FILED
United States Court of Appeals
Tenth Circuit

March 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLAUD R. KOERBER,

Defendant - Appellant.

No. 19-4147
(D.C. No. 2:17-CR-00037-FB-1)
(D. Utah)

ORDER

Before **HARTZ**, **PHILLIPS**, and **CARSON**, Circuit Judges.

This matter is before the court on Appellant's *Petition for Panel Rehearing or Rehearing En Banc* and *Koerber's Motion for Leave to File Reply Supporting Petition for Rehearing*. The motion for leave to file a reply in support of the petition is granted. Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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United States Court of Appeals
Tenth Circuit

August 26, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CLAUD R. KOERBER, Defendant - Appellant.	No. 19-4147

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:17-CR-00037-FB-1)

Dick J. Baldwin (Michael D. Zimmerman and Troy L. Booher, with him on the briefs), of Zimmerman Booher, Salt Lake City, Utah, for Defendant-Appellant.

Ryan D. Tenney, Assistant United States Attorney (John W. Huber, United States Attorney, with him on the brief), Salt Lake City, Utah, for Plaintiff-Appellee.

Before **HARTZ**, **PHILLIPS**, and **CARSON**, Circuit Judges.

PHILLIPS, Circuit Judge.

To his investors, Claud "Rick" Koerber seemed to have it all: more money than he knew what to do with, lavish cars, and a thriving real-estate business. And for envious onlookers, good news was waiting—Koerber claimed to have found the key to financial success and promised to help them do the same. The secret, or so he said,

was in mitigating investment risks. But as it turned out, nestled in Utah's Wasatch Front, Koerber was operating a multi-million-dollar fraud scheme.

It started in the early 2000s with a seemingly benign business model of buying undervalued real estate and selling it at a profit. Investors, believing that the investments were backed by real estate, saw this as a safe opportunity. And a lucrative one at that. According to Koerber, investors would receive high returns on their investments—even upwards of five percent a month. Unsurprisingly, investors quickly lined up.

But if it seemed too good to be true, it's because it was. Koerber's business was hemorrhaging money and his liabilities were growing. And without enough real-estate assets to satisfy his ever-increasing needs, his operation spiraled into the ground. What money Koerber did have coming in was being used to satisfy earlier obligations to other investors or to fund Koerber's façade of wealth. In total, his scheme cost victims roughly $45 million.

In 2009, after the nature of his venture was finally exposed, a grand jury indicted him for wire fraud, tax fraud, and mail fraud. A superseding indictment added to his wire fraud and tax evasion counts, charging him with additional counts for securities fraud, wire fraud, money laundering, and tax evasion. Yet more than five years passed without a trial, resulting in the district court's dismissing the case with prejudice under the Speedy Trial Act. On the government's appeal of that decision, this court reversed the district court's dismissal-*with*-prejudice order, identifying errors in its application of the Speedy Trial Act factors. On remand, after

reapplying the factors, the district court decided to dismiss *without* prejudice. So in 2017 the government reindicted Koerber for the offenses earlier charged in the superseding indictment. Koerber's first trial ended in a hung jury. His second trial ended in jury convictions on all but two counts. The court later imposed a 170-month prison sentence.

On appeal, Koerber challenges his prosecution and conviction. His asserted violations range from evidentiary rulings, to trial-management issues, to asserted statutory and constitutional violations. After reviewing the briefing, the record, and the relevant law, and exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

I. Koerber's Equity Mill

"You don't need to ever be a landlord to make a fortune in real estate," Koerber touted to potential investors at his business seminars. R. vol. 54 at 11777. In the early 2000s, Koerber developed a process he coined the "Equity Mill," *id.* at 11768, in which Koerber-controlled companies would buy undervalued properties and sell them at a profit to "preferred buyer[s]," reserving an option to repurchase the properties in the future, *id.* vol. 55 at 11909–12. Meanwhile, another of Koerber's companies would lease the properties, thereby "min[ing] the [properties'] equity." *Id.* vol. 54 at 11769–70. Founders Capital—one of the involved Koerber-owned companies that received investment funds directly—served as the lender or the "bank" of the whole operation. *Id.* vol. 57 at 12622; *id.* vol. 58 at 12864–65.

With the housing market booming, investors saw this as an opportunity to escape the "rat race." *Id.* vol. 54 at 11867. Koerber promised investors lucrative returns—between two and five percent monthly. And not only were the high monthly returns enticing, but Koerber also assured investors that this was a "safe[]" way to earn regular, passive income. *Id.* at 11778. As Koerber explained, his model held the key to investing: "Take risks, but mitigate those risks to near zero." *Id.* vol. 57 at 12596. Through his seminars, Koerber taught "specific ways to mitigate risks" based on "sound real estate values." *Id.* at 12595.

Koerber soothed any investor anxieties by representing that he was buying real estate with the investment money. But in fact, only about twenty-one percent of Koerber's incoming investments were used for real-estate purchases, with forty-seven percent being funneled back to earlier investors, one percent being spent on educational endeavors, and thirty-one percent being used to finance Koerber's lifestyle and pet projects—including luxury cars, a horror-movie production, a fast-food restaurant, minted coins, and more.

Further, Koerber represented to investors that he was running a profitable organization. In support, Koerber proudly advertised his personal earnings, describing at his seminars how the zeros in his bank account were quickly growing. He spoke of other companies that were "s[o]wing the seeds of their own financial destruction," by "spending all of their investors' money buying big houses, buying big cars, [etc.]" *Id.* vol. 58 at 12731–32. Describing those companies as "doomed to failure because they didn't know how to generate a profit," Koerber assured his

investors and potential investors that his companies were different—they were "profitable." *See id.* at 12730, 12732–33. And initially, some investors did receive interest payments, creating the impression that the operation was indeed profitable. But later, Koerber admitted that he had been "fall[ing] behind" and that "for a long time [he] had more liabilities than real estate equity." *Id.* vol. 54 at 11858–59. And after reviewing Koerber's financials, a forensic accountant testified that none of Koerber's companies had a profitable year—ever. Even so, in just over three years, between 2004 and 2007, Koerber attracted nearly $100 million in investments.

II. 2009 Indictment (Koerber I)

In May 2009, a federal grand jury sitting in the District of Utah indicted Koerber on three counts: mail fraud, wire fraud, and tax evasion. A superseding indictment in 2011 charged additional counts relating to securities fraud in violation of 15 U.S.C. § 77q(a) and § 77x, wire fraud in violation of 18 U.S.C. § 1343 and § 2(b), money laundering in violation of 18 U.S.C. § 1957 and § 2(b), and tax evasion in violation of 26 U.S.C. § 7201.

III. Suppression Motion

In April 2012, Koerber filed a motion to suppress statements that he made during two ex-parte law-enforcement interviews in February 2009, as well as evidence later obtained using those statements. Two federal agents—an IRS agent and an FBI agent—had interviewed Koerber before his indictment and without his counsel present. The kicker, as Koerber alleged, was that federal prosecutors "oversaw [the] illegal effort to circumvent counsel and interrogate [Koerber] *ex*

parte." R. vol. 4 at 969. Specifically, he complained that federal prosecutors had actively participated in setting up the agents' interviews with him—even going so far as providing the agents with questions to ask—despite knowing that he was represented by counsel. Under these facts, Koerber argued that the federal prosecutors had violated state legal-ethics rules by causing the agents to make ex-parte contact with Koerber. He further maintained that the prosecutors' actions had violated 28 U.S.C. § 530B (the "McDade Act"), which requires that prosecutors "be subject to State laws and rules." *Id.* at 986 (citing 28 U.S.C. § 530B). This, Koerber argued, warranted suppression.

The government responded by noting that Koerber was unindicted at the time of the interviews, and that federal prosecutors hadn't arranged for or "script[ed]" the interviews. *Id.* vol. 5 at 1010 n.2, 1017. It further argued that state legal-ethics rules permitted the interviews because, though Koerber had counsel on other matters, federal prosecutors had been informed that he no longer had counsel in his criminal investigation.

Judge Clark Waddoups rejected the government's argument and granted Koerber's motion to suppress. He found that though federal prosecutors "apparently believed" that Koerber was no longer represented, this belief wasn't reasonable. *Id.* vol. 6 at 1526, 1533. Judge Waddoups ruled that the prosecutors had thus violated Utah's legal-ethics rules by their conduct related to the interviews, which also amounted to a McDade Act violation for which suppression was the proper remedy.

In response, the government filed a notice of appeal of the suppression order, though it later moved to dismiss after the Solicitor General declined to approve the appeal.[1] Koerber objected to the dismissal and urged the court to impose sanctions on the government for its "truly reprehensible" conduct. *Id.* vol. 4 at 969–70. Our court declined to impose sanctions, and we granted the government's motion to dismiss the appeal.

IV. Speedy Trial Act Dismissal with Prejudice

In April 2014, after the court set the trial for June 13, 2014, Koerber moved to dismiss the case with prejudice, asserting multiple grounds—two of which are pertinent here. First, he claimed that the government's delay violated the time limits set out in the Speedy Trial Act (STA), 18 U.S.C. §§ 3161–3174. Second, he claimed that the Sixth Amendment's speedy-trial guarantee compelled dismissal in view of the government's five-year delay in prosecuting the case.

After noting the government's concession of an STA violation, Judge Waddoups dismissed the case *with* prejudice.[2] In doing so, he relied primarily on the government's "dilatory conduct and pattern of neglect" in moving the case forward, including its neglect in failing to prepare two ends-of-justice orders, a proper ends-

[1] Under 18 U.S.C. § 3742(b), "[t]he Government may not further prosecute [an] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General."

[2] Because Judge Waddoups dismissed the case based on the STA violation, he didn't reach Koerber's alternative argument for dismissal, that is, a Sixth Amendment speedy-trial violation.

of-justice order, and excluded-time orders as required by the STA. *Id.* vol. 9 at 2197–99. Judge Waddoups also noted "misconduct" in the government's prosecution: discovery practices that raised a "strong inference of tactical delay," the government's reliance on privileged information for its superseding indictment, and the two ex-parte law-enforcement interviews with Koerber. *Id.* at 2199–2201. The government didn't appeal the decision that it had violated the STA, instead appealing just the dismissal "*with* prejudice." *See id.* at 2206 (emphasis added).

