2020 WL 6120253 (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.
October 8, 2020.

D. Ct. No. CR-18-08135-PCT-SPL
On Appeal from a Judgment of the United States District Court for the District of Arizona

Brief of Appellee

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1 III. *STATEMENT OF JURISDICTION

A. *District Court Jurisdiction*

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant-appellant, Seraphina Charley ("Defendant"), was charged with federal crimes. (ER 39-40.) [1]

B. *Appellate Court Jurisdiction*

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on April 10, 2019. (CR 109.) [2]

C. *Timeliness of Appeal*

Following the entry of the final judgment, Defendant filed a notice of appeal on April 11, 2019. (ER 498-99.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. *Bail Status*

Defendant is currently in custody, serving her sentence, and is expected to be released on January 7, 2024, according to the Bureau of Prisons.

2 IV. *ISSUES PRESENTED

A. Whether, when viewed in the light most favorable to the prosecution, sufficient evidence exists from which any rational juror could find Defendant guilty beyond a reasonable doubt of making a false statement where she lied repeatedly to law enforcement throughout the case, continued to lie at trial under oath, admitted she was trying not to get in trouble, and made a false report to the police.

B. Whether the district court abused its discretion in admitting "other acts" of violence by Defendant where (1) evidence of the acts was admissible under Rule 404(a)(2)(B)(ii) because Defendant opened the door to such evidence; (2) in any event, evidence of the acts was admissible and relevant under Rule 404(b) to show intent, absence of mistake, and to rebut Defendant's claim of self-defense; and (3) the probative value outweighed any prejudice.

C. Whether the district court abused its discretion when it denied Defendant's motion for a mistrial based on prosecutorial misconduct where the prosecutor made a single inadvertent error during closing which was harmless and did not affect the fairness, integrity, or public reputation of judicial proceedings.

D. Whether any alleged errors cumulatively deprived Defendant of a fair trial where the only error was a single inadvertent misstatement in closing arguments and no prejudice resulted.

***3** E. Whether the district court plainly erred in imposing a standard condition of supervised release prohibiting Defendant from associating with felons where Defendant has not shown that there is such a person with whom she has a fundamental liberty interest.

4 V. *STATEMENT OF THE CASE

A. *Nature of the Case; Course of Proceedings*

On November 14, 2018, a federal grand jury returned a superseding indictment charging Defendant with one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6) (Count 1); one count of assault with a dangerous weapon, in violation of 18 U.S.C. §§ 1153 and 113(a)(3) (Count 2); and one count of false statement to a government agency, in violation of 18 U.S.C. § 1001(a)(2) (Count 3). (ER 39-40.) After a four-day jury trial, the jury convicted Defendant of all counts. (ER 447-48.) On April 8, 2019, the district court sentenced Defendant to concurrent terms of 78 months' imprisonment on Counts 1 and 2, and 60 months' imprisonment on Count 3, followed by 36 months of supervised release. (ER 493-97.)

B. *Statement of Facts*

1. *The Offense*

On March 6, 2018, at 3:34 a.m., Defendant called 911, identified herself as Hannah Charley (her sister), and reported that someone had come into the house, hit her boyfriend, Merle Begay, in the head, and that he was bleeding and "about to die." (ER 564-70.) While waiting for help to arrive - which took about an hour because of the remote location (Steamboat, Arizona on the Navajo reservation) - Defendant ***5** told the dispatcher various versions of what had happened, but each time stated that someone else assaulted Begay. (ER 570-73.)

Navajo Nation Police Sergeant Erwin Toddy arrived at 4:34 a.m., and Defendant again identified herself as Hannah Charley. (ER 237-38.) Defendant said Begay was her common-law husband, they had been drinking vodka, and were in the bedroom watching television when she heard a loud muffler outside. (ER 541.) Begay went outside to check on the noise while she stayed inside. (ER 541.) Several minutes later, Begay walked back into the bedroom, holding some rebar and bleeding on the head, then collapsed. (ER 541-42.) Defendant said she heard the vehicle take off, then she called the police. (ER 541-42.)

As Sergeant Toddy walked through the house, he smelled alcohol and noticed red bare footprints on the floor going in and out and towards the back door and bedroom. (ER 239-40, 534-35.) He also noticed a stack of boxes with blood on them pushed against the back door. (ER 534-36.) Begay was behind a closed bedroom door, unconscious on the ground, with a large pool of blood by his head. (ER 241, 532.)

When Sergeant Toddy interviewed Defendant, she told him her birthday was XX/XX/2001, which would have made her 16 years old. (She was actually 29.) (ER 539, 546.) When asked her nationality, Defendant said she was Hispanic, ***6** although she was full-blooded Navajo. (ER 539, 547.) Defendant also told Sergeant Toddy that she and Begay did not have a verbal dispute that night. (ER 543.)

FBI Special Agent Mulhollen arrived on the scene two hours later and Sergeant Toddy briefed her. (ER 545, 605.) When Agent Mulhollen spoke with Defendant, she thought Defendant was a witness, not a suspect, because of what Defendant had told Sergeant Toddy. (ER 611.) Defendant told Agent Mulhollen her name was Hannah Charley and her date of birth was XX/XX/2001. (ER 612; SER 4.)[3] Defendant repeated her story that Begay was attacked by someone outside, and stated that she thought Begay came inside through the back door so she moved boxes against the back door. (SER 5-7, 12-14.)

Based on Defendant's story of what happened, Agent Mulhollen and Sergeant Toddy searched the scene outside, looking for signs of a fight, but found no blood or evidence of a struggle. (ER 548-49, 618-19.) Blood spatter was on the bedroom walls, and blood was also on the doorknob outside the bedroom, on the bedroom door frame, and on the back-door doorknob that led from the inside to the outside. (ER 630-33.) Blood-stained boxes were stacked up against the back door, blocking it if someone tried to open it. (ER 633-34.)

***7** Defendant eventually gave Sergeant Toddy a date of birth that would make her 29 - her real age, but continued to lie about her name. (ER 546-47.) Sergeant Toddy arrested Defendant for public intoxication and booked her into Window Rock jail. (ER 560.) Defendant's booking indicated that her name was Hannah Charley, she was intoxicated, and had no injuries. (ER 892, 895-99.)

After Agent Mulhollen completed her investigation at the scene, she returned to her office and did more research on "Hannah Charley," then went to Window Rock jail to re-interview Defendant because she believed Defendant was perhaps the suspect. (ER 603, 616-17, 644.)

At the beginning of the jail interview, Defendant repeated her story about someone attacking Begay outside. (ER 649.) Agent Mulhollen challenged Defendant's statements with the physical evidence, and Defendant claimed she created the blood spatters on the wall. (ER 356-57, 649.) Agent Mulhollen told Defendant this happened during the course of a beating and she was tired of Defendant's lies. (ER 357-58, 650.) Defendant then replied, "I think I hit him. I don't know." (ER 358, 651.)

Agent Mulhollen asked Defendant if she remembered hitting Begay, and Defendant said "yeah." (ER 358, 652.) Over the remainder of the interview, Agent Mulhollen asked Defendant about details of the assault. Defendant said she hit Begay three times in the back of the head. (ER 365, 652.) She also said Begay was ***8** standing up and facing away from her and she struck him from behind the first time. (ER 376, 393-95.) He then fell to the ground and was looking downwards when she hit him two more times. (ER 392-95, 654-56.)

When Agent Mulhollen asked Defendant why there was blood all over the boxes by the back door, Defendant explained that she put the boxes there because she was trying to cover up the attack so she would not get in trouble - she was trying to stage it. (ER 378, 653.) Defendant also admitted that the story about the fight happening outside was not true. (ER 378-79, 654.) She further stated that the previous story she had told her about Begay tying her up with a rope never happened - she was never tied up. (ER 344, 366.) Defendant also claimed that Begay had assaulted her two-to-three days earlier, then changed it to two-to-three weeks earlier. (ER 368-69.)

Begay had life-threatening injuries, including skull fractures, brain and intracranial injuries, a scapular fracture, a nasal bone fracture, and a fractured finger. (ER 715.) Dr. Safavi-Abbasi, the neurosurgeon who treated Begay, testified that with Begay's severe injury, he would expect long-term effects and some permanent changes to Begay's brain. (ER 730.) In addition, Begay was extremely intoxicated with a .4 blood alcohol content ("BAC"), so it wouldn't be surprising if he did not remember anything at all - it's very common to have amnesia with regards to trauma like this. (ER 711, 729-30.) Agent Mulhollen met with Begay two months after the ***9** assault, and he was not able to provide a statement of what happened the night he was attacked. (ER 657, 659.)

