CASE NO. 23-5091

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

ELGA EUGENE HARPER
Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma

The Honorable Stephen J. Murphy
United States District Judge
Case No. 22-CR-170-SJM

RESPONSE BRIEF OF THE UNITED STATES

Oral argument is not requested

There are no attachments to this brief

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Statement of Prior or Related Appeals

Harper has filed no prior or related appeals. The issue of whether and how a tribal verification may be admitted as a business record is before this Court in *United States v. Wood*, Case No. 23-5027, argued March 21, 2024.

Statement of Jurisdiction

A grand jury charged Harper, a member of the Choctaw Nation, with kidnapping, aggravated sexual abuse, and assault in Indian Country and therefore the district court had jurisdiction over the criminal case under 18 U.S.C. § 1153. After a jury convicted Harper and the district court sentenced him to life imprisonment, he appealed his conviction. This Court has jurisdiction over his appeal under 28 U.S.C. § 1291.

Issues Presented for Appeal

1. Whether the district court abused its discretion in admitting, through the Choctaw Nation's CDIB and Membership manager, a letter from the Nation's CDIB/Membership Director as evidence that Harper qualified as an Indian for purposes of 18 U.S.C. § 1153.
2. Whether the district court abused its discretion in excluding under

Daubert proposed expert testimony about the memory formation which it found irrelevant to the circumstances of this case.

3. Whether, after the defense asked a government witness about the effect of trauma on memory formation, the district court abused its discretion by allowing questioning on the same subject on redirect, and if so, whether that error was harmless, given that the defense had the opportunity to recross the witness, the district court gave a cautionary instruction, and overwhelming evidence established Harper's guilt.
4. Whether the district court erred in declining to expand this Court's pattern kidnapping instruction to add a requirement never adopted by this circuit, and rejected by several other circuits, and if so, whether that error was harmless.

Statement of the Case

After an hours-long ordeal during which she was badly beaten and sexually assaulted, Ellen Finlay identified her attacker as her handyman, Elga Harper.

Sister Ellen Finlay, a 72-year-old semi-retired Episcopal nun, lived alone in Tulsa. (Vol. 3 at 478). Before coming to Tulsa, she had worked in Ireland and South Africa. (*Id*. at 463). In 2021, she was leaving her house when a man approached her, asking if she wanted her grass cut. (*Id*. at 466). She declined,

but when he told her he was earning money to go back to school, it touched her heart, so she looked for some other work for him to do. (*Id.*). Ms. Finlay asked the man's name, and "he introduced himself as Elga Harper." (*Id.*).

Harper went on to do several "odd jobs" at Ms. Finlay's house, fixing locks and replacing blinds. (*Id.* at 466–67). He worked inside her home, and they had many conversations. (*Id.*). They discussed his desire to go back to welding school and her time in Africa. (*Id.* at 468). Ms. Finlay gave Harper an African kaftan as a gift. (*Id.*). At some point, Harper was repairing a light fixture, and wasn't able to complete the task, so he said he'd come back the following Monday to finish. (*Id.* at 469). Instead, he came back on Tuesday, and when Ms. Finlay told him he couldn't do repairs in her house that day, he became "really, really angry." (*Id.* at 470). Assuming that he may have been angry because he needed the money, Ms. Finlay "went on and paid him," hoping he would leave gracefully. (*Id.*). Instead, he "stormed out." (*Id.*). She thought she would never see him again, and "because he was so unpleasant about that situation," Ms. Finlay "really didn't want him back." (*Id.* at 471).

A few months later, Harper came by Ms. Finlay's house late at night, acting as though nothing had gone wrong. (Vol. 3 at 471). He wanted Ms. Finlay to counsel him, but she responded, "Elga, I don't think I'm the right counselor

for you. We really didn't get off to a good start." (*Id*. at 471–72). He left, but two days later, on May 4, he rang her doorbell in the early afternoon to ask for work. (*Id*. at 472–73). When Ms. Finlay said no, he asked to come in and use the bathroom. (*Id*. at 474). She told him she had to see two people for an appointment at 6 p.m., but he had used her bathroom in the past, so she let him in. (*Id*. at 472, 474, 487).

After a while, Ms. Finlay became concerned because Harper was taking a long time. (*Id*.). She headed back and saw that Harper was in her bedroom, but before she could tell him she hadn't given him permission to be in there, she noticed he was completely naked. (*Id*.). He began moving toward her, grabbed her arms and hit her in the face. (*Id*. at 475–76). When she tried and failed to escape his grip, Harper "took a cord and made a noose," wrapped it around her neck, pulled it tight and "dragged [her] around [her] house like an animal." (*Id*. at 476). Early in the attack, before pulling Ms. Finlay around by the neck, Harper "ripped [her] clothes off," leaving her "completely naked." (*Id*. at 478). She "was screaming and trying to figure out a way to get out and he kept saying 'shut up, shut up, shut up.'" (*Id*. at 480).

After dragging Ms. Finlay around the house, Harper dragged her into the bathroom. (*Id*.) In the bathroom, Harper pulled Ms. Finlay into the shower

and turned it on. (*Id.* at 481). She screamed, because the water was scalding hot. (*Id.* at 484). Harper began to string her up and had the cord around her feet and partly around her neck. (*Id.* at 481). He held her "kind of sideways" with his arm, and while she screamed, penetrated her vagina and her anus with his fingers. (*Id.* at 481–82). Harper pushed Ms. Finlay up against the wall, tried to push her jaw open, and tried to force her to give him oral sex, saying "don't you dare bite me." (*Id.* at 482).

While Ms. Finlay was wet from the shower, Harper turned her upside down again and dropped her on her head. (*Id.* at 483). At first, she couldn't move, so she started screaming "Oh, my God, you've paralyzed me," and asking him to call 911. (*Id.* at 484). When she begged him to help her onto the bed, Harper grabbed under her arms and heaved her toward the bed. (*Id.*). Ms. Finlay began praying Hail Marys out loud, and asking Harper to call 911, but he told her repeatedly to shut up. (*Id.* at 485).

Ms. Finlay was "frantically" trying to think of some way to get rid of Harper so she could call 911, so she said, "look, you know where my car keys are, just take my car and go." (*Id.* at 486). Harper responded, "What? You would sign the title over to me?" (*Id.*). He asked where the title was, and when Ms. Finlay said she didn't know, he began "tearing the house apart looking for

the title to the car." As the time grew closer to 6 p.m., Harper began saying "oh, I need to get out of here," perhaps assuming that the couple was coming to Ms. Finlay's house for the 6 p.m. appointment she had mentioned. (*Id.* at 487). Harper began looking for his clothes to leave. (*Id.*). Ms. Finlay saw him pick up his shorts but didn't see what Harper was wearing when he left her house. (*Id.* at 488–89). After he left, she "stayed absolutely still" for about five minutes for fear that he was going to come back before she managed to call 911. (*Id.* at 495, 501).

