident - and his description of Hannah’s injuries, together with the district court’s admission of photographs of those injuries (ER405-09), only compounded the confusion and prejudicial effect, given the absence of any relationship between Hannah’s injured finger and stitched temple and Begay’s life-threatening head wound. The incident involving Hale-Charley, meanwhile, did not even involve an assault; the dissimilarity negated any probative value that the incident might otherwise have had. Cf. [Vizcarra-Martinez, 66 F.3d at 1014](#).

*51 The “other act” evidence admitted here was particularly damaging because the prosecutor improperly used it in summation to demonstrate propensity. “The requirement of government articulation of an evidential hypothesis to support the contested

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

admissibility of other-acts evidence does not impose a mere stationary barrier that once overcome may be ignored without consequence. Rather, the requirement defines an evidentiary course for trial to which the government must adhere.”  [United States v. Brooke](#), 4 F.3d 1480, 1485 (9th Cir. 1993). Thus, in *Brooke*, where the defendant was charged with fraud, the prosecutor's argument that the defendant's prior acts of lying about having [cancer](#) demonstrated that she was a liar heightened the prejudice to the defendant in excess of any probative value, requiring reversal.  *Id.* at 1486-87; *see infra* Section III.B.1 (explaining that the use of 404(b) evidence to argue propensity constitutes prosecutorial misconduct).

The prosecutor's argument that Charley “gets violent when she drinks” and that “pretty much every incident we heard about, she was intoxicated” (ER274) likewise invited the jury to infer that Charley acted in accordance with that character when she hit Begay. *See, e.g.*,  [United States v. Brown](#), 327 F.3d 867, 871-72 (9th Cir. 2003) (prosecutor's *52 statement that, “if a man is willing to cheat just a little bit over here, wouldn't he be willing to cheat just a little bit over here?” was “clearly designed to show Brown's criminal propensity, in violation of [Fed. R. Evid. 404\(b\)](#)”). The prejudicial effect of this “propensity” inference outweighed any marginal probative value the “other acts” evidence might otherwise have had. The district court therefore abused its discretion in admitting the evidence under [Rule 403](#). A new trial is required.

III. THE GOVERNMENT'S MISCONDUCT IN SUMMATION ALSO DEMANDS A NEW TRIAL.

A. Standard of review.

“When there are allegations of prosecutorial misconduct, the court reviews a district court's denial of a mistrial for abuse of discretion.” [United States v. Cardenas-Mendoza](#), 579 F.3d 1024, 1029 (9th Cir. 2009). The Court also reviews for an abuse of discretion “the district court's decision to permit comments made in closing argument after objection.”  [United States v. Diaz](#), 961 F.2d 1417, 1418 (9th Cir. 1992).

Otherwise, “[w]here the defendant has objected to alleged prosecutorial misconduct at trial, [the Court] review[s] for harmless error.”  [United States v. Alcantara-Castillo](#), 788 F.3d 1186, 1190 (9th Cir. 2015). The harmless error standard requires the Court to “look first to *53 the substance of [any] curative instruction[s]” and then to “examine the closeness of the case.”  [United States v. Kerr](#), 981 F.2d 1050, 1053-54 (9th Cir. 1992). The factors that inform whether reversal is warranted include “the form and timing of the misconduct, the extent to which the prosecutor asserted a personal opinion or extra-record knowledge, the importance of the testimony to which the improper conduct related, and the specificity and timing of any curative instruction.”  [Alcantara-Castillo](#), 788 F.3d at 1196. The challenged statements are viewed “in the context of the entire trial”; “if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial [,]” reversal is required.  *Id.* at 1190.

“Where the defendant has not objected to the alleged misconduct at trial,” review is for plain error. *Id.* The Court also reviews for plain error the combined effect of multiple errors where the defense lodged objections only to some of the errors. *Id.* Reversal is appropriate under that standard where: “(1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (citation omitted).

***54 B. The prosecutor's closing argument was rife with misstatements, misleading assertions, and improper appeals to convict Charley based on her character.**

1. The prosecutor improperly argued that the “other acts” showed that Charley has a propensity for violence when intoxicated, and falsely told the jury that Charley “was drunk” when Marna and James found her.

