APPENDIX 1

NOT FOR PUBLICATION

FILED

MAR 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	No. 18-10156 D.C. No. 4:16-cr-01704-RM-LAB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Rosemary Marquez, District Judge, Presiding

Submitted March 3, 2020**
Phoenix, Arizona

Before: HAWKINS, OWENS, and BENNETT, Circuit Judges.

Travon Jarvel Jackson appeals his jury conviction for one count of sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. § 1591(a)(1), (a)(2), and (b)(1); and one count of interstate transportation for prostitution, in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 18 U.S.C. § 2421(a). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not abuse its discretion in excluding evidence of the victim's (V.C.) other acts of prostitution. Federal Rule of Evidence 412 generally prohibits the admission of "evidence offered to prove that a victim engaged in other sexual behavior" in civil or criminal proceedings involving alleged sexual misconduct, including in sex trafficking cases. *See United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019). Jackson argues that one of the exceptions to Rule 412 applies because the exclusion of V.C.'s other acts of prostitution violated his Sixth Amendment confrontation rights. *See* Fed. R. Evid. 412(b)(1)(C). We disagree.

Evidence of other acts of prostitution is irrelevant to whether Jackson used force, fraud, or coercion to cause V.C. to engage in commercial sex acts. 18 U.S.C. § 1591(a); *Haines*, 918 F.3d at 697–98. Additionally, the district court acted within its discretion in excluding under Federal Rules of Evidence 403 and 412 evidence of V.C.'s lie to an investigating officer about her prior prostitution activities. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (discussing a trial judge's "wide latitude" in "impos[ing] reasonable limits on . . . cross-examination"). Finally, the district court did not abuse its discretion in ruling that

the government had not opened the door to V.C.'s other acts of prostitution because the evidence was not necessary to "rebut any false impression." *United States v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) (emphasis omitted). The district court acted within its discretion in concluding that even if the government opened the door, evidence of V.C.'s other prostitution activities would be more prejudicial than probative and should be excluded under Rule 412. *See S.M. v. J.K.*, 262 F.3d 914, 920 (9th Cir. 2001), *amended by* 315 F.3d 1058 (9th Cir. 2003).

2. The prosecutor did not engage in misconduct and deny Jackson a fair trial. The prosecutor did not impermissibly vouch when she stated that the law enforcement officers in the case "have experience interviewing people, judging their credibility, [and] making sure things match up." *See United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (discussing when a prosecutor impermissibly vouches). The statements were supported by law enforcement officers' testimony at trial and were responsive to defense counsel's argument that the officers took what V.C. said as "golden" and failed to obtain corroborating evidence.

Jackson also argues that the prosecutor impermissibly referenced that there was scant evidence of V.C.'s untruthfulness after successfully excluding V.C.'s lie to law enforcement. Assuming without deciding the prosecutor's argument was

improper, it was an invited response to the defense's inaccurate argument that "there were several things that just weren't true" in V.C.'s interview with law enforcement. *See United States v. Nobari*, 574 F.3d 1065, 1078–79 (9th Cir. 2009).

Further, Jackson's argument that the government committed prosecutorial misconduct by misstating the law on venue is without merit. *See United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015) (holding that misstating the law to the jury is prosecutorial misconduct). The government correctly stated the law when the prosecutor argued that the jury only needed to find Jackson harbored or transported V.C. for prostitution at "some point" between the dates given. *See* Model Crim. Jury Instr. 9th Cir. 3.20 (2010)[1]; *see also United States v. Loya*, 807 F.2d 1483, 1493–94 (9th Cir. 1987).

3. The district court did not plainly err by failing to give a venue instruction *sua sponte*. Jackson never contested venue before the district court, nor did he request a specific venue instruction. Venue was proper in Arizona because all the "essential conduct element[s]" occurred there. *United States v. Sullivan*, 797 F.3d 623, 631 (9th Cir. 2015) (internal quotation marks and citation omitted);

[1] At the time of the trial, the Ninth Circuit "on or about" instruction was numbered as 3.20, but since then, the committee renumbered this instruction to 3.18. *See* Manual of Model Criminal Jury Instructions, http://www3.ce9.uscourts.gov/jury-instructions/model-criminal (stating that 3.20 was renumbered in June 2018 to 3.18).

see also 18 U.S.C. § 3237(a).

4. Finally, the district court did not err in its jury instructions on the interstate transportation for prostitution count, 18 U.S.C. § 2421. Jackson argues the jury instruction should have required that the jury find that Jackson's dominant purpose of the transportation was for prostitution. The given jury instruction was consistent with the statute of the offense and this court's model instruction, *id.*; Model Crim. Jury Instr. 9th Cir. 8.191 (2010), and therefore was an accurate description of the elements of the statute and was sufficient to guide the jury's deliberation, *see United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008).

AFFIRMED.

APPENDIX 2

FILED

MAR 17 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	No. 18-10156 D.C. No. 4:16-cr-01704-RM-LAB-1 District of Arizona, Tucson ORDER

Before: HAWKINS, OWENS, and BENNETT, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing.

Appellant's petition for panel rehearing is DENIED.

APPENDIX 3

CA NO. 18-10156

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	(D.Ct. 4:16-cr-01704-RM)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HONORABLE ROSEMARY MARQUEZ
United States District Judge

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CA NO. 18-10156

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	(D.Ct. 4:16-cr-01704-RM)

APPELLANT'S OPENING BRIEF

I.
STATEMENT OF JURISDICTION

This appeal is from a judgment of conviction for sex trafficking, in violation of 18 U.S.C. § 1591(a)(1), and transportation for prostitution, in violation of 18 U.S.C. § 2421. This Court has jurisdiction under 28 U.S.C. § 1291. The appeal is timely because judgment was entered on April 24, 2018, *see* ER 2-7, and a notice of appeal was filed on April 26, 2018, *see* ER 1.

* * *

II.

STATEMENT OF ISSUES PRESENTED

A. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF AN ALLEGED SEX TRAFFICKING VICTIM'S OTHER PROSTITUTION?

1. Did the District Court Make an Error of Law and Therefore Abuse Its Discretion in Finding a Lie About the Other Prostitution During the Investigation Was Governed by Rule 608(b)?

2. Did the District Court Make an Error of Law and Therefore Abuse Its Discretion in Interpreting the Open the Door Rule to Require Testimony Directly in Conflict with the Truth?

3. Should Cross Examination About Prior Prostitution Have Been Allowed to Rebut a Sex Trafficking Fraud Theory?

B. DID THE PROSECUTOR ENGAGE IN MISCONDUCT WHICH DENIED MR. JACKSON A FAIR TRIAL WHEN SHE ARGUED THERE WAS NO EVIDENCE THE ALLEGED VICTIM HAD LIED TO THE INVESTIGATING OFFICERS AND "THESE ARE LAW ENFORCEMENT OFFICERS [WHO] HAVE EXPERIENCE INTERVIEWING PEOPLE, JUDGING THEIR CREDIBILITY, MAKING SURE THINGS MATCH UP?"

1. Was It Impermissible Prosecutorial Vouching to Argue "These Are Law Enforcement Officers [Who] Have Experience Interviewing People, Judging Their Credibility, Making Sure Things Match Up?"

2. Was It Prosecutorial Misconduct for the Prosecutor to Argue There Was No Evidence the Alleged Victim Had Lied When the Prosecutor Knew the Alleged Victim Had Lied About Prior Prostitution and That Lie Was Not in

Evidence Only Because the Prosecutor Had Successfully Excluded It?