Responding officers arrived at about 6:20 p.m., entered through the unlocked back door, and observed Ms. Finlay's "horrible injuries." (R. Vol. 3 at 123–24, 135, 340). After they got Ms. Finlay to the ambulance, they went back and searched the entire house, clearing every room and closet to make sure no one was there. (*Id.* at 121, 125–26; 326). An officer spoke to Ms. Finlay in the ambulance to get a description of the suspect; based on that description, they looked in the neighborhood for a handyman named Elga Harper. (*Id.* at 129–30). Based on the severity of her injuries, the officers "weren't sure she was going to make it through the night," so an SVU detective went immediately to the hospital. (R. Vol. 3 at 365–366). He was surprised to find Ms. Finlay "actually very coherent" and able to give "very descriptive details

on the incident that occurred and the person who committed the act," including the person's name. (*Id.* at 366–67). Despite her "extensive head wound," Ms. Finlay seemed "cognizant, talkative," and able to answer questions; she scored the highest possible score on a neurological exam conducted at the hospital. (*Id.* at 142, 230–32).

Many neighbors had seen Harper before and after the attack.

The officers searching for Harper identified several neighbors who had encountered him in the days surrounding the attack on Ms. Finlay. Thomas Cain and Diana Johnson were refurbishing a home across the park from Ms. Finlay's house, and Cain's cousin, John Nick, was helping them most weekdays. (R. Vol. 3 at 188–89). Elga Harper approached Mr. Cain while he was working at the property on Sunday, May 1, asking if he needed some help. (*Id.* at 190, 200). They worked together that afternoon, and Mr. Cain had Ms. Johnson pick up burgers and work gloves for Harper. (*Id.* at 191, 200). Harper also worked with Mr. Cain in the evening on Tuesday, May 3, for about an hour, and asked if he could come earlier the next day. (*Id.* at 192, 201). Mr. Cain was reluctant to have Harper working on the house when he and Ms. Johnson were not there, but he remembered that Mr. Nick would be there, and told Harper he could come earlier on Wednesday and start. (*Id.* at 192–93).

However, when Mr. Cain arrived Wednesday, May 4, Mr. Nick told him that Harper had never appeared. (*Id.* at 193, 219). By the time Ms. Johnson arrived at the house on May 4 around 6:30 or 7 p.m., quite a few police cars were in the neighborhood. (*Id.* at 206–07).

Two other neighbors, John Woodward and Aimee Moore, had met Harper the previous week. (Vol. 3 at 291). They knew Harper was homeless, and Mr. Woodward invited him to spend time in their home, out of the elements. (*Id.* at 308–09, 322–23). During that week, he had come over five or six times. (*Id.* at 291). On May 4, Harper came over in the morning, dressed to go to work. (*Id.* at 293). He said he needed to meet his boss around 1 p.m. and kept asking what time it was because he didn't want to be late. (*Id.* at 293, 317). He left at 1 p.m. (*Id.*).

Harper returned around 6 p.m., knocked on their door, and said he needed a shower, a shave, a driver, and needed them to wash his clothes for him. (*Id.* at 293–94, 317, 229). Harper was carrying his sneakers and wearing a "purple gown" that Mr. Woodward had never seen before. (*Id.* at 294, 317). Harper was carrying a set of keys, and said he needed a set of keys cut. (*Id.* at 318). He was sweating, and when Ms. Moore asked why, he said he was tired and had run from work to their house. (*Id.* at 317). Harper seemed "real nervous," and

"jittery," so much so that Ms. Moore "told him that he was acting like he did something." (*Id.* at 294, 319). He said no, but said he "needed some Xanax or Valium or Benadryl," because "he had a rough day at work." (*Id.* at 319).

Harper asked to borrow Mr. Woodward's electric razor. (*Id.*) He showered, shaved his head and face, and changed into different clothes, changing his appearance. (*Id.* at 295, 318–19). He stayed several hours, pacing the floors, and wouldn't leave. (*Id.* at 319). Ms. Moore told her husband that Harper was "acting like he did something, like he's guilty of something," and told him to make him leave because she was not comfortable with him there. (*Id.* at 319–20). Eventually, Mr. Woodward asked him to leave. (*Id.* at 296, 320). Harper left before midnight but came back again about an hour later. (*Id.* at 296–97, 320). Mr. Woodward did not let him back into their house. (*Id.* at 297, 320).

The next morning, when Mr. Woodward was getting ready to take the trash out, he noticed a green duffle bag and a black backpack in his truck. (*Id.* at 297, 302). Police officers approached, showed him a picture of Harper, and asked if Woodward knew him. (*Id.*). He said he did, and pointed out the bags in his truck, which he gave to police. (*Id.* at 298). When Woodward returned to the house, his wife asked if the police officers had looked in the trash. (*Id.* at 298, 321). When she heard they had not, she directed Woodward to put on some

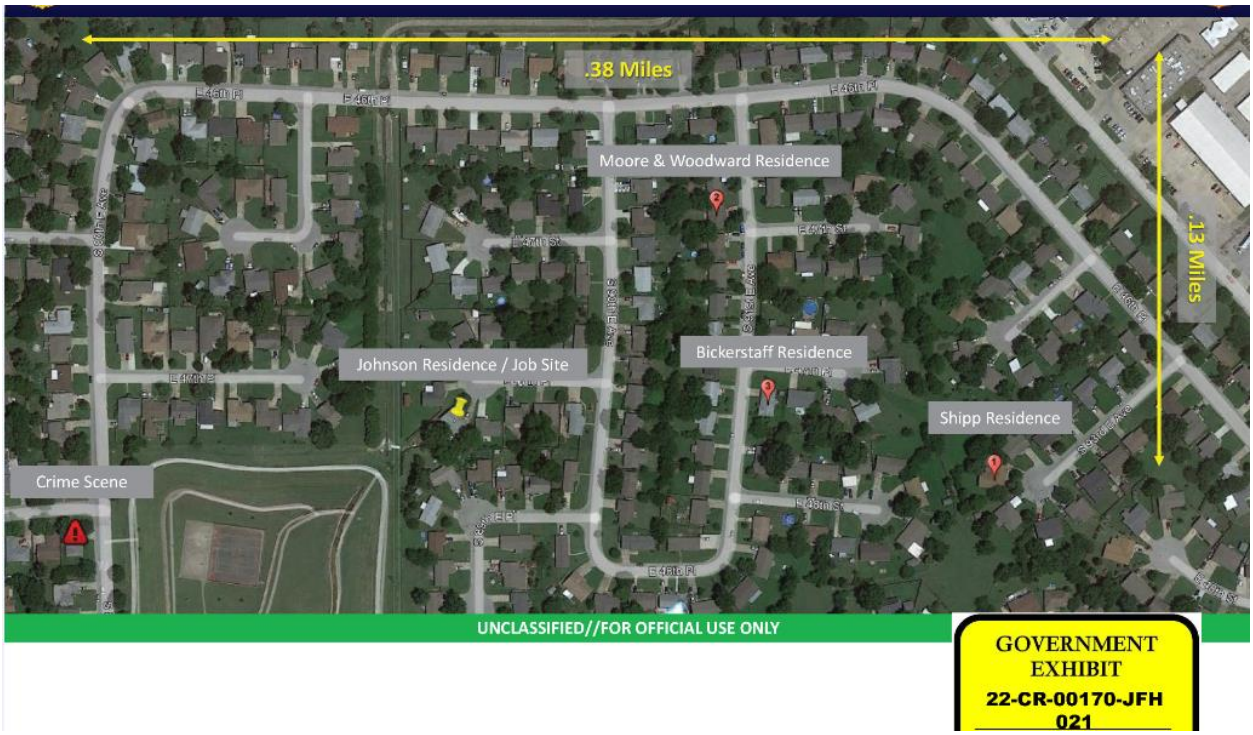
gloves and check in there. (*Id.*). In the trash can, Woodward found the "robe-ish" purple "gown" Harper had been wearing, and the electric razor Woodward had given him. (*Id.* at 300, 322). He placed the things he pulled from the trash in a paper bag and gave them to an SVU detective. (*Id.* at 300, 377)

Raymond Shipps, Harper's brother-in-law, also lived in Ms. Finlay's neighborhood. (R. Vol. 3 at 173). Harper visited Shipps on May 4, and Shipps's doorbell camera recorded him arriving at 8:10 a.m. (*Id.* at 175). It also showed Harper returning that night at around 11:30 p.m., without the backpack he had earlier that day. (*Id.* at 181–82).