On May 1, 2018, Agent Mulhollen and two other FBI agents went to Defendant's family address in Gallup, New Mexico to arrest Defendant. (ER 659.) When the agents contacted Defendant, she told them her name was Colandra Charley, but Hannah, who was present, told them Defendant's real name. (ER 660.) About six weeks later, in a recorded jail phone call, Defendant and her

new boyfriend talked about how Defendant made up a name when she was getting arrested. (ER 805; SER 29-30.)[4] Defendant stated, "dammit, I thought I was going to get away with it until my little sister. She had to ruin everything." (ER 805; SER 30.)

2. *Rule 404(b) Pre-Trial Motion*

Before trial, the government gave notice of its intent to introduce evidence of Defendant's prior acts of violence to establish Defendant's motive and intent in assaulting the victim, to show her modus operandi, and to rebut any self-defense claim under Federal Rules of Evidence Rules 404(a) and (b). (CR 42, 59; ER 50-54, 68-77.) The court took the motion under advisement, stating that Defendant could make objections during trial. (ER 133.)

***10** 3. *The Trial*

The prosecution's witnesses testified to the facts set forth above. After the United States rested, Defendant made a Rule 29 motion for judgement of acquittal as to all three counts, which the district court denied. (ER 736-38.) Defendant thereafter made a motion for mistrial, arguing that in the government's opening statement it vouched by stating that the victim had no memory of what happened but not producing any testimony to support this statement. (ER 739.) The district court denied the motion, finding no misconduct by the government. (ER 740.)

Defendant testified and claimed self-defense. According to Defendant, the night of the assault, she and Begay were alone at Begay's house, drinking vodka, and Begay was very intoxicated. (ER 747.) Begay then started to get angry towards her, "became a different person," and blocked the doors when she tried to leave. (ER 747-48.) Begay subsequently threw her on the bed, had his elbow on her chest, and his right hand around her neck. (ER 750.) Begay also tore off her bra and shirt, and took off her bottoms. (ER 752.) According to Defendant, Begay had a knife in his pocket, and it seemed like he was putting it on the shelf behind him. (ER 753.) Begay then grabbed a rope and tried tying her arms and wrists. (ER 753.) Defendant unraveled the rope and shook it off, and Begay told her not to move, "or else." (ER 753.)

***11** According to Defendant, when Begay turned his back on her, it seemed like he was trying to look for something, and she thought he might have other weapons. (ER 779.) She thought he was going to hurt or kill her, so when she turned to her side and saw the piece of metal rebar on the floor, she grabbed it and hit him in the back of the head. (ER 754, 784.)

Defendant further testified she was scared Begay was going to do something to her because he had been violent with her before. (ER 761.) Over the government's objection, Defendant testified about what she claimed to be prior incidents of violence between her and Begay that occurred in the weeks before the assault. One time, in the middle of the night, Defendant tried to hitchhike back to Gallup, but Begay threw her down and grabbed her by the neck, choking her, then dragged her across the road. (ER 363-64.) Shortly thereafter, Marna and Tom Begay drove by, picked Defendant up, and took her to her aunt's house the next day. (ER 765-67.)

Defendant testified that she lied about her name and someone else assaulting Begay because she was afraid of Begay's family and them seeking revenge. (ER 773-74, 784.)

During her cross-examination, when Defendant was confronted with statements she had previously made, Defendant claimed she did not remember making the statement or denied making the statement at all. For example, Defendant claimed she did not remember telling Agent Mulhollen that: (1) after she first hit ***12** Begay, he went to the ground face-down and she hit him two more times; (2) Begay threatening her with a rope never happened; (3) she blacked out and didn't remember what happened; and (4) she said the road-dragging incident happened two-to-three weeks earlier. (ER 788-90, 813, 815-16, 822.) Defendant

also testified that she did not remember: (1) telling Sergeant Toddy at the scene that someone else did this to Begay; (2) telling Sergeant Toddy that she and Begay were not fighting that evening but were having a peaceful evening together; and (3) telling the 911 operator that someone broke into the house while they were watching a movie and assaulted Begay. (ER 793, 801, 813.) Defendant also did not remember that she failed to tell Agent Mulhollen that Begay had his elbow on her chest. (ER 808, 817.)

Defendant admitted telling a number of different stories the day of the assault, and agreed that it was difficult to keep each of the stories straight. (ER 799.) She admitted to lying about her name, date of birth, and what happened. (ER 799, 804.) Defendant also admitted lying about her name when being arrested, and stated this was not the first time she had lied to law enforcement to get out of trouble. (ER 514.) Two weeks before the assault, when officers were responding to a call about Defendant, Defendant gave them a fake name, date of birth, and social security number. (ER 806-07.)

Defendant admitted on cross-examination that she never mentioned a knife to anyone, and that Begay never threatened her with a knife. (ER 808-09.) She also ***13** stated that she hit Begay after he had put the rope in a shelf. (ER 812.) Defendant admitted that she spoke with law enforcement four different times on the day of the assault but never told them the story that Begay took off her clothes, had his elbow on her chest, or turned and put the rope in a drawer. (ER 824.) She further admitted that the previous incidents with Begay happened in the weeks before the assault. (ER 822.)

In its rebuttal case, the government presented, over Defendant's objections, witnesses who testified to only two of Defendant's prior acts of violence noticed pretrial. Defendant's step-mother, Roberta Hale-Charley testified that in June 2016, Defendant visited her while she was recovering from a leg infection. (ER 907.) Defendant smelled of alcohol, was angry and aggressive, and went after Hale-Charley - almost chest-bumping her - when Hale-Charley was slow in answering the door. (ER 907-09.) Hale-Charley managed to get away and call 911, but Defendant was kicking Hale-Charley's bedroom door while Hale-Charley was on the phone. (ER 909-10.)

The government next called Defendant's younger sister, Hannah Charley, who testified that in December 2015, Defendant was visiting her and her infant son. (ER 916.) Hannah smelled alcohol on Defendant's breath and asked Defendant to leave because Hannah wanted to have some alone time with her son. (ER 917-18.) ***14** Defendant got mad, pushed Hannah, and hit her on the side of her head with a ceramic mug, causing Hannah to bleed and get stitches at the hospital. (ER 919-20.)

Thereafter, the government attempted to call Defendant's former boyfriend, Lambert Lapanie, about another prior incident of violence, but the court sustained Defendant's objection on grounds that it was cumulative. (ER 929-31.)

After the government rested, Defendant summarily renewed her Rule 29 motion, which the court denied. (ER 932.) After closing arguments and jury instructions, Defendant made a motion for a mistrial, contending that during the government's closing argument it argued facts not in evidence and vouched. (ER 319-20.) The court disagreed with defense counsel and denied the motion. (ER 320.)

4. *The Sentence*

At sentencing, the court denied Defendant's request for a downward variance or departure based on the victim's conduct. (ER 483.) The court did not find Defendant's testimony “to be credible at all,” and found Defendant's conduct “was absolutely outrageous.” (ER 484-85.) The court sentenced Defendant to concurrent terms of 78 months' imprisonment on Counts 1 and 2, and 60 months' imprisonment on Count 3, followed by 36 months of supervised release. (ER 486-87.)

15 VI.** ***SUMMARY OF ARGUMENTS

A. Viewed in the light most favorable to the prosecution, sufficient evidence exists from which any rational juror could find beyond a reasonable doubt that Defendant knowingly and willingly made a false statement to the FBI. Defendant continuously lied throughout this case and during trial (even after she had sworn under oath to tell the truth), admitted that she staged the crime scene to avoid getting in trouble, stated that she almost got away with it when she lied to the FBI and gave them a fake name when they were arresting her, and made a false report to the police.

B. The district court did not abuse its discretion when it admitted "other acts" of violence by Defendant. This evidence was properly admissible under Rule 404(a)(2)(B)(ii) because Defendant opened the door to such evidence when it offered evidence of the victim's character for violence. Furthermore, the evidence was limited in scope and also admissible under Rule 404(b) because it was relevant to establish intent, absence of mistake, and to rebut Defendant's self-defense claim. Additionally, the probative value outweighed any prejudice. And given the strength of the government's case, including the physical evidence, Defendant's demonstrable lies on cross-examination, the implausibility of her self-defense claim, and the court's limiting jury instruction, any error in admitting this limited evidence was harmless.

***16** C. The district court did not abuse its discretion in denying Defendant's motion for mistrial based on prosecutorial misconduct because the prosecutor did not make any improper arguments during her closing arguments, except for a single inadvertent error immediately conceded by the government following trial. This single error was harmless. But even if this Court were to find that any of the prosecutor's other arguments were improper - which they were not - they were either harmless or did not affect the fairness, integrity, or public reputation of judicial proceedings.

D. The district court did not err in its evidentiary rulings, and the one prosecutor error was harmless; thus, no cumulative error exists, and Defendant was not denied a fair trial.

E. The district court did not plainly err when it imposed a supervised release condition prohibiting Defendant from associating with felons, because Defendant has not shown that there is such a person with whom she has a fundamental liberty interest.