C. WAS A DISTRICT COURT FAILURE TO INSTRUCT ON VENUE COMBINED WITH A PROSECUTOR ARGUMENT THE JURY COULD FIND SEX TRAFFICKING AT ANY TIME DURING MR. JACKSON'S AND THE ALLEGED VICTIM'S ASSOCIATION, WHEN MR. JACKSON AND THE ALLEGED VICTIM WERE IN FLORIDA MOST OF THAT TIME, ERROR WHICH PREJUDICED MR. JACKSON?

1. Was the District Court's Failure to Give a Venue Instruction Error – and Even Plain Error in Light of the Prosecutor's Argument Suggesting the Sex Trafficking Offense Could Have Been Committed Even When Mr. Jackson and the Alleged Victim Were in Florida?

2. Was the Prosecutor's Argument Misconduct in the Form of a Misstatement of the Law, and Does That Misconduct Independently Require Reversal?

D. DID THE DISTRICT COURT ERR IN INSTRUCTIONS ON THE 18 U.S.C. § 2421 CHARGE WHEN IT INSTRUCTED ONLY THAT MR. JACKSON MUST HAVE TRANSPORTED THE ALLEGED VICTIM WITH INTENT SHE ENGAGE IN PROSTITUTION WITHOUT ALSO INSTRUCTING THAT PROSTITUTING THE ALLEGED VICTIM MUST HAVE BEEN A DOMINANT PURPOSE OF THE TRANSPORTATION?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provisions are included in a Statutory Appendix.

III.

BAIL STATUS OF DEFENDANT

Mr. Jackson is presently in custody. His projected release date is September 9, 2029.

IV.

STATEMENT OF CASE

A. ARREST AND INDICTMENT.

On August 4, 2016, the International Rescue Mission in Tucson, Arizona received a call from a sex trafficking hotline asking it to help a woman who had called the hotline from a hotel. *See* RT(9/7/17) 67-69, 74-75. An International Rescue Mission case manager went to the hotel to pick up the woman – who was the alleged victim in this case, V.C. *See* RT(9/7/17) 69-70. After detectives interviewed V.C., she was taken to a hospital, *see* RT(9/7/17) 71-72, and from there she went to a Gospel Outreach Shelter, *see* RT(9/6/17) 100.

Police arrested Mr. Jackson, *see* RT(9/8/17) 62, and he was eventually indicted in federal court, *see* ER 363-65. He was charged with sex trafficking, in violation of 18 U.S.C. § 1591(a)(1); interstate transportation for prostitution, in violation of 18 U.S.C. § 2421; and kidnapping, in violation of 18 U.S.C. § 1201(a). *See* ER 363-65.

B. RULE 412 MOTION.

Prior to trial, the defense filed a motion pursuant to Rule 412 of the Federal Rules of Evidence to introduce evidence of other prostitution. The motion noted V.C. had told a Tucson detective she had worked as a cosmetologist for 26 years and had never before engaged in prostitution. *See* CR 57, at 5; *see also* ER 387 (partial transcript of interview). The defense proffered three pieces of evidence suggesting this was a lie. The first piece of evidence was a set of reports showing V.C. had been arrested for prostitution in 1990. *See* ER 497-505. The second piece of evidence was a set of text messages dated May 4, 2016 – two weeks before V.C. met Mr. Jackson – suggesting she had been engaging in prostitution then. *See* ER 440, 495. The third piece of evidence was a set of advertisements V.C. had posted on a website called backpage.com after returning to her home in Florida, offering services as an "escort." *See* ER 507-16. At a later offer of proof hearing, V.C. admitted what this evidence suggested, namely, that she had "been involved in prostitution at least as far back as" 1990, ER 393, and she was performing acts of prostitution when she was advertising herself as an escort on the backpage website, ER 401. Further, she had engaged in other prostitution entirely on her own, without a pimp. *See* ER 399.

The defense argued that V.C.'s lie to the police supported a theory V.C. had fabricated her claims and that exclusion would violate Mr. Jackson's right to confront witnesses. *See* CR 57. The government argued the evidence should be excluded. *See* CR 69. The district court held extrinsic evidence of the prior lie was inadmissible under Rule 608(b) of the Federal Rules of Evidence, though it might become admissible if the government opened the door. *See* ER 432-34. In recognition of that possibility, it indicated the defense could renew the motion

"depending upon the nature of the testimony and evidence presented at trial." ER 434.

C. TRIAL.

1. The Government's Case.

a. The prosecutor's opening statement.

The prosecutor told the jury in her opening statement that V.C. met Mr. Jackson when V.C. responded to a "bikini maid" ad in Tampa, Florida, where she lived, at a time when she was desperate for money. *See* ER 342. The prosecutor claimed V.C. didn't expect to engage in prostitution and progressed to "body rubs and massages" and prostitution only when she "did not make a whole lot of money as a Bikini Maid." ER 343.

The prosecutor explained things became worse for V.C. when she was kicked out of her apartment after her daughter broke the apartment windows and was placed in foster care. *See* ER 343-44. Without the apartment, V.C. provided body rubs and prostitution in a business suite Mr. Jackson rented and then in hotel rooms he rented for her. *See* ER 344-46. Mr. Jackson also "came in like a hero" and put V.C.'s property in storage, ER 344, and allegedly "convinced" V.C. to designate Mr. Jackson as payee for her Social Security disability checks, ER 345. The prosecutor also claimed Mr. Jackson started providing V.C. with cocaine because "it helped her deal with it, it made her numb." ER 347.

The prosecutor then described an attempted robbery by one of V.C.'s customers. The customer held V.C. at gunpoint and demanded money, but V.C.

could not give him money because Mr. Jackson kept the money. ER 347-48. V.C. jumped out of a bathroom window to escape and hurt her back and neck. ER 348. She needed a brace and medication for the injury, but Mr. Jackson allegedly made her continue with prostitution anyway. *See* ER 348.

The customer was subsequently arrested and V.C. was scheduled to appear for court proceedings. *See* ER 348. The prosecutor claimed Mr. Jackson worried this would reveal him as V.C.'s pimp and made a plan to take V.C. to Arizona. *See* ER 348. The prosecutor claimed V.C. did not want to go to Arizona, but Mr. Jackson simply drove out of Florida one day and on to Arizona. *See* ER 348-49. When they got to Tucson, they visited a friend of Mr. Jackson's and Mr. Jackson started renting hotel rooms for prostitution in Tucson. ER 349-50. Mr. Jackson allegedly kept V.C.'s back brace in the trunk of his car because customers would not like a prostitute with a back brace. *See* ER 350.

The prosecutor went on to state V.C. stopped responding to customers' calls one night and described Mr. Jackson as "livid" and going on a "text tirade." ER 351. The prosecutor claimed V.C. remembered a billboard she had seen about sex trafficking, Googled on her phone, and called a sex trafficking hotline. *See* ER 352.

b. V.C.'s testimony.

V.C. began her testimony by explaining she had lived in Tampa, Florida, her whole life, she worked as a hairstylist "off and on" and that was her "current profession," and she had two children. ER 118-19. She explained she was on Social Security mental health disability and the Social Security Administration used to require a payee manage her money, but she was now her own payee. *See*

ER 119-20. The prosecutor summed up with the question, "So it sounds like things have gotten a little better for you recently," to which V.C. replied, Yes." ER 120.