As discussed in Section II.C, *supra*, the prosecutor argued in closing that Charley has a propensity for violence when she drinks, stating:

The defendant put on evidence that the victim has a character for violence. In fact, the defendant testified he gets violent when he drinks.

The evidence really showed that's true for her. The evidence showed that pretty much every incident we heard about, she was intoxicated.

ER274. The prosecutor emphasized the testimony regarding the two other acts, describing the “scene” of the Hannah Charley incident as “familiar.” ER30. She then bolstered her propensity argument by claiming that Charley “was drunk” when Marna and James picked her up (ER299), even though James testified that Charley did not “appear to be intoxicated at all” (ER885).

It is impermissible for the prosecutor to argue that evidence admitted under [Rule 404\(b\)](#) reflects the defendant's character.

 [Brooke](#), 4 F.3d at 1485; *see, e.g.*,  *55 [United States v. Derington](#), 229 F.3d 1243, 1247 (9th Cir. 2000) (“[T]he prosecutor's argument to the jury highlighting Derington's greed touches on a trait of character. As evidence was inadmissible to prove Derington was greedy, an argument based on his greed should not have been made.”). “This prohibition remains even when the Court has admitted the [Rule 404\(b\)](#) evidence for some permissible non-propensity purpose - the government cannot later argue that the evidence shows the defendant's propensity to engage in criminal behavior.”  [United States v. Richards](#), 719 F.3d 746, 764 (7th Cir. 2013). “[T]he prosecutor's use of [Rule 404\(b\)](#) evidence during closing presents a question separate from whether the court properly admitted the evidence in the first place.”  [Id.](#) at 759.

The prosecutor's use of the “other act” evidence to demonstrate propensity was as unsurprising as it was improper, given the Government's stated intent to use it to illustrate Charley's character. *See* ER50-51 (arguing for admission to show that Charley “is a heavy drinker” and that she “fight[s] when she is intoxicated”); ER75 (asserting that the “assault” on Hannah would “directly rebut” any evidence of Begay's violent character “by demonstrating similar violent character evidence of the defendant”). And its unexplained assertion that the evidence related *56 to “intent,” “modus operandi,” “to show that she is the one who committed the assault in this case” and to the jury's “consideration whether she acted in self-defense” (ER275) did nothing to dispel the improper inference. *See*  [Richards](#), 719 F.3d at 765 (propensity argument in summation was improper where the “[p]rosecutors never explained to the jury specifically *how*” the prior act served a permissible purpose).

In light of the unique danger posed by “other act” evidence, this Court has reversed where the prosecutor argued in closing that the other acts reflected the defendant's character. That is true even where the evidence was otherwise admissible under [Rules 404\(b\)](#) and 403. *See, e.g.*,  [Brown](#), 327 F.3d at 870-72; [United States v. Lugo](#), 613 F. App'x 581, 583 (9th Cir. 2015); *see also*  [Richards](#), 719 F.3d at 764. In light of the centrality of the other acts to the prosecutor's case, and the impermissible propensity inference the prosecutor propounded, justice demands reversal.

2. The prosecutor stated, incorrectly, that Charley committed a “completely unprovoked attack” on her sister, Hannah.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

After describing Hannah's injuries, and over Charley's objection, the prosecutor stated: "That's what the defendant did in a *completely* *57 *unprovoked* attack on her sister." ER275 (emphasis added). This statement not only furthered the Government's impermissible theme that Charley "tends to get intoxicated and hit people in the head, unprovoked, as an aggressor" (ER904), it was flatly contradicted by the evidence, as Hannah testified that she, not Charley, was the aggressor. ER918 ("Q. What did [Charley] do? A. She didn't really do nothing, it was just talk first. I probably was the one that got her offended, because I basically pushed her first.").