Patricia Bickerstaff, a neighbor who lived between Mr. Shipps and Ms. Finlay, encountered Elga Harper on the evening of May 4. (R. Vol. 3 at 279). She was outside smoking when Harper approached, wearing a garment she described as a robe, a pair of shorts, and nothing else. (*Id.* at 280). His shoes were in his hand. (*Id.*). Harper asked for a ride, and Ms. Bickerstaff declined, saying she had her grandchildren visiting. (*Id.* at 281). After he left, she called her daughter, and then called the non-emergency number of the Tulsa Police Department at about 7 p.m. that night. (*Id.* at 282–84).

Timing and physical evidence linked Harper to the attack.

Each of the neighbors who had seen Harper on the day of the attack or met him in the previous week lived within a half-mile of Ms. Finlay's home:



(R. Vol. 3 at 604; Gov't Ex. 21). Likewise, the physical evidence linked him to the attack, and reflected his Indian tribal membership. The backpack seized from Woodward's truck contained Harper's social security card, a partially completed Oklahoma City Indian clinic questionnaire, handwritten notes about getting "help for glasses from the tribe," and Ms. Finlay's business card. (R. Vol. 3 at 302, 370–74, 491; Gov't Ex. 86(b), 86(e), 86(f), 87(a), 88(a)). The bag of items Woodward pulled from his trash can the morning after the attack

contained a purple-ish blue garment that several witnesses identified as a robe or a gown that they had seen Harper wearing, and that Ms. Finlay identified as her raincoat. (*Id.* at 280–81, 294, 300, 305, 317, 378, 495; Gov't Ex. 91(a)). The same bag also contained the electric razor that Mr. Woodward had loaned Harper, loose hair, and a set of keys that Ms. Finlay identified as hers. (*Id.* at 303–305, 377–379, 491, Gov't Ex. 18, 90(b)).

Harper initially denied seeing Ms. Finlay that day but then changed his story.

Five days after the attack, officers arrested Harper a few miles from Ms. Finlay's house. (R. Vol. 3 at 252). After being advised of his rights, Harper agreed to speak to officers. (*Id.* at 263). His May 10 interview was recorded, and later transcribed. (*Id.* at 268, 270; Gov't Ex. 181(a), Supp. R. Vol. 2 at 20). Harper immediately admitted that Ms. Finlay would know him by name and that he had "been all in her house," because she helped him by allowing him to do yard work. (Gov't Exh. 181(a), Supp. R. Vol. 2 at 22). Initially, he claimed not to have been at Ms. Finlay's house on the day of the attack, saying that he spoke with his sister, who lived close to Ms. Finlay, that morning, and then was at his boss Tom's rent house from 2:30 until 5:30 or 6 p.m. (Supp. R. Vol. 2 at 33-35, 46). When the officer said, "you're telling us you weren't there the night this happened," and asked, "did you do this to her?" Harper responded,

"No, sir." (*Id.* at 46). He insisted he had last seen her "at least maybe two days to a week from when" officers said "this happened." (*Id.* at 48). He explained that when he saw "her last, Ms. E was just fine." (*Id.* at 49). Harper claimed that the last time he spoke with her, Ms. Finlay would not let him in, that she gave him a card and said she would not be able to counsel him. (*Id.* at 50).

However, when confronted with the physical evidence he had left in the trash at Mr. Woodward's house, Harper admitted having gone over to Ms. Finlay's house after work the day of the attack, entering through the unlocked sliding back door, and finding the house "ramshacked." (Supp. R. Vol. 2 at 52–60, 66). He claimed he heard Ms. Finlay say, "help me," went into her room, found her bleeding and tied up on the bed, cut the cord and began rummaging for a phone. (*Id.* at 61–62, 74, 79). Harper claimed he couldn't find her phone and got scared, so he left and went straight to his sister's house. (*Id.* at 63–64, 74). After insisting throughout the interviews that he did not have Ms. Finlay's keys, toward the end of the interview he speculated that he could have had the keys because he "might have asked her if [he] could pick her up and maybe possibly drive her." (*Compare* Supp. R. Vol. 2 at 71 *with id.* at 77, 96). At the end of the interview, Harper was transported to jail. (*Id.* at 97).

Harper faced federal charges for the assault; before trial, the court excluded his proposed witness on false memory formation.

A federal grand jury charged Harper, an enrolled member of the Choctaw Nation, with four Indian Country offenses: kidnapping, aggravated sexual abuse, assault with a dangerous weapon with intent to do bodily harm, and assault resulting in serious bodily injury. (Vol. 1 at 20, 33).

Before trial, the government moved to exclude under *Daubert* proposed testimony from Geoffrey Loftus about false memory formation. (R. Vol. 1 at 228). After reviewing Harper's response (R. Vol. 1 at 314) and hearing argument (R. Vol. 3 at 24–28), the district court granted the government's motion, finding the proposed testimony inadmissible. (R. Vol. 1 at 376). Relying on this Court's precedent, the district court noted that in these circumstances "expert psychological testimony is unlikely to assist the jury—skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial." (*Id.* at 378, quoting *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006). It also observed that the narrow, limited circumstances in which this Court has found expert witness testimony on identification appropriately admitted were not present, because "the identifications in this case were not made after a long delay." (*Id.* at 379). Significantly, it noted that that unlike the study cited by the defense,

here, "E.F. was allegedly assaulted for approximately four hours and immediately thereafter spontaneously and repeatedly" identified Harper, "whom she had repeated previous acquaintance with, as the individual who assaulted her." (*Id.* & n.1). Accordingly, the district court excluded the defense expert. (*Id.*; Vol. 3 at 50).

At trial, the jury heard about Harper's Choctaw membership and blood quantum.

Tabitha Oakes, manager of the Choctaw Nation's membership department, explained that her office maintains enrollment records for the Choctaw Nation and the Certificate Degree of Indian Birth records issued by the Bureau of Indian Affairs. (R. Vol. 3 at 111–12). Once the Bureau of Indian Affairs issues a CDIB for an individual, they can apply for membership and become an enrolled member of the Choctaw Nation. (*Id.* at 112). Ms. Oakes identified a verification letter and an accompanying certificate of authenticity that she had prepared in the course of her duties as enrollment officer. (*Id.* at 113, Gov't Ex. 1; Supp. R. Vol. 1 at 2–3). Harper objected on foundation and hearsay grounds, but the district court overruled the objection and admitted the verification letter. (Vol. 3 at 113). Ms. Oakes testified that the verification letter stated that Harper had a Certificate of Degree of Indian Blood and indicated he "is an enrolled member by blood of the Choctaw Nation." (*Id.* at 114–15).

