19-10133

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SERAPHINA CHARLEY,

Defendant-Appellant.

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 REPLY BRIEF

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INTRODUCTION

This case involves the desperate act of a domestic violence survivor in fear of imminent harm or death by her abuser. Choked, bloodied, dragged, and held against her will in the days or weeks prior, and held down while a knife and gun were within his reach, she had no choice but to defend herself by hitting him with a rebar.

The Government's brief underscores the errors requiring reversal. For the false statement count, its burden was to prove willfulness—which, it agrees, means she knew that lying to federal agents was unlawful. Yet the only support it can muster is that she knowingly lied and knew hitting Begay could bring repercussions. The dearth of evidence proving this element compels her acquittal.

As to the assault counts, the Government's brief confirms the improper central theory of its case: Charley hit Begay because she became aggressive in the past, with others, after drinking, and, here she was, doing it again. Its insistence on illustrating her character through extrinsic evidence of prior bad acts was impermissible, dominated its rebuttal case, and subsumed her claim of self-defense.

The Government offers no persuasive justification for highlighting in summation how these other acts showed Charley's purported alcohol-fueled propensity for violence. And it seeks in vain to marshal support and legal validation for the prosecutor's repeated misrepresentations of the record and excluded evidence, reference to extra-record information, vouching, and exploitation of her personal knowledge.

Absent the irrelevant and highly prejudicial "other act" evidence and the prosecutor's misconduct, this was a close case. Five witnesses corroborated that Begay had previously attacked and injured Charley, and no evidence proved that she did *not* reasonably defend herself. The Government's relentless innuendo that Charley is a violent drinker and its egregious closing argument, independently and together, fatally infected the trial and dictate reversal.

As for Standard Condition 8, Charley's significant liberty interest in associating with her brothers is well established. Remand is required for the district court to verify they are felons and make appropriate modifications.

ARGUMENT

I. THE GOVERNMENT FAILS TO IDENTIFY EVIDENCE SUFFICIENT TO SUSTAIN THE FALSE STATEMENT CONVICTION.

"[T]he government acknowledges that it is bound by the *Ajoku*[1] willfulness standard[,]" which required it to prove for Count 3 that Charley knew the act of lying to federal agents was unlawful when she lied to Mulhollen on March 6, 2018. AB19; *see* OB36-39.[2] It fails to identify evidence sufficient to prove that element.

The Government first points to Charley's admission that "she lied to the FBI about her name, date of birth, and who perpetuated [sic] the assault on the victim." AB20. By the Government's admission, this is not enough: it was required to prove she knew that *lying itself* was unlawful. AB19-20.

Next, the Government accuses Charley of lying by testifying that she acted in self-defense, and of lying "continually throughout the case." AB20-21. Even if that were true (which Charley denies), she was not

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[1] *Ajoku v. United States*, 572 U.S. 1056 (2014).

[2] Whether other circuits require only "that the defendant deliberately made the statement with knowledge that it was false" (AB23-24) is therefore immaterial. These cases, moreover, precede *Ajoku*. *Id.*

charged with committing perjury at trial but rather with making specific false statements on March 6, 2018 to the FBI. 2-ER-40. Lies about other matters, subsequent to March 6, and to other persons, are immaterial.

The Government also notes Charley "admitted that she was trying to avoid getting in trouble" by staging the scene; she "gave the FBI a fake name when they were trying to arrest her for the assault" on May 1, 2018; and she told her boyfriend she "'thought [she] was going to get away with it[.]'" AB21-22 (quoting SER-30). None of these statements suggests Charley knew as of March 6 that *lying* was unlawful; at most, they suggest she understood that hitting Begay might be. This does not satisfy "willfulness." OB38.

To the extent the Government's cases reflect that circumstantial evidence is sufficient (AB24), such evidence is missing here. In *United States v. Mousavi*, 604 F.3d 1084 (9th Cir. 2010), and *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005), the evidence showed that the defendants—charged with violating trade embargoes—knew that trade was prohibited. *Mousavi*, 604 F.3d at 1094; *Brodie*, 403 F.3d at 149. The absence of evidence Charley even had reason to suspect that making false statements to federal agents was unlawful entitles her to acquittal.

II. THE GOVERNMENT FAILS TO JUSTIFY THE ADMISSION OF THE "OTHER ACT" EVIDENCE.

The district court violated Rule 404(b) in admitting testimony and photographs of two unrelated wrongful acts Charley allegedly committed against her sister and her stepmother, respectively. OB39-47. Neither was relevant for any reason other than to prove that she becomes violent when she drinks. *Id.* But even if this evidence was admissible under Rule 404, it was far more prejudicial than probative and should have been excluded under Rule 403. OB48-52; *contra* AB24-34.

