APPENDICES

APPENDIX A

41 F.4th 812
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Bryan PROTHO, Defendant-Appellant.

No. 21-2092
|
Argued February 24, 2022
|
Decided July 20, 2022

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Illinois, Andrea R. Wood, J., of kidnapping, and his motions for new trial and for judgment of acquittal were denied, 2021 WL 1020999. Defendant appealed.

Holdings: The Court of Appeals, Kirsch, Circuit Judge, held that:

relevant scientific community generally had accepted fiber analysis, as required for fiber analysis testimony by FBI forensic scientist to be admissible as expert;

FBI photographic technologist who had extensive experience and specialized expertise in reviewing visual evidence could testify on image enhancements he made to surveillance videos and on subjects captured in those videos;

government was not motivated in substantial part by discriminatory intent in violation of *Daubert* by striking Black juror;

factual findings were not clearly erroneous that victim was afraid not just of testifying but of testifying in same room as defendant and that testimony by two-way closed-circuit television was necessary to protect victim's welfare because calling her to testify in defendant's presence in his kidnapping trial would cause her substantial emotional trauma;

defendant was not prejudiced by prosecutor's passing comment during government's closing rebuttal argument at kidnapping trial allegedly wrongfully suggesting that victim was both familiar with him and fearful of him;

merely identifying exhibit that jury specifically requested during deliberations did not interfere with jury's independence; and

district court did not abuse its discretion in projecting that 12-year-old victim who had been snatched by total stranger on her walk home from school, threatened with death, and sexually assaulted would require psychotherapy treatment for eight more years.

Affirmed.

Jackson-Akiwumi, Circuit Judge, filed opinion concurring in part.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

***819** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:17-cr-827 — **Andrea R. Wood**, *Judge*.

Attorneys and Law Firms

Brian J. Kerwin, Attorney, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Michael I. Leonard, Attorney, Leonard Trial Lawyers, Chicago, IL, for Defendant-Appellant.

Before Rovner, Kirsch, and Jackson-Akiwumi, Circuit Judges.

Opinion

Kirsch, Circuit Judge.

Bryan Protho grabbed a child off the sidewalk and assaulted her in his vehicle. A jury found Protho guilty of kidnapping, and Protho has raised many issues on appeal. Finding no error, we affirm.

I

Days before winter break at her Calumet City, Illinois school, a ten-year-old girl named Amani walked home after class. She started her usual six-or seven-block route with two friends.

When those friends turned in a different direction, Amani still had a few blocks left to go. At that point, she noticed a red truck exit a parking lot, pass her, and pull into a driveway. A man got out, walked toward the road, and pretended to use a cellphone. When Amani got close enough, the man grabbed her, pushed her into the vehicle's passenger side, and drove off. In the vehicle, Amani kicked, screamed, and prayed. The man hit her eye and lip and threatened to kill her.

***820** After driving a few blocks, the man parked in an alley and ordered Amani to pull her leggings down. She refused. The man pulled them down himself and touched her inside of her underwear. Amani got out and ran down the alley. She knocked on three unanswered doors and then flagged down a passing car with her coat. In tears, Amani explained to the driver that she had been sexually assaulted, and the driver called 911.

A week after the incident, police arrested Bryan Protho. A grand jury later indicted him for kidnapping in violation of the Federal Kidnapping Act (18 U.S.C. § 1201(a)(1) and (g)(1)). For this charge, the court held a nine-day jury trial. Twenty-nine witnesses, including Amani and Protho, testified. The trial focused on the kidnapper's identity, not on whether the kidnapping took place (that was uncontested). The jury found Protho guilty, and the district court sentenced him to 38 years' imprisonment and ordered him to pay restitution that included $87,770 for Amani's psychotherapy needs.

Protho has appealed. Below, we discuss the many issues he has raised, filling in the relevant facts as we go.

II

Protho contends that six trial errors entitle him to acquittal or a new trial. We address and reject each in turn.

A

First, Protho moved to exclude testimony from three expert witnesses. In performing its gatekeeping function under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the district court found each expert qualified and their testimony relevant and reliable. Fed. R. Evid. 702(b)–(c) (an expert's testimony must rest on "sufficient facts or data" and "reliable principles and methods"). It thus denied Protho's pre-and post-trial motions challenging the admissibility of the experts' testimony. On appeal, Protho has renewed his challenges to the admission of these experts' testimony. We review the district court's decision to admit or exclude an expert's testimony for abuse of discretion and find none. *United States v. Godinez*, 7 F.4th 628, 637 (7th Cir. 2021); see *Kumho Tire Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