*17 VII. *ARGUMENTS*

A. When Viewed in the Light Most Favorable to the Prosecution, There Was Sufficient Evidence From Which Any Rational Juror Could Find Defendant Guilty Beyond a Reasonable Doubt of Making a False Statement.

1. *Standard of Review*

This Court reviews de novo a sufficiency of the evidence challenge. *United States v. Tatoyan*, 474 F.3d 1174, 1177 (9th Cir. 2007). Sufficient evidence supports a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The reviewing court may not ask itself whether *it* believes that the evidence at the original trial established guilt beyond a reasonable doubt, only whether *any* rational trier of fact could have made that finding." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (internal citations omitted) (emphasis added) ("[A] court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial."). The verdict may only be reversed "if the evidence of innocence, or lack of evidence of guilt, is such that *all* rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt." *Id.* at 1165 (emphasis added). "Circumstantial evidence and ***18** inferences drawn from it may be sufficient to sustain a conviction." *United States v. Jackson*, 72 F.3d 1370, 1381 (9th Cir. 1995).

2. *Argument*

In light of the evidence presented and the reasonable inferences that could be drawn from it, sufficient evidence exists from which any rational trier of fact could find Defendant guilty of making a false statement in violation of 18 U.S.C. § 1001.

In Count 3 of the indictment, Defendant was charged with making a false statement to the FBI when she told them her name was Hannah Charley, her birthdate was XX/XX/2001, and that the victim was assaulted by a male subject. (ER 40.) The district court gave the jury Ninth Circuit Model Criminal Jury Instruction 8.73, False Statement to a Government Agency, which required the government to prove, *inter alia*, that "the defendant acted willfully, that is, the defendant acted deliberately with knowledge both that the statement was untrue and that her conduct was unlawful." (ER 316-17.)

The Instructions Committee added the willfulness element to this instruction in 2014 after the Solicitor General conceded that to prove a willful violation of 18 U.S.C. § 1035, the government must prove the defendant acted with knowledge that his conduct was unlawful. *See Ajoku v. United States*, Brief for the United States in Opposition, No. 13-7264, 2014 WL 1571930, at *10-11 (Mar. 10, 2014) (also conceding that the same interpretation of willfulness should apply to ***19** 18 U.S.C. § 1001). In light of this concession, this Court in *United States v. Ajoku*, 584 F. App'x 824 (9th Cir. 2014) ("*Ajoku II*"), held that the district court erred by giving an instruction of "willfulness" under 18 U.S.C. § 1035 that did not require the government to prove that the defendant acted with knowledge that his conduct was unlawful.

The new model jury instruction arguably requires more than necessary under § 1001, as two recent unpublished decisions have recognized. *See United States v. Mazzeo*, 592 F. App'x 559, 562 (9th Cir. 2015) ("As *Ajoku* addressed a conviction under 18 U.S.C. § 1035, it did not disturb the longstanding precedent in this circuit that, under 18 U.S.C. § 1001, 'willfully' means only 'deliberately and with knowledge' ... Whether or not the 'willfullness' element for a § 1001 crime should be altered is a question for another day."); *see also United States v. Eglash*, 640 F. App'x 644, 646 (9th Cir. 2016) (same). However, the government acknowledges that it is bound by the *Ajoku* willfulness standard as it pertains to this case because the model instruction was given to the jury.

Nonetheless, even under the heightened willfulness standard, sufficient evidence exists to support Defendant's conviction for making a false statement. Defendant does not dispute that she lied when she told the FBI her name was Hannah Charley, her date of birth was XX/XX/2001, and that a male assaulted Begay. She also does not contest that these lies were material. (Op. Br. at 38-39.) Rather, ***20** Defendant claims only that the government failed to prove she knew on the morning of March 6th that it was unlawful to lie to the FBI about these matters. (Op. Br. at 39.)

Admittedly, the evidence of Defendant's willfulness is closer here than in some other cases. However, viewing the evidence in the light most favorable to the government, the jury could have reasonably inferred that Defendant knew lying to the FBI was unlawful. The jury was neither unreasonable nor irrational in reaching that conclusion. The evidence supporting this element includes Defendant's repeated lies to law enforcement during the case, the nature of those lies (which included an affirmative false report to police), her continuing lies during trial even when she was under oath, and Defendant's statements that she was trying to not get in trouble - all viewed through the lens of common sense.

Defendant lied continually throughout the case and admitted she lied to the FBI about her name, date of birth, and who perpetuated the assault on the victim. (ER 237-38, 357, 379, 539-42, 546-47, 553, 568, 570-73, 612, 686; SER 4-7, 12-14.) At trial, after swearing under oath to tell the truth, Defendant continued to lie.[5] ***21** Defendant testified to facts to support her

claim that Begay was threatening her that night and she was justified in hitting him (ER 749-50, 753-54, 774), but she had never made these allegations to law enforcement despite having the opportunity to do so four different times when she talked with officers the day of the assault. (ER 824.) Rather, Defendant told law enforcement that she did not have a verbal dispute with Begay that evening, and he did not tie her up. (ER 808-09, 813, 817.) In addition, every time Defendant was confronted with a discrepancy between her trial testimony and her statements to law enforcement, Defendant claimed she did not remember making the statement. (ER 788-90, 799, 801, 809, 813.)

Defendant also admitted that she was trying to avoid getting in trouble. In her jail interview, Defendant admitted staging the scene with the blood-stained boxes because she was trying to "cover up" and not get in trouble. (ER 653.) Defendant also gave the FBI a fake name when they were trying to arrest her for the assault, and later talked about it with her new boyfriend in a jail phone call:
[Defendant]: Did you see how I made up my name?

JARED [new boyfriend]: I know. Why'd you do that? You shouldn't have done that. That probably just made it worse.

[Defendant]: I know. And I was like, ugh. I was like too - - I was - - like, I wasn't thinking straight, and I just came up with a name. And I was like, dammit. I thought I was going to get away with it until my little sister. She had to ruin everything. But - -

***22** (ER 805; SER 29-30.) Defendant further admitted that this was not the only time she had lied to law enforcement to get out of trouble. (ER 514, 806-07.)

The jury heard specific argument on Defendant's lack-of-willfulness theory in the defense closing and rejected it in their verdict. (ER 284.) The district court was also incredulous, stating at sentencing that it did not believe Defendant's story. (ER 485.)

Taking all these facts together, a rational juror could rely on his or her common sense to infer that Defendant knew it was unlawful to tell these lies to the FBI. A "jury is entitled to make common sense inferences from the proven facts." *United States v. Gallop*, 694 F.2d 205, 206 (9th Cir. 1982) (internal quotation marks and end citation omitted) (determining whether the government met its burden in a sufficiency of the evidence claim). "Without inferences, the government could seldom prove up its case, as it must rely on the common sense and life experience of the jurors to fill in matters that are not provable by direct evidence such as intent ...." *United States v. Ramirez*, 714 F.3d 1134, 1138 (9th Cir. 2013) ("Juries have broad discretion in deciding what inferences to draw from the evidence presented at trial." (internal quotation marks and end citations omitted)).

After Defendant assaulted Begay, she called the police and reported a false crime - that someone else had assaulted Begay. She perpetuated this story throughout her interviews with law enforcement that day. It defies common sense ***23** that Defendant did not know that telling the police this false story was not unlawful. The jury could likewise infer from Defendant's jail phone call that she knew it was unlawful to lie when Defendant's boyfriend told her she shouldn't have lied to the FBI about her name and that it probably just made things worse, and Defendant said, "I know," and then lamented that she almost got away with "it." (SER 29-30.) Although Defendant may now argue that what she was referring to by "it" was ambiguous, "when 'faced with a record of historical facts that supports conflicting inferences' a reviewing court 'must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to the resolution.'" *See* *Nevils*, 598 F.3d at 1164 (quoting *Jackson*, 443 U.S. at 326)).

If this Court were to accept Defendant's argument, it would amount to needing an explicit admonishment by law enforcement or confession by a defendant in every case in order to prove willfulness. That is not the law. Various other circuit courts of appeal have held that the government need only prove that the defendant deliberately made the statement with knowledge

that it was false. *See, e.g.,* *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006); *United States v. Daughtry*, 48 F.3d 829, 831-32 (4th Cir.), *vacated on other grounds*, 516 U.S. 984 (1995), *reinstated in relevant part*, 91 F.3d 675 (1996); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *United States v. Hildebrandt*, 961 F.2d 116, 118-19 (8th Cir. 1992); ***24** *Walker v. United States*, 192 F.2d 47, 49 (10th Cir. 1951). In addition, this Court and others have upheld findings of sufficient evidence based on circumstantial evidence of willfulness. *See, e.g., United States v. Mousavi* 604 F.3d 1084 (9th Cir. 2010) (finding sufficient evidence that defendant knew conducting business with Iran was illegal and acted willfully by nevertheless conducting such business where he was a sophisticated and politically-connected businessman who lived and conducted business in Iran, scheduled numerous trips through third-party countries because of the embargo with Iran, and traveled regularly to Iran); *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005) (holding district court erred in entering judgment of acquittal where circumstantial evidence showed defendant had general knowledge of the law which forbade his actions and acted with specific intent to circumvent that law).