A. Rule 404(a) does not enable admission of specific instances of conduct.

The Government's initial argument—that "the evidence was admissible under Rule 404(a)(2)(B)(ii) because Defendant opened the door" (AB25)—is wrong. While that Rule permits the prosecutor to "offer evidence of the defendant's same trait" where the defendant "offer[s] evidence of an alleged victim's pertinent trait[,]" FED. R. EVID. 404(a)(2)(B)(ii), Rule 405 "determine[s] what *form* that evidence may take[,]" *United States v. Keiser*, 57 F.3d 847, 855 (9th Cir. 1995). Rule 405(a) limits that evidence to "testimony about the person's reputation or … testimony in the form of an opinion." FED. R. EVID. 405(a); *Gov't of Virgin Islands v. Carino*, 631 F.2d 226, 229 (3d Cir. 1980); *see, e.g.*, *United*

States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992). That the Government introduced the evidence in its rebuttal case (AB26 n.6) is immaterial: the restriction "is applicable to evidence in rebuttal as well as to original testimony." GEORGE L. BLUM ET AL., 29 AM. JUR. 2D EVID. § 374 (2020).

Accordingly, Tom James' opinion that Begay becomes violent when he drinks opened the door to reputation or opinion testimony regarding whether Charley has the same trait, but it did *not* permit evidence of specific acts to illustrate the point. AB26. Nor did the testimony about Begay's attacks open the door: these acts were admissible not as character evidence or under 404(b) but because they were relevant to show Charley's belief that she was "in danger of grievous bodily harm or death" from Begay. *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc).

Neither of Rule 405's exceptions applies. *First*, a witness who offers reputation or opinion testimony maybe be cross-examined "regarding relevant specific instances of the person's conduct[,]" FED. R. EVID. 405(a); *see, e.g.*, *United States v. Dillon*, 566 F.2d 702, 704 (10th Cir. 1977), but the Government introduced the evidence through direct examination.

Nor does the Rule permit admission of extrinsic evidence, *United States v. Hazelwood*, 979 F.3d 398, 410 (6th Cir. 2020), like evidence here.

Second, specific act evidence is admissible "[w]hen a person's character or character trait is an essential element of a charge, claim, or defense." FED. R. EVID. 405(b). But violent character is not an essential element of a self-defense claim, *Keiser*, 57 F.3d at 857, and the Government waived reliance on this exception by failing to raise it, *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011).

Rule 404(a)(2)(B)(ii) does not apply.

B. The Government fails to prove the evidence relevant under Rule 404(b).

The Government is likewise mistaken in asserting the evidence was admissible under Rule 404(b) to prove Charley's intent or the absence of mistake or accident, or "to rebut any claim of self-defense." AB25, 29.[3] Its sole justification is, "That Defendant was previously willing to intentionally assault others helps to show that it was not a mistake or accident that she assaulted Begay." AB30. But this is true only if the

[3] The Government's failure to defend the district court's conclusion that the evidence was also admissible to prove motive and identity waives those arguments. *McEnry*, 659 F.3d at 902.

jury infers from the prior acts that Charley has a propensity to commit assault—the inference Rule 404(b) forbids. OB41-43. The Government's inability to articulate a "propensity-free chain of reasoning" dooms its argument. OB41 (quoting *United States v. Rodriguez*, 880 F.3d 1151, 1168 (9th Cir. 2018)).

United States v. Hinton, 31 F.3d 817 (9th Cir. 1994) (AB29), is off-point because it concerned "evidence of a prior incident involving the same victim[.]" *Id.* at 822. On that basis, *Hinton* distinguished *United States v. Bettencourt*, 614 F.2d 214 (9th Cir. 1980), which involved a different victim and held that "[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time." *Id.* at 217.

The Government does not address *Bettencourt*. Nor does it respond to *United States v. Commanche*, 577 F.3d 1261 (10th Cir. 2009), *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992), or *United States v. Ferguson*, 425 F. App'x 649 (9th Cir. 2011)—all of which hold that evidence of a separate assault on a third party is not admissible to prove intent or refute a self-defense claim. OB46-47.

The Government also omits key language in *Hinton* in asserting that "intent was 'plainly an element' of the charged crimes[.]" AB29 (quoting *Hinton*, 31 F.3d at 822). *Hinton* held that "intent is plainly an element of *assault with intent to commit murder*[,]" not simple assault. *Hinton*, 31 F.3d at 822 (emphasis added). Regardless, whether intent is an "element" is not the test; the question is whether it is "'a material point' at issue." OB41-42 (quoting *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012)).

The Government's remaining cases (AB29) are unenlightening. Both involved "bare bones" presentations of prior convictions—not detailed and inflammatory accounts, as here. *United States v. Burk*, 912 F.2d 225, 229 (8th Cir. 1990); *United States v. Steele*, 550 F.3d 693, 701 (8th Cir. 2008). Nor do *Hinton* or *Steele* hold intent evidence admissible to rebut a self-defense claim, as neither defendant asserted self-defense. *See Hinton*, 31 F.3d at 822; *Steele*, 550 F.3d at 701. To the extent *Steele* suggests that "other act" evidence is admissible to disprove mistake or accident, it contravenes binding precedent. *E.g.*, *United States v. Brown*, 880 F.2d 1012, 1016 (9th Cir. 1989). Charley, moreover, did not argue that she hit Begay by mistake or accident, so that was not a material

point in issue. *See United States v. Johnson*, 879 F.2d 331, 334 (8th Cir. 1989); OB41-42.