The letter admitted by the Court contained Harper's tribal membership number, noted that his CDIB had been issued in 2002, and that Harper had been a member of the Choctaw nation since 2011. (R. Supp. Vol. 1 at 2). The letter bore the signature of Terry Stephens, the tribe's CDIB/Membership Director. (*Id.*). The accompanying document signed by Ms. Oakes stated it was a certificate of authenticity of domestic business records pursuant to Rule 902(11) of the Federal Rules of Evidence. (*Id.* at 3). It stated that the attached record was "the original record or a true and accurate duplicate of the original record in the custody of the Choctaw Nation of Oklahoma, Membership Dept." and that Ms. Oakes was a custodian of the record. (*Id.*). It further explained that the records were "kept in the course of a regularly conducted business activity" of the Choctaw Nation's membership department. (*Id.*). The certificate also contained Harper's name and the same tribal membership number contained on the verification letter. (*Id.*).

After Ms. Oakes, the jury heard from officers, neighbors, and Ms. Finlay herself about Harper's attack and the subsequent investigation, as set forth above. *Supra* pp. 2–13. Ms. Finlay described her memories from the four hours as "absolutely imprinted" on her mind, and repeatedly identified Elga Harper as her assailant. (R. Vol. 3 at 496, 510–11).

After Harper's counsel cross-examined a SANE nurse about the potential effects of trauma on memory, the district court allowed her to testify on re-direct about what her training had taught her about memory.

Among the expert witnesses who testified was Kathryn Bell, who had recently retired as the Tulsa Police Department's forensic nursing administrator. (*Id.* at 392). She explained that in the cases of sexual assault, forensic nurses do a specific evaluation called a Sexual Abuse Nurse Examiner exam. (*Id.* at 398). Ms. Bell acknowledged that it was "not customary to find DNA in samples taken of victims who were subject to digital penetration of the vagina or anus," and testified about contributing factors that influence the placement of skin cells from the offender to the victim. (*Id*. at 411–12). On cross-examination, defense counsel noted that Ms. Bell had "regularly dealt with people that have undergone just extremely traumatic events," and asked if "those traumatic events can have profound effects on people." (*Id.* at 413–14). After Ms. Bell agreed, defense counsel asked, "It can have an effect on their memory?" (*Id.*). About the report of Ms. Finlay's SANE examination, counsel asked Ms. Bell to confirm that "at one point it's noted that she struggled to remember some of the details." (*Id.*). In response, counsel for the government began her redirect by reiterating the cross-examination topic, then asked follow-up questions:

> Q: Now, you were just asked on cross-examination about the effect that trauma can have on the brain.
>
> A. Yes.
>
> Q. In your experience and in your education are there two kinds of memories that a person has of events?
>
> MS. McCLELLAN: Objection; foundation for the memory testimony.
>
> MS. NELSON: Your Honor, they just asked her opinion about memory.

(R. Vol. 3 at 415). In response to a question about whether she had "any experience or education in the area of memories," Ms. Bell testified, "I've gone to specific sessions that have talked about memories and how memories are formed and how memories are formed after a traumatic event." (*Id.* at 416). She explained that trauma "can impact memories," "there are different ways memories are made," and "there are different types of memories." (*Id.* at 417). Ms. Bell testified that "the type of memory that we see most often with trauma is going to be memory that is – is kind of coded or developed at a point in the brain called the amygdala and that's the part of the brain that is the fight and flight of the brain." (*Id.*). She further clarified that "things like fear and emotional type of things can help you code that type of memory." In contrast, she explained, "the other type of memory is the memory that's coded by a part of the brain called the hippocampus," which is "the area that kind of codes the

– maybe the sequence, or maybe not necessarily sequence of events, but the events that happen, the whos, the whats, kind of the whens part of that." (*Id.* at 417–18). When Ms. Bell continued to explain, defense counsel objected, first that the response was a narrative, and then that Ms. Bell was "not established as an expert on the area of memory and that the testimony was not sufficient to qualify her as an expert." (*Id.* at 418). The district court agreed, and asked Ms. Bell, "Is there anything in your description of memory that you just discussed that's relevant to the question of how Finlay remembered things closer to the event than she did perhaps when you interviewed her on the 17th of May?" (*Id.*) As Ms. Bell began to answer, defense counsel objected that she did not "have the expertise to make this testimony." (*Id.* at 419). The district court indicated it would "let her finish her answer" and let defense counsel "take that up on cross-exam." (*Id.*). Before allowing Ms. Bell to answer, the court reminded the jury that "these are opinions of a witness who does have some expertise study background and experience in these issues, but you'll weigh her testimony as you do within the instructions I give you." (*Id.*). Ms. Bell went on to explain that "when all those chemicals are released," "with that fight and flight" "you see things better, your heart rate goes up;" "you have this physiologic response to the trauma that's happening." (*Id.*). After she

explained that "those same chemicals are impacting that other part of the brain, the hippocampus part," the court interrupted, saying "I think that answered the question." (*Id.*).

The defense highlighted the limitations of Ms. Bell's testimony, and the judge instructed the jury they could decide how much weight to give it.

On re-cross, defense counsel confirmed that Ms. Bell was not a doctor, a psychologist, or a head trauma surgeon. (*Id.* at 420). Ms. Bell acknowledged that Ms. Finlay had suffered a serious head injury, and that she had not interviewed Ms. Finlay personally, and could not personally "give an opinion about her statement." (*Id.* at 420–21). The Court ultimately instructed that the jury was "not required to accept" an expert witness's opinion, and "should give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial." (R. Vol. 1 at 568).

The district court declined to adopt either party's modifications to the pattern kidnapping instruction.

At the instruction conference, the district court noted that it had taken out language the defense had proposed adding to the kidnapping instruction. (R. Vol. 3 at 624). It explained that several reasons led to the exclusion. First, it was "lengthy and confusing and clouds the --- or qualifies the definition of a

kidnapping unnecessarily." (*Id.*). Next, it noted that although the Third Circuit case Harper cited provided "authority for including this type of language in a kidnapping case, . . . the Tenth Circuit never adopted it." (*Id.*). The court also declined to add language proposed by the government that was supported by this Court's precedent. (*Id.* at 625–26, 649–50, 697; R. Vol. 1 at 572).

After the jury convicted Harper, the district court denied his Rule 29 motion.

The jury convicted Harper of all four charges. (R. Vol. 3 at 707–-8; R. Vol. 1 at 556–57). Although the court initially denied the defense's Rule 29 motion as moot in light of the jury's verdict, it later granted a motion to reconsider and denied the motion on the merits. (Compare R. Vol. 3 at 709 with R. Vol. 1 at 586–87). Finding that "the evidence against Defendant was overwhelming," the district court denied "the Rule 29 motion for acquittal on the merits because the evidence at the close of the Government's case was clearly sufficient for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." (*Id.* at 588.)

Harper now appeals his conviction.

Summary of the Argument

The district court did not abuse its broad discretion in the context of hearsay determinations by admitting a tribal verification letter identified by the tribal

membership manager who prepared it from the tribe's enrollment records. After the manager testified that she prepared a certificate, which established that the verification letter met every element of the business records exception, defense counsel did not cross-examine her about the accuracy of those statements. Accordingly, the district court properly admitted the verification letter. That she testified that the tribal enrollment records, rather than the verification letter, were kept in the normal and ordinary course of business, does not alter the analysis; this Court has recognized that "business records in one form may be presented in another for trial." Moreover, Harper cannot show that the alleged evidentiary error affected his substantial rights, where he never challenged his Choctaw membership or Indian blood quantum, and where other evidence showed he was Indian.