V.C. then went through the story outlined by the prosecutor, with several qualifications. She explained she was having a hard time making ends meet because her Social Security payee, who was her adult son, was not giving her any of the money or paying her bills. *See* ER 121-22. She saw the bikini maid ad, responded, and met Mr. Jackson. ER 123-24. He told her she was too old to be just a bikini maid and would have to do body rubs. ER 125. She added matter-of-factly that "[m]ost of the men wanted more, so I had to give more," ER 128, meaning "sexual acts in many different types and forms," ER 129. Mr. Jackson "synced" their phones so he would know when she got a call[1] and not be cheated out of his share of the money, ER 127, which they divided 40%-60%, ER 125-26.

V.C. then described the incident with her daughter. Her daughter had stolen some money from her, they had gotten into a fight, and the daughter broke all of the apartment windows. ER 130-31. V.C.'s daughter was taken away and the man who was subleasing the apartment to V.C. told V.C. she had 48 hours to fix the windows or get out. ER 131. V.C. called Mr. Jackson, and he came over, told her to "pack [her] stuff," started packing things himself, and took her property to a storage unit whose location V.C. did not know. ER 131-32. V.C. also made Mr. Jackson the payee for her Social Security checks because her son was not using the money for her. *See* ER 166.

V.C. next described prostituting at the business suite Mr. Jackson was

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[1] Later testimony revealed this was an application called "Google Voice," which forwards calls and texts made to a Google voice number to multiple phones. *See* RT(9/7/17) 156-66, 190-91.

renting and subsequently in hotel rooms he rented for her in various Florida cities. *See* ER 133-37. Mr. Jackson used the money from V.C.'s Social Security to pay for the hotels. ER 167. He also started keeping all of the money from the prostitution, explaining V.C. "spent money recklessly and that [V.C.] needed to save money if [V.C.] was going to get an apartment to get [her] daughter back." ER 133-34. V.C. agreed because she "didn't have anywhere to go" and "was not doing so good mentally." ER 134. Their phones remained "synced" so Mr. Jackson knew when a customer contacted V.C. and could come collect the money after the customer left. *See* ER 139-40.

V.C. also testified Mr. Jackson supplied her with cocaine. V.C. admitted Mr. Jackson "was not really physical with [her], but "it was his mouth" and it "really, really broke me down." ER 147.[2] She testified he gave her cocaine to try to cheer her up and "deal with the clients, and just kind of, like, make me numb." ER 148.

V.C. also testified about the attempted robbery. She testified the client tried to rob her with a gun, she had no money to give him, and so she jumped out the bathroom window. *See* ER 143-45. She fell and "broke [her] back." ER 145. She was taken to a hospital, where she stayed several days and was discharged with medication, a back brace, and a neck splint. *See* ER 149-50.

After the injury, Mr. Jackson had V.C. try to make money by selling "fire sticks," ER 150-51, which are devices to download movies or music without paying for cable, *see* ER 135. V.C. did not make money at this, and Mr. Jackson told her they were "broke" and "have to do something," so she started prostituting

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[2] The prosecutor claimed in pretrial motions that Mr. Jackson had sexually and physically assaulted V.C., *see, e.g.*, CR 95, at 2, but V.C. made no such claim in her actual testimony.

again. ER 150-51. She claimed she asked him to just take her to a shelter, but he refused, made her start working again, and continued to keep the money. *See* ER 151-52. She also claimed he would not let her wear her back brace and neck splint, but kept them in the trunk of his car. *See* ER 152-53.

V.C. then testified, "Next thing I know, he tells me 'going to Arizona.'" ER 154. She claimed he knew she had a court date related to the attempted robbery coming up, *see* ER 154, she was in the car with Mr. Jackson, and "the next thing I know, we're on our way to Arizona." ER 156. V.C. did not provide the exact date on which they left for Arizona, but receipts introduced through the Department of Homeland Security case agent showed hotel rooms rented in Florida through at least July 28, *see* RT(9/7/17) 123-24.

When Mr. Jackson and V.C. arrived in Tucson, they went to the house of a friend of Mr. Jackson named Malachi. ER 158-59. They "hung out there for a while getting high," Mr. Jackson posted an "outcall" ad, and Mr. Jackson used the money from an "outcall" to rent a hotel room for prostitution.[3] ER 159-62. Mr. Jackson collected the money as before and provided V.C. with a prepaid Visa credit card to buy food. *See* ER 162-63.

V.C. claimed she finally told Mr. Jackson, "I can't do this any more," but he sent her texts saying things like "you cannot quit now," "We've come too too far," "If I lose, you lose," and "What about your daughter?" ER 164. She claimed she fell asleep that night and did not answer any customer calls, which led to angry texts in the morning. *See* ER 164-65. She claimed she decided to call the sex trafficking hotline when Mr. Jackson sent her a text saying, "Well, I'm coming over right now and take care of this." ER 165.

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[3] An "outcall" is prostitution at the customer's location. *See* ER 162-63.

At the end of V.C.'s story, the prosecutor returned to the topic of V.C.'s present circumstances with which she had begun the direct examination. V.C. again testified she had a job cutting hair, had gotten an apartment, and had gotten custody of her daughter back. *See* ER 173-74.

2. Renewal of Rule 412 Motion.

The defense renewed the Rule 412 motion after V.C.'s testimony, arguing it and the prosecutor's opening statement opened the door in multiple ways. *See* ER 412-13. This included the suggestion in the opening statement that V.C. naively believed bikini maid work would not lead to prostitution, the suggestion in the opening statement and V.C.'s testimony that V.C. could continue with the prostitution only by using cocaine to make her numb, and V.C.'s portrayal of reform after returning to Florida. *See* ER 412-13. The district court did express concern about the jury having been misled, *see* ER 389-90, 417, 419-21, 425, but ultimately denied the motion on the ground the testimony was "technically correct," ER 390.

3. The Defense.

The defense challenged parts of V.C.'s testimony and suggested alternative interpretations of testimony it did not challenge. On cross examination, the defense elicited evidence suggesting V.C. was not under duress in Arizona. This included evidence of calls she had made to an aunt and a friend in Florida, speaking to the friend for 39 minutes, *see* ER 238, and speaking with the aunt on the phone and exchanging texts about the aunt's dog, *see* ER 238, 282, which V.C.

described as "so cute," ER 282. It also included photographs taken during the drive from Florida to Arizona. *See* ER 246-52. V.C. claimed she took these photographs as "landmarks" because "I thought he was going to kill me or do something to me," ER 310, but the photographs did not show any locations, *see* Def. Exs. 490-500.

The defense also elicited admissions suggesting V.C. had a reason to return to Florida and had explored returning on her own. She admitted her daughter had asked her to be present for the daughter's high school graduation on August 23 and that she had searched the Internet for airfare and bus tickets to Florida shortly before calling the sex trafficking hotline. *See* ER 269-70. She claimed she did not find out about the graduation until after calling the hotline, but her phone showed several phone calls with her daughter before that. *See* ER 290.

There was also evidence suggesting V.C. could have left or gotten help if she wanted to. There were texts suggesting periods V.C. was alone without Mr. Jackson, including a text about a flash flood that appeared to be preventing Mr. Jackson from traveling, *see* ER 276-77, and a text from V.C. saying she "had a 9:00 o'clock" and was "going to the store now," ER 277. Mr. Jackson's friend, Joel Malachi Wilson, testified about times V.C. and Mr. Jackson were apart, including Mr. Jackson's return after dropping V.C. off at a hotel one night, Mr. Jackson spending 80% to 90% of his time with Mr. Wilson, and the two men planning a night in Scottsdale without V.C. *See* RT(9/8/17) 52-53, 55, 56-57. Mr. Wilson also described V.C. and Mr. Jackson staying at his house the first night, saying they had drunk, eaten, and smoked "herb," and everyone, including V.C., was "smiling and laughing." RT(9/8/17) 41. *See also* RT(9/8/17) 52 (testimony that "everybody was all smiles and grins, you know").