The Government also fails to show that the other acts were sufficiently similar to the charged assault. OB44. It does not even attempt to explain how Charley kicking a door and yelling at her stepmother resembles an assault against her boyfriend. *See, e.g.*, *United States v. Preston*, 873 F.3d 829, 841 (9th Cir. 2017). Nor does it explain how hitting Hannah on the head with a coffee mug shows anything other than that she has a propensity to hit people in the head. Whether "[b]oth acts involved attacks where [Charley] was the aggressor,[4] against people with whom [she] had a close relationship, while [she] had been drinking" (AB30) says nothing about whether Begay violently attacked Charley on March 6, requiring Charley to defend herself. It simply suggests that she has a propensity to commit assault when she drinks and was therefore inadmissible character evidence. OB45-47 (citing cases).

[4] The Government ignores Hannah's testimony that *she* was the aggressor (5-ER-918, 5-ER-920), which further negates any probative value. OB49.

C. The Government fails to refute that the evidence was unduly prejudicial under Rule 403.

Even if the "other act" evidence was admissible under Rule 404, it was far more prejudicial than probative and should have been excluded under Rule 403. OB48-52.

The Government does not dispute that the evidence was prejudicial. The "unfair impact is heightened where the improper evidence is extensive[,]" *United States v. Brooke*, 4 F.3d 1480, 1487 (9th Cir. 1993), as the Government's own cases (AB29) recognize, *see Steele*, 550 F.3d at 702; *Burk*, 912 F.2d at 229.

The Government's unexplained assertion that "the probative value of the evidence [was] high" (AB31) ignores that these incidents concerned third parties, and that neither involved Charley's arrest or prosecution. OB45-49. Nor does the Government dispute that the Hannah incident injected into the trial the unrelated question of whether Charley acted in self-defense against Hannah, rendering that evidence minimally probative, extremely prejudicial, confusing, and misleading. OB49-50. And it does not disagree that the photographs of Hannah's injuries were gratuitous and inflammatory. OB50; *see United States v. Hitt*, 981 F.2d 422, 424-25 (9th Cir. 1992).

The Court's standard instruction would not have affected the verdict. AB31. Even where "carefully instructed," "jurors are likely to regard such evidence of a past act as proof of a defendant's turbulent character and to conclude that he acted consistently with that character at the time alleged in the indictment." *Bettencourt*, 614 F.2d at 218. "When the government [] argues propensity[,]" moreover, "the curative value of a limiting instruction diminishes dramatically." *United States v. Richards*, 719 F.3d 746, 766 (7th Cir. 2013). The Government "acknowledged and openly exploited this pronounced danger of unfair prejudice when it argued in its closing summation" that these incidents demonstrated Charley's propensity for violence when she drinks. *Brooke*, 4 F.3d at 1486-87; *see* OB51-52. That "[j]urors are presumed to follow the [district] court's instructions" (AB31) does not help the Government because the instruction misinformed the jury that it could consider the other acts for motive and identity, which the Government concedes were not permissible purposes. 3-ER-431.

The Government's cases (AB31) do not suggest otherwise. In *United States v. Ramos-Atondo*, 732 F.3d 1113 (9th Cir. 2013), the evidence was highly probative and relevant under "several logical

theories," including knowledge, plan, intent, and modus operandi. *Id.* at 1123. *Dubria v. Smith*, 224 F.3d 995 (9th Cir. 2000), involved hearsay evidence—not prior bad acts—and the trial court gave two tailored cautionary instructions, one contemporaneous to the defense objection. *Id.* at 1002. The district court's boilerplate instruction at the end of the case was insufficient to cure the prejudice arising from the admission of two inflammatory but minimally- or non-probative acts. Its refusal to permit the Government to parade *additional* witnesses to testify about *additional* bad acts (AB25 & 32) has no bearing on the prejudice caused by the erroneously-admitted evidence.

D. The Government cannot prove the erroneous admission harmless.

The harmless error inquiry begins "with 'a presumption of prejudice'" that compels reversal unless the Government proves it "more probable than not that the error did not materially affect the verdict." *Bailey*, 696 F.3d at 803 (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005)). An error can be harmful even where the defense is "not very plausible" and the Government's case is "strong" but not overwhelming. *United States v. Marsh*, 144 F.3d 1229, 1240 (9th Cir. 1998). The Court takes Charley's account as true in assessing the strength of the

Government's case and the plausibility of Charley's defense. *United States v. Levario Quiroz*, 854 F.2d 69, 74 (5th Cir. 1988).