On appeal, this court determined that the district court had abused its discretion in two ways: (1) in failing to properly consider the seriousness of Koerber's offense and (2) in failing to consider Koerber's responsibility for some of the delay. *United States v. Koerber*, 813 F.3d 1262, 1274–75, 1284 (10th Cir. 2016). On the first point, we ruled that the district court had "slighted" the seriousness-of-offense factor by not weighing it in favor of a dismissal without prejudice. *Id.* at 1274–75. We noted that the district court had abused its discretion by considering improper factors in weighing this factor, namely, the indictment's *allegations* rather than charges, and the presumption of innocence. *Id.* On the second point, we ruled that the district court had failed to consider Koerber's own disregard of deadlines, his failure to proactively assert his STA rights, and his acquiescence to continuances and trial postponements. *Id.* at 1284. This court remanded with instructions to reevaluate these factors as part of the overall prejudice determination. *Id.* at 1286–87.

V. STA Dismissal without Prejudice

On remand, the case was reassigned to Judge Jill Parrish. Koerber again moved to dismiss with prejudice. After further briefing and argument, Judge Parrish reevaluated the prejudice factors in accordance with the remand and dismissed the case *without* prejudice. In doing so, she concluded that the parties' culpabilities in creating delays effectively canceled each other out. Judge Parrish further concluded that a "strong public interest" justified having Koerber's multi-million-dollar fraud charges "adjudicated on the merits." R. vol. 9 at 2347–48.

In her order, Judge Parrish rejected Koerber's alternative argument, that the trial delays violated his Sixth Amendment right to a speedy trial. Though the length of the delay exceeded a year, and thus was presumptively prejudicial, she determined that Koerber was responsible for much of that delay and that he had failed to timely assert his Sixth Amendment speedy-trial right. She signed the order in August 2016.

VI. 2017 Indictment (Koerber II)

In January 2017, a federal grand jury reindicted Koerber, renewing the government's charges of securities fraud, wire fraud, money laundering, and tax evasion. Judge Robert Shelby was assigned the case.

VII. Renewed Motions to Judge Shelby

After remand, Koerber argued that the doctrine of issue preclusion bound Judge Shelby to enforce Judge Waddoups's order suppressing Koerber's statements made during the 2009 law-enforcement interviews, as well as evidence derived from those statements. After receiving additional briefing on the issue, Judge Shelby ruled

that he was not bound by the earlier order, because the order had "played no role whatsoever in the final disposition of Koerber I,"[3]—that is, in Judge Parrish's dismissal without prejudice. *Id.* vol. 31 at 7289–90. Judge Shelby then denied suppression on the merits. He determined that Judge Waddoups's earlier order was "clearly erroneous" because the Utah legal-ethics rule didn't apply without a criminal proceeding having commenced. *Id.* at 7286, 7299. He likewise determined that even if the prosecutors had violated state legal-ethics rules, suppressing the evidence would be an improper remedy.

Koerber also challenged Judge Parrish's rejection of his Sixth Amendment speedy-trial claims. In ruling on this issue, Judge Shelby noted that Judge Parrish's decision rejecting Koerber's Sixth Amendment claims likely bound him. And even if it didn't, he declined to dismiss Koerber's conviction on Sixth Amendment grounds, determining, as had Judge Parrish, that Koerber's role in the delays weighed "heavily against him." *Id.* vol. 13 at 3314.

Finally, Judge Shelby rejected Koerber's argument that the 2017 indictment was filed after the limitations period expired. Though acknowledging that the original statute of limitations had run before the 2017 indictment, Judge Shelby ruled that 18 U.S.C. § 3288 extended the limitations period for six months after August 25, 2016, the date that Judge Parrish dismissed the indictment without prejudice.

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[3] For consistency with the record references, we use Judge Shelby's case-reference terminology, that is, Koerber I ends with Judge Parrish's dismissal without prejudice, and Koerber II encompasses all proceedings after that. In other words, Koerber I and Koerber II are separated by the 2017 indictment.

VIII. Koerber's First Trial

In October 2017, Koerber's trial ended in a hung jury, and the court declared a mistrial. And after every judge on the District of Utah recused from the case, Judge Frederic Block, from the Eastern District of New York, was assigned the case.

IX. Renewed and Additional Motions to Judge Block

After Judge Block's appointment, Koerber renewed several of his motions—including his motion to suppress the 2009 law-enforcement interviews and his motion to dismiss the indictment as being beyond the limitations period. Judge Block denied both motions, "agree[ing] with and adopt[ing] Judge Shelby's conclusions." *Id.* vol. 15 at 3925.

In addition to his renewed motions, Koerber filed several other motions. For instance, he moved to suppress QuickBooks[4] files that the government had introduced at the first trial during the testimony of Koerber's former bookkeeper, Forrest Allen. In September 2007, Allen copied the files at work, soon before quitting his job. He later voluntarily provided those files to a government agent. Koerber didn't object to the government's use of these files at his first trial. Judge Block denied his motion to suppress, relying on the inevitable-discovery doctrine. He noted

[4] QuickBooks is "an accounting software" that is "designed to allow entry of financial transactions and then produce profit-and-loss statements, balance sheets, [and] accounting reports." R. vol. 32 at 7446–47. Koerber's accountants relied on QuickBooks to make payments; enter bills; write checks; create invoices; and record assets, liabilities, and expenses.

that IRS summonses, which were issued in April 2007, would have inevitably obtained the QuickBooks files.

In addition, Koerber filed a motion to limit testimony and evidence at his second trial to those activities "*directly connected*" to Founders Capital. *Id.* vol. 16 at 3980. This, he argued, was necessary to prevent a constructive amendment of the indictment during trial. Judge Block denied the motion and allowed the government to show the variety of ways that Koerber had raised the $100,000,000 mentioned in

the indictment. These included Koerber's efforts in soliciting investments from feeder funds[5] and downstream investors.[6]

X. Koerber's Second Trial

In 2018, Koerber was tried a second time. At the outset, Judge Block informed jurors that he might "interrupt a witness" or ask questions of a witness, but that this shouldn't make the jurors believe that he had a particular "view of the case." *Id.*

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[5] By feeder funds, the parties refer generally to the non-Koerber-owned companies that were funneling investment capital to Koerber's companies. Because Koerber limited the number of investors in his companies, he sometimes directed would-be investors to invest in feeder funds, or "pass-through" companies, and these investments would then make their way to Koerber's companies. R. vol. 56 at 12279, 12363–64. Though Koerber didn't tell investors that their money was going to Koerber's companies, based on the circumstances, many believed that to be the case. For example, Jeff Goodsell testified that he "asked Rick to be able to . . . invest in the fund," and Koerber told him "yes," and directed him "to talk to Jason Vaughn"—who owned a feeder fund. *Id.* at 12363–64. This was a common experience among investors. *See, e.g.*, *id.* at 12422–24 (Austin Westmoreland testifying that when he wired investment money, "[he] thought it was going to Rick's company," despite actually going to Hunter's Capital, a feeder-fund to Koerber's companies); *id.* vol. 57 at 12535–38 (Frank Breitenstein testifying that though he invested in Vonco, he believed that that money would then be invested with Founders Capital).

At sentencing, Judge Block described feeder funds in this way: "You have a network of so-called feeder funds, LLCs, that took me a considerable amount of time to follow the bouncing ball to understand the flow of funds that wound up under the control of Mr. Koerber . . . . So I'm satisfied that [Koerber's] role in setting up, staffing, [and] advis[ing] the LLCs was at least partly motivated by a desire to . . . complicate the scheme so it would be difficult for anyone to figure out what was really . . . going on." *Id.* vol. 64 at 14200.

[6] The term "downstream investors" refers generally to the "indirect[]" and "intermediar[y]" investors who invested in feeder-fund companies, that then invested in Koerber's companies. *See* R. vol. 10 at 2444; *id.* vol. 64 at 14222 ("When people, these downline investors said, look, this money was really going to you. We know it went through these feeder funds, but it was going to you, Mr. Koerber.").

vol. 54 at 11694. As it turned out, the judge did actively interrupt and question witnesses. But in doing so, he reminded the jury that he wasn't "intimating . . . any opinions as to what has or has not been proven in this case." *Id.* vol. 17 at 4266.

The jury convicted Koerber on all counts except for the two tax-evasion counts. At sentencing, the judge described Koerber's scheme as one that "Bernie Madoff would probably have been proud of." *Id.* vol. 64 at 14202. The judge sentenced Koerber to 170 months' imprisonment, 3 years' supervised release, and $45 million in restitution. This appeal followed.

DISCUSSION

On appeal, Koerber raises seven arguments for reversal. First, he argues that the district court erred in not enforcing its earlier suppression order under the doctrine of issue preclusion. Second, he argues that the court erred in not dismissing his case with prejudice based on the government's STA violations. Third, he argues that the court erred in denying his Sixth Amendment right to a speedy trial. Fourth, he argues that the court erred in not ruling that his 2017 indictment was time-barred. Fifth, he argues that the court violated his Fourth Amendment rights by not suppressing certain QuickBooks files. Sixth, he argues that the court erred by allowing the government to constructively amend his indictment to encompass investments from feeder funds. Seventh, he argues that Judge Block abused his discretion by interfering at trial and imposing his personal views on the jury. We address each issue in turn, finding that none of them merit reversal.

I. Issue Preclusion

Koerber maintains that Judge Shelby erred in concluding that he wasn't bound by Judge Waddoups's order suppressing evidence from the two 2009 law-enforcement interviews of Koerber.[7] Judge Shelby determined that the question of issue preclusion "turn[ed] on" the requirement that the suppression order be "essential to or necessary to the outcome of [a] prior proceeding." *Id.* vol. 31 at 7289 (citing *Bobby v. Bies*, 556 U.S. 825 (2009)). But because Judge Waddoups's order "played no role whatsoever in the final disposition of Koerber I"—that is, Judge Parrish's order dismissing without prejudice—the order had no preclusive effect. *Id.* at 7287, 7290. Koerber challenges that conclusion. "We review *de novo* the district court's conclusions of law on the applicability of issue and claim preclusion." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (citation omitted).

"The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating the same issue in another lawsuit." *In re*

[7] Koerber also maintains that issue preclusion applies "with equal force to the district court's protective order relating to the privileged 'To Our Lenders' letter." Appellant's Opening Br. at 24 n.2. This letter was a "draft of a proposed letter to investors of a company controlled by Mr. Koerber." R. vol. 3 at 666. Previously, Judge Waddoups had granted Koerber's motion for a protective order over this letter, determining that the attorney-client privilege applied. Yet Koerber's reference to this issue is so brief, we needn't address the matter. *Harsco Corp. v. Renner*, 475 F.3d 1179, 1190 (10th Cir. 2007) ("[A] party waives those arguments that its opening brief inadequately addresses." (citation omitted)). Even were we to consider it, we would decline to give Judge Waddoups's order any preclusive effect for the same reasons explained below.