The district court correctly exercised its discretion to exclude a defense expert on memory formation, when his testimony was based on scenarios involving identification of an unknown attacker long after the assault upon suggestive questioning, and the victim in this case immediately, spontaneously, and repeatedly identified her assailant as Harper, a handyman she had employed multiple times.

When defense counsel cross-examined a forensic nurse about the effects of trauma on memory formation, and she had received some training on memory formation, the district court did not abuse its discretion in allowing redirect questions on the same subject. Even if the nurse's testimony went beyond her expertise, any error was harmless, because defense counsel limited any prejudice by cross-examining her on the limitations of her testimony, the district court gave a cautionary instruction, and because overwhelming evidence established Harper's guilt.

Finally, the district court did not err in failing to amend the pattern kidnapping instruction to include the Third Circuit's requirement that kidnapping may not be incidental to the commission of other crimes. This Court has never adopted the additional element, and other circuits have rejected it as "irrelevant." However, this Court may affirm Harper's kidnapping conviction without adopting or rejecting the additional requirement, because the facts here showed that Harper's four-hour seizure of Ms. Finlay was not incidental to his sexual abuse or assaults of her.

Argument

I. The district court did not abuse its discretion in admitting a tribal verification as a business record to confirm Harper's tribal membership.

A. Record Reference

When Choctaw Nation CDIB and membership manager Tabitha Oakes identified a verification letter she had prepared indicating Harper's tribal membership and blood quantum, Harper objected to the letter's admission on foundation and hearsay grounds. (R. Vol. 3 at 112–113; Supp. R. Vol. 1 at 2). The trial court overruled Harper's objection. (*Id*.)

B. Standard of Review

Because Harper objected to the admission of his tribal verification letter, this Court reviews the ruling for an abuse of discretion. *United States v. Walker*, 85 F.4th 973, 979 (10th Cir. 2023). "Evidentiary rulings generally are committed to the very broad discretion of the trial judge, and they may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment." *United States v. Keck*, 85 F.3d 789, 795 (10th Cir. 2011) (internal quotations and citation omitted). Although district court determinations on the admissibility of evidence are reviewed for an abuse of discretion, this Court provides "a

more deferential review" of hearsay determinations, because they "are particularly fact and case specific." *United States v. Channon*, 881 F.3d 806, 810 (10th Cir. 2018). "Even if the court finds an erroneous evidentiary ruling, a new trial will be ordered only if the error prejudicially affects a substantial right of a party." *Keck* at 795 (internal quotations omitted).

C. The district court did not abuse its discretion in admitting Harper's tribal verification letter.

The testimony of Tabitha Oakes provided adequate foundation for admitting the letter verifying Harper's tribal membership and Indian blood quantum, and the letter did not constitute inadmissible hearsay because it was derived from enrollment records kept in the normal and ordinary course of business. Ms. Oakes, the manager of the Choctaw Nation's CDIB & membership department, explained that CDIB stands for Certificate Degree of Indian Blood. (R. Vol. 3 at 110–11). She testified that she keeps "the enrollment records for the Choctaw Nation of Oklahoma in the normal and ordinary course of business." (*Id.*). Ms. Oakes identified Government's Exhibit 1 as containing a verification letter and certificate of authenticity which she had prepared "in her duties as enrollment officer and using the information and resources" she had described as kept in the normal and ordinary course of business. (*Id.* at 113).

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter," but "[e]vidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602. "The foundational requirement for personal knowledge is not difficult to meet." *United States v. Duran*, 941 F.3d 435, 448 (10th Cir. 2019); *Walker*, 85 F.4th at 980. "Accordingly, if a rational juror could conclude based on a witness's testimony that he or she has personal knowledge of a fact, the witness may testify about that fact." *Walker* at 981. In *Duran*, this Court found the district court "had the discretion to find personal knowledge" of controlled buys where the witness testified he had helped arrange the buys. (*Id.).* Under the circumstances, Ms. Oakes's testimony amply established her personal knowledge of the verification letter and the facts in it. Her testimony showed that she had prepared the verification letter, and the accompanying certificate of authenticity, which noted that the attached records were made by a person with knowledge of the matters set forth therein. She therefore had personal knowledge to support admission of the verification letter.

Likewise, the trial court did not abuse its discretion in overruling Harper's hearsay objection. "Rule 803(6) carves out an exception to the general rule

against hearsay for records 'kept in the course of a regularly conducted activity of a business . . . [if] making the record was a regular practice of that activity." *United States v. Jenkins*, 540 F. App'x 893, 900 (10th Cir. Jan. 7, 2014) (quoting Fed. R. Evid. 803(6)). To be admissible, records must (1) be prepared in the normal course of business; (2) be made at our near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate that the sources, methods, and circumstances by which the record were made were trustworthy. *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).

Here, Ms. Oakes testified that she prepared the certificate of authenticity that accompanied the verification letter, which met each of the requirements for admission under Rule 803(6). (R. Vol. 3 at 113). It stated that (1) Ms. Oakes was the records custodian for the Choctaw Nation's membership department; (2) the attached record was "the original record or a true and accurate duplicate of the original record in the custody of" the membership department; (3) that the records attached to the certificate "were made at or near the time of the occurrence of the matters set forth"; (4) "the records were made by (or from information transmitted by) a person with knowledge of

those matters"; (5) the records were "kept in the course of a regularly conducted business activity of" the membership department, and (6) they were made by the membership department as a regular business practice. Because Ms. Oakes's certificate showed that the verification letter met each element of the business records exception, the district court did not err in overruling Harper's hearsay objection.

Nor do Harper's challenges to the accuracy of statements in Ms. Oakes's certificate, made for the first time on appeal, require a different result. Notably, despite being given an opportunity to cross-examine Ms. Oakes, Harper's counsel asked no questions about either the verification letter or the accompanying certificate. In fact, Harper's counsel asked Ms. Oakes no questions at all. (R. Vol. 3 at 26).

Harper's attempt to distinguish between the enrollment records Ms. Oakes testified she keeps "in the normal and ordinary course of business," and the verification letter admitted at trial likewise falls flat. (R. Vol. 3 at 112). Ms. Oakes testified that she prepared the verification letter "in [he]r duties as enrollment officer and using the information and resources [she] described." Because the verification letter reflected the information contained in the enrollment records, it qualified as an "original" of the electronically stored

information, and the fact that it was presented in a different form did not "eliminate[] the business records exception." *See Channon*, 881 F.3d at 810–11 (an original of electronically stored information is "any printout—or other output readable by sight—if it accurately reflects the information."). The Channons argued that "because the spreadsheets resulted from many data queries, they [we]re not originals." They also claimed the spreadsheets were not admissible under the business records exception because they "were created for purposes of litigation."