The defense attorney who gave the closing argument discussed both this

evidence and alternative interpretations of other evidence. He noted there was no hint of coercion when V.C. responded to the bikini maid ad and started engaging in prostitution in her apartment. *See* ER 39-40, 41, 52. He suggested Mr. Jackson was trying to help V.C. when he took her belongings to the storage unit and agreed to become her Social Security payee, noting V.C. had no place else to store her possessions and her prior payee, the son, was withholding the money. *See* ER 40-41, 42, 51. He suggested Mr. Jackson was managing the money for V.C. by using it to pay for the hotel rooms and provide her with food. *See* ER 43. He suggested Mr. Jackson could have left the back brace in the storage unit if he did not want V.C. to have it. *See* ER 46.

Mr. Jackson's attorney also pointed to evidence suggesting V.C. went to Arizona voluntarily. He characterized the photographs as "picture[s] of a road trip," and pointed out there was nothing in them that would make them useful as the "landmarks" V.C. claimed they were. ER 44. He also pointed to Mr. Wilson's testimony that V.C. did not act like she was under duress and was often alone. *See* ER 46-47, 51-52. Finally, he suggested V.C. called the hotline because she was homesick and wanted to come home, perhaps because of the calls with her daughter. *See* ER 57-58.

4. Objectionable Prosecutorial Argument.

With the evidence of V.C.'s lie to the Tucson detective about prior prostitution excluded, the only lie to which the defense could point in closing argument was a much less significant lie – a lie that V.C. had lost her apartment because the sublessor wanted to move back in rather than because her daughter broke the windows. *See* ER 45. The prosecutor responded to this in two ways in

her rebuttal argument. First, she dismissed it as a minor lie deserving of no weight, by sarcastically responding, "Oh, well, she didn't she tell him – she told him that the person she was subleasing for wanted the apartment back, and she did not mention the incident with her daughter." ER 72. Second, she prefaced that response with a rhetorical question,"What evidence did you hear about things that were not true?" ER 71-72. She asked this knowing she had succeeded in excluding evidence of the far more significant lie about prior prostitution.

The prosecutor also suggested the jury should believe V.C. because the officers did. She argued "these are law enforcement officers [who] have experience interviewing people, judging their credibility, making sure things match up." ER 64. She then listed both the Tucson Police Department and Department of Homeland Security – and added the International Rescue Committee which picked V.C. up and the Gospel Rescue Mission where V.C. subsequently stayed. *See* ER 64-65 ("So again the defense wants you to believe that this woman who was down and out, ninth grade education, was able to pull the wool over Tucson Police Department, Homeland Security, Gospel Rescue Mission, International Rescue Committee, pull the wool over everyone's eyes all to get a bus ticket back to Florida.")

Finally, the prosecutor argued the jury could convict for any sex trafficking of V.C. at any time – and apparently in any state. Despite the prosecution being in Arizona and the vast majority of the activity V.C. testified about being in Florida, the prosecutor argued:

> You don't even have to find that everyday [sic] between May 26th and August 4th [Mr. Jackson] did these things. It is enough that at some point during that time frame he harbored her or transported her or provided her up for prostitution.

ER 68. There was no acknowledgment the conduct had to have taken place in Arizona, as required by constitutional and statutory venue limitations.

D. VERDICT.

The jury did not completely reject the defense argument. It did return a verdict of guilty on the sex trafficking and interstate transportation for prostitution charges. *See* RT(9/11/17) 92-93. But it returned a verdict of not guilty on the kidnapping charge. *See* RT(9/11/17) 93.

V.

SUMMARY OF ARGUMENT

Multiple errors require reversal of Mr. Jackson's convictions. The first was evidentiary error in the district court's exclusion of evidence of V.C.'s other prostitution activity. While Rule 412 creates a general rule that evidence of an alleged victim's prior sexual conduct is inadmissible, there is an exception where admission of the evidence is necessary to protect a defendant's right to confront witnesses. This exception was triggered here for three reasons. First, V.C.'s lie to the investigating detective about prior prostitution activity raised doubt about her truthfulness in the investigation of this very case. Second, the prosecutor's portrayal of V.C. in her opening statement and V.C.'s portrayal of herself in her testimony created a misleading impression which opened the door to the truth. Third, evidence of V.C.'s prior prostitution would have rebutted a fraud theory argued by the government.

While a district court has discretion in applying Rule 412, an error of law is by definition an abuse of discretion, and the district court made two errors of law here. The first of those errors was in applying Rule 608(b) of the Federal Rules of Evidence to V.C.'s lie to the investigating detective. That rule applies only to

evidence offered to show a general character for untruthfulness unrelated to the charge being tried, and the lie here was made during the very investigation which led to the charge. The district court also erred by ruling the prosecutor and V.C. had not opened the door because their testimony was "technically correct," even though it was misleading. The test under this Court's case law is not whether the testimony is "technically correct," but whether it is "potentially misleading."

The district court's Rule 412 exclusion was also error because one of the prosecutor's theories was a fraud theory that V.C.'s prior prostitution experience would have rebutted. The prosecutor argued Mr. Jackson tricked V.C. by making her think working with him was the only way she would get money to get back on her feet and get her daughter back. This might have seemed plausible to a jury with no knowledge of V.C.'s prior prostitution experience. It would have seemed far less plausible had the jury known V.C. had previously worked as a prostitute on her own, with no pimp at all.

The district court's exclusion of the prior prostitution evidence was aggravated by improper prosecutorial argument which transformed the Rule 412 exclusion from a shield into a sword, and this argument was independent reversible error. The prosecutor's argument there was no significant evidence of lies was improper because the prosecutor knew there was a highly significant lie about prior prostitution activity that was not in evidence only because she had successfully excluded it. The prosecutor also engaged in impermissible vouching when she argued "these are law enforcement officers [who] have experience interviewing people, judging their credibility, making sure things match up." This was improper vouching both because it suggested the law enforcement officers actually believed V.C., when there was no actual testimony to that effect, and because evidence a government official believes a witness improperly places the

prestige of the government behind the witness.

There was also reversible error in the prosecutor's argument the jury could find sex trafficking at any time between May 26, 2016 and August 4, 2016, at least in the absence of a venue instruction. Statutory and constitutional venue requirements made this argument correct only if the sex trafficking had taken place in or was somehow connected to Arizona. The argument might have been proper if the prosecutor had acknowledged the venue requirement in her argument or the court had given a venue instruction, but there was neither such an acknowledgment nor such an instruction. The argument combined with the failure to instruct on venue is a third reason Mr. Jackson's convictions must be vacated.

Finally, there was an error in the district court's 18 U.S.C. § 2421 instructions. Section 2421 requires not only intent that the transported person engage in prostitution but also that the prostitution be a "dominant purpose" and/or "an efficient and compelling purpose" of the transportation and not merely incidental. Yet all the district court's instructions required was that Mr. Jackson had intent to prostitute V.C. The instructions said nothing about the additional requirement that prostitution be a dominant, or efficient and compelling, purpose.

* * *

VI.

ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING THE EVIDENCE OF V.C.'S OTHER PROSTITUTION.

1. Reviewability and Standard of Review.

Mr. Jackson's attorneys made multiple motions to introduce evidence of V.C.'s other prostitution on multiple grounds. In their initial written motion, they argued the evidence was admissible to show V.C. had lied to the investigating detective and had a motive to fabricate claims against Mr. Jackson. *See* CR 57. They supported this argument with supplemental authority in a written motion for reconsideration. *See* CR 98. Finally, they argued the government and V.C. had opened the door during trial by (1) suggesting V.C. did not realize the bikini maid role would require prostitution activity; (2) suggesting V.C. had been able to make herself continue the prostitution only by numbing herself with cocaine; and (3) suggesting V.C. had turned her life around. *See* ER 412-13.

The district court denied both the initial motion and the motions for reconsideration.[4] It ruled the lie to the investigating detective was subject to Rule 608(b) of the Federal Rules of Evidence, so extrinsic evidence was absolutely barred and allowing cross examination was discretionary; it then exercised that discretion to bar even cross examination, in part because of the policy underlying Rule 412. *See* ER 432-34. It rejected the argument the government's presentation

[4] There does not appear to have been any separate ruling on the written motion for reconsideration.

had opened the door on the ground V.C.'s testimony was "technically correct" and so did not "lend itself to direct impeachment" even though the court believed the jury "was misled." ER 390.

Claims that limitations on cross examination violate a defendant's confrontation rights are reviewed for abuse of discretion. *United States v. Nickle*, 816 F.3d 1230, 1235 (9th Cir. 2016). Basing a decision on an erroneous view of the law is necessarily an abuse of discretion, however. *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc).

2. Rule 412 Is Limited by the Sixth Amendment Right to Confront Witnesses, and Challenges to Witness Credibility Are a Core Part of the Confrontation Right.

Rule 412 does create a general rule that evidence of "other sexual behavior" and evidence of an alleged victim's "sexual predisposition" "is not admissible in a civil or criminal proceeding involving alleged sexual misconduct." Fed. R. Evid. 412(a). Still, a mere evidentiary rule cannot override a constitutional right such as a defendant's right to confront witnesses. Rule 412 expressly recognizes this in subsection (b)(3), by creating an exception for "evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412(b)(3).

Confrontation Clause interests are at their zenith when a defendant seeks to challenge the credibility of a crucial government witness. A defendant has a general right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1035 (9th Cir. 2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), and *Davis v. Alaska*, 415 U.S.

308, 318 (1974)). "When the case against the defendant turns on the credibility of a witness, the defendant has broad cross-examination rights." *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984). This interest overrides other privacy interests, as explained by the Supreme Court in considering a juvenile privacy statute in *Davis*.

> We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. (Citation omitted.) Here, however, petitioner sought to introduce evidence of [the juvenile witness's] probation for the purpose of suggesting that [the witness] was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record – if the prosecution insisted on using him to make its case – is outweighed by petitioner's right to probe into the influence of a possible bias in the testimony of a crucial identification witness.

Id., 415 U.S. at 319.

3. The District Court Made an Error of Law and Therefore Abused Its Discretion in Finding V.C.'s Lie During the Investigation Was Governed by Rule 608(b).

As noted *supra* p. 19, a district court necessarily abuses its discretion when it makes an error of law. Here, there was an error of law in concluding Rule 608(b) applied to V.C.'s lie about prior prostitution to the investigating detective.

Rule 608(b) does sometimes preclude proof of a prior lie by extrinsic evidence and grant a court discretion to preclude even cross examination. But this is only "where the evidence is introduced to show a witness's *general character*

for truthfulness." *United States v. Skelton*, 514 F.3d 433, 441 (5th Cir. 2008) (quoting *United States v. Opager*, 589 F.2d 799, 801 (5th Cir. 1979)) (emphasis added in *Skelton*). *See also United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987) (explaining Rule 608(b) applies when evidence is "probative only of the witness' general propensity for truthfulness"); Fed. R. Evid. 608 advisory committee's note (2003 Amendments) (explaining rule amended "to clarify that it applies only when the sole reason for proffering that evidence is to attack or support the witness' *character* for truthfulness" (emphasis added)). Evidence offered "to impeach a witness on grounds other than character is not regulated by Rule 608(b)." 28 Charles Alan Wright and Victor M. Gold, *Federal Practice and Procedure: Evidence* 1 (2d ed. Supp. 2018). *See also United States v. Ray*, 731 F.2d at 1364 (explaining that Rule 608(b) "regulates only the admissibility of evidence offered to prove the truthful or untruthful character of a witness"); 4 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence* 608-34 (Mark S. Brodin, ed., Matthew Bender 2d ed. 2018) (noting 2003 amendment "sought to conform the Rule's language to the drafters' original intent, which was to exclude extrinsic evidence of a witness's general propensity for honesty and truthfulness, rather than particular instances of honesty or dishonesty used for other, non-propensity purposes").

Expressed another way, the rule "limits only the use of evidence 'designed to show that the witness has done things, *unrelated to the suit being tried*, that make him more or less believable per se.'" *Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724, 734 (5th Cir. 2011) (quoting *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984)) (emphasis added in *Learmonth*). An analogy may be drawn to the "inextricably intertwined" limitation on Rule 404(b) of the Federal Rules of Evidence, which governs evidence of "other bad acts." That rule applies only to

other bad acts having no relation to the charged offenses. The rule does not apply to conduct which is "inextricably intertwined" with the charged offense. *See United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987).

With this understanding of Rule 608(b), it is apparent the rule does not apply to V.C.'s lie to the investigating detective. The lie was not "unrelated to the suit being tried," but was made during the very investigation which led to the suit, or charge, so it was inextricably intertwined with the investigation. The lie was not offered to show a general character or general propensity for untruthfulness but was offered to show V.C. was being untruthful in this very case. The argument was not that this lie showed V.C. could not be trusted generally, but that it showed she could not be trusted in this case. It was also circumstantial evidence of a motivation to lie in this case; it suggested V.C. was trying to portray herself in the best possible light so she would be more likely to be believed. She wanted to be believed so she could get back to Florida, as suggested by the calls she made about airline and bus tickets, the multiple calls with her daughter, and her daughter's pending graduation.

Two cases cited in the district court – one by the government and one by the defense in its written motion for reconsideration – illustrate the use of victim lies during the very investigation of the case. In *United States v. Chang Da Liu*, 538 F.3d 1078 (9th Cir. 2008), the court found no error in a government failure to undertake further investigation of sex trafficking victims in part because the defense was allowed to introduce evidence of the victims' initial lies in the investigation. *See id.* at 1087. In *United States v. Chin*, 606 Fed. Appx. 538 (11th Cir. 2015) (unpublished), the court found no error in excluding evidence of prior prostitution in part because the defense had been allowed to elicit admissions "that [the victim] lied to the police about several aspects of her involvement in the

prostitution business." *Id.* at 541.

The Confrontation Clause interests which Rule 412 recognizes were implicated here. One of the factors to be considered in evaluating a Confrontation Clause claim is "whether the jury had 'sufficient information to assess the credibility of [the] witness.'" *United States v. Nickle*, 816 F.3d at 1235 (quoting *United States v. Larson*, 495 F.3d 1094, 1102-03 (9th Cir. 2007) (en banc)). Here, the only lie to which the defense attorneys could point with the lie about prior prostitution excluded was V.C.'s lie about why she had lost the apartment, *see supra* p. 13. And the prosecutor jumped to take advantage of this weak argument in her rebuttal, first posing the rhetorical question, "What evidence did you hear about things that were not true?," and then sarcastically responding to the one minor lie the defense attorney had been able to point out – "Oh, well, she didn't she tell him – she told him that the person she was subleasing for wanted the apartment back, and she did not mention the incident with her daughter." *Supra* p. 14.