Corey, 583 F.3d 1249, 1251 (10th Cir. 2009). Put differently, issue preclusion prevents a litigant from taking two bites at the apple, thus conserving judicial resources and providing consistent decisions. *Id.*

First, the parties dispute what elements Koerber must prove to prevail on issue preclusion. The government contends that the issue to be precluded must have been "essential to the judgment." Appellee's Br. at 27 (citing *Bies*, 556 U.S. at 834). Koerber argues that essentiality isn't a requirement, and that even if it is, it is satisfied here. In applying the issue-preclusion analysis, we acknowledge that Koerber's case is an unusual one in that he seeks to preclude revisiting a pretrial motion decided in a criminal prosecution that was dismissed and then later recommenced with a reindictment.

We begin with the elements of issue preclusion in the federal common-law criminal realm.[8] First, "the issue to be precluded must have been actually and necessarily decided in the prior case." *United States v. Arterbury*, 961 F.3d 1095, 1103 (10th Cir. 2020) (citing *Willner v. Budig*, 848 F.2d 1032, 1034 (10th Cir. 1988) (per curiam)). Second, the party against whom issue preclusion is invoked "must have had a full and fair opportunity in the earlier case to litigate the issue to be precluded." *Id.* (citation omitted). Both parties agree on these elements. But the

[8] We note that while the doctrine of issue preclusion "applies in both civil and criminal proceedings," there is "an important distinction." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016). That is, the Supreme Court has emphasized that the government's inability in criminal cases to appeal adverse judgments on the merits "calls for guarded application of [the] preclusion doctrine in criminal cases." *Id.* (citation omitted).

parties diverge on whether this test includes a requirement that the issue have been essential to the final judgment of the earlier case. *Bies*, 556 U.S. at 834 (citing Restatement (Second) of Judgments § 27 (1982)).

In *Bies*, the Court declared that issues are "necessary or essential only when the final outcome hinges on it." *Id.* at 835 (citing 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4421 (2d ed. 2002)). But Koerber contends that *Bies*'s essentiality requirement applies only in Double Jeopardy cases, not cases involving common-law criminal issue preclusion.

For support, he points to *Arterbury*, 961 F.3d 1095. In *Arterbury*, Scott Arterbury was charged with possessing child pornography. *Id.* at 1097. Ruling that an out-of-district search warrant for a search of the defendant's computer was invalid, the court suppressed the pornography evidence found on Arterbury's computer. *Id.* The government filed a notice of appeal but dismissed it before any briefing. *Id.* at 1098. Soon afterward, acting on the government's motion, the district court dismissed the case without prejudice. *Id.* But months later, after an intervening circuit case approved the validity of the same out-of-district search warrant, the government reindicted Arterbury. *Id.* at 1099. Arterbury moved the court to enforce its earlier suppression motion, arguing that issue preclusion barred the government from relitigating the suppression issue. *Id.* The district court denied the motion. *Id.* On appeal, we reversed, holding that the district court had to enforce its earlier suppression order. *Id.* at 1103–04.

Arterbury applied federal common-law issue preclusion in a criminal case. *Id.* at 1100. In discussing issue preclusion, it quoted a portion of *Willner* that didn't identify essentiality as a requirement. *Id.* at 1103 (quoting *Willner*, 848 F.2d at 1034). Though not singling out essentiality, *Arterbury* fully recognized the importance of essentiality in the issue-preclusion analysis. In this regard, *Arterbury* stressed that "[f]or collateral-estoppel purposes, . . . the government had every reason to appeal the unfavorable suppression ruling." *Id.* And it addressed the essentiality concept in this way: "The suppression order sounded the death knell for the government's case—simply put, no child-pornography evidence, no prosecution." *Id.* In other words, the suppression ruling was "outcome determinative." *Bies*, 556 U.S. at 835. So though *Arterbury* could have been more explicit in identifying essentiality as a requirement under *Bies*, it did factor essentiality into its result.

This makes sense. For issue preclusion to apply, a party must have an "adequate . . . incentive to obtain a full and fair adjudication in the first proceeding." 6 Wayne R. LaFave, *Search and Seizure* § 11.2(g) (6th ed. 2020) (footnote omitted). This incentive must exist for the issue to be essential to the judgment. Were it otherwise, a party would even need to appeal minor issues to avoid issue preclusion. *See Loera v. United States*, 714 F.3d 1025, 1030 (7th Cir. 2013) ("Not every ruling has collateral estoppel effect in a subsequent proceeding in which the issue resolved by the ruling pops up again. Considering the number of rulings that a judge is apt to make in a case, whether civil or criminal, we worry that to give every ruling

collateral estoppel effect would make the doctrine proliferate excessively."). We likewise determine that essentiality is a requirement.

A. Essentiality

Next, we apply the elements of issue preclusion to Koerber's case. The government doesn't dispute that Judge Waddoups decided the suppression issue in Koerber I, or that it had a full and fair opportunity to litigate the issue. Instead, it argues only that Judge Waddoups's suppression order wasn't essential to the outcome of Judge Parrish's dismissal without prejudice (which ended Koerber I). We agree with the government.

In addressing the essentiality question, we must resolve what was the "final judgment" in Koerber I. In his Opening Brief, Koerber argues that the "final judgment" in Koerber I should be Judge Waddoups's dismissal with prejudice. According to Koerber, "Judge Waddoups'[s] dismissal order demonstrated that the suppression order was necessary to the outcome because it repeatedly explained that dismissal was based on delays caused by the misconduct that gave rise to the suppression order." Appellant's Opening Br. at 26. But Judge Waddoups's dismissal with prejudice wasn't the final determination of Koerber I. It didn't end the case. The government appealed, and we remanded for a redetermination. After evaluating our decision, Judge Parrish dismissed without prejudice. That ended the case.

Alternatively, in his Reply Brief and at oral argument, Koerber asserted a separate argument for essentiality: that the suppression issue was essential to the suppression order itself. *See* Appellant's Reply Br. at 8 ("The government's argument

also fails in part because it rests on the incorrect premise that the dismissal order is the outcome for which the suppression order must be essential."). According to Koerber, the suppression issue needn't be essential to the final dismissal of Koerber I—the suppression order itself can be considered the final judgment. In his words, essentiality means that an issue "is material, not that it is dispositive." Oral Argument at 8:26–8:32; *see also id.* at 13:16–13:29 (counsel answering that an issue satisfies essentiality even if it is just "one factor in dismissing the case").

Leaving aside Koerber's delay in raising this alternative argument, we disagree. Such an application would run counter to *Bies*, which stated that issue preclusion "bars relitigation of determinations necessary to the *ultimate outcome* of a prior proceeding." 556 U.S. at 829 (emphasis added). And it would contradict our language in *Arterbury*, which treated the dismissal of the first indictment—not the suppression order itself—"as if it were a final judgment." 961 F.3d at 1103 (citation omitted).

Here, the final determination was Judge Parrish's decision to dismiss without prejudice. Her without-prejudice ruling relied heavily on her finding that both the government and Koerber were responsible for the delays. In dismissing without prejudice, she mentioned the suppression issue only once—and even then, she did so in cataloging Koerber's own delays. In no way did her decision "hinge on" the suppression order. *See Bies*, 556 U.S. at 835 (citation omitted). This distinguishes Koerber's case from *Arterbury*. In *Arterbury*, the dismissal of the first indictment did hinge on the unfavorable suppression order. *See* 962 F.3d at 1098. After the district

court suppressed the evidence, the government moved to dismiss the indictment because it had no prosecutable case without the child-pornography evidence. *Id.* at 1098, 1103. As noted, the suppression order "sounded the death knell for the government's case." *Id.* at 1103.

This is true even though the government appealed Judge Waddoups's suppression decision, and in doing so "certified to the court . . . that the suppressed evidence was substantial proof of material facts, as required by 18 U.S.C. § 3731." Appellant's Opening Br. at 28 (citing R. vol. 6 at 1571). Though the government's "certification" represented that it might face increased difficulty in prosecuting the case, it didn't signal that the suppression order was essential to the "ultimate outcome" of Koerber I. *Bies*, 556 U.S. at 829. This matters. Though the government may sometimes dismiss a case after substantial evidence is suppressed, oftentimes, as here, the government still seeks a trial date, obviously believing sufficient evidence remains to convict.

Our decision today aligns with the Seventh Circuit's decision in *Loera*, 714 F.3d at 1030. There, a district court had granted a criminal defendant's motion to suppress evidence against him. *Id.* at 1026. After several delays resulting in an STA violation, the court dismissed the indictment without prejudice. *Id.* at 1028. The defendant was reindicted and again sought to suppress the evidence, but this time, the judge denied the motion and the defendant was convicted. *Id.* On appeal, Judge Posner determined that issue preclusion wasn't applicable, because "the grant of the motion to suppress had played no role in the dismissal of the first indictment," and

that "[t]he only ground for that dismissal had been violation of the Speedy Trial Act, a ground to which the motion was irrelevant." *Id.* at 1030.

Taking a different approach, Koerber argues that "[g]reat mischief could result if Speedy Trial Act violations serve as a safe harbor when the government loses suppression motions." Appellant's Reply Br. at 6. He explains: "Under the government's reasoning, any time evidence is suppressed the government could simply let the STA clock run, secure a dismissal without prejudice, reindict the defendant, and relitigate the suppression issue." *Id.* But this argument fails to consider procedural protections guarding against such an outcome. For instance, Rule 48(a) prevents the government from unilaterally dismissing an indictment. Fed. R. Crim. P. 48(a) ("The government may, *with leave of court*, dismiss an indictment[.]" (emphasis added)). Thus, Rule 48(a) gives the district court power to deny the government's dismissal of an indictment if "dismissal is clearly contrary to manifest public interest." *United States v. Romero*, 360 F.3d 1248, 1251 (10th Cir. 2004) (citations omitted).