The Government's case was plagued by the lack of evidence of any motive for Charley to hit Begay other than self-defense. The only reason it offered was its improper closing argument, supported by inadmissible evidence, that she is prone to violence when she drinks. OB54-56; *infra* Section III.A.1. Its propensity argument alone negates any possibility of harmlessness. OB51-52.[5]

The Government incorrectly maintains that self-defense "was not justified" because Charley "admitted she was not faced with an imminent threat of death or great bodily harm." AB33. Charley made no such admission. Although she agreed in hindsight that Begay "was not a threat to her when he was face-down on the ground," she testified that she believed "he was going to kill" her, that she hit him within several seconds of him trying to tie her up, that she did not want to see him injured and did not want to kill him, and that she was "trying to defend

[5] The prosecutor also asked Charley if she was "upset that [Begay] wouldn't marry [her]," but she said no (5-ER-797), and no evidence suggested otherwise.

[her]self" and hit him in an effort to get away. 5-ER-754–55, 5-ER-790, 5-ER-826.

Her reasonable fear of Begay was bolstered by testimony from Marna Begay, Tom James, Bryan Martinez, Gilbertina Jackson, and Arlene Charley confirming that Begay had recently attacked her on at least three occasions, causing visible injury. OB18-20. The district court rightly instructed the jury on self-defense, and a reasonable jury could have found that Charley believed "such force [was] necessary to prevent death or great bodily harm" in the heat of the moment. 3-ER-436; *accord* 2-ER-310. That Begay did not threaten her with a knife or a gun and did not succeed in tying her up (AB33) does not disprove her reasonable fear of injury or death.

The record does not support the Government's assertion that Charley "lied about Begay using rope to tie her up." *Id.* She testified that she did not recall telling Mulhollen that "it never happened[,]" and the Government did not properly impeach her. 5-ER-813; *see United States v. Rusnak*, 981 F.3d 697, 708 (9th Cir. 2020) ("Attorneys may not

introduce hearsay statements under the guise of cross-examination.'") (citation omitted).[6]

The Government is mistaken that Charlie's lies to law enforcement "fatally undercut her claim." AB33. Charley credibly testified that she lied because she feared retaliation by Begay's friends and family. 5-ER-773, 5-ER-784. She tried to explain the basis for that belief but was stymied by the Government's successful objection. 5-ER-784. Her fear of retaliation also would have been supported by the excluded photograph of Begay and a friend in which Begay holds a gun and flashes a gang sign while the friend points his gun at the camera. 3-ER-415, 5-ER-785. The Government cannot rely (AB33) on Charley's purported "omissions regarding self-defense" to law enforcement since the district court excluded any helpful statements. OB60-61.

[6] In any event, Charley's alleged out-of-court statement, as described by the prosecutor, does not clearly reflect that Charley meant *Begay* never tied her up; when she said "it never happened," she could have meant that her other boyfriends never did so. *See* 5-ER-813 (MS. SAMPSON: "… [Y]ou said: 'He was about to with the rope, but he was like, since you said that your other boyfriends kept you hostage, why can't I?' And Special Agent Mulhollen said: But it never happened, right? And you said: It never happened.").

That the evidence was introduced in the Government's rebuttal case does not reduce its harmfulness. This is particularly true since Hannah, Hale-Charley, and Benally were the final witnesses of the trial, and their testimony comprised three-fourths of the rebuttal. *See United States v. Yates*, 524 F.2d 1282, 1287 (D.C. Cir. 1975). Indeed, their testimony was *more* harmful because it was "prominently positioned" at the end of trial. *United States v. Al-Moayad*, 545 F.3d 139, 165 (2d Cir. 2008).

The standard jury instruction did not render the error harmless (AB32, 34) for the reasons discussed in Section II.C above.

The Government's cases (AB32) are inapposite. In *United States v. Carpenter*, 923 F.3d 1172 (9th Cir. 2019), a "mountain" of evidence—including testimony from the victim, two co-defendants, and a fourth witness—implicated the defendant in the charged conspiracy and kidnapping, so inadmissible references to the defendant's methamphetamine use during the commission of the kidnapping were harmless. *Id.* at 1183. The evidence here was far more damaging, as it suggested Charley's propensity to commit the crime charged, not merely to commit crime or behave badly. *United States v. Swint*, 566 F. App'x

618 (9th Cir. 2014), is even less relevant, as the jury there was not charged on self-defense. *Id.* at 619.

"Even if not argued at closing, when faced with the single disputed issue in the case—self-defense—the jury could not escape[] the clear articulation that [Charley] was a violent and aggressive person who was merely repeating that tendency." *Commanche*, 577 F.3d at 1270; *see* OB51-52. A new trial is warranted.

III. THE GOVERNMENT FAILS TO JUSTIFY THE PROSECUTOR'S MISCONDUCT IN SUMMATION.

The prosecutor's closing argument was rife with impermissible, prejudicial commentary that impaired Charley's defense. OB54-66. The Government's effort (AB35-56) to dispel this misconduct and to refute that it violated Charley's due process rights is unpersuasive, and the errors either were not harmless or they were plain.

A. Each instance of misconduct compels reversal.

1. The misuse of specific act evidence to show propensity and the misrepresentation that Charley was "drunk" were not harmless; alternatively, the errors were plain.