In sum, Rule 608(b) did not apply to V.C.'s lie about prior prostitution activity because the lie was offered not to show a general propensity or character for untruthfulness but to show V.C. lied in this very case. Excluding the evidence violated Mr. Jackson's confrontation rights because V.C. was the crucial witness against Mr. Jackson and there were no other significant lies to which the defense could point.

* * *

4. The District Court Made an Error of Law and Therefore Abused Its Discretion in Interpreting the Open the Door Rule to Require Testimony Directly in Conflict with the Truth.

The district court also made a second error of law – in its application of the open the door rule. The court did recognize, in ruling the defense could renew its motion, that a party can open the door to otherwise inadmissible evidence through the presentation it makes at trial. *See* ER 434 (giving examples of how government might "open[ ] the door" after stating defense could renew motion during trial). As this Court explained in holding a defendant had opened the door in *United States v. Mendoza-Prado*, 314 F.3d 1099 (9th Cir. 2002), "[t]he government may introduce otherwise inadmissible evidence when the defendant '"opens the door" by introducing potentially misleading testimony.'" *Id.* at 1105 (quoting *United States v. Beltran-Rios*, 878 F.2d 1208, 1212 (9th Cir. 1989)). A party may also open the door through representations it makes in its opening statement. *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000), *quoted with approval in Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1130 (9th Cir. 2010).

The Court has applied this "open the door" rule in multiple cases. In *Mendoza-Prado*, the Court upheld the admission of other bad acts evidence because the defendant's testimony "implied that Defendant was law-abiding and hard-working." *Id.*, 314 F.3d at 1105. In *Beltran-Rios*, the Court upheld the admission of otherwise inadmissible drug courier profile evidence because "defense counsel 'opened the door' to this line of questioning by emphasizing [the defendant's] apparent poverty." *Id.*, 878 F.2d at 1211. In *United States v. Batts*, 573 F.2d 599 (9th Cir. 1978), the Court upheld the admission of other bad acts evidence under Rule 404(b) because "the general tenor of appellant's testimony

was a portrayal of one completely naive about drugs," which presented a "mispainted picture." *Id.* at 603. In *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979), the Court upheld otherwise impermissible cross examination about the details of a book about violent revolution because the defendant had given testimony about other books that painted him as "a scholarly, humane, peace-loving political activist who possessed a decidedly non-violent character." *Id.* at 1189. The Court explained:

> Justice would not have been served had the jurors been left with only the one-sided impressions created by [the defendant's] 18 innocuous books. To show the opposite side of the coin, as it were, it was fair for the government to cross-examine [the defendant] on other books he had sold, owned, or read.

Id. at 1191.

The district court did recognize the rule, but misapplied it. The court acknowledged "there were many instances," ER 389, and "numerous statements," ER 390, where "it appears [the jury] could have been misled," ER 390, and that it, the court, personally "believe[d] that the jury was misled," ER 390. It adhered to its exclusion of the evidence only because the testimony was "worded in a way that does not lend itself to direct impeachment" and was "technically correct." ER 390.

This was legal error because the open the door rule does not require a direct false statement. What the Court found sufficient in *Batts* was the "general tenor" of the defendant's testimony which created a "mispainted picture." *Id.*, 573 F.2d at 603. What the Court found sufficient in *Giese* was one-sided "impressions" the defendant's testimony created. *Id.*, 597 F.2d at 1191. What the Court found sufficient in *Mendoza-Prado* was what the defendant's testimony "implied." *Id.*, 314 F.3d at 1105. The general rule as stated in *Mendoza-Prado* and *Beltran-Rios* is that a party "'opens the door' by introducing *potentially misleading* testimony."

Mendoza-Prado, 314 F.3d at 1105 (quoting *Beltran-Rios*, 878 F.2d at 1212) (emphasis added).

Such potential misleading – indeed, actual misleading – is exactly what the district court found here. In the court's own words, "I do believe that the jury was misled." ER 390. This conclusion was well supported by both V.C.'s testimony and the prosecutor's opening statement – first, about V.C. naively believing the "bikini maid" work would lead to nothing more; second, the suggestion that, after a time, the only way V.C. could make herself continue the prostitution was by numbing herself with cocaine; and, third, the more overt suggestion that V.C. was now leading an ordinary life as an ordinary hairstylist.

On the first of these subjects, the prosecutor asserted in her opening statement: "She knew she would have to dress scantily, she knew it would mean that men would be ogling her, but it seemed like a lot of money, especially if it did not mean that the men had to touch her, but just watch her while she cleaned in a bikini." ER 342. V.C. was a little less definite about this, but did testify, "I was not quite sure exactly what that would be," ER 123, "[m]y understanding was that I was going to be doing body rubs," ER 125, and "most of the men wanted more, so I *had* to give them more," ER 126 (emphasis added).

On the second subject, the prosecutor asserted in her opening statement that V.C. "didn't like what she was doing" and Mr. Jackson had to supply her with the cocaine to "help[ ] her deal with it" and "ma[k]e her numb." ER 347. V.C. backed this up by testifying the cocaine "was just something apart to deal – just to deal with the clients, and just kind of, like, make me numb." ER 146.

Far worse, however, was the picture of reform painted at both the beginning and the end of V.C.'s direct examination. The testimony at the beginning was:

> Q. I am going to ask you a lot of questions and some of them might be a little bit personal, so I apologize for that, but

maybe we can get started by you telling us just a little bit about yourself. Where are you from?
A. I am originally from Tampa, Florida, and I've been a hairstylist off and on since 1987, and I have two children, and I am single, and I've never been married.
Q. Have you lived in Tampa, Florida, your whole life?
A. Yes.
Q. You mentioned that you've been a hairstylist off and on.
A. Yes.
Q. Is that your current profession?
A. Yes.
Q. And you mentioned that you have two children, can you tell us a little bit about them?
A. Sure. My son is 25 and my daughter is 17. She will be 18 on November 4th.

ER 118-19. The prosecutor and V.C. then book-ended this with similar testimony near the end of the direct examination – buttressed by V.C.'s "belie[f] in God":

Q. How was it living at the shelter for a month?
A. It was good. It was a good place for me to be. It was.
Q. Why do you say that?
A. Because the Gospel Outreach Center is. . . . I am not sure what the word is.
Q. That's okay if you can't think of it. Just do the best you can to describe.
A. It was Bible based. And I believe in God. And I pray. And that was a good place for me to get my mind together, regroup, so I could stay and get a ticket back home.
Q. And you said you were eventually able to go back home?
A. Yes.
Q. After you went back home, were you at some point able to get a job?
A. Yes.
Q. And are you cutting hair now?
A. Yes.
Q. And you mentioned before that you have an apartment now?
A. I do.
Q. And is your daughter living with you?
A. She is.
Q. Were you able to get custody of her?
A. Yes, I did.

ER 173-74.