Enshrined in the Due Process Clause is "the right not to be convicted except on the basis of evidence adduced at trial."  *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987). Although a prosecutor "can argue reasonable inferences based on the evidence,"  *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993), she has no latitude to "misstate or manipulate the evidence at trial,"  *Preston*, 873 F.3d at 844. For a prosecutor to make "unsupported factual claims" in summation is "definitely improper."  *United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993).

The prosecutor's misrepresentation that the Hannah incident was "completely unprovoked" is unjustifiable. It was all the more harmful *58 because it bolstered the Government's improper propensity argument, inducing the jury to convict based on Charley's character. This misrepresentation, too, necessitates a new trial.

3. As the Government conceded, the prosecutor introduced facts outside the record by stating that Charley falsely told Agent Mulhollen that Begay cut her wrists and then admitted to cutting them herself.

Over Charley's objection and subsequent mistrial motion, the prosecutor stated, in rebuttal, that Charley

told Special Agent Mulhollen that the victim cut her wrists, and then made it look like she did it to herself. When in fact, when Special Agent Mulhollen drilled down on that, she admitted she lied about that, too, and she had cut her own wrists.

ER293. Only after the district court ruled in the Government's favor on both occasions did the Government admit that it had misrepresented the record; no such evidence was offered. ER449.⁶

This Court has "repeatedly reversed" where "'witness credibility was paramount' and the prosecutor sought to bolster critical testimony *59 through improper conduct."  *Alcantara-Castillo*, 788 F.3d at 1196. Charley's credibility was central to the case. The prosecutor's extra-record assertion that Charley had falsely accused Begay of cutting her wrists - and that she had gone so far as to cut herself in an effort to frame him - devastated her credibility by creating the inference that her self-defense claim was made up, too. *See, e.g.,*  *United States v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999) (reversing "because the prosecutor committed misconduct in attempting to destroy [the defendant's] credibility and in his argument to the jury").

This misstatement was "'likely to be significant'" for the additional reason that "the government's rebuttal was the last thing the jury heard before beginning its deliberations."  *Alcantara-Castillo*, 788 F.3d at 1198 (quoting  *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011)). In this situation, a prompt and specific curative instruction was required. *See Kerr*, 981 F.3d at 1054 (generalized instructions did not neutralize the prosecutor's vouching because "[t]hey did not mention the specific

statements of the prosecutor and were not given immediately after the damage was done"). None was given. Because this misstatement went *60 to the heart of Charley's defense and went uncorrected, the Government cannot prove that it did not affect the jury's decision.

4. The prosecutor stated that the jury "didn't see any photographs" of Begay with guns and that Charley "never said anything about guns," after obtaining exclusion of those photographs and statements.

In a further effort to undermine Charley's credibility, the prosecutor stated in rebuttal: "You didn't see any photographs of any guns. The defendant never said anything about any guns. This is being used simply after the fact to try to convince you that she acted in reasonable self-defense." ER295. Yet, the prosecutor knew her hypothesis to be untrue: Charley attempted to introduce two photographs of Begay with guns, but the district court excluded them. ER781, 785. And Charley *did* tell Mulhollen - twice - that Begay had a gun (ER354, ER364), but the Government obtained the exclusion of these statements, too. ER123; *see* ER86 n.1 (noting that, if granted, the Government's motion *in limine* regarding "self-serving hearsay" would exclude Charley's prior statements that Begay "had access to a gun"); *see also* ER829-30, 863, 864, 872-73, 879 (sustaining objections to the *61 introduction of Charley's statements to Mulhollen as "self-serving hearsay").

"Deliberate false statements by those privileged to represent the United States harm the trial process and the integrity of our prosecutorial system."  [United States v. Reyes, 577 F.3d 1069, 1076 \(9th Cir. 2009\)](#). "Possessed of knowledge that destroyed" - or at least impaired - "her theory of the case, the prosecutor had a duty not to mislead the jury."  [Brown v. Borg, 951 F.2d 1011, 1015 \(9th Cir. 1991\)](#). That is precisely what she did here by claiming that excluded evidence did not exist. *See, e.g.,*  [Reyes, 577 F.3d at 1076-77](#) (prosecutor committed misconduct by "assert[ing] as fact a proposition that he knew was contradicted by evidence not presented to the jury");  [United States v. Blueford, 312 F.3d 962, 969-71 \(9th Cir. 2002\)](#) (similar); *see also, e.g.,*  [United States v. Flores-Chapa, 48 F.3d 156, 159-61 \(5th Cir. 1995\)](#). Moreover, because she made the statement in rebuttal, and no cautionary instruction was given, the jury was likely to believe her.  [Alcantara-Castillo, 788 F.3d at 1198](#). Because the prosecutor's "culpably false" statements undermined Charley's credibility on the critical question of self-defense, a new trial is required. *See*  [Reyes, 577 F.3d at 1077-78](#).