What's more, applying issue preclusion as Koerber proposes would likely lead the government to take more interlocutory appeals from pretrial evidentiary rulings, as it is permitted to do—yet rarely does—under 18 U.S.C. § 3731. *See Loera*, 714 F.3d at 1030. And "[i]nterlocutory appeals are a burden to appellate courts and delay the finality of litigation; they are not to be encouraged." *Id.*

We find Koerber's arguments unpersuasive and conclude that Judge Shelby wasn't bound to enforce Judge Waddoups's earlier suppression order.[9]

B. Merits

Having determined that Koerber hasn't satisfied the required showings for issue preclusion, we now review whether Judge Shelby (and later, Judge Block) should have suppressed the interview evidence. Though Judge Waddoups suppressed the evidence after ruling that prosecutors violated Rule 4.2 of Utah's Rules of Professional Conduct, which he concluded in turn amounted to a violation of the McDade Act, Judge Shelby disagreed. Judge Shelby concluded that no state legal-ethics violation had occurred, and that even if one had, suppression would be an improper remedy. Judge Block, "adopt[ing] Judge Shelby's conclusions," also denied Koerber's reasserted motion. R. vol. 15 at 3924–25.

"In reviewing a district court's denial of a motion to suppress, this court considers the totality of the circumstances and views the evidence in the light most favorable to the government." *United States v. Madden*, 682 F.3d 920, 924 (10th Cir. 2012) (citation omitted). We review the district court's factual findings for clear error

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[9] Koerber briefly addresses a related doctrine to issue preclusion, the law-of-the-case doctrine. Under this doctrine, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, generally becomes the law of the case." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1242 (10th Cir. 2016) (alterations and citation omitted). But we needn't address this doctrine on appeal. Koerber devotes a single paragraph to the issue and advances no supporting cases or legal arguments. We deem Koerber's argument on this point waived. *See United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) ("[A]rguments may be deemed waived when they are advanced in an opening brief only in a perfunctory manner." (citations and internal quotation marks omitted)).

and the ultimate determination of reasonableness de novo. *United States v. Cash*, 733 F.3d 1264, 1272–73 (10th Cir. 2013) (citations omitted).

On appeal, Koerber argues that Judge Waddoups got it right. He contends that in violating Utah's Rule 4.2, the government violated "publicly known internal agency policies designed to protect constitutional rights," Appellant's Opening Br. at 27, namely, the McDade Act, requiring that prosecutors "be subject to State laws and rules," 28 U.S.C. § 530B. According to him, this amounts to a due-process violation for which suppression is the proper remedy.

But Koerber's briefing hardly engages with Judge Shelby's analysis of the interaction between Rule 4.2 and suppression, nor do the cases he cites in his briefing support vacating his conviction. *See, e.g.*, *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973) ("A violation of the canon of ethics as here concerned need not be remedied by a reversal of the case wherein it is violated. This does not necessarily present a constitutional question.").

In any event, if the federal prosecutors violated Rule 4.2, and violated Koerber's due-process rights—two questions we needn't resolve today—Judge Block would still have properly denied the motion because suppression wasn't the proper remedy. A violation of Utah's Rules of Professional Conduct can't overcome the Federal Rules of Evidence. *See United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 921 (10th Cir. 2016) ("When it comes to the admissibility of evidence in federal court, . . . [s]tate rules of professional conduct . . . cannot trump the Federal Rules of Evidence. . . . There is nothing in the language or legislative history of the [McDade]

Act that would support such a radical notion." (fourth and fifth alteration in original) (citing *United States v. Lowery*, 166 F.3d 119, 1125 (11th Cir. 1999))).

Federal Rule of Evidence 402 states: "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court." This list is exhaustive and state rules of professional conduct are not included. *Lowery*, 166 F.3d at 1125 (footnote omitted). Accordingly, otherwise admissible evidence can't be excluded because of a violation of a state rule of professional conduct.

This is true even though Congress referenced local rules in enacting the McDade Act. *See* 28 U.S.C. § 530B(a) (requiring that prosecutors "be subject to State laws and rules"). We doubt that in enacting § 530B, Congress gave states power to govern the admission of evidence in federal court. If Congress sought to bestow states with this power, it needed to do so more explicitly.

In sum, even if the prosecutors here violated Utah's Rule 4.2, we conclude that the violation would not result in the exclusion of Koerber's 2009 interviews. *See United States v. Hill*, 197 F.3d 436, 447 (10th Cir. 1999) (noting that a prosecutor's violation of Colorado Rules of Professional Conduct "would not result in the exclusion of [evidence]" (citation omitted)). So Judge Block properly denied Koerber's suppression motion.

II. Speedy Trial Act Violation

Koerber argues that Judge Parrish erred in dismissing his case *without* prejudice. The STA "requires that the trial of a criminal defendant commence within

seventy days of the filing of the indictment, or from the date that the defendant first appears before a judicial officer, whichever is later." *United States v. Abdush-Shakur*, 465 F.3d 458, 461–62 (10th Cir. 2006) (citations omitted). The statute dictates that an indictment must be dismissed if "more than seventy non-excluded days have passed." *United States v. Cano-Silva*, 402 F.3d 1031, 1034 (10th Cir. 2005) (citing 18 U.S.C. § 3162(a)).

Neither party disputes that Judge Parrish's dismissal of the indictment was proper. But they disagree on whether the district court should have dismissed with or without prejudice.[10]

In determining whether to dismiss a case with or without prejudice, a court must consider three factors: "[1] the seriousness of the offense; [2] the facts and circumstances of the case which led to the dismissal; and [3] the impact of a reprosecution . . . on the administration of justice." 18 U.S.C. § 3162(a)(1).

As Koerber tells it, Judge Parrish slighted the second STA factor—the facts and circumstances leading to dismissal—by failing to meaningfully consider the government's "widespread pattern of misconduct" and "tactical delay." Appellant's Opening Br. at 32. He also argues that Judge Parrish exceeded this court's mandate

[10] Even though Judge Parrish's dismissal without prejudice occurred in Koerber I, we nonetheless have jurisdiction to consider his claim because Koerber brings this appeal following his conviction. *See United States v. Kelley*, 849 F.2d 1395, 1397 (11th Cir. 1988) (noting that for an appellate court to have jurisdiction, "any challenge to the dismissal of [an] indictment without prejudice must await the defendant's subsequent conviction" (footnote omitted)).

on remand by revisiting the third STA factor---the impact of reprosecution. We disagree.

We review a district court's dismissal without prejudice for an abuse of discretion. *See United States v. Taylor*, 487 U.S. 326, 885 (1988) (citations omitted). And we accept the court's factual findings in a Speedy Trial Act order unless they are clearly erroneous. *Abdush-Shakur*, 465 F.3d at 461 (citation omitted). "When the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed." *Id.* (alteration and citation omitted). Because Congress has determined that a court's decision must be governed by these factors, "appellate review is limited to ascertaining whether a district court has ignored or slighted a factor." *United States v. Saltzman*, 984 F.2d 1087, 1092 (10th Cir. 1993) (internal quotation marks and citation omitted).

Neither party disputes that dismissal of the case was proper. But they disagree on whether the district court should have dismissed with or without prejudice. We consider the second and third prejudice factors, noting that Koerber doesn't dispute that Judge Parrish acted within her discretion in weighing the first factor, the seriousness of the offense, in favor of dismissing without prejudice.

A. Facts and Circumstances Leading to Dismissal

Koerber argues that Judge Parrish slighted the second factor by failing to include the government's own delays in her analysis. Under this factor, we focus "on the culpability of the delay-producing conduct." *Saltzman*, 984 F.2d at 1093 (citation

omitted). "Where the delay is the result of intentional dilatory conduct, or a pattern of neglect on the part of the Government, dismissal with prejudice is the appropriate remedy." *Id.* at 1093–94 (citation omitted). But "a defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention." *Id.* at 1094 (alteration and citation omitted).

As for the years leading up to Koerber's trial, the government doesn't contest Judge Waddoups's finding that it engaged in "intentional dilatory conduct," resulting in a "pattern of neglect." R. vol. 9 at 2197 (citations omitted). The question, then, is whether Judge Parrish abused her discretion in determining that Koerber's own delay tactics "cancel[ed]-out" the government's delays. *Id.* at 2347. We conclude that she did not.

Koerber shares the blame for the lengthy delays. Judge Parrish cited several instances of Koerber's own delays throughout the case, and the record amply supports her findings. On many occasions, Koerber opposed setting a trial date. In addition, we see nothing in the record about Koerber requesting a trial date between his indictment in 2009 and 2014. The government, on the other hand, began requesting a trial date as early as 2010. Then in 2014, after Koerber's suppression motion was granted, Judge Waddoups asked Koerber if he wanted to set a trial date. In response, Koerber questioned why a trial date was necessary considering his pending motions. He also requested several continuances or acquiesced to the government's continuances. *See, e.g.*, *id.* vol. 3 at 562 (Koerber's motion to continue

the pretrial motion date); *id.* vol. 4 at 844 (Koerber's motion to continue the pretrial motion date); *id.* vol. 7 at 1837 (Koerber's motion to continue the trial date). In addition, he requested several deadline extensions or resisted cut-off deadlines. *See, e.g.*, *id.* vol. 4 at 844 (motion to continue pretrial-motion deadline); *id.* vol. 6 at 1385 (motion to extend time to file supplemental authority); *id.* vol. 7 at 1837 (motion to vacate pretrial motion deadline).

But that's not all. The record reveals several times when Koerber expressed his intentions to file pretrial motions but then delayed filing them until months or even years later. For example, as noted, in 2009, law-enforcement officers twice interviewed Koerber without his counsel being present. By August 2010, Koerber stated at a hearing that he anticipated filing a motion to suppress statements from these interviews. But it wasn't until April 2012 that he filed. Added to that, Koerber delayed in asserting his STA rights. According to Koerber's own calculation, by October 13, 2009, 110 unexcluded days had elapsed on the STA clock. Thus, dismissal was warranted at that time. Yet Koerber didn't file his speedy-trial motion until April 2014, nearly five years later.

For these reasons, we see no clear error in Judge Parrish's *key* factual finding that "Koerber intentionally delayed his case in order to try and obtain a dismissal with prejudice under the [STA]." *Id.* vol. 9 at 2346.

But Koerber doesn't contest that he contributed to the delays. Instead, he argues that Judge Parrish nonetheless erred in two ways: first, by only briefly referencing the government's delays and thereby failing to meaningfully consider the

government's misconduct in her analysis, and second, by failing to analyze the relationship between the government's misconduct and Koerber's delays. To his second point, he maintains that his delays directly resulted from the government's delays, meaning that he had "good cause" for any delays that he might have caused. Appellant's Opening Br. at 37; *see also* Appellant's Reply Br. at 17. Neither argument has merit.