The prosecutor's assertion that Charley gets violent when she drinks, which she then illustrated by describing the other acts (2-ER-274–75), improperly invited the jury to consider those acts as proof of

Charley's character. OB54-56. The prosecutor then reinforced this impermissible inference by misrepresenting that Charley was "drunk" when Marna and James picked her up after Begay attacked her. *Id.* (citing 2-ER-299). The Government's effort (AB35-40) to refute both that the statements were inappropriate and that they necessitate reversal is unavailing.

The Government's first argument—that the violence comment was proper because the other acts were admitted as character evidence under Rule 404(a)(2)(B)(ii) (AB36-37)—fails for the reasons detailed in Section II.A above. Its second argument—that the comment was proper under Rule 404(b) in light of the prosecutor's further statement that the evidence was relevant "to her 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" (2-ER-275; *see* AB37-38)—likewise fails because (1) the prosecutor "never explained to the jury specifically *how*" the evidence served those purposes (OB56 (quoting *Richards*, 719 F.3d at 765)) and (2) there is no dispute that modus operandi and identity were not permissible purposes. The jury was not instructed to disregard the invited propensity inference, and the

partially-incorrect standard instruction "was inadequate to guide the jury's deliberations." *United States v. Brown*, 327 F.3d 867, 872 (9th Cir. 2003).

It was *not* reasonable to infer that Charley was "drunk" based on Marna's testimony that she "smelled alcohol." AB39 (quoting 2-ER-299). While it may have been fair to argue that Charley had been drinking, the testimony does not reflect she had consumed so much that she was "drunk." James' testimony that she did not "appear to be intoxicated at all" (5-ER-885) repudiates any such inference.

The Government also misunderstands the import of that statement. AB39. Charley did not argue that the Marna/James incident was 404(b) evidence; rather, the "drunk" comment reinforced the prosecutor's argument that Charley is a heavy drinker and was lying about Begay attacking her that night. OB54.

Because the district court overruled the defense's motion *in limine* and repeated objections to the "other act" evidence—and did so despite the Government's stated intent to use those acts to illustrate Charley's character (*e.g.*, 2-ER-50–51, 2-ER-71, 2-ER-75, 5-ER-904–05)—any further objection during summation would have been futile. Accordingly,

no objection was required, and the harmless error standard applies. FED. R. EVID. 103(b); *see, e.g.*, *United States v. Pirovolos*, 844 F.2d 415, 424 n.8 (7th Cir. 1988).

The Government fails to prove its misuse of this evidence harmless beyond a reasonable doubt. The prosecutor's assertion that Charley "gets violent when [s]he drinks" was hardly "an isolated statement." AB38. She followed with a detailed description of the incidents and an express invitation to compare Charley's conduct on those occasions with her alleged conduct on the night of March 6—all of which encompasses seven paragraphs of the transcript (2-ER-274–75), not two, as the Government claims (AB38). Nonetheless, no curative instruction was given, and this was a close case, for the reasons stated in Section II.D above. "[D]espite the other evidence against [Charley], the continued reference to [Charley]'s prior bad acts at the Government's closing arguments make it impossible for [the Court] to say it is more likely than not that they did not affect the jury's verdict." *Brown*, 880 F.2d at 1016; *see* OB56 (citing cases).

Even if review is for plain error (AB36), reversal is required. Binding precedent prohibited the prosecutor from using the other acts for

propensity purposes (OB54-55), so the error was plain. It also affected Charley's substantial rights and seriously affected the fairness of the proceedings because "[a] repeat offender is less likely to be believed, and that's precisely why propensity evidence—that she did it before and now she's doing it again—is prohibited." *United States v. Lugo*, 613 F. App'x 581, 583 (9th Cir. 2015). Reversal is warranted under either standard.

2. The misstatement that the "attack" on Hannah was "completely unprovoked" was improper and not harmless.

Contrary to the Government's contention (AB40), the testimony did *not* support the prosecutor's statement that the "attack" on Hannah was "completely unprovoked." OB56-58. Although Hannah acknowledged that she didn't "really" initiate the verbal argument, she also testified that *she* started the physical altercation by pushing Charley first. 5-ER918, 5-ER-921.

This misrepresentation was harmful because it enhanced the Government's prejudicial propensity argument and brought to the fore the irrelevant question of whether Charley engaged in self-defense against Hannah. *See Levario Quiroz*, 854 F.2d at 74. "Standard jury instructions such as that 'statements and arguments of counsel are not

evidence,' and that it is the jury's memory of the evidence that should control during ... deliberations have long been recognized not to be a cure-all for such errors[,]" *United States v. Davis*, 863 F.3d 894, 903 (D.C. Cir. 2017), yet the court did not instruct the jury to disregard the comment or offer any curative instruction. AB41. The statement was also accompanied by a number of other critical misrepresentations, detailed herein. It therefore materially affected the fairness of the trial.

3. The extra-record statement that Charley cut her wrists and falsely blamed Begay was improper and not harmless.

The Government concedes (AB41) that the prosecutor introduced facts outside the record when she told the jury that Charley cut her own wrists in an effort to frame Begay. 2-ER-293; OB58-60.[7] It fails to prove this statement harmless.