The reality of course was that V.C. had been working not just as a hairstylist but also as a prostitute, that she did not need cocaine to "make her numb" in order to deal with prostitution clients, and that she likely had a very good idea of what

working as a bikini maid would lead to. Rule 412 did allow the prosecutor and V.C. to exclude evidence of the other prostitution if they wanted to leave the subject of V.C.'s profession and experience entirely untouched. But it did not allow them to affirmatively suggest something different. The cautions that evidentiary privileges "may not be used both as a sword and a shield," *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992), and may not be used to "mutilate the truth," *Brown v. United States*, 356 U.S. 148, 156 (1958), apply equally to Rule 412. It is one thing to say an alleged victim should not be shamed by her past, but it is a very different thing to say the alleged victim may affirmatively mislead. An alleged victim who misleads must be confronted with the truth.

5. Cross Examination of V.C. About Her Prior Prostitution Should Have Been Allowed to Rebut a Fraud Theory.

One of the Rule 412 opinions cited by the district court in its pretrial written order was *United States v. Rivera*, 799 F.3d 180 (2d Cir. 2015). *See* ER 429, 430. A dissenting judge would have reversed the convictions in *Rivera* because cross examination about prior prostitution would have undercut the sex trafficking victims' claims of fraud. As the dissenting judge explained:

> [T]he government's theory was that the victims accepted employment with defendants and then "engage[d] in [the] commercial sex act[s]" that form the basis for defendants' prosecution only because of defendant's "fraud." 18 U.S.C. § 1591(a). But the precluded line of inquiry – the victims' prior places of employment and exposure to sexualized environments (as well as prior work as prostitutes) – bears directly on whether they were defrauded within the meaning of 18 U.S.C. § 1591(a); that is, whether they understood the terms and circumstances of their employment.

Rivera, 799 F.3d at 193 (Jacobs, J., dissenting). The majority disagreed, but only

because it disagreed that fraud was the government's theory. It noted that the defendant's own brief characterized the "central issue" as "whether the women voluntarily engaged in commercial sexual acts, or whether they were *forced*," so "the dissenter's concerns are grounded in neither the evidence defendants sought to offer nor the arguments they have made." *Id.* at 188.

In the present case, fraud was a government theory. In the absence of physical force and in the face of evidence suggesting long periods where V.C. was left alone, the prosecutor argued sex trafficking could be established by force, coercion, *or* fraud. Near the beginning of her argument, she explained that "we don't have to prove to you the defendant used fraud, coercion and threats of force. It is enough to prove any one of those or any combination of them." ER 12. She also offered examples of fraud. In her opening argument, she suggested:

> He mislead [V.C.]. He led her to believe that she had no choice but to commit acts of prostitution. He led her to believe that this is the only way that she would get money. The only way she would be able to get her daughter back. He led her to believe that she had no choice, because he manipulated her weaknesses, he took advantage of her situation.

ER 35-36. *See also* ER 36 (arguing that "[h]e also used fraud, ladies and gentlemen, trickery, deceit, especially involving misrepresentation," and that "[w]e heard about all that misrepresentation, that she was going to be making this money"). Then again, in her rebuttal argument, the prosecutor argued:

> He misled her, he tricked her, he used that element of fraud, he made her believe that things would be better if she stayed with him. This is the only way you are going to get an apartment back, the only way you're going to get your daughter back. She thinks it's in my best interest to give him this money, at least maybe he will give some to me eventually. He never did.
>
> But that is what he led her to believe.

ER 69-70.

The jury may have found this argument plausible without knowing V.C. had experience with prostitution. But it might have found it far less plausible if it had

known V.C. did have experience as a prostitute and, in particular, prostitution without the aid of a pimp, *see supra* p. 5. V.C.'s prior experience prostituting on her own made it far less plausible Mr. Jackson could have misled her into believing she could earn money from prostitution only through him.

B. THE PROSECUTOR ENGAGED IN MISCONDUCT WHICH DENIED MR. JACKSON A FAIR TRIAL WHEN SHE ARGUED THERE WAS NO EVIDENCE V.C. HAD LIED TO THE INVESTIGATING OFFICERS AND "THESE ARE LAW ENFORCEMENT OFFICERS [WHO] HAVE EXPERIENCE INTERVIEWING PEOPLE, JUDGING THEIR CREDIBILITY, MAKING SURE THINGS MATCH UP."

The prosecutor did more than mislead the jury and successfully exclude the evidence of V.C.'s lie to the investigating detective about other prosecution activity. The prosecutor also made the exclusion into a sword when she affirmatively argued there was no evidence V.C. had made any false statements. She then went even further by suggesting the law enforcement officers believed V.C. – and were trained in making such judgments. This was misconduct that aggravated the district court's evidentiary error.

1. Reviewability and Standard of Review.

Defense counsel did not object to the prosecutor's suggestion there was an absence of evidence of lies or the argument that "these are law enforcement officers [who] have experience interviewing people, judging their credibility, making sure things match up," *supra* p. 14, so review is for plain error. *See*

APPENDIX4

CA NO. 18-10156

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	(D.Ct. 4:16-cr-01704-RM)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HONORABLE ROSEMARY MARQUEZ
United States District Judge

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CA NO. 18-10156

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVON JARVEL JACKSON, Defendant-Appellant.	(D.Ct. 4:16-cr-01704-RM)

APPELLANT'S REPLY BRIEF

I.

ARGUMENT

A. THE DISTRICT COURT DID ABUSE ITS DISCRETION IN EXCLUDING THE EVIDENCE OF V.C.'S OTHER PROSTITUTION ACTIVITY – THROUGH ERRORS OF LAW IN ITS INTERPRETATION OF RULE 608(b) OF THE FEDERAL RULES OF EVIDENCE AND THE OPEN THE DOOR RULE, AND THROUGH OVERLOOKING THE EVIDENCE'S RELEVANCE TO THE GOVERNMENT'S FRAUD THEORY.

1. The Government Emphasizes the Wrong Legal Rule.

The government spends 12 of its 18 pages on the Rule 412 issue attacking a

straw man, by arguing a point which is not contested. That is the principle of relevance which Congress accepted when it adopted Rule 412. As expressed in some of the cases applying the rule, "unchastity of a victim has no relevance whatsoever to [the victim's] credibility as a witness." *United States v. Elbert*, 561 F.3d 771, 777 (8th Cir. 2009) (quoting *United States v. Kasto*, 584 F.2d 268, 271-72 n.3 (8th Cir. 1978)). The multiple Rule 412 cases cited by the government only recognize this general principle. They are not cases like the present one in which the alleged victim lied to investigating officers during the investigation of the very offense being prosecuted and/or affirmatively created a misleading impression on direct examination.

The government also goes through a series of assertions, based on this general case law, about what the evidence of other prostitution activity "does not tend to prove" in this case. Govt. Brief, at 26-28.[1] But the government ignores what the evidence of other prostitution activity did tend to prove in this case. First, it tended to prove – and in fact, conclusively did prove – that V.C. had lied to the Tucson detective when he interviewed her. Second, it tended to prove, in contrast to what V.C. suggested in her testimony on direct examination, that V.C. did not need cocaine to "make her numb" in order to deal with prostitution clients and likely had a very good idea of what working as a bikini maid would lead to. Third, it tended to disprove a misleading picture V.C. painted in her testimony on

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[1] One of the things the government says the evidence "did not tend to prove" is that Mr. Jackson "did not physically and sexually assault the victim to make her comply with his demands." Govt. Brief, at 27. This was just an allegation by the government in pretrial pleadings, however, not a claim V.C. made in her testimony. *See* Appellant's Opening Brief, at 9 n.2. Perhaps it was a lie V.C. told to investigators and/or prosecutors that she abandoned when she testified.

direct examination when she described herself as just a hairstylist who "believe[d] in God," had "g[otten] [her] mind together," and just started working as a hairstylist again and living an ordinary family life after she returned to Florida. ER 118-19, 173-74, *quoted in* Appellant's Opening Brief, at 26-27.