However, after the government's witnesses "testified that the spreadsheets reflected the same information as the database," the district court found that the spreadsheets accurately reflected database information and were thus originals, and found they fell under the business records exception. Applying the deferential standard applicable to hearsay determinations, this Court affirmed, rejecting the Channons' contention that "transferring the records into spreadsheets for purposes of litigation eliminates the business records exception." (*Id.* at 811). Because "business records in one form may be presented in another for trial," presenting the information from a database in a spreadsheet did not eliminate the business records exception. *Id.*

Here, as in *Channon*, the government was not required to present the

entirety of the Choctaw Nation's enrollment records at trial, but instead could conduct a query of those records for information specific to Mr. Harper and present that information in letter form. Because the verification letter presented the same data contained in the Choctaw Nation's enrollment records in another form, the district court did not abuse its broad discretion in hearsay matters when it found the letter qualified under the business records exception to the hearsay rule.

Finally, even if the district court abused its discretion in admitting that the verification letter as a business record, Harper cannot show that the error prejudicially affected his substantial rights where he does not suggest that his CDIB and enrollment information in the verification letter was false, or even questionable. Indeed, the other evidence admitted at trial included a partially completed medical history from the Oklahoma City Indian Clinic, and a page of handwritten notes referencing getting "help for glasses from the tribe," both seized from a backpack that also contained Harper's Social Security card. (Supp. R. Vol. 2 at 8, 9, 10; Gov't Ex. 86(b), 86(e), and 86(f)).

II. The district court did not abuse its discretion in excluding Harper's proposed expert under *Daubert*.

A. Record Reference

After the government moved to exclude Mr. Loftus's testimony about false memory formation, Harper responded, asserting that the testimony satisfied the standards of *Daubert*. (Vol. 1 at 314). After reviewing the briefs and hearing argument, the trial court excluded Dr. Loftus's testimony, finding that this case did not present the "narrow, limited circumstances" under which this Court "instructs that psychological expert witness testimony on identification is appropriately admitted." (Vol. 1 at 379).

B. Standard of Review

This Court reviews a district court's application of *Daubert* for abuse of discretion. *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006).

C. The district court did not abuse its discretion in finding Dr. Loftus's testimony would not assist the trier of fact.

Rule 702 of the Federal Rules of Evidence requires trial courts to ensure that "proposed expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony." *Rodriguez-Felix* at 1122. In *Daubert*, the Supreme Court explained that the trial court must first determine whether an expert's testimony is reliable,

"assess[ing] the reasoning and methodology underlying the expert's opinion." *Rodriguez-Felix* at 1123, quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993). If this reliability prong is met, the court must next determine whether the testimony will assist the trier of fact, essentially assessing "whether the reasoning or methodology properly can be applied to the facts in issue." *Rodriguez-Felix* at 1123, quoting *Daubert* at 593.

This Court has recognized that "expert psychological testimony on the validity of eyewitness identification" may be appropriately admitted in narrow, limited circumstances. *Rodriguez-Felix* at 1124. "The narrow circumstances held sufficient to support the introduction of expert testimony have varied, but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and [such] psychological phenomena as the feedback factor and unconscious transference." *United States v. Smith*, 156 F.3d 1046, 1053 (10th Cir. 1998) (alteration in the original) (affirming district court's exclusion of Dr. Loftus's testimony on circumstances that give rise to inaccurate memories). "[O]utside these specialized circumstances, expert psychological testimony is unlikely to assist the jury – skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial." *Rodriguez-Felix* at 1125.

Here, neither the government nor the district court contested Dr. Loftus's qualifications. However, the court did not abuse its discretion in finding that his testimony would not assist the jury. See *Rodriguez-Felix* at 1123 (if reliability prong is met, courts should consider "(1) whether the testimony is relevant; (2) whether it is within the juror's common knowledge and experience, and (3) whether it will usurp the juror's role of evaluating a witness's credibility.")

First, Dr. Loftus's testimony was not relevant in many respects. As the court noted, "this case is not analogous to the situation" presented in the study referenced in Harper's response brief. (R. Vol. 1 at 379). That study "described an assault of less than an hour performed by an individual whom the victim did not know, followed by a gap of more than 24 hours before suggestive questioning." (*Id.* at n.1). In contrast, the court noted, "E.F. was assaulted for approximately four hours and immediately thereafter spontaneously and repeatedly identified Defendant, who she had repeated previous acquaintance with, as the individual who assaulted her." (*Id.*). Because Dr. Loftus's analysis relied on situations in which a victim identified an unknown attacker long after the assault, and upon suggestive questioning, the trial court correctly concluded his testimony would not be helpful to the jury.

Next, Dr. Loftus's testimony did not fall outside the juror's common

knowledge and experience. As this Court has recognized, "jurors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation to make [a] reliability determination." *Rodriguez-Felix* at 1125. The trial court observed that unlike a case with evidence of long delay and outside influence, here, E.F. identified Harper "repeatedly and immediately after the assault she endured," and there was "a recorded 911 call of her identification along with multiple reports to first responders, medical professionals, and investigators." Therefore, it correctly found that this "situation is more akin to an 'evidentiary cornucopia' of identification where expect testimony on memory and perception is not helpful." (R. Vol. 1 at 379). (*Rodriguez-Felix* at 1126; *see also Smith* at 1053–54)(finding no abuse of discretion in excluding Dr. Loftus's testimony where there were multiple identifications and defendant changed his alibi).

Because the district court correctly found that Dr. Loftus's proposed testimony was not relevant, it did not abuse its discretion in excluding it at trial. And in any event, the error was harmless, because cross-examination of Ms. Finlay and other government witnesses addressed the concerns identified by Dr. Loftus and highlighted any arguable deficiencies in Ms. Finlay's memory. (R. Vol. 3 at 385–87; 391–92; 500–03; 509).

III. The district court did not err in allowing a nurse to testify on re-direct about the nature of memory, where Harper cross-examined her on the subject.

A. Record Reference

At trial, defense counsel cross-examined SANE nurse Kathryn Bell by asking her about the effects of trauma on memory. (R. Vol. 3 at 413–14). When counsel for the government asked follow-up questions about memory on redirect, defense counsel objected. (*Id.* at 415). The district court allowed Ms. Bell to testify based on her training, but when the defense later objected that she did not "have the expertise to make this testimony," the district court indicated it would let defense counsel "take that up on cross-exam," and gave a limiting instruction. (*Id.* at 419).

B. Standard of Review

The district court's decision to admit expert testimony is reviewed for abuse of discretion. *United States v. Brooks*, 736 F.3d 921, 929 (10th Cir. 2013). However, improper admission of expert testimony is harmless unless the error affected the defendant's substantial rights. *United States v. Turner*, 295 F.3d 909, 914 (10th Cir. 2002). Reversal is required only if, reviewing the record as a whole, "the error had a substantial influence on the outcome or leaves on in grave doubt as to whether it had such effect." *United States v. Pehrson*, 65 F.4th

526 (10th Cir. 2023).

Moreover, "where defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." *Brooks* at 933 (citations omitted). When defense counsel has opened the door, "the decision to admit or exclude rebuttal testimony remains within the trial court's sound discretion." *Id.*

C. The trial court did not abuse its discretion in allowing Ms. Bell to testify about how trauma impacts memory after defense counsel asked about it.