Accordingly, when viewed in the light most favorable to the prosecution and taken together with the circumstances of this case, sufficient evidence supports Defendant's conviction for making a false statement.

B. The District Court Did Not Abuse its Discretion When it Admitted "Other Acts" of Violence by Defendant Because They Were Admissible Under Rule 404(a)(2)(B)(ii) after Defendant Opened the Door to Such Evidence; and In Any Event, Relevant Under Rule 404(b) to Show Intent, Absence of Mistake, and to Rebut Any Claim of Self-Defense; and the Probative Value Outweighed Any Prejudice.

1. *Standard of Review*

A district court's decision to admit or exclude evidence, and its balancing of the probative value against its prejudicial effect, are reviewed for abuse of discretion. ***25** *United States v. Murillo*, 288 F.3d 1126, 1139 (9th Cir. 2002). "Trial judges have 'wide discretion' in determining whether evidence is relevant," and reversal is warranted only "if it is 'more probable than not' that the error affected the verdict." *United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004) (citations omitted). "Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). Where a district court errs in admitting other act evidence, this Court reviews for harmless error. *United States v. Carpenter*, 923 F.3d 1172, 1181 (9th Cir. 2019).

2. *Argument*

The district court did not abuse its discretion when it admitted limited "other act" evidence of Defendant's prior acts of violence. The evidence was admissible under Rule 404(a)(2)(B)(ii) because Defendant opened the door to the introduction of this evidence. Furthermore, the evidence was admissible and relevant under Rule 404(b) to show intent, absence of mistake, and to rebut any claim of self-defense, and the probative value outweighed any prejudice. The evidence was limited to only two instances of Defendant's many prior violent episodes noticed by the government, and introduced only in the government's rebuttal case.

***26** Defendant's other acts of violence were admissible for any purpose under Rule 404(a)(2)(B)(ii). In her defense, Defendant testified that Begay had previously assaulted her in the weeks leading up to the assault, which is why she feared for her life and hit Begay with the metal rebar. (ER 761-62.) Defendant also had witnesses testify about these specific acts in an attempt

to corroborate her stories of Begay's previous assaults. (ER 38-43, 854-57, 863-64, 880-84.) One of these witnesses further testified that when Begay "consumes alcohol, he becomes very violent." (ER 884-85.) On appeal, Defendant concedes that she presented testimony regarding Begay's character for violence "[p]ursuant to Rule 404(a)(2)(B)." (Op. Br. at 19.)

Once Defendant put Begay's character for violence at issue, she opened the door for the government to use Defendant's "other acts" of violence under Rule 404(a)(2)(B)(ii) to rebut her claim of self-defense.[6] *See*Fed. R. Evid. 404(a)(2)(B)(ii) ("[A] defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may ... offer evidence of the defendant's same trait."); Fed. R. Evid. 404, Advisory Committee Notes, 2000 Amendment (Rule 404(a)(1) amended so when a defendant attacks the character of the victim under 404(a)(2) "the door is opened to an attack on the same character ***27** trait of the accused"); *id*. (clarifying through an example that Rule 404(a)(2) evidence is not subject to the purpose limitations of Rule 404(b)).

The district court did not abuse its discretion in admitting this other act evidence. In its notice of intent to introduce Rule 404 evidence, its reply in support of its notice, and in response to Defendant's objections at trial, the prosecutor argued that this evidence was admissible under Rule 404(b)*and*Rule 404(a).[7] (ER 50-54, 68-76, 903-04.) The district court initially took the government's motion under advisement, then later overruled Defendant's Rule 404 objection. (ER 905.) The court did not articulate the exact basis for the admission of the evidence, but it gave the jury a limiting instruction that it "may consider this [other acts] evidence only for its bearing, if any, on the question of the defendant's intent, motive, and identity and for no other purpose. You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial." (ER 307-08.)

This evidence was properly admissible for any purpose under Rule 404(a). The fact that the district court instructed the jury to consider the evidence only for limited purposes only benefitted Defendant by limiting the purposes for which the jury could consider this admissible evidence. Whether the instruction was necessary ***28** is not the question in front of this Court - that question is whether the evidence was properly admitted - and it was, whether under Rule 404(a)(2)(B)(ii) or 404(b). This Court "may affirm on any basis supported by the record." *United States v. Pope*, 686 F.3d 1078, 1083 (9th Cir. 2012).

That the evidence was properly admissible under Rule 404(a)(2)(B)(ii) renders most of Defendant's arguments irrelevant. Nevertheless, even absent Rule 404(a), the evidence could have been properly admitted under Rule 404(b).

"This court regards Rule 404(b) as an inclusionary rule - 'evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal propensities.'" *United States v. Sneezer*, 983 F.2d 920, 924 (9th Cir. 1992) (internal quotation marks and citation omitted); *United States v. Cruz-Garcia*, 344 F.3d 951, 954 (9th Cir. 2003) ("Rule 404(b) is 'one of inclusion,' and if evidence of prior crimes bears on other relevant issues, 404(b) will not exclude it."). Rule 404(b) evidence may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Cruz-Garcia*, 344 F.3d at 955. This list, however, is "illustrative, not exhaustive." *Id*.

This Court has articulated a multi-factor test to assist district courts in evaluating the admissibility of potential 404(b) evidence: (1) whether the evidence tends to prove a material point, (2) whether the other act is too remote in time, (3) whether there is sufficient evidence that the defendant committed the other act, ***29** (4) whether the other act is similar to the offense charged, and (5) whether the evidence is subject to exclusion under Rule 403. *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000).[8]

Because intent was "plainly an element" of the charged crimes, evidence of prior acts probative on the issue of intent were relevant here. *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994). Here, however, Defendant made intent and motive particularly central issues at trial by arguing that she acted in self-defense. The United States only presented other act evidence in its rebuttal case, in response to this self-defense allegation. Defendant's prior acts of violence were probative of who the initial aggressor was in Begay's assault and rebuts Defendant's self-defense claim. "Evidence that rebuts a claim of self-defense is admissible under Rule 404(b) if it shows an absence of mistake or accident." *United States v. Steele*, 550 F.3d 693, 701 (8th Cir. 2008) (holding evidence of defendant's prior assault conviction and resisting arrest relevant to whether officer used lawful force to arrest defendant and whether defendant acted reasonable in self-defense); *see United States v. Burk*, 912 F.2d 225, 228-29 (8th Cir. 1990) (evidence that defendant, charged with assaulting a federal officer, had previously threatened to assault a police officer was properly admitted under Rule 404(b) to prove intent).

***30** Defendant contends her prior acts of violence had no bearing on Defendant's intent with respect to Begay. (Op. Br. at 46.) But because intent is an element of the assault charges, Defendant's state of mind during the assault was relevant. That Defendant was previously willing to intentionally assault others helps to show that it was not a mistake or accident that she assaulted Begay.

Defendant also contends her "other acts" were not similar, and therefore irrelevant to show her intent or whether she was justified in using self-defense against Begay. (Op. Br. at 43-47.) Defendant's prior acts of violence were similar to the assault in this case. Both acts involved attacks where Defendant was the aggressor, against people with whom Defendant had a close relationship, while Defendant had been drinking. With the attack on Defendant's sister, Hannah, Defendant used a weapon (a coffee mug) to strike her sister in the head, putting her in the hospital - just as she used a metal rebar to strike Begay. (ER 919.) These acts are similar enough to be probative of Defendant's intent and to rebut her claim of self-defense, and are thus admissible under Rule 404(b).

The final consideration under Rule 404(b) is "whether the probative value is substantially outweighed by the prejudicial impact under Rule 403." *Chea*, 231 F.3d at 534. Exclusion under this rule is "an extraordinary remedy to be used sparingly." *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995) (citation omitted). Federal Rule of Evidence 403 provides that relevant evidence may only be excluded ***31** "if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. "Relevant evidence is inherently prejudicial, but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (internal quotation marks and end citation omitted). "As long as it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission, we conclude that the demands of Rule 403 have been met." *United States v. Verduzco*, 373 F.3d 1022, 1029 n.2 (9th Cir. 2004) (quotation marks and citation omitted).