Most of the cases the government cites do not consider such case-specific circumstances, and two that do consider this possibility – as well as Rule 412 itself – suggest such case-specific circumstances make a difference. *See United States v. Roy*, 781 F.3d 416, 421 (8th Cir. 2015) (holding evidence of past prostitution had little impeachment value "because it does not contradict [the victim's] testimony about [the defendant]"); *United States v. Powell*, 226 F.3d 1181, 1197-98 (10th Cir. 2000) (noting trial judge had warned government that evidence of prior sexual conduct would be admitted if government painted victim as "someone who is very chaste, who's virginal and who . . . wouldn't engage in any of the conduct that [defendant] wants to introduce" and judge excluded evidence only after hearing testimony). *See also* Fed. R. Evid. 412(b)(3) (creating exception for "evidence whose exclusion would violate the defendant's constitutional rights").

2. The District Court Abused Its Discretion in Excluding the Evidence by Misinterpreting and Hence Misapplying Rule 608(b).

As an initial matter, the government understates the nature of V.C.'s deception of the investigating detective. It is not just that V.C. "did not tell Detective Wilson about," Govt. Brief at 30, "did not mention," Govt. Brief, at 31, or "did not disclose," Govt. Brief, at 32, the arrest. She affirmatively lied to the detective. He directly asked her whether she had previously engaged in prostitution and she directly told him no. *See* ER 387 (transcribing question, "So

prior to meeting [Mr. Jackson] had you ever prostituted yourself . . . in Florida, anywhere?," and answer, "No"). That was a flat lie, as both implied by the arrest and expressly established by testimony during an in camera hearing, in which V.C. admitted what the arrest implied – that she had been involved in prostitution at least as far back as 1990, *see* ER 393. And this flat lie was not a flat lie at some unrelated time in some unrelated situation, but a flat lie in the investigation *in this case*.

The government cites no case law applying Rule 608(b) to a lie told during the investigation of the very offense being prosecuted. A lie told during the investigation of the very offense being prosecuted does not reflect on just the "general character for truthfulness," *United States v. Skelton*, 514 F.3d 433, 441 (5th Cir. 2008) (quoting *United States v. Opager*, 589 F.2d 799, 801 (5th Cir. 1979)), unrelated to the suit being tried," *Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724, 734 (5th Cir. 2011) (quoting *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984)), that Rule 608 governs. It shows a willingness to lie in the very case being prosecuted. A lie during the investigation in the very case being prosecuted is not governed by Rule 608(b) any more than "inextricably intertwined" "other bad acts" evidence is governed by Rule 404(b).

The district court's conclusion that the evidence was governed by Rule 608(b) was therefore an error of law. And an error of law is "by definition" an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). *See also United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . . ." (Quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

3. The District Court Abused Its Discretion by Misinterpreting and Hence Misapplying the Open the Door Rule.

The government also offers no defense of the district court's interpretation of the open the door rule. It cites no authority to counter the authority in Appellant's Opening Brief that establishes the rule is triggered not just by flatly contradictory testimony, but also by "potentially misleading testimony," *United States v. Mendoza-Prado*, 314 F.3d 1099, 1105 (9th Cir. 2002) (quoting *United States v. Beltran-Rios*, 878 F.2d 1208, 1212 (9th Cir. 1989)). And the district court expressly found the testimony here was misleading, stating, "I do believe the jury was misled." ER 390. That the district court's finding may have been limited to V.C.'s testimony about her current employment and financial situation – as the government claims, but which may or may not be correct[2] – is of little moment, because the evidence the district court excluded included not just prostitution before V.C. met Mr. Jackson but prostitution after V.C. returned to Florida from Arizona. *See* ER 507-16 ("Backpage" advertising after return from Arizona); ER 401 (in camera testimony admitting acts of prostitution while advertising on

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[2] V.C.'s testimony, which is quoted more extensively in Appellant's Opening Brief, *see* Appellant's Opening Brief, at 26-27, was not just that she had been a hairstylist after returning to Florida from Arizona, but that she had "been a hairstylist off and on since 1987." ER 118. V.C. also at least implied that prostitution was something new to her when she met Mr. Jackson, saying she needed the cocaine Mr. Jackson provided to "make her numb," ER 146, and suggesting she was "not quite sure exactly" what body rubs would lead to, ER 123. The prosecutor's opening statement was even more suggestive on the latter point – asserting that, V.C. "knew she would have to dress scantily, she knew it would mean that men would be ogling her, but it seemed like a lot of money, especially if it did not mean that the men had to touch her, but just watch her while she cleaned in a bikini." ER 342.

"Backpage"). Notably, the government's argument is entirely silent about the post-return prostitution evidence. *See* Govt. Brief, at 32-34 (discussing only 1990 arrest and failing to discuss post-return prostitution).

The abuse of discretion here was even more clear than in the application of Rule 608(b), because the district court both made an error of law – by treating merely "misleading" testimony as insufficient to trigger the open the door rule, *see* Appellant's Opening Brief, at 25-26 – *and* made a factual finding – "the jury was misled" – that supported application of the rule under the correct law. Applying the correct law, which is reviewed de novo, to the factual finding, which must be given deference, establishes an abuse of discretion. Rule 412 does allow a prosecutor and alleged victim to exclude evidence of unsavory character if they want to leave the subject untouched, but it does not allow them to affirmatively mislead the jury about the alleged victim's character. An alleged victim who misleads may be confronted with the truth.

4. The District Court Overlooked the Relevance of V.C.'s Other Prostitution Activity to the Government's Alternative Fraud Theory.

Though the Court need not reach this question in light of the other district court errors, there is also one thing the government asserts the evidence of other prostitution activity "did not tend to prove," *supra* p. 2, that the evidence actually did tend to prove. That is that Mr. Jackson did not defraud V.C. into the prostitution.

Evidence that V.C. had previous experience with prostitution, including prostitution on her own without a pimp, *see* ER 399 (admitting prior prostitution and testifying, "I have never, ever worked for someone, ever"), was directly

responsive to a government argument that Mr. Jackson led V.C. to believe she could make money from prostitution only through him. The prosecutor argued Mr. Jackson "led [V.C.] to believe that [committing acts of prostitution for Mr. Jackson] was the only way that she would get money," ER 35, and "he made her believe that things would be better if she stayed with him," ER 69. This was a plausible argument if V.C. had never before earned money as a prostitute without using a pimp. But it was far less plausible if she had earned money as a prostitute without using a pimp. The evidence of prior prostitution activity without using a pimp thus "tended to prove" Mr. Jackson did not use fraud to induce V.C. to engage in prostitution.

The government's argument that there was also coercion and force, so fraud was not the government's only theory, did not make evidence rebutting the fraud theory irrelevant. Mr. Jackson had to respond to each one of the government theories, because the jury could convict based on just one of them, *see* ER 82 (requiring "fraud, coercion, threats of force, *or* any combination of such means" (emphasis added)). And the fraud argument may have been the government's best theory without rebuttal by the evidence of V.C.'s prior prostitution experience. The district court thought the evidence of force so weak that it almost refused to instruct on force, *see* ER 110-11, and the jury acquitted of the kidnapping charge that required something more than fraud.

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