Although retired forensic nurse Kathryn Bell was not presented as a witness on the formation of memories during traumatic experiences, the defense's cross-examination her on the subject and Ms. Bell's training properly allowed her to give limited testimony on redirect. Notably, on direct examination, Ms. Bell testified only about the process of conducting SANE examinations of sexual abuse victims, the limitations on that testing, and her post-attack visit with Ms. Finlay. (R. Vol. 3 at 392–412). However, on cross-examination, defense counsel asked Ms. Bell if she "regularly dealt with people that have undergone just extremely traumatic events." (*Id.* at 413). When she said yes, counsel followed up by asking if "those traumatic events can have profound effects on people," such as "an effect on their memory." (*Id.* at 414). Counsel

also asked if the report indicated that "it was difficult to keep [Ms. Finlay] on topic while she was being questioned about the assault" and "that she struggled to remember some of the details." (*Id.*).

On redirect, noting that Ms. Bell had just been asked "about the effect that trauma can have on the brain," counsel for the government asked her about memory formation. The district court permitted Ms. Bell to provide limited testimony based on her training, but eventually agreed with defense counsel that her "testimony was not sufficient to qualify her as an expert." It allowed her to complete her answer, suggesting counsel could "take that up on cross-exam," and cautioned the jury that "these are opinions of a witness who does have some expertise study background and experience in these issues, but you'll weigh her testimony as you do within the instructions I give you." (*Id*. at 419). On re-cross, defense counsel confirmed that Ms. Bell was not a doctor, psychologist, or head trauma surgeon, that she did not interview Ms. Finlay about the events, and could not give an opinion about her statement. (*Id*. at 420–21).

The district court "did not abuse its discretion in allowing the government's questioning to rebut testimony [defense] counsel had elicited on cross examination." *Brooks* at 933. Specifically, counsel's cross-examination about

the effect of trauma on memory opened the door to Ms. Bell's testimony that "they type of memory that we see most often with trauma is . . . coded or developed at a point in the brain called the amygdala. . . the fight and flight part of the brain" and that "things like fear and emotional types of things can help you code that type of memory." (*Id.* at 417). As the district court observed, Ms. Bell's description of her training showed that she had some knowledge about memory formation that supported her testimony. (*Id.* at 416). Accordingly, the district court did not abuse its discretion in allowing her limited testimony on redirect, in response to defense cross-examination on the subject.

D. Any error was harmless, because cross-examination revealed the limits of Ms. Bell's testimony, and overwhelming evidence demonstrated Harper's guilt.

Even if Ms. Bell's testimony about the types of memories went beyond her expertise, Harper cannot show that testimony affected his substantial rights, for several reasons. First, Harper's counsel was able to limit any prejudice from Ms. Bell's memory testimony by cross-examining her about her qualifications to speak on the subject. (R. Vol. 3 at 420–21). Next, the district court cautioned the jury, both at the time of the testimony, and in its final jury instructions abut expert testimony. (R. Vol. 3 at 419). Specifically, the court told the jury they were "not required to accept" an expert opinion, and "should give opinion

testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial." (R. Vol. 1 at 568).

Finally, given the overwhelming evidence of his guilt, Harper cannot show that Ms. Bell's limited testimony about the nature of memory formation could have "had a substantial influence on the outcome." *United States v. Pehrson*, 65 F.4th 526, 544 (10th Cir. 2023). Pehrson challenged admission of a doctor's testimony based upon his specialized knowledge because he was not qualified as an expert. (*Id.* at 543). This Court declined to address the issue, finding that "any error was harmless," where "review show[ed] that Dr. Cox's statement added virtually nothing to the evidence otherwise before the jury."

Likewise, here, Ms. Bell's re-direct testimony could not have had a substantial effect on the outcome of the case, because it added virtually nothing to the evidence otherwise before the jury. Before Ms. Bell's testimony, the jury heard Ms. Finlay's 911 call. (R. Vol. 3 at 117–18). They heard testimony from police officers who responded to Ms. Finlay's house after her 911 call. (R. Vol. 3 at 118–167). They saw body-cam video of the officers' arrival on the scene, including Ms. Finlay's "horrible injuries." (*Id.* at 121, 124). They saw dozens of pictures of the crime scene. (*Id.* at 146–47).

Next, the jury heard testimony from multiple neighbors who encountered Harper in their neighborhood in the days before and hours after the attack. (*Id.* at 173–221; 278–324). Those neighbors described seeing Harper wearing a "robe" or "gown" the evening of the attack. (*Id.* at 280–81; 294, 317). The jury heard that Harper showed up at a neighbor's house around 6 p.m. that night, looking "nervous" and "sweating," telling them he "needed a shower," "his clothes washed," "a driver and a set of keys cut." (*Id.* at 318). He had keys in his hand. (*Id.*). At the neighbors' house, Harper borrowed a trimmer, showered, and shaved his head and his face, changing his appearance. (*Id.* at 318–19). He stayed for a few hours, until a neighbor noted that he was "acting like he did something, like he's guilty of something," and made her husband make Harper leave. (*Id.* at 319–20). The next day, the neighbor found two bags in his truck, and a bag with the "gown," and the electric razor in a bag in his trash can. (*Id.* at 300; 305). The bag with the "robe" also contained a set of keys; Ms. Finlay later identified the keys as hers and the "robe" as her raincoat. (377–79, 491, 495). The bags found in the neighbor's truck contained Harper's social security card and Ms. Finlay's business card. (*Id.* at 372–74).

After Ms. Bell's redirect testimony, and all the evidence placing Harper in the neighborhood and linking him to Ms. Finlay's house, the jury heard from

Ms. Finlay herself. She described her prior acquaintance with Harper, the many tasks she found for him to do inside her house, and the substantial conversations they had. (R. Vol. 3 at 466–68). She related a dispute they had when Harper failed to return to finish a job as he had promised, and how angry Harper became, "storm[ing] out." (*Id.* at 469–471). Ms. Finlay then described the events of May 4, starting from letting Harper in to use her bathroom through the assault and ending with her 911 call and hospitalization. (*Id.* at 474–489). Although she acknowledged that she was "unsure of some of the chronology," Ms. Finlay testified that her memories from those four hours were "absolutely imprinted on her mind." (*Id.* at 477). She described the assault in detail, beginning with Harper making a noose with a cord, wrapping it around her neck, and dragging her around the house like an animal. (*Id.* at 476).

Ms. Finlay then described what happened in the bathroom, again noting that she was "not comfortable being, you know, absolutely precise about the chronology." (*Id.* at 480). She testified that Harper raped her with his fingers, and specifically that she felt her "vagina being penetrated and [her] anus being penetrated." (*Id.* at 482). After that, Ms. Finlay testified, Harper dropped her on her head at the threshold between the bathroom and her bedroom. (*Id.* at

483). Acknowledging that she wasn't sure about the details "about this point," she testified that she "kept screaming to him to call 911," and asked for his help to get on the bed. (*Id.* at 484). She described Harper "ransacking" her house looking for valuables and telling him to take her car keys and go. (*Id.* at 485–86).

While cross-examining Ms. Finlay, defense counsel highlighted that "this was obviously a very traumatic incident and ordeal" for her and noted that she sustained "a very serious blow to [her] head." (*Id*. at 500). Counsel asked if she was "afraid that [she] might have a brain injury," and confirmed she had a serious laceration to her forehead with blood running down her face. (*Id*. at 501). Ms. Finlay clarified that she "did not have blood rolling down [her] face when he first showed up at [her] house and started hitting [her]." (*Id*.). Counsel also questioned Ms. Finlay about her initial description of Harper as being in his early 20's; she responded that her perception was "that he was a young man." (*Id*. at 503). Ms. Finlay admitted that her memory of being in the ER was "very, very hazy." (*Id*. at 509).