Turning to Koerber's first argument, Judge Parrish's failure to recount in detail the specific instances of government misconduct doesn't amount to an abuse of discretion. This court instructed that on remand, the district court "need not reevaluate (but should still include) the other facts and circumstances upon which it relied to dismiss Koerber's case with prejudice." R. vol. 9 at 2251. Judge Parrish met this directive by considering those facts. She didn't need to relist them item by item. Judge Parrish acknowledged in her findings that the government's deficiencies in preparing orders were "symptomatic of [its] pattern of neglect and dilatory conduct in managing the [STA] clock in this case," which raised "a strong inference of tactical delay . . . in its prosecution of the case." *Id.* at 2345. And though she spent the bulk of her analysis evaluating Koerber's own delays, to do anything less would have violated the mandate from this court to "consider whether any of Koerber's other actions in the case contributed to the STA delay and, if so, what effect that has on the second factor." *Id.* at 2246 (internal quotation marks and citation omitted). We

likewise see no basis for Koerber's suggestion that Judge Parrish failed to consider the government's misconduct in her analysis.[11]

For his second argument, Koerber contends that the government's misconduct was the "root cause" of his own delay. Oral Argument at 18:22–23, 19:00–19:06 (citing *United States v. Black*, 830 F.3d 1099, 1120 (10th Cir. 2016)). In other words, Koerber contends that the government, not he, should be faulted because his own delays were simply a by-product of the government's delays. For support, he uses as an example the government's method of prolonging discovery over several years, including its delay in producing 1,400 pages of discovery and 100 disks of information, despite several certifications that its discovery was completed. And because Koerber's pretrial motions relied on this discovery, or so he alleges, he couldn't have filed these motions any earlier.

Though we don't condone the government's management of the case, nor any other of its delays in Koerber's trial, Koerber can't fault the government as the "root cause" of all his delays. As but one example, several of Koerber's requests for continuances or extensions resulted from his own delays in reviewing the discovery

[11] As a corollary point, Koerber contends that the government can't simultaneously assert that Judge Parrish considered evidence of the government's misconduct under the STA, while also arguing under issue preclusion that the government's misconduct relating to the suppression of the two 2009 interviews "played no role whatsoever" in Judge Parrish's dismissal determination. Appellant's Reply Br. at 21 (citing R. vol. 3 at 7290). But this is a faulty comparison. Judge Parrish's dismissal decision had everything to do with the timing of filing the suppression motion as it pertains to STA delays and nothing to do with the merits of the suppression motion.

material that he had already received. *See, e.g.*, R. vol. 24 at 5903 (requesting "more time to review" the existing discovery materials); *id.* vol. 27 at 6558 (requesting three months); *id.* vol. 28 at 6576-77 (requesting five months). Koerber's responsibility for at least some of the delays "substantially undercuts" any weight that we might otherwise attribute in favor of dismissal with prejudice. *Saltzman*, 984 F.2d at 1094 (quoting *United States v. Peeples*, 811 F.2d 849, 851 (5th Cir. 1987)).

B. Impact of Reprosecution on the Administration of Justice

Finally, the third factor considers whether reprosecution would "serve[] the administration of the Act and justice." *Id.* Koerber alleges that Judge Parrish exceeded this court's mandate by reevaluating the impact-of-reprosecution element. According to Koerber, Judge Parrish failed to consider Judge Waddoups's prior findings regarding the government's extreme prosecutorial misconduct when she determined that this factor was "somewhat mitigated" due to Koerber's share in the delay. Appellant's Opening Br. at 37 (quoting R. vol. 9 at 2347). We aren't persuaded.

Under the mandate rule, a district court must strictly comply with the mandate issued by the reviewing court. *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (citations omitted). "When reviewing the district court's application of our mandate, we consider whether the court abused the limited discretion that our mandate left to it." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1125 (10th Cir. 2003) (citation omitted). But if a mandate is general, "the district court is free to decide anything not foreclosed by the mandate." *Id.* (citations

omitted). To determine whether the district court violated our mandate, we begin by examining the mandate and then consider what the district court did on remand. *Id.* at 1126 (citations omitted).

Previously, on appeal, this court instructed the district court to weigh the seriousness-of-the-offense factor as supporting a dismissal without prejudice and to "include Koerber's role in the delay, if any, in its evaluation of the second factor." R. vol. 9 at 2251. We also emphasized that the district court "need not reevaluate (but should still include) the other facts and circumstances upon which it relied to dismiss Koerber's case with prejudice," noting that the district court "retains discretion" to determine the ultimate dismissal determination. *Id.*

On remand, Judge Parrish dismissed the case without prejudice after concluding that the first factor weighed heavily against Koerber, the second factor was neutral, and the third factor weighed modestly in Koerber's favor. In reaching this conclusion, Judge Parrish noted that under the first factor, Koerber was indicted on "serious charges" of defrauding millions of dollars. *Id.* at 2347. She determined that the second factor was neutral because both parties had contributed to the delay. And finally, "in light of the finding of intentional delay on Mr. Koerber's part," Judge Parrish concluded that the third factor "[was] somewhat mitigated" so that it "weigh[ed] only modestly in favor of dismissal with prejudice." *Id.*

Judge Parrish had discretion to consider the third factor. Even though this court didn't require that the district court consider the third factor on remand, we disagree with Koerber that Judge Parrish's evaluation of the third factor exceeded our

mandate. The third factor must be weighed with the reevaluated first two factors. After all, the third factor considers whether a dismissal without prejudice would serve the administration of justice—a factor that includes a party's intent to cause delays. *See United States v. Toombs*, 713 F.3d 1273, 1281 (10th Cir. 2013) (citations omitted). Additionally, the mandate obviously didn't prohibit the district court from considering the third factor. In fact, it gave the district court discretion to determine the ultimate dismissal outcome.

Though we note that the government shouldn't be rewarded for its serious deficiencies in this case, including its "pattern of neglect and dilatory conduct in managing the [STA] clock," R. vol. 9 at 2345, a dismissal with prejudice "is not the only method for a court to show that violations [of the STA] must be taken seriously," *United States v. Jones*, 213 F.3d 1253, 1257 (10th Cir. 2000). In the end, a dismissal without prejudice still requires the government to reindict, potentially causing the indictment to flounder on the statute of limitations. *See id.* (citation omitted). For these reasons, we conclude that Judge Parrish acted within her discretion in dismissing the case without prejudice.

III. Right to Speedy Trial: Sixth Amendment

Koerber contends that the district court erred in denying his motion to dismiss in which he asserted a violation of his Sixth Amendment right to a speedy trial. According to Koerber, Judge Parrish misapplied the test for a speedy trial by neglecting several of Judge Waddoups's prior findings about the government's delay and by failing to consider the resulting prejudice to Koerber.

Judge Parrish determined that Koerber's Sixth Amendment right wasn't violated. Even though the seven-plus years of delay in the government's prosecution were presumptively prejudicial and did prejudice Koerber, he shared responsibility for the delay. Not only that, but Judge Parrish noted that Koerber had intentionally delayed his case to obtain a dismissal with prejudice under the STA, and that he had failed to promptly assert his right to a speedy trial—a factor that she weighed heavily against him. We review Koerber's Sixth Amendment claim de novo "but accept the district court's factual determinations unless clear error is shown." *United States v. Gould*, 672 F.3d 930, 935 (10th Cir. 2012) (citations omitted).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Though this right has been described as "somewhat amorphous, the remedy is severe: dismissal of the indictment with prejudice." *Black*, 830 F.3d at 1111 (internal quotation marks and citations omitted). The right attaches when a defendant "is arrested or indicted, whichever comes first." *United States v. Medina*, 918 F.3d 774, 779 (10th Cir. 2019) (citation omitted). But "[o]nce charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation." *United States v. MacDonald*, 456 U.S. 1, 8–9 (1982) (footnote omitted).

To determine whether a delay violates a defendant's right to a speedy trial, we apply the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972). These factors are (1) the length of the delay, (2) the reason for the delay, (3) the defendant's

assertion of his right, and (4) the prejudice to the defendant. *Id.* at 530. "None of the factors are necessary or sufficient; rather, the factors are related and should be considered together with other relevant circumstances." *Gould*, 672 F.3d at 936 (citation omitted).

Judge Parrish determined that no Sixth Amendment violation occurred after finding as follows: (1) the length of delay favored Koerber; (2) the reasons for delay favored neither party; (3) Koerber's untimeliness in asserting his right favored the government; and (4) the prejudice to the defendant modestly favored Koerber. Like Judge Parrish, we reject Koerber's Sixth Amendment speedy-trial claim. In any event, "[i]t is unusual to find a Sixth Amendment violation when the Speedy Trial Act has been satisfied." *Abdush-Shakur*, 465 F.3d at 464–65 (citation omitted).

A. Length of Delay

Under the first factor, the length of the delay, the government accepts that the seven-plus years of delay extending from May 26, 2009, the date that Koerber was first indicted, to August 25, 2016, the date that Judge Parrish denied his motion to dismiss on Sixth Amendment grounds, qualified as presumptively prejudicial. We agree and determine that the first factor weighs in favor of Koerber.

B. Reason for Delay

The second *Barker* factor, the reason for delay, is "[t]he flag all litigants seek to capture." *United States v. Margheim*, 770 F.3d 1312, 1326 (10th Cir. 2014) (citation omitted). Our analysis under this factor mirrors what we have said above regarding the delays that Koerber created on his own accord. Judge Parrish observed

that while some of the delays were "symptomatic of the Government's pattern of neglect and dilatory conduct," "many of the delays were attributable to Mr. Koerber's own actions." R. vol. 9 at 2349. And in a key fact finding, Judge Parrish emphasized that "Koerber intentionally delayed his case in order to try and obtain a dismissal with prejudice under the Speedy Trial Act." *Id.* at 2349–50. Though Koerber argues that the government's misconduct led to his delays, he fails to explain how the district court's contrary factual finding is clearly erroneous. We conclude that this factor is neutral.