The district court did not abuse its discretion when it admitted some of the other act evidence under Rule 403. Not only was the probative value of the evidence high, but the district court took steps to reduce any risk of unfair prejudice by giving a limiting instruction. (ER 307-08.) This Court has recognized that such steps are sufficient to cure Rule 403 concern. *See United States v. Ramos-Atondo*, 732 F.3d 1113, 1124 (9th Cir. 2013); *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000). Jurors are presumed to follow the court's instructions. *United States v. Reyes*, 660 F.3d 454, 468 (9th Cir. 2011).

***32** In addition, the court clearly weighed the probative value and prejudicial effect when it limited the other act evidence presented under Rule 403. In its notice of intent to use "other act" evidence, the government set forth numerous other acts of violence by Defendant. (ER 50-54, 68-76). After the government called two witnesses in its rebuttal case to testify to Defendant's

prior acts of violence, the court precluded the government from calling a third witness - Defendant's former intimate partner, L.L. - to testify to additional acts, finding that it was cumulative.[9] (ER 930.)

But even if it was error to admit this "other act" evidence, it is harmless given the strength of the government's case, the implausibility of Defendant's self-defense claim, and the court's limiting instruction. *See Carpenter*, 923 F.3d at 1183 (finding harmless error where the government presented more than enough evidence to defeat defendant's duress defense and overwhelming evidence as to defendant's guilt); *United States v. Swint*, 566 F. App'x 618, 619 (9th Cir. 2014) (holding that any error in admitting Rule 404(b) evidence did not affect the verdict given the strength of the government's case and the implausibility of the defendant's self-defense claim).

***33** At trial, Defendant claimed she struck Begay in self-defense. (ER 754, 761, 772.) However, her repeated, obvious lies and omissions regarding self-defense both to law enforcement and at trial fatally undercut her claim. (*See, e.g.*, ER 539, 541-42, 547, 570-72, 612, 649, 653).

Furthermore, her own testimony and the physical evidence demonstrated the implausibility of Defendant's self-defense claim. Defendant's self-defense claim would have failed even without the admission of Defendant's other acts of violence. *See Carpenter*, 923 F.3d at 1183; *Swint*, 566 F. App'x at 619. Defendant was not justified in her use of force because she admitted she was not faced with an imminent threat of death or great bodily harm. "Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm." Ninth Circuit Model Crim. Jury Instr. 6.8. (ER 310.) There was no evidence that Begay ever threatened Defendant with a knife or gun - even by Defendant's own admission - and Defendant clearly lied about Begay using rope to tie her up, saying both that it never happened and that Begay put away the rope he allegedly used before she assaulted him. (ER 750-54, 761, 779-80, 809-11.) Defendant also admitted that Begay was standing up, facing away from her, when she hit him for the first time with the rebar, after which she hit him two more times while he was lying on the ground. (ER 653-56, 786.) Defendant agreed that Begay was not a threat to her when he was face-down on the ground. ***34** (ER 790.) In addition, Defendant admitted that the alleged prior acts of violence by Begay happened weeks before the assault. (ER 819.)

Given the evidence presented against Defendant, the implausibility of her self-defense claim, and the court's limiting instruction, any alleged error in admitting this limited other act evidence was harmless.

C. The District Court Did Not Abuse its Discretion When it Denied Defendant's Motion for a Mistrial Based on Prosecutorial Misconduct, and Any Alleged Error by the Prosecutor was Either Harmless or Did Not Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

1. *Standard of Review*

This Court reviews claims of prosecutorial misconduct for harmless error when the defendant objects at trial, and reviews for an abuse of discretion a trial court's denial of a motion for a mistrial based on prosecutorial misconduct. *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006). "Under harmless error review, claims of prosecutorial misconduct are viewed in the entire context of the trial and reversal is justified only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial." *United States v. Ruiz*, 710 F.3d 1077, 1082 (9th Cir. 2013) (internal quotation marks and citation omitted).

If a defendant fails to object to acts of alleged prosecutorial misconduct at trial, this Court reviews for plain error. ***35** *United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995). Under the plain error doctrine, this Court reverses only if, "viewing the

error in the context of the entire trial, the impropriety seriously affects the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction would amount to a miscarriage of justice." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (internal quotation marks omitted); *see* *Bracy*, 67 F.3d at 1432.

2. *Argument*

The prosecutor did not make improper arguments during closing arguments, except for the single reference to Defendant lying about cutting her wrists, which the prosecutor argued as a part of the laundry list of lies Defendant had told on cross-examination and throughout the case. This error was harmless. All of the other allegations of prosecutorial misconduct are meritless. But even if this Court were to find any of the prosecutor's other arguments to be improper, they were either harmless or did not affect the fairness, integrity, or public reputation of judicial proceedings. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

a. *Defendant's "other acts"*

The prosecutor did not make any propensity inference based on the "other act" evidence admitted. Rather, she properly used it under Rule 404(a)(2)(B)(ii) after Defendant opened the door to Begay's character for violence, and for permissible ***36** Rule 404(b) purposes such as proving intent, modus operandi, absence of mistake, and to rebut Defendant's self-defense claim. (ER 274-75.)

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

(ER 274.) The prosecutor then briefly summarized the other acts of violence involving Defendant and her sister Hannah and her step-mother, explained why the other act evidence was relevant, and described the purposes for which it could be used. (ER 274-75 ("That's relevant ... to her intent. It is relevant to her modus operandi. It is relevant to show that she is the one who committed the assault in this case, and it's relevant to your consideration of whether she acted in self-defense.").)

Defendant did not object to this argument, so for reversal it would have to rise to the level of plain error - an egregious error that must substantially affect the fairness, integrity, and reputation of judicial proceedings. *See* *Bracy*, 67 F.3d at 1432. No error, let alone plain error, occurred.

First, the prosecutor correctly argued that the evidence properly came in as rebuttal evidence once Defendant opened the door and attacked Begay's character for violence. *See* Fed. R. Crim. Evid. 404(a)(2)(B)(ii). The government was therefore allowed to present evidence of Defendant's character for violence and ***37** comment on it. *Id*. This was not propensity evidence but proper rebuttal evidence. *See*Fed. R. Evid. 404, Advisory Committee Notes, 2000 Amendment.

The prosecutor also argued that the other act evidence was relevant for showing permissible Rule 404(b) purposes - intent, modus operandi, and rebutting Defendant's self-defense claim. The government's theory throughout trial and closing argument

was that Defendant intentionally assaulted Begay and lied numerous times about what had happened to cover up her conduct. In response to the self-defense claim, the prosecutor argued Defendant's self-defense claim should not be believed, but that even if the story were true, Defendant did not act in reasonable self-defense because she was not faced with an imminent threat of death or great bodily harm as required by law. (ER 264-74, 291-92, 295-301.)

Contrary to Defendant's contention, the prosecutor never argued that the "other act" evidence demonstrated Defendant's propensity for violence and that Defendant acted in accordance with that propensity when she assaulted Begay. Rather, she argued the evidence for permissible purposes under Rules 404(a)(2)(B)(ii) and 404(b). The court instructed the jury on the limited purpose of the other act evidence. (ER 308.) To the extent the prosecutor argued the evidence could be used for one purpose that was not included in the jury instructions (modus operandi), the jury was instructed that arguments by the lawyers are not evidence ***38** (ER 304), and jurors are presumed to follow their instructions. *See* *Reyes*, 660 F.3d at 468.

Second, the prosecutor's argument about the "other act" evidence was an isolated statement and a very small part of the government's closing argument. (ER 274-75.) In her closing argument, the prosecutor focused on the plethora of lies Defendant told about the assault - both to law enforcement and the jury - the lack of evidence supporting her self-defense claim, how Defendant was not justified in using deadly force against Begay, and how the physical evidence supported the government's case. In fact, in the transcript of the government's closing argument, only a few paragraphs addressed the "other act" evidence, and it was never mentioned in the government's rebuttal closing. (ER 62-77; 291-301.)

Furthermore, as previously discussed, *supra* at pages 32-34, the evidence against Defendant and the implausibility of her self-defense claim was significant. Accordingly, any improper argument or inference by the prosecutor regarding this evidence did not affect Defendant's substantial rights or affect the fairness, integrity, or public reputation of judicial proceedings. *See* *Necoechea*, 986 F.2d at 1276.

In addition to claiming that the prosecutor improperly used the "other act" evidence as propensity evidence, Defendant argues that the prosecutor "bolstered" her propensity argument by claiming that Defendant "was drunk" during the alleged ***39** incident introduced by Defendant when Marna and Tom picked her up on the side of the road. (Op. Br. at 54.) Defendant's argument is misplaced for several reasons.

First, the incident involving Marna Begay was not a Rule 404(b) "other act" incident. This was evidence introduced by Defendant - not the government - that Begay was allegedly previously violent towards Defendant and choked her, which is why she felt threatened the night of the assault and supposedly felt she had to use self-defense. The prosecutor's comment regarding Defendant's intoxication properly called into question Defendant's story of a previous attack by Begay and impeached her ability to recall and perceive the alleged incident. (ER 299 ("[Defendant] was drunk. Nobody knows if she fell and hit her face on the ground. Marna Begay didn't see marks around her neck.").) This had nothing to do with Defendant's intoxication the night of the assault, nor did the prosecutor argue or infer any such connection.