On redirect, Ms. Finlay clarified that most of the assaults happened before she was dropped on her head. (*Id.* at 510). Without equivocation, she told the jury that "The man who introduced himself to [her] as Elga Harper is the man

who attacked me." (*Id.*).

Given the ample opportunity the jury had to observe Ms. Finlay's testimony, her repeated identifications of Harper as her assailant, the strong circumstantial evidence linking Harper to the crime, and his counsel's ability to cross-examine Ms. Finlay about her memory of the assault, Harper cannot show that Ms. Bell's limited testimony about the formation of memory during traumatic events substantially influenced the outcome of his trial. Any error in allowing the testimony on redirect, in response to defense counsel's questions on memory formation during cross-examination, was harmless.

IV. The district court did not commit plain error in using the Tenth Circuit's pattern jury instructions on kidnapping.

A. Record Reference

Harper proposed a kidnapping instruction that would have amended the Tenth Circuit pattern instruction with factors identified in a Third Circuit case that have never been adopted by this Court. (R. Vol. 1 at 404–05). The trial court declined to add that language, finding it was "lengthy and confusing" and "qualifie[d] the definition of a kidnapping unnecessarily." Observing that the Tenth Circuit had never adopted that type of language, the court rejected the language as "not supported by law." (*Id.* at 624–25). Instead, it gave the

Tenth Circuit pattern instruction, modified to include Indian Country jurisdictional elements that Harper had proposed. (R. Vol. 1 at 404, 572).

B. Standard of Review

This Court reviews "the jury instructions de novo and view[s] them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Freeman*, 70 F.4th 1265, 1278 (10th Cir. 2023).

C. The kidnapping instruction correctly reflected Tenth Circuit law.

The district court did not err by instructing the jury on the elements of kidnapping under Tenth Circuit law and declining to add a test adopted by the Third Circuit and rejected by other courts. Generally, to convict a defendant of kidnapping, the government must prove that (1) the defendant, knowingly acting contrary to law, seized, confined, or held the victim against their will; "(2) for some purpose or benefit, (3) voluntarily and with the intent to violate the law; and (4) using an instrumentality of interstate commerce." *United States v. Nelson*, 801 F. App'x 652, 664 (10th Cir. Mar. 20, 2020) (citing Tenth Circuit Pattern Jury Instructions (Criminal) 2.55 (2018) and *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998)). Here, the trial court instructed the jury

based on the 2021 version of Pattern[1] Instruction 2.55, substituting the elements of Indian Country jurisdiction for the interstate commerce element:

> The defendant is charged with a violation of 18 U.S.C. §§ 1151, 1153, 1201(a)(2).
>
> This law makes it a crime for an Indian person, within Indian country, to unlawfully kidnap another person.
>
> To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> > **First:** The defendant, knowingly acting contrary to law, kidnapped E.F. by seizing and confining her as charged in the Indictment;
> >
> > **Second:** The defendant kidnapped E.F. and held her for ransom, reward, or some other purpose or benefit;
> >
> > **Third:** The defendant is an Indian person; and
> >
> > **Fourth:** The defendant kidnapped E.F. within Indian Country within the Northern District of Oklahoma.
>
> To "kidnap" a person means to unlawfully hold, keep, detain, or confine the person against that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.

(R. Vol. 1 at 572). The trial court did not err because its instruction correctly

[1] Although model pattern instructions may offer valuable guidance on how to articulate the elements of an offense, they are not binding. *Freeman*, 70 F.4th at 1280 & n.13.

stated the elements of the offense of kidnapping in Indian Country.

Harper asks this Court to alter Tenth Circuit law to add an element requiring the government to prove that the victim's confinement was more than incidental to the commission of other crimes. In *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 228 (3d Cir. 1979), the Third Circuit adopted this requirement from state courts' interpretation of state kidnapping statutes, identifying "a four-factor test for distinguishing crimes for which kidnapping charges are justified from those where they are not." *United States v. Gabaldon*, 389 F.3d 1090, 1096 (10th Cir. 2004). Harper is simply wrong that *Gabaldon* required the district court to instruct the jury in this case on the "more than incidental" requirement or the four-factor *Berry* test. Rather, *Gabaldon* explicitly recognized that this Court "has yet to take a position either adopting or rejecting the *Berry* test," and that the test "has not been widely adopted by other Circuits." *Id.* at 1097; *citing United States v. Jones*, 808 F.2d 561, 565–66 (7th Cir. 1986) (rejecting as "wholly irrelevant" the argument that an interstate kidnapping was merely incidental to the interstate transportation of a woman for an "immoral purpose" in violation of the Mann Act, on the grounds that kidnapping and Mann Act offenses were "distinct and separately punishable"); *United States v. Lowe*, 145 F.3d 45, 52 (1st Cir. 1998) (same); *see also United*

States v. Baker, 419 F.2d 83, 83, 89 (2d Cir. 1969). As the Seventh Circuit explained, the "federal kidnapping statute, apparently unlike some of its state counterparts, is broadly construed." *Jones*, *citing United States v. Healy*, 376 U.S. 75, 81 (1964) (remanding to district court to reinstate charge under § 1201). *Berry* misunderstands the language of § 1201, which provides "no support" for an argument that a kidnapping charge merges with underlying offenses. *Baker* at 89 ("That the ultimate purpose sought to be furthered by a kidnaping (*sic*) is theft in no way precludes conviction under" § 1201, "which require[s] only that the victim be transported in interstate commerce and 'held for ransom or reward or otherwise.'") Here, as in *Lowe*, *Baker*, and *Jones*, Harper's kidnapping charge is separate and distinct from the other charged offenses, which have different underlying congressional purposes. *Lowe* at 52. Therefore, it "is irrelevant that the kidnapping many have been incidental to the [assault] offense[s] so long as the government proved the elements of the kidnapping charge." *Id.* Because this Court has not adopted the *Berry* test and because that test imports an irrelevant consideration to the analysis of kidnapping, the district court did not err in failing to add Harper's proposed language to this Court's pattern kidnapping instruction.

In any event, as in *Gabaldon*, this Court may affirm without either adopting

or rejecting the *Berry* test, because the evidence clearly established kidnapping as a separate crime. It demonstrated that Harper held Ms. Finlay for four hours, longer than was necessary to assault and sexually abuse her, and that he tied her up with a cord to prevent her from getting away from him. These facts allowed a reasonable jury to conclude beyond a reasonable doubt that "her confinement was not merely an inconsequential and inherent side effect of" the assaults. *See Gabaldon* at 1090 and *United States v. Cassidy*, 571 F.2d 534, 537 (10th Cir. 1978) (although defendant had seized guards to further his escape attempt, ten-hour detention undermined claim that seizure was an incidental part of the attempted escape). Accordingly, even if the district court erred in declining to adopt the Third Circuit's *Berry* test, that error was harmless.

Conclusion

For all the reasons set forth above, this Court should affirm Harper's convictions.

Statement Regarding Oral Argument

The United States does not request oral argument.

Respectfully submitted,
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Certificate of Service

I certify that on April 8, 2024, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing, which will send notification of that filing to the following ECF registrant:

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