The Government acknowledges that the statement damaged Charley's credibility, but grossly overstates in asserting that the prosecutor made it "while reciting a laundry list of lies" to law enforcement. AB41. The prosecutor identified only two other purported

[7] The Government's confession of error *after* the district court denied Charley's mistrial motion and the jury returned its verdict (AB41) could not have cured the misstatement.

lies, neither of which finds record support. *First*, she improperly asserted that the excluded evidence of Begay's access to guns did not exist. 2-ER-294–95; OB60-61. *Second*, she erroneously claimed Charley told Mulhollen that the Marna/James incident occurred a couple of days before March 6 but then corrected herself to say that it happened a couple of weeks before when Mulhollen looked for injuries. 2-ER-293. In fact, Charley testified that the most recent instance of abuse (she did not identify which incident this was) occurred a "[c]ouple of days, at least three days before" March 6. 5-ER-819. There was no testimony that she told Mulhollen anything different. In the context of the argument that these three points illustrated Charley "slinging things at the wall" during the jailhouse interrogation and her failure to "tell this story that she told here" (2-ER-294), the wrist-cutting statement was prejudicial.

Charley's admission that she lied about her identity (AB42-43) went to a wholly different issue. Charley explained that she lied out of fear of retaliation. 5-ER-773, 5-ER-784. This admission did not call into question that Begay had previously abused her, which reinforced her claim of self-defense, and so it did not "devastat[e]" her credibility (AB43) on that critical issue.

The wrist-cutting statement was especially egregious because it described a shocking act—harming herself to frame Begay. No evidence suggested that she had such a history, and it called into question whether she had also caused the injuries that Marna and Arlene described.

That the statement came during the Government's rebuttal argument made it *more* prejudicial, not less. OB59 (citing cases). The court's instruction that the lawyers' statements are not evidence did not render the statement harmless for the reasons discussed in Section III.A.2 above.

The Government does not prove it more probable than not that the fairness of the trial was materially unaffected. The district court therefore abused its discretion in permitting the statement and denying the mistrial motion.[8]

[8] *Grigg v. Phillips*, 401 F. App'x 590, 594-95 (2d Cir. 2010), where the inadmissible statement was isolated, minor, and cumulative, "and other evidence" against the defendant "was certainly weighty" (AB43), is inapposite for the reasons discussed.

4. The misleading suggestion that the excluded photographs of guns and statement about Begay's access to guns did not exist was improper and plainly erroneous.

The Government's effort (AB44-47) to justify the prosecutor's statement "[y]ou didn't see any photographs of guns. The defendant never said anything about guns" (2-ER-295) rests on a mischaracterization of the record and a misunderstanding of the law.

The Government contends that the statement "you didn't see any photographs of guns" was accurate because "no guns were photographed *at the crime scene*[.]" AB44 (emphasis added). But the prosecutor did not limit her broad remark to guns "at the crime scene," and the Government does not explain how its proposed qualification was "clear from the context." AB46. This misleading statement undermined Charley's testimony that Begay owned or possessed a gun (5-ER-780), which would have been supported by the excluded photographs of Begay with guns (3-ER-415–16, 5-ER-781, 5-ER-785).

The Government does not defend the prosecutor's knowingly false statement that Charley "never said anything about guns" to Mulhollen. OB60-61. Nor does it cite any authority for its apparent assertion that a prosecutor may falsely suggest to the jury that excluded evidence does

not exist as long as exclusion was proper. AB46. A prosecutor commits misconduct by "assert[ing] as fact a proposition that [s]he knew was contradicted by evidence not presented to the jury." OB61 (quoting *United States v. Reyes*, 577 F.3d 1069, 1076-77 (9th Cir. 2009)). Whether the evidence was "properly excluded" (AB46) is irrelevant.

The error was plain, and it compromised Charley's substantial rights and the integrity of the trial because it materially undermined her credibility about whether she acted in self-defense. Moreover, as the statement was made in rebuttal, Charley had no opportunity to respond—nor could she have done so without impermissibly referencing excluded evidence. OB61.

This Court "do[es] not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had very strong reason to doubt." *Reyes*, 577 F.3d at 1078. It should reverse. *See* OB61 (citing cases).

5. The misrepresentation that Marna, James, and Arlene did not see red marks around Charley's neck was improper and plainly erroneous.

The Government strains (AB47-49) to defend the prosecutor's misleading statement that neither Marna nor James nor Arlene saw red

marks on Charley's neck. OB62-63. It cannot dispute that Arlene testified—repeatedly—that she *did* see "red marks." OB62 (citing 5-ER-864–65, 5-ER-867–68). With respect to Arlene, its illogical defense is that, because Arlene described the "red marks" as "hand marks" (5-ER-864–65, 5-ER-867), the prosecutor was correct in stating that Arlene saw "handprints" around Charley's neck but *not* red marks. 2-ER-299.