C. Defendant's Assertion of His Right

As to the third *Barker* factor, this court has emphasized that "the defendant's assertion of the speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Toombs*, 574 F.3d at 1274 (citation omitted). Under this factor, we ask whether the defendant "actively" asserted his right, which requires more than merely "moving to dismiss after the delay has already occurred." *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006). That is, we consider "whether the defendant's behavior during the course of litigation evinces a desire to go to trial." *Id.* (citations omitted). Judge Parrish concluded that this factor weighed "heavily" against Koerber because of his "extreme delay in asserting his speedy trial right" and his consistent resistance to the court's setting a trial date. R. vol. 9 at 2350. We agree.

By his own account, Koerber first asserted his speedy-trial right at a status conference in August 2013. But even then, that was over four years after Koerber's

initial indictment. We would be hard-pressed to call his assertions "frequent" or "forceful." *See United States v. Latimer*, 511 F.2d 498, 501 (10th Cir. 1975) ("We may weigh the frequency and force of the objections." (citation omitted)). And in the meantime, Koerber requested several continuances and deadline extensions—behaviors hardly characteristic of a desire for a speedier process. *See Batie*, 433 F.3d at 1292 ("[Defendant]'s persistent requests for continuances, even when opposed, scarcely demonstrate a desire for a speedier process." (footnote omitted)). Obviously, we are "unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire." *Id.* at 1291 (citation omitted). Thus, this factor weighs heavily against Koerber.

D. Prejudice to the Defendant

Finally, "[w]e assess prejudice in light of the particular evils the speedy trial right is intended to avert: pretrial incarceration; anxiety and concern of the accused; and the possibility that the defense will be impaired." *Id.* at 1292 (internal quotation marks, ellipses, and citation omitted). Judge Parrish acknowledged that Koerber had suffered some prejudice, but she also found that "Koerber [was] culpable for much of the delay in this case," meaning that "much of the prejudice he suffered [was] a result of . . . his own making." R. vol. 9 at 2350. She accordingly weighed this factor only modestly in Koerber's favor.

Koerber primarily argues that he was prejudiced based on the length of the delay. Beyond this, he argues that the government's delay undermined his chances at a fair trial. But "[w]e have looked with disfavor on defendants' hazy descriptions of

prejudice, and required criminal defendants to show definite and not speculative prejudice." *Margheim*, 770 F.3d at 1331 (internal quotation marks and citations omitted). Koerber's failure to make any specific allegations does little to support a finding of prejudice. *See id.* We acknowledge the prejudice a defendant experiences waiting over seven years for trial. But we have no reason to believe that Judge Parrish erred in her factual findings relating to Koerber's own delay. So Koerber's own conduct contributed to the prejudice.

We therefore agree with the district court and hold that Koerber's Sixth Amendment right wasn't violated, because his failure to timely and forcefully assert his right heavily weighed against any delay or prejudice that he might have experienced.

IV. Reindictment and the Limitations Period

Koerber asserts that the government's 2017 indictment extended past the limitations period provided by the savings statute, 18 U.S.C. § 3288, because the government failed to reindict him within sixty days of Judge Parrish's decision to dismiss without prejudice. To that end, he argues that we should vacate his conviction.

A court's dismissal of an indictment near the end of the statute-of-limitations period can defeat a reprosecution. In balancing the considerations, § 3288 provides the government additional time to reindict a defendant, even if the original limitations period has run. Under § 3288, the government may return a new indictment "within six calendar months of the date of the dismissal" "or, in the event

of an appeal, within 60 days of the date the dismissal of the indictment . . . becomes final." Judge Parrish dismissed Koerber's case without prejudice in August 2016, and Koerber was reindicted less than five months later—in January 2017. All agree that by then the original statute of limitations had expired. According to Koerber, the sixty-day provision governs, and the government missed it. According to the government, the indictment was timely under the six-month provision.[12] This issue raises a question of first impression: whether the six-month or sixty-day provision of the savings statute applies when an indictment is dismissed with prejudice by the district court and the prejudice determination is reversed on appeal and remanded to the district court for a final determination.[13]

Addressing this question, Judge Shelby applied the six-month provision and held that the 2017 indictment was timely. Determining that the cases cited by the parties weren't "particularly helpful," he concluded that Congress added the sixty-

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[12] Alternatively, the government contends that the 2017 indictment was timely under the 60-day provision. For this, the government relies on Koerber's multiple filings—including a petition for rehearing en banc—after Judge Parrish dismissed Koerber's case without prejudice on August 25, 2016. But we needn't address this argument, because we conclude that the 60-day provision applies only when the appellate decision affirms the dismissal of the case, making the dismissal final.

[13] If Koerber contends that the final date of dismissal should be the date that Judge Waddoups dismissed with prejudice, we disagree. Though the government didn't appeal the dismissal itself (just its with-prejudice ruling), the final dismissal decision was Judge Parrish's decision on remand to dismiss without prejudice. Before the government could reindict Koerber, it had to overturn the "with prejudice" ruling. As a result, the only rational reading of "the date of the dismissal" under § 3288 is the date when both the dismissal and prejudice determinations become final—here, Judge Parrish's order.

day provision to the statute so that the "government can appeal . . . and if unsuccessful, still have time in which to bring a new prosecution." R. vol. 13 at 3280–81 (ellipsis in original) (footnote omitted). With that in mind, he concluded that the sixty-day provision "applies only when a district court dismisses an indictment without prejudice, the decision is then appealed, and the appellate court subsequently affirms the dismissal without prejudice. In any other situation, the six-month provision applies." *Id.* Judge Block later agreed. We review de novo the district court's ruling regarding the applicability of a statute of limitations. *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (citation omitted).

Koerber contends that the sixty-day provision applies whenever the government appeals. He argues that it doesn't matter whether "the dismissal first happens on appeal rather than in the district court or if the government appeals only a prejudice determination," because these scenarios all occur "in the event of an appeal." Appellant's Opening Br. at 47. Under this reading, he argues that the 2017 indictment was too late because it was returned more than sixty days after Judge Parrish's dismissal without prejudice.

The government takes a different approach. Tracking Judge Shelby's reasoning, it argues that the reindictment was timely under the six-month provision. In the government's view, for the "in the event of an appeal" condition to apply, the appellate decision must affirm the dismissal of the case—leaving the district court nothing left to decide. It further argues that for cases like Koerber's, in which the appellate court remanded for a final decision on whether the dismissal should be with

or without prejudice, the six-month limitation period applies. We agree with the government.

In resolving the meaning of § 3288, we apply traditional rules of statutory interpretation. Our goal is to "ascertain the congressional intent and give effect to the legislative will." *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) (citation omitted). We first examine the statute's plain text. *Id.* (citation omitted). Absent ambiguity, our analysis ends there. *See United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) (citation omitted). Section 3288 provides as follows:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment . . . becomes final.

We see a simple dichotomy. When the appellate court is responsible for a final dismissal of a case, the sixty-day limitation period applies; when the district court is responsible for a final dismissal of a case, the six-month provision applies.

Even so, we recognize that § 3288 is "reasonably susceptible to more than one interpretation." *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019) (citation omitted). For one, the statute could more clearly state that the appeal must *affirm* a dismissal without prejudice of the indictment to activate the 60-day period. *See* 18 U.S.C. § 3288. The text refers only to "the event of an appeal"; it doesn't specify that the sixty-day provision is triggered only when the appellate court affirms a dismissal without prejudice. *See id.* Because of this, we hold that the

plain language of § 3288 is ambiguous, and therefore consider other canons of statutory interpretation to further inform our analysis. *See In re Taylor*, 899 F.3d at 1129 ("A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different senses." (internal quotation marks and citation omitted)).

We turn to § 3288 as enacted and amended. Originally, the statute provided for reindictment only within six months of the date of dismissal. 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (statement of then-Sen. Joseph R. Biden, Jr.). This led to an obvious problem—an appeal of a dismissal order might take longer than six months to decide. The limitations period could prevent the government from seeking another indictment if the six months ran from (1) the district court's dismissal without prejudice rather than the appellate court's affirmance, or (2) the appellate court's reversal of the district court's dismissal with prejudice.[14]

[14] For what it's worth, the congressional record also lends support to a limited application of the sixty-day provision. For example, at a congressional hearing, then-Senator Biden stated that adding the sixty-day provision and allowing it to run when the dismissal "becomes final" would "make clear that the government need not face the unreasonable choice whether to pursue an appeal or to accept the lower court's decision and commence a reprosecution." 134 Cong. Rec. S17360-02. He added that under the new sixty-day provision, the government could appeal the dismissal without prejudice "and, if unsuccessful, still have time in which to bring a new prosecution." *Id.* Additionally, Representative Martin Frost explained at a congressional hearing that "in the event of *an appeal resulting in the dismissal of charges*, [the amendment would] give the government an additional 60 days from the date of dismissal in which to bring new charges." 134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) (emphasis added) (citation omitted).

Here, Judge Waddoups dismissed the case with prejudice. The government appealed only the prejudice determination, meaning that this court considered whether the district court erred in dismissing with prejudice. In reversing the dismissal with prejudice, we remanded for the district court to apply the law as we announced it and to redetermine whether to dismiss the case with or without prejudice. The dismissal of the indictment was in limbo pending the district court's decision. Once the district court decided to dismiss without prejudice, the government had six months to reindict. In no way could Koerber's appeal be said to make "the dismissal of the indictment" final. 18 U.S.C. § 3288.[15]

In summary, we determine that the 2017 indictment was timely because it was returned within six months of Judge Parrish's order dismissing without prejudice.

V. Inevitable Discovery

Koerber argues that the district court erroneously denied his motion to suppress certain of his companies' QuickBooks files on grounds that the government would have inevitably discovered these files. He says that without a warrant, and without authorization to seize the files, the government violated the Fourth Amendment by obtaining these records. The government counters that because a

[15] There could also be scenarios, unlike here, in which the government argues that the district court shouldn't have dismissed the case at all—with *or* without prejudice. For example, had the government appealed a second time, challenging the dismissal *without* prejudice (i.e., arguing that dismissal was an inappropriate remedy), the government would then have sixty days to reindict after any affirmance by this court.

private citizen voluntarily provided it the records, the Fourth Amendment isn't implicated. We agree with the government.

Forrest Allen worked as the bookkeeper for several of Koerber's companies. In September 2017, when Allen left the accounting department, he "downloaded onto a disk all of [Koerber's] financial records as of that date." R. vol. 55 at 12120. These financial records were password-protected QuickBooks files. And Allen did so without Koerber's permission. Later, in summer 2008, Allen voluntarily provided the documents to the government.