***62 5. The prosecutor manipulated the record in stating that Marna Begay, Tom James, and Arlene Charley did not see red marks around Charley's neck.**

The prosecutor also attacked Charley's credibility by casting doubt on Charley's account of Begay's prior abuse. The prosecutor claimed: "Marna Begay didn't see marks around [Charley's] neck. Tom James didn't see red marks around her neck. Her aunt, Arlene Charley, who loves her and wants to protect her, remember, insisted that she had handprints around her neck. Not bruises, *not red marks*, but handprints." ER299 (emphasis added).

This statement was substantially misleading, if not downright false. *See, e.g.,* [Sanchez-Soto, 617 F. App'x at 698](#) (finding misconduct where the prosecutor incorrectly quoted a witness whose testimony was ambiguous, falsely suggesting that her testimony was clear). Aunt Arlene testified clearly and repeatedly that she saw "red marks" on Charley's neck. ER865 ("Q. Why did you think it was a hand mark? A. Because I seen it. I seen it with my own eyes. And it was red."); ER867 ("Q. And did you see a bruise on her neck that day? A. There wasn't no bruise, but there was a red mark...."); ER868 ("Q. And what did that mark - what color was that? A. Red.")).

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

*63 Marna couldn't see Charley's neck, but she *did* see that Charley was visibly injured. ER841 (“[Charley] had a big lip. She had blood on her lips. She had a black eye - but she had her hood over her face, and it was tied really tight so I could just see this part of her face.”). James “didn't look for injuries on her or anything like that, out of respect for her as a female” (ER886) and couldn't see anyway because of her hoodie. ER884 (“Q. And did you see any marks or injuries on her? A. Oh, no, she was wearing a sweater, had a hood on.”).

The prosecutor's assertion here that the physical evidence did not support Charley's claim, when the opposite was true, impacted Charley's credibility, compromised her substantial rights, and compels a retrial.

6. The prosecutor introduced facts outside the record and testified for her own case by stating that Begay did not remember the incident.

In its opening statement, the Government represented that Begay “has a loss of long-term and short-term memories, and unfortunately, [he] cannot tell you much about that night.” ER183. The prosecutor then repeated this claim in its rebuttal over a defense objection, stating, “there was testimony in this case that the victim was unable to say what *64 happened the night of the assault. And he had no relevant evidence regarding that night to provide.” ER300.

There was no such testimony. Begay did not testify. Safavi-Abbasi opined that patients with injuries like Begay's sometimes suffer memory loss, but he did not know whether Begay presently did; he could only speak to Begay's condition in the few days after the incident, seven months before trial. *See* ER733-34. Although Mulhollen testified that Begay was “unable” to provide a statement as of May 4, 2018 (ER658-59), she could not speak to Begay's condition at the time of trial either, and she did not explain whether Begay's *physical* condition precluded him from giving a statement, as opposed to memory loss. Nor could she have so testified without falling afoul of the hearsay rule and the Confrontation Clause. “A prosecutor may not testify to the jury in this manner.” *Sanchez-Soto*, 617 F. App'x at 698; *see, e.g., United States v. Martinez*, 514 F.2d 334, 343 (9th Cir. 1975) (prosecutor's suggestion in closing that the Government had extra-record evidence “was highly improper”); *Sanchez-Soto*, 617 F. App'x at 698 (finding misconduct where the prosecutor's closing supplied “the missing testimony”).