This was not merely a "matter of semantics." AB48. The import of the prosecutor's statement was that, because Arlene emphasized seeing handprints but did not describe them as red marks, she must be lying to protect Charley. 2-ER-299–300. The prosecutor would not have drawn the distinction between "red marks" and "handprints" if she didn't think that it undercut Arlene's credibility.

The statement that Marna and James "didn't see red marks" insinuated that they observed Charley but saw no injury. 2-ER-299. To the contrary, both testified that they couldn't see her neck, and Marna described substantial injuries to her face. OB63 (citing 5-ER-841, 5-ER-884, 5-ER-886). Together, these misstatements encouraged the jury to conclude that Charley was lying about Begay's abuse, and, accordingly, that she was also lying about needing to defend herself on March 6.

Neither of the Government's stated reasons as to why the error did not affect the fairness of the trial (AB48) is persuasive. These misrepresentations were not cured by the standard jury instruction. *Supra* Section III.A.2. Nor does the prosecutor's back-up argument that Begay's prior attacks on Charley "just don't matter" because "no evidence" proved that he was an immediate threat (AB48 (citing 2-ER-300)) indicate that the "red marks" statement was unimportant. Discrediting Charley's testimony about Begay's abuse made the jury more likely to disbelieve her testimony about self-defense. Moreover, it was the *Government's* burden to prove that Charley did *not* act in self-defense (3-ER-443–44), and no evidence showed that Begay was *not* an immediate threat. This was reversible plain error.

6. The extra-record vouching that Begay did not remember the incident was improper, and the Government has waived harmless error review.

The Government similarly fails (AB49-53) to point to any evidence supporting the prosecutor's vouching—made in opening and repeated in its rebuttal closing—that Begay could not remember the incident. OB63-65 (citing 2-ER-183, 2-ER-300). Neither Abassi's testimony that "it wouldn't be surprising" if Begay had suffered memory loss (5-ER-730; *see*

5-ER-731) nor Mulhollen's testimony that Begay was "unable to provide a statement" (4-ER-659)[9] raised a "logical inference" that Begay could not, in fact, remember. AB50. Because the content of Begay's memory was outside the record, *United States v. Dorsey*, 677 F.3d 944 (9th Cir. 2012) (AB53)—in which the prosecutor "did not refer to extra-record facts[,]" *id.* at 954—is irrelevant.

The Government misunderstands Charley's argument in asserting that the statement did not violate Charley's confrontation rights. AB53. By intimating she had personal knowledge that Begay could not remember what happened and "had no relevant evidence to provide" (2-ER-300), the prosecutor acted as a "silent witness" who "was not subject to cross-examination." *United States v. Edwards*, 154 F.3d 915, 923 (9th Cir. 1998). This Court has framed this type of confrontation problem as a form of vouching. *Id.* at 922-23. In any event, Charley hardly could

[9] Mulhollen could not have known whether Begay could remember unless he made a statement to that effect—which she testified that he did not, and which would have been inadmissible hearsay in any event. OB64; FED. R. EVID. 801(c).

"have called Begay as a witness" in response to the statement (AB53), since it was made after the close of evidence.[10]

The Government has waived any harmlessness. *United States v. Murguia-Rodriguez*, 815 F.3d 566, 574-75 (9th Cir. 2016).[11] The denial of a mistrial and the district court's decision to permit the statement necessitate reversal. *See* OB65 (citing cases).

B. The prosecutor's repeated misconduct, viewed collectively, violated due process and compels a new trial.

The Government offers nothing new to contest that the pervasive misconduct throughout summation infringed on Charley's due process rights. OB66. Its contentions that the wrist-cutting statement was harmless, that no other statements were improper, that the standard jury instruction corrected any errors, and that its case was strong and Charley's defense weak (AB54-55) fail for the reasons discussed. *Supra* Section III.A. The errors were plain, *id.*, and they affected Charley's

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[10] Because Charley does not assert a Confrontation Clause violation apart from the improper vouching, *United States v. Heck*, 499 F.2d 778 (9th Cir. 1974), and the Government's plain error argument (AB53) are irrelevant.

[11] Even if the Court were inclined to address harmlessness sua sponte, reversal is required. *See, e.g.*, *Reyes*, 577 F.3d at 1078; *United States v. Martinez*, 514 F.2d 334, 343 (9th Cir. 1975).

substantial rights and the integrity of the trial because they went to every aspect of Charley's defense, attacking her character and inviting the jury to convict her based on a propensity for violence; casting doubt on her account of Begay's prior abuse and the injuries she suffered, and on whether he had access to a deadly weapon; shielding Begay from cross-examination while nonetheless informing the jury what he would have said; and eviscerating her credibility as to whether she acted in self-defense. This misconduct overwhelmed her defense. *See, e.g.*, *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1198 (9th Cir. 2015).