Second, the prosecutor reasonably argued the inference that Defendant was drunk based on Marna's testimony that when Defendant got in her car, Marna smelled alcohol (ER 299). *See* *United States v. Macias*, 789 F.3d 1011, 1023 (9th Cir. 2015) ("Prosecutors have considerable leeway to strike hard blows based on the evidence and all reasonable inferences from the evidence.") (internal quotation marks and citation omitted); *Necoechea*, 986 F.2d at 1276 ("[P]rosecutors must have reasonable lattitude to fashion closing arguments, and thus can argue reasonable ***40** inferences based on the evidence, including that one of the two sides is lying."). This was a single reference that Defendant did not object to, but now raises for the first time. Defendant would therefore have to establish plain error - that the comment seriously affected the fairness,

integrity or public reputation of judicial proceedings - which she cannot do in light of all the evidence presented against her. *See* *Bracy*, 67 F.3d at 1432.

b. *"Completely unprovoked attack" on Hannah Charley*

The prosecutor properly argued that Defendant's attack on Hannah was unprovoked because there was testimony to support this inference. Defendant objected to this argument, and the court overruled the objection. (ER 275.) It did not abuse its discretion in doing so.

Hannah first attempted to protect her sister and testified on direct examination that "[Defendant] didn't really do nothing, it was just talk first. I probably was the one that got her offended, because I basically pushed first." (ER 918.) Hannah acknowledged this was the first time she ever said she pushed Defendant first. (ER 918.) On cross-examination, defense counsel asked Hannah if she was the one who initiated the argument, and Hannah responded, "Not really, it's just - maybe she just wanted to talk with me. That's what kind of offended her." (ER 921.)

The prosecutor's argument was based on Hannah's testimony and her statement that she did not initiate the fight. Furthermore, the court instructed the jury ***41** that what the lawyers say during closing arguments is not evidence (ER 304), and "[i]f the facts as [the jurors] remember them differ from the way the lawyers state them, [the jurors'] memory of them controls" (ER 304). *See* *United States v. Sanchez*, 659 F.3d 1252, 1257 (9th Cir. 2011) ("To determine whether prosecutorial misconduct has deprived a defendant of a fair trial, [this Court] look[s] to the substance of any curative instructions, and the strength of the case against the defendant absent the misconduct."). Defendant must show that it is more probable than not that this comment materially affected the fairness of the trial. *See* *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190 (9th Cir. 2015); *see also* *United States v. Kennedy*, 714 F.2d 968, 976 (9th Cir. 1983) ("'[W]here the prosecutorial comment was a single isolated statement, where it did not stress any reference to guilt, and where it was followed by curative instructions, we have been reluctant to reverse."). It clearly did not here. Accordingly, Defendant is not entitled to relief on this basis.

c. *Defendant cutting her wrists*

The prosecutor inadvertently erred in arguing to the jury during her rebuttal closing argument that Defendant lied about cutting her wrists. This misstatement occurred while reciting a laundry list of lies Defendant had told law enforcement and the jury, and the government conceded error immediately once it was realized following the trial. (ER 293, 449-50.) This single error was harmless.

***42** During its rebuttal closing argument, the prosecutor told the jury,

> This was the same interview where [Defendant] 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.

(ER 293.)

Defense counsel objected that this was "not in evidence." After a sidebar discussion in which the prosecutor stated that she believed it was in evidence, the court overruled the objection. (ER 293-94.) The prosecutor made no further arguments about the wrist-cutting and moved on to other arguments. The court also denied Defendant's subsequent motion for a mistrial on this basis. [10] (ER 320.)

The district court did not abuse its discretion in denying Defendant's motion for a mistrial because the prosecutor's misstatement was harmless. First, the prosecutor's statement was a single, isolated remark, and did not stress any reference to guilt (ER 272-80). *See Kennedy*, 714 F.2d at 976. Second, it did not "devastate Defendant's credibility" or "go to the heart of [Defendant's] defense," as Defendant contends. (Op. Br. at 58-60.) The government had already presented substantial ***43** evidence and argument about the numerous lies Defendant had told throughout this case to law enforcement and others, and Defendant herself admitted lying to law enforcement, so Defendant's credibility was already devastated by this point in the trial. (ER 266-71, 301.)

As the prosecutor told the jury in her closing argument, Defendant told the 911 operator and law enforcement officers numerous lies: she lied about her name, date of birth, nationality, said someone broke into the house and assaulted Begay while they were watching a movie, described the perpetrator as wearing all black with a black mask, said an ATV drove up and the assault happened outside, said she didn't know who assaulted Begay, and said that she threw Begay's blood on the wall. (ER 266-70.) And weeks later, when law enforcement officers went to Gallup to arrest Defendant, she lied again as to who she was. (ER 271.)

The wrist-cutting incident was just another example of a lie Defendant had told to law enforcement, and the reference to it was so fleeting during the rebuttal closing argument that it was essentially lost in the sea of overwhelming evidence of Defendant's lies and guilt. *See Grigg v. Phillips*, 401 F. App'x 590, 594-95 (2d Cir. 2010) (holding prosecutor's reference to Defendant's pretrial silence was harmless where reference made up a small part of the record, was presented as a minor example of Defendant's failure to cooperate, was cumulative of properly admitted evidence, and other evidence against defendant was weighty). And finally, the court ***44** instructed the jurors that statements and arguments by the lawyers are not evidence, and if the facts as the jurors remembered them were different than what the lawyers said, the jurors' memory controls. (ER 304.)

Given the prosecutor's single, isolated misstatement in the context of the entire trial, the court's instructions, and the presumption that jurors follow their instructions, it is not more probable than not that this single misstatement materially affected the fairness of the trial. *See* *Alcantara-Castillo*, 788 F.3d at 1190; *Reyes*, 660 F.3d at 468; *Kennedy*, 714 F.2d at 976.

d. *Photographs of Begay with guns*

The prosecutor did not commit misconduct, and no plain error occurred, when the prosecutor told the jurors a fact - that photographs and statements of guns did not exist. This was an accurate statement of the evidence: no guns were photographed at the crime scene, and Defendant never said Begay threatened her with a gun. This argument was never raised at trial. In raising it for the first time on appeal, Defendant misstates and confuses the prosecutor's argument, which was clear to all parties below.

During Defendant's interview with the FBI at Window Rock jail, Defendant never said that Begay threatened her with, or used, a gun against her. (ER 342-95.) During trial, for the first time, Defendant testified that before she hit Begay, she was afraid of other weapons Begay might use against her, and stated, "I remember that ***45** he laid a handgun on top of that dresser, on the very top." (ER 780.) When defense counsel asked Defendant if Begay owned or possessed a handgun, Defendant said, "Yes." (ER 780.) The government objected on relevance grounds, and the court overruled the objection. (ER 780.) Defendant then attempted to introduce into evidence a photograph of Begay holding a gun that was taken at an unknown time and place. (ER 416, 781.) The government objected on the grounds of relevance and Rule 403, and the court sustained the objection on the basis of Rule 403. (ER 781.)

Defendant later testified she was afraid of Begay's brothers and possible retaliation if she admitted that she was involved in Begay's assault. (ER 784.) She then tried to introduce into evidence a photograph of Begay and another man holding guns, again taken at an unknown time and place. (ER 785.) The government objected on grounds of Rule 403, speculation, and relevance, and the district court sustained the objection on Rule 403 and relevance grounds. (ER 785.)

In her rebuttal argument, the prosecutor argued why Defendant's story of self-defense should not be believed:
And one thing that is important to recall again, using your common sense, is that her story in court yesterday tended to attempt to conform with the evidence.

The defendant knew what was in those photographs. There was never any mention of the victim threatening her with a knife. She never told Special Agent Mulhollen anything about that. There was never any threat with a gun.

***46** These are things that have now been fabricated after the fact because this guy who tends to horses and has livestock happens to have a knife in his room that is placed on a dresser in his room, and suddenly that is somehow relevant because he owns a knife.

That is not reasonable self-defense, to say "if" because he had a knife in the room. You didn't see any photographs of any guns. The defendant never said anything about guns.

This is being used simply after the fact to try to convince you that she acted in reasonable self-defense. And they just are not facts in this case.

(ER 294-9*l*5.) Defendant did not object to this argument, so any review is for plain error. *See* *Bracy*, 67 F.3d at 1431. No error, let alone plain error, occurred.