*65 The prosecutor's repeated affirmations here that Begay did not remember the incident also implied that she had independent knowledge that this was so. But “an attorney may not say anything to the jury implying that evidence supporting the attorney's position exists but has not been introduced in the trial.” *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978)). The Government's conscious decision *not* to call Begay to testify and instead to represent what he would have said effectively turned the prosecutor into a witness for her own case. As such, “it was a blow against which [Charley] had no way to defend” that impaired her right of confrontation. *Edwards*, 154 F.3d at 922. Moreover, “[d]oing so clearly took ‘advantage of the natural tendency of jury members to believe’ in a prosecutor.” *United States v. Rangel-Guzman*, 752 F.3d 1222, 1225 (9th Cir. 2014) (quoting *United States v. Edwards*, 154 F.3d 915, 922 (9th Cir. 1998)). As this statement went directly to the critical issues of prior abuse, showing Charley's state of mind, and her self-defense claim, and no evidence that directly rebutted Charley's account in fact existed, the statement cannot be deemed harmless.

***66 C. The prosecutor's misconduct prejudiced Charley and violated due process.**

“[C]losing statements from the prosecution ‘matter a great deal.’” *Reyes*, 577 F.3d at 1078 (quoting *Kojayan*, 8 F.3d at 1323). Indeed, “[t]he force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence.” *Brown*, 951 F.2d at 1017. “Improprieties in closing arguments [therefore] can, themselves, violate due process.” *Id.* “A new

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

trial is required if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury.” *Id.* (citation omitted).

The force of the prosecutor's improper arguments here, independently and together, would not have been lost on the jury. “That the government felt the need to engage in these improper tactics only enforces just how close the credibility [issue] was, further demonstrating that the combined misconduct ... was highly prejudicial.” *Alcantara-Castillo*, 788 F.3d at 1997; *see, e.g., Sanchez*, 176 F.3d at 1225. The prejudice to the integrity of the trial and Charley's due process rights compels a retrial on Count 1 and 2.

***67 IV. THE DISTRICT COURT'S ERRORS, CONSIDERED CUMULATIVELY, DEPRIVED CHARLEY OF A FAIR TRIAL.**

A. Standard of review.

The Court reviews de novo whether the cumulative effect of multiple trial errors calls for the reversal of a conviction. *See United States v. Mendez-Gonzalez*, 697 F.3d 1101, 1102 n.1 (9th Cir. 2012) (matters necessarily first addressed on appeal may be described as being “reviewed” de novo); *see, e.g., United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

B. The trial errors and the prosecutor's improper argument worked in tandem to undercut Charley's defense.

The district court's trial errors and the prosecutor's misconduct reinforced each other in undermining Charley's self-defense claim and induced the jury to convict not due to the absence of a reasonable doubt as to her guilt of the instant offense, but instead based on her prior actions. Considered cumulatively, those errors “rendered [Charley's] defense ‘far less persuasive,’ infecting [her] trial with unfairness, and depriving [her] of due process.” *Parle v. Runnels*, 505 F.3d 922, 933 (9th Cir. 2007); *see, e.g., Preston*, 873 F.3d at 845-46 (reversing due to cumulative impact of misstatements in summation and erroneous admission of a prior act evidence under 404(b)); *Frederick*, 78 F.3d at 1381 (reversing for cumulative error due to the propensity inference given prior wrongful acts and multiple improper statements in closing argument). Thus, even if the Court concludes that neither the trial error nor the prosecutor's misconduct demands reversal on an individual basis, it should reverse due to their cumulative impact on Charley's defense.

V. REMAND IS REQUIRED AS TO STANDARD CONDITION 8, WHICH BARS CHARLEY FROM COMMUNICATING OR INTERACTING WITH FELONS, INCLUDING HER BROTHERS.

A. Standard of review.

Supervised release conditions to which trial counsel did not object are reviewed for plain error. *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012). “Conditions affecting fundamental rights, however, are ‘reviewed carefully.’” *Id.* (quoting *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007)).