At Koerber's first trial, the government introduced several of these QuickBooks files through Allen. Koerber didn't object at trial. But before his second trial, he moved to suppress these files, arguing in essence that he retained a reasonable expectation of privacy in these files that Allen didn't have the authority to waive. The government countered that Allen had acted as a private citizen when he copied Koerber's electronic documents, so the Fourth Amendment didn't apply. In the alternative, the government contended under the inevitable-discovery doctrine that the court shouldn't suppress the files because IRS summonses would have obtained the same documents. Judge Block didn't address the government's first argument, but because he agreed with the government's second argument, that the records fell within the inevitable-discovery doctrine, he denied Koerber's motion to suppress.

We accept the court's factual findings unless they are clearly erroneous, and we view the evidence in the light most favorable to the government. *United States v.*

Burgess, 576 F.3d 1078, 1087 (10th Cir. 2009) (citation omitted). "The ultimate question of reasonableness under the Fourth Amendment is a legal conclusion that we review de novo." *Id.* (citation omitted).

Unlike the district court, we don't reach the government's alternative argument about the inevitable-discovery doctrine, because we conclude that the government never violated Koerber's Fourth Amendment rights. *See United States v. White*, 326 F.3d 1135, 1138 (10th Cir. 2003) ("[W]e may affirm on any grounds supported by the record." (citation omitted)). "Subject to limited exceptions, the Fourth Amendment prohibits warrantless searches." *United States v. Benoit*, 713 F.3d 1, 8 (10th Cir. 2013) (citation omitted). But "it is well-settled that the Fourth Amendment proscribes only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Id.* at 9 (alterations, internal quotation marks, and citation omitted). Otherwise stated, "Fourth Amendment concerns simply are not implicated when a private person voluntarily turns over property belonging to another and the government's direct or indirect participation is nonexistent or minor." *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996) (internal quotation marks and citation omitted).

We now address a question that the district court didn't answer: whether Allen was acting as a government actor when he copied Koerber's electronic QuickBooks files. To answer this, we consider two subsidiary questions: first, "whether the government knew of and acquiesced in the individual's intrusive conduct," and

second, "whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *United States v. Poe*, 556 F.3d 1113, 1123 (10th Cir. 2009) (alteration and citations omitted).

Koerber doesn't argue that Allen acted as a government actor. And nothing in the record supports a view that the government "knew of and acquiesced in" Allen's retrieval of the documents, *id.* (citation omitted), let alone "coerce[d], dominate[d] or direct[ed]" his actions, *id.* (citation omitted). Instead, Allen had a "legitimate, independent motivation" to retrieve the files: he wanted to cover his own tracks. *Smythe*, 84 F.3d at 1243 (internal quotation marks and citations omitted). Indeed, at trial, when the court questioned Allen why he copied the files, he said this: "I wanted to be sure that if anything came up in the future that I had a way of showing what I had done. I wanted a snapshot." R. vol. 55 at 12120–21.

Even so, Koerber argues that Allen lacked authority to disclose the files and that the government can't "skirt the Fourth Amendment by obtaining evidence from persons unauthorized to disclose it." Appellant's Reply Br. at 30 (citation omitted). The government acknowledges that Allen copied the files without Koerber's permission. But this fact alone doesn't invoke Fourth Amendment protections. "When a private individual conducts a search not acting as, or in concert with, a government agent, the Fourth Amendment is not implicated, *no matter how unreasonable the search*." *Poe*, 556 F.3d at 1123 (emphasis added) (citation omitted). And "[w]hile government agents may not circumvent the Fourth Amendment by

acting through private citizens, they need not discourage private citizens from doing that which is not unlawful." *Smythe*, 84 F.3d at 1243 (citation omitted).

We conclude that Allen's actions didn't implicate Koerber's Fourth Amendment rights. Accordingly, we affirm the district court's dismissal of Koerber's motion to suppress.[16]

VI. Constructive Amendment of Indictment

Koerber next claims that the government constructively amended his indictment to encompass investments from "feeder funds." Appellant's Opening Br. at 54. For this, he argues that both his Fifth and Sixth Amendment rights were violated—"his Fifth Amendment right to be indicted by a grand jury on the charges against him and his Sixth Amendment right to receive notice of those charges." *Id.* at 60 (quoting *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018)). The government disputes that any evidence regarding feeder funds extended beyond the indictment's parameters. We agree with the government.

Before trial, Koerber filed a motion in limine for an order prohibiting testimony and evidence relating to investments in companies other than Founders

[16] We needn't consider Koerber's additional argument that the files Allen recovered "distorted financial reality" and were "different in kind" than other files that the government may have received through the IRS summonses. Appellant's Opening Br. at 53. Because we conclude that Allen's actions didn't invoke the Fourth Amendment, these contentions go to the weight of the evidence, not to their admissibility under the exclusionary rule. *Cf. United States v. Calandra*, 414 U.S. 338, 347 (1974) ("Under [the exclusionary] rule, evidence obtained *in violation of the Fourth Amendment* cannot be used in a criminal proceeding against the victim of the illegal search and seizure." (emphasis added) (citations omitted)).

Capital. More specifically, he sought to limit evidence to those activities "*directly connected with Founders Capital.*" R. vol. 16 at 3980. The district court denied his motion, allowing testimony at trial that Koerber asserts resulted in his conviction for uncharged conduct. "We review de novo the question of whether an amendment or a variance occurred." *United States v. Rosalez*, 711 F.3d 1194, 1209 (10th Cir. 2013) (citations omitted).

"It is a fundamental precept of federal constitutional law that a court cannot permit a defendant to be tried on charges that are not made in the indictment." *United States v. Williamson*, 53 F.3d 1500, 1512 (10th Cir. 1995) (alteration, internal quotation marks, and citation omitted). And an accused has the right to be informed of the charges against him. *Hunter v. State of N.M.*, 916 F.2d 595, 598 (10th Cir. 1990) (first citing U.S. Const. amend. VI; then citation omitted). "A fatal variance denies a defendant this fundamental guarantee because it destroys his right to be on notice of the charge brought in the indictment." *Id.* (citations and footnote omitted).

This court recognizes two types of variances. *United States v. Sells*, 477 F.3d 1226, 1237 (10th Cir. 2007). At one end of the variance spectrum is a simple variance, which occurs "when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." *Hunter*, 916 F.2d at 598 (internal quotation marks and citations omitted). This type of variance triggers a harmless-error analysis. *Id.* (citation omitted).

At the other end of the spectrum is a "more severe alteration[]" known as a constructive amendment. *Id.* at 599. A constructive amendment occurs when "the

district court's instructions and the proof offered at trial broaden the indictment." *Sells*, 477 F.3d at 1237 (citation omitted). That is to say, a constructive amendment "modif[ies] essential elements of the offense charged [such] that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *Rosalez*, 711 F.3d at 1210 (citation omitted). A variance rising to this level is reversible per se. *Hunter*, 916 F.2d at 599 (citation omitted). "The defendant bears the burden of proof both to show that a variance occurred and that it was fatal." *Sells*, 477 F.3d at 1237 (citation omitted). Koerber argues that a fatal variance has occurred, but we determine that he has failed to meet his burden to show that a variance of either type occurred.

At its core, Koerber asserts that he was charged with devising a fraud scheme to get people to invest in Founders Capital, but that the jury instructions and the government's evidence at trial allowed the jury to "convict Koerber for devising a scheme or artifice relating to money invested in other companies—so called feeder funds that Koerber did not control—without connecting those investments to Founders Capital." Appellant's Opening Br. at 54. In other words, Koerber argues that the indictment was constructively amended when "[he] was convicted on evidence that a handful of the companies who invested in Founders Capital had defrauded the individuals who invested in those other companies." Appellant's Reply Br. at 32. For several reasons, we find his argument unpersuasive.

First, Koerber's view of the indictment is much narrower than reality. Reading the indictment "as a whole and interpret[ing it] in a common-sense manner," *United*

States v. Stoner, 98 F.3d 527, 531 (10th Cir. 1996) (citation omitted), we conclude that it broadly alleged Koerber's involvement in feeder-fund schemes. For example, it alleged that Koerber "accepted money from individuals *and companies* through Founders Capital," and that Koerber "communicated his misrepresentations and omissions regarding his schemes, both directly *and indirectly*, to the investors," the "*potential investors*," and "*intermediaries*." R. vol. 10 at 2444 (emphasis added). It also alleged that Koerber "obtained approximately $100 million in investor funds," *id.* at 2447, thereby naturally contemplating money received from feeder funds.

Second, the evidence presented at trial didn't expand the scope of the indictment. Koerber contends that the government failed to connect the investments of four individuals to Founders Capital. We don't see it that way. Though the government didn't show a paper trail at trial, it did elicit testimony connecting these investments in feeder funds back to Koerber's companies. *See, e.g.*, *id.* vol. 56 at 12363 (Jeff Goodsell testifying that he invested money in Freestyle Holdings, a company that was a "pass-through to Founders Capital"); *id.* at 12422–24 (Austin Westmoreland testifying that when he wired investment money to Hunters Capital, "[he] thought it was going to Rick's company"); *id.* vol. 57 at 12486–87 (Garth Allred testifying that though he invested in Vonco, a non-Koerber owned company, "[Vonco] took the money and then paid it to Rick's companies"); *id.* at 12535–38 (Frank Breitenstein testifying that he invested in Vonco, believing that his money would then be invested with Founders Capital).

Third, even if the evidence proved, as Koerber alleges, that neither he nor his companies were connected to these investments, this would merely show that his fraud scheme was narrower than the indictment alleged. But "[p]roof of a narrower scheme than alleged in the indictment does not prejudice a defendant's substantial rights." *Sells*, 477 F.3d at 1238 (citations omitted).[17]

Fourth, the government admitted overwhelming evidence at trial of Koerber's "scheme or artifice to defraud"—which included indirect investments. *See* 18 U.S.C. § 1343; *see also* R. vol. 10 at 2448. For example, testimony revealed that Koerber refused to accept investments "directly," R. vol. 57 at 12486–87, but that when approached about investment opportunities, Koerber directed potential investors to invest in other pass-through companies, because only "a dozen or so investors [could] give Rick and his companies money," *id.* at 12479. Downstream investors even requested permission to invest in Koerber's feeder funds. Other testimony at trial supported that some indirect investors wrote their investment checks out to Koerber directly, despite investing in a feeder fund, and some even received interest payments

[17] Koerber additionally argues that not only did the government fail to provide evidence connecting indirect investments to Founders Capital, but in the case of Austin Westmoreland, the investment money stopped at the feeder fund and never passed through to Founders Capital at all. According to Koerber, any fraud that Westmoreland experienced was a direct result of the feeder fund, not Koerber. We disagree that this rose to the level of a constructive amendment, and even if this were a simple variance, Koerber has failed to demonstrate that it was fatal. After all, Koerber was on notice that evidence of Westmoreland's investment might be addressed at trial. *See Stoner*, 98 F.3d at 536 ("[A] variance between facts alleged in the indictment and proved at trial was not fatal because the defendant had notice of what he must defend against." (citation omitted)). In fact, he actively defended against this evidence at trial and at pre-trial.

from Founders Capital directly. Still others noted that some of the feeder-fund companies used email addresses for Franklin Squires—a Koerber-owned company—adding to investors' confusion about who they were really investing in.