Given the evidence at the crime scene, Defendant's statements to law enforcement, and Defendant's trial testimony, the prosecutor did not commit misconduct or mislead the jury when she told the jurors that they did not see any photographs of any guns and Defendant never said anything about guns. It is clear from the context of the rebuttal closing argument that the prosecutor was referring to the fact that Defendant did not fabricate a story involving a gun because, in contrast to the knife, there were no photographs of guns from the crime scene. (SER 46.) This argument correctly described the evidence and did not mislead the jury: the photographs of guns that Defendant attempted to introduce were taken at a different time and place, making them irrelevant and properly excluded. Accordingly, the prosecutor did not commit misconduct or mislead the jury, and her ***47** argument did not affect the fairness, integrity, or public reputation of judicial proceedings. *See* *Bracy*, 67 F.3d at 1432.

e. *Red marks around Defendant's neck*

The prosecutor's argument that neither Marna, Tom, nor Defendant's Aunt Arlene saw red marks around Defendant's neck was a true statement of the evidence, was not "substantially misleading," and does not constitute plain error.

In her rebuttal closing, the prosecutor questioned Defendant's story of the "middle-of-the-night roadside choking" incident by Begay and the evidence corroborating what Defendant said had occurred. The prosecutor argued that neither Marna nor Tom saw marks around Defendant's neck, and Defendant's aunt Arlene:

> insisted that [Defendant] had handprints around her neck. Not bruises, not red marks, but handprints. The next day she actually testified she saw a handprint around her neck. And you will remember how emphatic she was about getting the word 'choke' in. Because she wanted to convince you that he had choked her niece. She is trying to help her niece.

(ER 299-300.) Defendant did not object to this argument, so any review is for plain error. *See* *Bracy*, 67 F.3d at 1431. There was no error here.

The prosecutor did not substantially mislead the jury, and no plain error occurred, when she argued that neither Marna nor Tom saw red marks on Defendant's neck. That is what they stated in their testimony. (ER 848 ("Q: So you didn't see anything on her neck? A: No."; ER 886 "Q: So you didn't see any injuries on her? A: None.").) Nor did the prosecutor mislead the jury when she stated that ***48** Arlene claimed she saw handprints rather than red marks on Defendant's neck. Arlene testified that she observed handmarks on Defendant's neck. (ER 864-65, 867.) The prosecutor's use of the word handmark rather than red marks is merely a matter of semantics, and it certainly did not impact Defendant's credibility. (ER 864-65, 867.) As previously stated, Defendant devastated her own credibility with her continuous lies throughout the investigation and prosecution.

Because Defendant did not object to this "no red marks" argument, reversal is required only if the argument substantially affected the fairness, integrity, or public reputation of judicial proceedings, which it did not. First, the court instructed the jurors that statements and arguments by the lawyers are not evidence, and if the facts the jurors remembered were different than what the lawyers said, the jurors' memory controls. (ER 304.) And second, as the prosecutor properly argued in her closing, even if the jury were to believe Defendant's accounts of the prior abuse by Begay, it does not mean she was justified in assaulting him on the night in question because he was not an immediate threat to her then:

A lot of time has not been spent on these prior incidents because they just don't matter. And if you believe that the victim really did abuse her, and I submit to you that there have been so many lies in this case that you can't believe it.

But if you agree or believe that the victim did that to her, you may not like him. You may think he is a bad person. You might even think deep down that he deserved what he got, if you believe her. But that is not what the law says.

***49** He had to have been an immediate threat to her that night, and there is simply no evidence of that here. None.

(ER 300.) The prosecutor correctly stated the law of self-defense, and the "red marks" defense was irrelevant in light of that law. *See* Ninth Circuit Model Criminal Jury Instruction 6.8; *United States v. Ornelas*, 906 F.3d 1138, 1147 (9th Cir. 2018). Accordingly, the prosecutor's argument questioning Defendant's account of this prior abuse was not error, let alone plain error.

f. *Victim's inability to remember the incident*

The district court did not abuse its discretion when it denied Defendant's motion for a mistrial based on the prosecutor's opening statement and rebuttal closing argument regarding Begay's inability to remember what happened to him when he was assaulted because it was reasonably anticipated admissible evidence and not an improper argument.

During the government's opening statement, the prosecutor told the jury about Begay's memory loss:

He has a loss of long-term and short-term memories, and unfortunately, Begay cannot tell you much about that night. He was extremely intoxicated.

Extreme intoxication aside, you will hear testimony from neurosurgeon Dr. Sam Safavi-Abbasi. He will tell you that it is common for patients who have experienced a traumatic event to have memory loss.

(ER 183.)

***50** During trial, Agent Mulhollen testified that about two months after Begay was assaulted, she met with him at a rehabilitation facility and he was unable to provide a statement of what happened the night of the assault. (ER 657-59.) Dr. Safavi-Abbasi testified that during Begay's treatment, Begay was not able to remember any of the events of the assault. (ER 711.) He also testified that patients with a simple brain concussion can have difficulties with memory, and Begay had "a pretty severe injury to the brain," so he would expect long-term effects. (ER 711, 730.) Dr. Safavi-Abassi testified that a lot of patients with this type of severe head trauma do not have recollections of the trauma, and in Begay's case, he was also extremely intoxicated, so "it wouldn't be surprising if he doesn't remember anything at all." (ER 730.) He further stated that it's "very common to have amnesia with regards to trauma like that." (ER 731.)

After the government rested, Defendant made a motion for a mistrial, arguing that in the government's opening, the prosecutor stated that the victim had no memory of the events and there had been no testimony to that effect, so it "essentially constitutes vouching." (ER 738-39.) As set forth above, ample evidence supported the prosecutor's argument. The court did not find misconduct on the part of the government, allowed Defendant to raise this during her closing argument, and denied the motion for a mistrial. (ER 740.)

***51** During her closing argument, Defendant argued to the jury that it did not hear any evidence contradicting the evidence that Begay was abusive to Defendant:
You never heard from Merle. There's been no testimony that he has no memory of this event. There's testimony that people with such injuries can often have amnesia about the event. There's been no testimony that he actually doesn't remember it.

And even if he has no memory of it, the government could have called him to tell you so. He was walking around the courthouse here just the other day.... No evidence was presented suggesting why it's not possible for Merle Begay to come to court and tell you his side of the story. Even if his side of the story is, I don't remember.

(ER 290.)

During the government's rebuttal closing argument, the prosecutor argued 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 what happened that night to provide. He was .404." (ER 300.) Defendant objected on the grounds that the prosecutor misstated the testimony and vouched, but the district court overruled the objection on both bases. (ER 300.) The prosecutor continued, "He was a .404 at the time this happened. You heard that. The defense is accusing him of committing a crime. That's not for you to consider, whether he should be here testifying to rebuke those or not." (ER 300-01.)

After the court gave the jurors their final instructions and they retired to deliberate, Defendant made another motion for a mistrial, arguing in part that the government vouched in its rebuttal closing when the prosecutor stated that Begay ***52** had no relevant evidence to offer. (ER 320.) The court disagreed with Defendant and denied the motion for mistrial. (ER 320.)

The prosecutor's argument regarding Begay's inability to remember was not improper, but an accurate statement and a logical inference from the testimony presented. *See* *Macias*, 789 F.3d at 1023. Agent Mulhollen and Dr. Safavi-Abbasi both testified that when they saw Defendant, he was not able to remember what happened that night. (ER 658-59, 711.) Dr. Safavi-Abbasi also testified that given Begay's injuries, and the fact that he had a .4 BAC and was extremely intoxicated, it wouldn't be surprising if Begay did not remember anything at all. (ER 711, 730-31.)

Because the prosecutor argued a permissible inference from record evidence, her statement was not vouching. "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *Necoechea*, 986 F.2d at 1276. "A prosecutor may not make statements during closing arguments that the jury would perceive to be 'based on [her] personal knowledge of the evidence,' that amounts to 'testimony' or that 'vouch[es] for ... evidence not produced at trial.'" *United States v. Hernandez*, 802 F. App'x 293, 294 (9th Cir. 2020) (quoting *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985)).

***53** Here, the prosecutor's statement did nothing of the sort. The argument did not involve a personal assurance of Begay's veracity, nor did it suggest that something outside of the evidence existed to support her statement. *See* *United States v. Dorsey*, 677 F.3d 944, 954 (9th Cir. 2012) (no vouching where "[t]he prosecutor did not refer to extra-record facts or say that it could verify that Fomby was telling the truth"). It repeated a fact regarding Begay's blood alcohol level and what witnesses had said regarding Begay's memory and ability to recall the incident.

Defendant also contends that the prosecutor's decision not to call Begay as a witness denied him his confrontation rights. (Op. Br. at 64-65.) Because Defendant raises this issue for the first time on appeal, this Court reviews for plain error. *See United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017). No error, let alone plain error, occurred. The government did not introduce any testimonial statements by Begay. In addition, Defendant could have called Begay as a witness and was not prevented from doing so. Defendant cannot now complain that Begay never testified. *See United States v. Heck*, 499 F.2d 778, 789 n.9 (9th Cr. 1974) (holding that where defendant was on trial for assaulting and interfering with special agent, and special agent did not testify, defendant's confrontation rights were not violated because defendant could have called special agent to testify, and his right of confrontation was satisfied by this available opportunity).