B. The requirement that Charley obtain the probation officer's consent before communicating or interacting with her brothers needlessly burdens her fundamental rights.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

Standard Condition 8 provides:

You must not communicate or interact with someone you know is engaged in criminal activity. *If you know someone has been convicted of a felony, *69 you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.*

ER495, 502 (emphasis added).

The presentence report reflects that one or both of Charley's brothers, Tyrell and Tyrone, may be felons. According to Charley, Tyrell was convicted of armed robbery, and Tyrone "has a history of arrests and was recently convicted of DUI." PSR14.

Charley has a significant liberty interest in associating with her family without the probation officer's involvement. *See*  [Rosenbaum v. Washoe Cty.](#), 663 F.3d 1071, 1079 (9th Cir. 2011) ("The substantive due process right to ... familial association is well established."). The burden on Charley's fundamental rights required the district court to "'undertake an individualized review' on the record of the relationship between the defendant and [her brothers] to determine whether the restriction is necessary to accomplish the goals of deterrence, protection of the public, or rehabilitation."  [Wolf Child](#), 699 F.3d at 1090 (quoting  [United States v. Napulou](#), 593 F.3d 1041, 1047 (9th Cir. 2010)).

Although the district court presumably "did not intend to preclude contact" between Charley and her brothers, "the no-contact condition *70 violates [her] substantive due process rights" nevertheless. [United States v. Navarro](#), 756 F. App'x 702, 706 (9th Cir. 2018). "Because the record is devoid of any explanation for the need to infringe on th[ese] [sibling] relationship [s]," the Court should "remand for the district court to either exempt [Charley's brothers] from Standard Condition 8 or explain why it should apply to [them]." [United States v. Angle](#), 761 F. App'x 775, 779 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 90 (2019); *see also, e.g.,* [Navarro](#), 756 F. App'x at 706.

CONCLUSION

The convictions should be reversed and a judgment of acquittal entered on Count 3. The case should also be remanded for a new trial on Counts 1 and 2. At a minimum, the Court should remand for resentencing as to Standard Condition 8.

*71 Respectfully submitted,

JON M. SANDS

Federal Public Defender

By:

MOLLY A. KARLIN

Assistant Federal Public Defender

UNITED STATES OF AMERICA, Plaintiff-Appellee, v...., 2020 WL 1853186...

850 West Adams Street, Suite 201

Phoenix, Arizona 85007

(602) 382-2700

molly_karlin@fd.org

Attorneys for Defendant-Appellant Seraphina Charley

Footnotes

- 1 No additional notice of appeal was required because all rulings challenged here were issued before the amended judgment was filed. [FED. R. APP. P. 4\(b\)\(2\)](#); see [Manrique v. United States](#), 137 S. Ct. 1266, 1273 (2017).
- 2 “Ex. 15” refers to Government’s Trial Exhibit 15, the audio recording of the interrogation in the SUV, which is submitted concurrently with this Brief.
- 3 For the avoidance of confusion, Charley refers to the witnesses with the last names “Charley” or “Begay” by their first names.
- 4 “Ex. 28-1” refers to Government’s Trial Exhibit 28-1, the audio recording the jail call, which is submitted concurrently with this Brief.
- 5 These cases thus altered this Court’s prior holding (*see, e.g.*, [United States v. Carrier](#), 654 F.2d 559, 561 (9th Cir. 1981)) that “willfully,” as used in [§ 1001](#), means “deliberately and with knowledge.” *See, e.g., Harris v. United States*, Nos. 2:16-cv-05606-CAS & 2:12-cr-01085-CAS, 2017 WL 3443207, at *5-6 (C.D. Cal. Aug. 9, 2017) (“*Carrier* no longer remains good law in light of the Supreme Court’s holdings in *Bryan* and decision to vacate the judgment in *Ajoku*”).
- 6 While the Government’s post-hoc admission may be laudable, its apparent good faith is irrelevant to the misconduct analysis. [Gaither v. United States](#), 413 F.2d 1061, 1079 (D.C. Cir. 1969); *see, e.g., United States v. Rangel-Guzman*, 752 F.3d 1222, 1225 (9th Cir. 2014).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.