Surely this evidence is what the indictment contemplated when it described Koerber's scheme as one defrauding "investors and potential investors" "both directly and indirectly." *Id.* vol. 10 at 2444. And it was through the testimony of Koerber's downstream investors that the government demonstrated how Koerber obtained the alleged $100 million in investment funds.

Fifth, the jury instructions didn't broaden the indictment as Koerber contends. For support, Koerber relies on a portion of the instructions stating: "It is sufficient if Mr. Koerber participated in the scheme or fraudulent conduct that *involved* the offer or sale of a security from Founders Capital." *Id.* vol. 17 at 4280 (emphasis added). This, Koerber contends, exceeded the scope of the indictment which limited Koerber's charges to "fraud from investments made directly with him or his company." Appellant's Opening Br. at 57. But as stated above, Koerber mischaracterizes the nature of the indictment, which alleged that Koerber made "misrepresentations and omissions to colleagues and *intermediaries* with the knowledge that such information would be disseminated to other investors and *potential investors*." R. vol. 10 at 2444 (emphasis added).

We conclude that Koerber has failed to meet his burden to show that a variance of either kind occurred, let alone show that a variance was fatal. *Sells*, 477 F.3d at 1237 (citation omitted).

VII. Judge Interference at Trial

Last, Koerber asserts that Judge Block abused his discretion by interfering at trial. In his words, the district court "suggest[ed] to the jury that Koerber was guilty," "persistently [took] control of questioning witnesses," "undermin[ed] the defense's impeachment efforts," and "impl[ied] the defense was not credible." Appellant's Opening Br. at 60. Reviewing for an abuse of discretion, *United States v. Rodebaugh*, 798 F.3d 1281, 1293 (10th Cir. 2015) (citation omitted), we disagree.

This court has stated the general rule that "[a] district court has considerable discretion in running its courtroom." *Id.* at 1294 (internal quotation marks and citation omitted). We review two aspects of a trial court's discretion: (1) its control over its courtroom procedures, including "its considerable discretion to ensure that the jury's time [isn't] wasted and that evidence [is] presented at trial efficiently," *United States v. Banks*, 761 F.3d 1163, 1193 (10th Cir. 2014) (citations omitted); and (2) its power to question witnesses called by the parties, *United States v. Orr*, 68 F.3d 1247, 1250 (10th Cir. 1995) (citation omitted). Though a court's discretion isn't without its limits, we conclude that the district court acted within its discretion in managing Koerber's trial.

A. Control Over Courtroom

Under Federal Rule of Evidence 611, district courts have "wide-ranging control over management of their dockets, the courtroom procedures, and the admission of evidence," to ensure "the jury's time [is] not wasted." *Banks*, 761 F.3d at 1193 (citations omitted). Rule 403 grants courts a similar power to exclude

cumulative evidence "in the interests of trial efficiency, time management, and jury comprehension." *Jewell v. Life Ins. Co. of N. Am.*, 508 F.3d 1303, 1314 (10th Cir. 2007) (citation omitted). Nonetheless, Koerber claims that the court abused its discretion in the way that it managed four testifying witnesses at trial.

First is Michael Isom. Isom was a government witness who was cooperating to testify against Koerber in exchange for leniency on his own fraud charges. In his testimony, Isom had underestimated by half the number of times that he previously met with the government to give information. Defense counsel attempted to refresh his memory by requesting that he count and review each of the government's written summaries of the meetings. The court refused to allow it, stating that defense counsel could "make a representation as an officer of the court. And if the government . . . agree[d,] [the court could] move on." R. vol. 55 at 11980–81. Defense counsel did so without objection and the questioning proceeded. Koerber claims that the court's "distracting" manner of interrupting questioning undermined the impact of Isom's false testimony. Appellant's Opening Br. at 63.

We don't view this conduct as improper. And we disagree that there was any substantive difference in counsel stating the number of times that Isom met with the government versus Isom counting the times himself—the former being much more efficient. *See* Fed. R. Evid. 611(a)(2) (The court should exercise reasonable control over . . . presenting evidence so as to . . . avoid wasting time.").

Second, Koerber points to the court's handling of Jeff Goodsell's testimony, another government witness. At trial, the court curtailed defense's questioning of

Goodsell after Goodsell testified that he knew little about real-estate-investment risks—despite previous testimony that he did understand the risks. But the court permitted defense counsel to make the representation to the jury that his testimony conflicted prior testimony. Later, when defense counsel repeatedly asked Goodsell whether a promissory note to him made any mention of Founders Capital or Koerber, the court cut counsel off, stating: "We can all read it," and "[t]here is nothing there that says anything about that." R. vol. 56 at 12379–80, 12383–84.

Yet "[e]ven evidence which is relevant may be excluded in order to promote the administration of the judicial process." *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir. 1987) (citation omitted). Here, we cannot conclude that the court's decision to limit Goodsell's testimony resulted in "manifest injustice" requiring that we disturb the court's decision. *Rodebaugh*, 798 F.3d at 1294 (citation omitted).

Third, Koerber claims that the court disproportionately limited the defense's expert-witness testimony. For support, he argues that the court permitted the government to present a 43-slide presentation, but later told the defense's expert witness, "I really don't want to go through 54 slides[;] it will take us a[ ]long time." R. vol. 61 at 13587–88. Instead, the court asked the expert to "[t]ell the jury what conclusions [he] came to," in order to "get right to it." *Id.* at 13588. To that end, Koerber complains that the court suggested to the jury that the defense's expert testimony "was a waste of their time." Appellant's Opening Br. at 68.

But there are no rules requiring that a judge spend an equal amount of time on each side—let alone consider an equal number of expert slides. And after the court

attempted to narrow the focus of the defense's expert testimony, defense counsel responded that the court's questioning had been "very helpful," and would allow them to "eliminate a lot of slides." R. vol. 61 at 13595.

Fourth, Koerber takes issue with Judge Block falling asleep during the defense's cross-examination of an IRS agent. This isn't the first time that a judge has fallen asleep during trial (and likely not the last). *See, e.g.*, *United States v. Martinez*, 97 F. App'x 869, 872 (10th Cir. 2004) (unpublished). But we find it difficult to believe that this somehow demonstrated the judge's partiality or unfairness to the jury. In fact, in the presence of the jury, the judge explained to defense counsel: "[D]on't take it personally. You're doing a great job. It may be the elevated air in Utah." R. vol. 58 at 12805.

We likewise find Koerber's challenges without merit.

B. Discretion in Questioning Witnesses

Federal Rule of Evidence 614 gives a judge authority to question witnesses. Though this power is beyond dispute, it is equally clear that in exercising this power, a judge must avoid "creat[ing] the appearance that he or she is less than totally impartial." *United States v. Scott*, 529 F.3d 1290, 1299 (10th Cir. 2008) (citation and footnote omitted). This is because in a criminal case, a judge's questioning of witnesses before the jury creates a heightened risk that the jury will perceive the judge as an advocate. *United States v. Albers*, 93 F.3d 1469, 1485 (10th Cir. 1996) (citation omitted). While it is proper for the court to clarify testimony or to uncover

the truth, it is improper for the court to assume the role of an advocate for either side. *Id.* (citation omitted).

Koerber asserts that the court "failed to remain neutral" during the questioning of two witnesses. Appellant's Opening Br. at 61–64. First, Koerber argues that the court imputed its own narrative of the facts when it called Isom, who had previously been convicted of fraud, Koerber's "copycat"—in other words, implying Koerber's guilt. *Id.* at 61–62. But a closer look at the record reveals that the "copycat" comment by the court referred to the similar way in which the men structured their agreements with investors, not the deceptive nature of those agreements. And Isom was prosecuted for "[n]ot disclosing to investors the summer of 2007 [that] the interest [from Founders Capital] had stopped," R. vol. 54 at 11862, not for the way that he structured his investor agreements. These statements by Judge Block fail to demonstrate that he crossed the line of neutrality.

Next, Koerber complains of the court's comments directed at Westmoreland. As Koerber tells it, Westmoreland testified on direct that he had invested with Koerber, but on cross-examination, he explained that he had actually invested in Hunters Capital, a feeder fund to Founders Capital. Defense counsel attempted to question Westmoreland further about who paid him interest on his investments. When Westmoreland said that he couldn't remember who put the money in his bank account, Judge Block interjected, "Santa Claus put it in?" *Id.* vol. 56 at 12426. Then, when Westmoreland again denied knowledge of where the money came from, Judge Block asked him whether he thought the money was coming from "these

organizations," without clarifying whether that meant Koerber's company or Hunter's Capital. *Id.* Westmoreland responded, "Yes, sir." *Id.* at 12427. Based on this interaction, Koerber claims that the judge implied that "defense's questioning was not serious and any contradictions in the witness'[s] testimony should be disregarded." Appellant's Opening Br. at 64.

Though we don't condone the judge's sarcasm, his questioning sought to uncover who paid the interest to Westmoreland. And if anything, the judge's questioning seems to *support* the defense's argument that the witness's failure to remember was unreasonable.

At bottom, the record doesn't support Koerber's contention that the judge treated defense counsel unfairly. At several points in the trial, the judge became impatient with government counsel, interrogated government witnesses, or cut off the government's questioning entirely. And we conclude that the judge took sufficient precautions to avoid the appearance of bias because he repeatedly instructed jurors that he had no opinions as to Koerber's guilt or innocence, and that nothing he said was meant to suggest what the jury should or shouldn't think. Though we don't support some of the court's tactics, we conclude that it acted within its discretion.

CONCLUSION

For the foregoing reasons, we affirm Koerber's conviction.