IV. THE GOVERNMENT CANNOT REFUTE THAT THE CUMULATIVE ERRORS DENIED CHARLEY A FAIR TRIAL.

The Government posits only two arguments to refute that the erroneous admission of the "other act" evidence, in conjunction with any or all of the prosecutorial misstatements, deprived Charley of due process: (1) that the wrist-cutting statement was the sole error, and (2) that any errors were harmless. AB56. Its first argument fails because the errors were numerous. *Supra* Sections II & III. Its second fails because, absent the errors, its case was not overwhelming and Charley's defense was not wholly implausible. *Supra* Section III.A. The power of

the inadmissible propensity evidence and the wide-ranging impact of the misconduct enhanced each other, mandating a retrial. OB67-68.[12]

V. THE GOVERNMENT CANNOT AVOID RESENTENCING ON STANDARD CONDITION 8.

The Government does not dispute that resentencing is required where a district court fails to justify the burden on a family relationship imposed by a supervised release condition. It concedes that, if this rule applies to siblings, the Court must remand for the district court to exempt Charley's brothers from the condition barring contact with felons or make additional findings. AB59.

The Government's only argument is that any error was not plain because sibling relationships are not "as significant" as the parental and intimate relationships addressed in *United States v. Wolf Child*, 699 F.3d 1082, 1092 (9th Cir. 2012), and *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010). AB58. But this Court has spoken broadly of a "fundamental right to familial association," *Wolf Child*, 699 F.3d at 1092, and the Supreme Court has long made clear that the right extends even

[12] *United States v. Feldman*, 788 F.2d 544, 557-58 (9th Cir. 1986) (AB56), has no bearing on this case because the only issue was identity, which was amply proven by witness testimony and substantial physical evidence.

beyond the nuclear family. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977); *id.* at 506 n.2 (Brennan, J., concurring). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503 (maj. op.). The Government cannot seriously dispute that sibling relationships are deeply rooted in American history and tradition.

Other circuits have accordingly refused to uphold supervised release conditions that restrict the defendant's contact with a sibling absent express, heightened justification. *E.g.*, *United States v. Bryant*, 976 F.3d 165, 183-84 (2d Cir. 2020); *United States v. Smith*, 606 F.3d 1270, 1284 (10th Cir. 2010). Even if this Court has not yet done so, a lack of "appellate case law answering th[e] precise question" does not preclude the determination that an error is plain. *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013). The Court has not hesitated to find plain error respecting a supervised release condition even where it has not previously addressed the restriction at issue. *E.g.*, *United States v. LaCoste*, 821 F.3d 1187, 1192-93 (9th Cir. 2016); *United States v. Abbouchi*, 502 F.3d 850, 858 (9th Cir. 2007). Indeed, it has held that a

district court commits "plain procedural error" by imposing a condition that burdens familial associations without making the necessary findings. *Wolf Child*, 699 F.3d at 1095.

Even if sibling relationships are not fundamental, the condition requires heightened justification because it may also impede Charley's relationship with her parents. It may functionally preclude her from attending family or tribal gatherings and could preclude her from residing with her mother, as she intends to do upon her release, or with her father, who she lived with prior to her arrest in this case. PSR14-15.

Tyrone's and Tyrell's "potential felon status" (AB58) is apparent from the record. PSR14. Tyrell resides in New Mexico while Tyrone resides in Arizona (PSR14), and armed robbery is a felony in both states. ARIZ. REV. STAT. ANN. § 13-1904(B); N.M. STAT. ANN. § 30-16-2. In both states, DUI can be a felony or a misdemeanor. ARIZ. REV. STAT. ANN. §§ 28-1381, 28-1382, 28-1383; N.M. STAT. ANN. § 66-8-102. On remand, the district court can receive evidence confirming whether they are felons.[13]

[13] The Government's apparent attempt to fault Charley for failing to present new evidence of her brothers' convictions (AB57) ignores that this Court's review is limited to the record below. FED. R. APP. P. 10(a).

The error is plain because the restriction was imposed without justification, *United States v. Barsumyan*, 517 F.3d 1154, 1161-62 (9th Cir. 2008); it affected Charley's substantial rights because it affected the outcome of the proceedings, *id.* at 1162; and it seriously affected the fairness of the proceedings due to the "paucity of the evidence in the record" to support it, *Abbouchi*, 502 F.3d at 858.[14]

CONCLUSION

Charley's convictions should be reversed, a judgment of acquittal entered on Count 3, and a new trial ordered on Counts 1 and 2. At a minimum, the Court should remand as to Standard Condition 8.

[14] *United States v. Stephens*, 821 F. App'x 905 (9th Cir. 2020) (AB58) is inapposite because the rejection of plain error was "based on the facts of this particular case"; the district court would have had to "piece together facts, spread out across multiple hearings, that would have indicated that [the no-contact] condition would restrict [the defendant] from seeing his fiancée." *Id.* at 907. To the extent *United States v. Farley*, 696 F. App'x 210, 213 (9th Cir. 2017), suggests that an unreasoned restriction on familial association is not reversible absent an objection, it cannot be reconciled with *Wolf Child*. *See Wolf Child*, 699 F.3d at 1095.

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CERTIFICATE OF COMPLIANCE

This brief contains 7,000 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

DATED: January 8, 2021

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