54 g. *The prosecutor's conduct did not violate due process or prejudice Defendant

The prosecutor's arguments during closing and rebuttal closing argument, taken either independently or cumulatively, did not prejudice Defendant or violate her due process rights. Defendant has for the first time tacked on numerous additional allegations of error that were never raised at trial, and now tries to claim cumulative error. There was no more than one single error, so cumulative error does not exist.

"Even when separately alleged incidents of prosecutorial misconduct do not independently rise to the level of reversible error, the cumulative effect of multiple errors can violate due process." *Wood v. Ryan*, 693 F.3d 1104, 1116 (9th Cir. 2012) (quotation marks and end citation omitted). In determining whether prosecutorial misconduct has deprived a defendant of a fair trial, this Court "look[s] to the substance of any curative instructions, and the strength of the case against the defendant absent the misconduct." *Sanchez*, 659 F.3d at 1257. When assessing the combined prejudicial effect of multiple errors, only as to some of which the defendant registered a timely objection, this Court applies the plain error standard. *Alcantara-Castillo*, 788 F.3d at 1191.

As discussed in greater detail above, the prosecutor's arguments during closing and rebuttal closing argument were not improper, except for the prosecutor's single comment about Defendant cutting her wrists, which was harmless. The court ***55** gave the jurors appropriate limiting instructions as to how they should view the evidence and what could be considered as evidence. In addition, the government presented a strong case against Defendant and refuted her self-defense claim. Accordingly, any alleged error by the prosecutor in her arguments did not prejudice Defendant or violate her due process rights, and did not constitute plain error.

D. Because the District Court Did Not Err and the Only Prosecutor Error was Harmless, No Cumulative Error Exists, and Defendant was Not Denied a Fair Trial.

1. *Standard of Review*

Defendant is entitled to a fair trial, not a perfect trial. *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991). "Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal." *Necoechea*, 986 F.2d at 1282. The fact that multiple errors have occurred during a trial, however, does not mean that reversal is required. *United States v. De Cruz*, 82 F.3d 856, 868 (9th Cir. 1996). "Even where there are errors below, they do not rise to the level of cumulative error where they "were minor and did not render [the defendant's] trial fundamentally unfair." *Ayala v. Chappell*, 829 F.3d 1081, 1116 (9th Cir. 2016) (internal quotation marks omitted). If this Court finds that the district court committed no error at trial, cumulative error review necessarily fails. *United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007).

*56 2. *Argument*

Defendant's cumulative error argument fails for two reasons. First, because there were not multiple trial errors here, it is fundamental that no cumulative error exists. *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012) ("There can be no cumulative error when a defendant fails to identify more than one error."). Although Defendant alleges multiple errors on the part of the trial court and prosecutor, as discussed above, the only error that occurred was the prosecutor's single reference to Defendant cutting her wrists during the presentation of a laundry list of other lies Defendant told, which was harmless.

Second, even if there were some additional errors - which there were not - their cumulative effect does not warrant reversal. *See De Cruz*, 82 F.3d at 868. As previously stated, the evidence of Defendant's guilt and the incredulity of her self-defense claim rendered any errors harmless. *See* *United States v. Feldman*, 788 F.2d 544, 557-58 (9th Cir. 1986) (affirming conviction, even though district court made several instructional and evidentiary errors, because the errors "even if taken together ... must be regarded as harmless and unlikely to have materially prejudiced the jury given the highly incriminating evidence"). Accordingly, Defendant was not denied a fair trial.

*57 E. The District Court Did Not Plainly Err in Imposing Supervised Release Standard Condition 8

1. *Standard of Review*

When a party does not object to a district court's imposition of supervised release conditions yet asserts error on appeal, this Court reviews for plain error. *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012).

2. *Argument*

This Court should affirm Supervised Release Standard Condition 8 (prohibition on associating with felons) because no plain error occurred. Defendant has not shown she has a fundamental liberty interest in associating with her brothers, or that they are even felons.

A district court is not required to place on the record the basis for each condition of supervised release unless "the condition implicates a particularly significant liberty interest of the defendant." *United States v. Weber*, 451 F.3d 552, 561 (9th Cir. 2006). "If a court imposes a supervised release condition that restricts a defendant's significant liberty interest, such as an intimate relationship, it must justify the condition by making heightened findings on the record." *United States v. Stephens*, 19-10273, 2020 WL 5569464, at *2 (9th Cir. 2020); *see* *Wolf Child*, 699 F.3d at 1091 (minor child and fiancee); *United States v. Napulou*, 593 F.3d 1041, 1047 (9th Cir. 2010) (life partner). "[T]he burden is not on the district court to search the record to determine if the supervised release condition will interfere with any of ***58** the defendant's liberty interests. Instead, it is the defendant's responsibility to raise such issues to the court." *Stephens*, 2020 WL 5569464, at *2 (holding the district court did not plainly err by imposing a supervised release condition preventing defendant from interacting with his fiancée who was a convicted felon without heightened findings being made where Defendant did not show he had a felon fiancée at sentencing).

Defendant never objected to Supervised Release Standard Condition 8 at sentencing, and never contended that her brothers were felons. Defendant has not shown her interest in associating with her adult brothers is as significant as the intimate relationships identified in *Wolf Child* and *Napulo*. *See* *United States v. Farley*, 696 F. App'x 210, 213 (9th Cir. 2017) (holding that, even assuming association with one's siblings constituted a "particularly significant liberty interest," the defendant's failure to object to a condition restricting his ability to associate with his brothers at sentencing meant that the district court's failure to consider that relationship was not plain error). And, Defendant still has not shown that her brothers are actually felons.

With no authority suggesting Defendant (an adult) has a fundamental liberty interest in associating with her adult brothers, and no mention of this or her brothers' potential felon status at sentencing, just as in *Farley*, any error on this front cannot be plain.

***59** If this Court finds that Defendant has a fundamental liberty interest in associating with her brothers and additional findings are required to impose this condition, this Court should remand this matter back on a limited basis to allow the district court to exempt Defendant's brothers from the condition or make additional findings supporting their inclusion in the condition.

60 VIII. *CONCLUSION

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

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Footnotes

1 "CR" refers to the Clerk's Record, followed by the document number(s). "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record, respectively, followed by the page number(s).

2 An amended judgment was entered on April 26, 2019, to correct the statutes listed in the offenses. (ER 500.)

3 Defendant submitted a copy of the recording of this first interview (Exhibit 15) concurrently with her Opening Brief. (Op. Br. 7.) A transcript of the recorded interview (Exhibit 16) has been provided in the SER for this Court's convenience. (SER 1-22.)

4 An audio recording of the phone call was played for the jury. (Exhibit 28.) A transcript of the call has been provided in the SER for this Court's convenience. (SER 23-44.)

5 "On review of a renewed motion for acquittal made at the conclusion of the defendant's case, all the evidence - including the evidence presented by the defendant - can be considered." *United States v. Alexander*, 48 F.3d 1477, 1490 n.10 (9th Cir. 1995) (citing *United States v. Figueroa-Paz,* 468 F.2d 1055, 1058 (9th Cir.1972)).

6 When the prosecutor asked the court whether she could get into Rule 404 evidence while cross-examining Defendant, the court said, "the door is wide open, absolutely you will be allowed to do that." (ER 802.) The government did not cross-examine Defendant on any Rule 404 evidence, but rather presented this evidence in its case on rebuttal. (ER 905-12, 914-20.)

7 The cases Defendant cites (Op. Br. at 46-47) are distinguishable for this reason. *Commanche* and *Sanders* concerned evidence that was only admissible under Rule 404(b), unlike the evidence here. *See*Fed. R. Evid. 404(a)(2)(B)(ii); Fed. R. Evid. 404, Advisory Committee Notes, 2000 Amendment.

8 Defendant does not challenge the materiality, timeliness, or proof of the other act evidence.

9 As set forth in the government's reply in support of its notice to use other act evidence, on one occasion in 2017, Defendant struck L.L. in the head with a lemonade jug, injuring him, and it was Defendant who contacted the police and alleged L.L. abused her, despite the fact that she was the main aggressor. (ER 75.)

10 Two weeks after Defendant was convicted, after the prosecutor ordered the transcript of Defendant's cross-examination and reviewed it, the government immediately filed a notice to correct the record regarding this misstatement. (ER 449-50.) The prosecutor explained that she had intended and prepared to cross-examine Defendant on her wrist-cutting allegation, which led to the prosecutor's mistaken and sincere belief that such a question had been asked. (ER 450.)