1

We start with the first challenged expert: Ashley Baloga, an FBI forensic scientist specializing in the examination of fiber evidence. As Baloga explained, fiber examination aims to determine whether different fibers are consistent with one another by exhibiting the same microscopic characteristics and optical properties. First, to identify a particular fiber, a forensic scientist uses a high-magnification, transmitted-light microscope to look at the fiber's color, shape, lumen, scales, diameter, delustrant particles, and voids. Then, to compare two fibers to determine consistency with one another, a forensic scientist uses five methods in sequential order, stopping if she finds two fibers inconsistent: (1) view two samples side-by-side in the same visual field with high-powered microscopes; (2) use controlled light settings to observe the orientation of polymers on a fiber's axis; (3) illuminate light wavelengths to observe color and intensity of fluorescence; (4) compare the intensity of a fiber's light absorption at different wavelengths against a known spectra; and (5) analyze the fiber's chemical composition through infrared light. Using this methodology, Baloga compared fibers recovered from Protho's ***821** vehicle and residence with fibers obtained from the clothing Amani wore on the day of the kidnapping and testified that the fibers were consistent, though she acknowledged that her results could not definitively identify fibers as coming from the same source. Indeed, Baloga disclosed that fiber analysis can "never" associate "a single item to the exclusion of all others" and that consistency alone "is not a means of positive identification."

Protho argues that the government did not offer enough evidence that Baloga's methods had been or could be tested, were subjected to peer review and publication, had a known error rate, or were generally accepted by the scientific community. Although the government—not Protho—had the burden to support Baloga's testimony, Protho did not do much to help his case. He did not meaningfully question

Baloga's methods beyond listing the *Daubert* factors and did not cite any contradictory scientific information. Probably for good reason: The National Academy of Sciences, which "was created by Congress ... for the explicit purpose of furnishing" scientific advice to the government, *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 460 n.11, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (citation omitted), has concluded that fiber analysis can produce "class" evidence, meaning that it can show whether two fibers may have "come from the same type of garment, carpet, or furniture," Nat'l Research Council, Strengthening Forensic Science in the United States: A Path Forward 163 (2009); see *United States v. Herrera*, 704 F.3d 480, 484–87 (7th Cir. 2013) (relying on the same National Academy of Sciences report to hold that "responsible fingerprint matching is admissible evidence"). According to the report, "there are standardized procedures" for fiber analysis, these "analyses are reproducible across laboratories," and fiber analysts routinely take proficiency tests on the subject. Strengthening Forensic Science, at 163.

In finding Baloga's opinion admissible here, the district court relied upon Baloga's background, experience, expert report, testimony, and upon the regular admission of fiber-analyst testimony in courts across the country. Specifically, the district court found that the conclusions reached by fiber analysis were falsifiable; another expert could undertake the same series of steps to reach her own conclusions about the consistency of two fibers. The court also found that fiber analysis was generally accepted in the relevant scientific community because fiber experts were regularly qualified as expert witnesses in federal court and that their methods were commonly employed. And it found that the scope of Baloga's testimony was appropriately confined because she candidly acknowledged the limitations of her analysis, which could show only whether fibers were consistent with each other and thus *could* have come from the same source.

In undertaking their gatekeeping role, district judges must assess whether the reasoning or methodology underlying an expert's testimony meets "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 141, 149–52, 119 S.Ct. 1167 (citation omitted and cleaned up). This calls for a "flexible" approach "tied to the facts of a particular case." *Id.* Indeed, "*Daubert* makes clear that the factors it mentions do not constitute a definitive checklist or test." *Id.* at 150, 119 S.Ct. 1167 (citation omitted and cleaned up). Given this flexibility, district courts have "broad latitude" in deciding both "how to determine reliability" and in "the ultimate reliability determination." *Id.* at 142, 119 S.Ct. 1167 (emphasis omitted). ***822** Once a district judge properly finds an expert's testimony relevant and reliable, any challenge to it goes to its "weight, ... not its admissibility." *Lees v. Carthage Coll.*, 714 F.3d 516, 525 (7th Cir. 2013); see *Deputy v. Lehman Bros.*, 345 F.3d 494, 506 (7th Cir. 2003) ("[W]hether an expert's theory is correct is a factual question for the jury to determine.").

Here, we have been given no reason to second-guess the district court's conclusion that Baloga's methods met the same level of rigor as others in her field. Based on our own review of Baloga's testimony and expert report, it's clear that her testimony stayed within reliable scientific bounds. See *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 814 (7th Cir. 2012) (affirming admission of expert testimony based on the expert's own "report, calculations, and deposition testimony"). Indeed, we think Baloga reached her opinion with the "soundness and care" expected of experts. *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 431 (7th Cir. 2013). And although the validity of fiber analysis can—like other scientific evidence—still be questioned in future cases, we do not doubt the district judge's conclusion here that the relevant scientific community has generally accepted this type of fiber analysis. Nor do we doubt that the results reached by this kind of analysis are "falsifiable," i.e., that the same samples could be re-examined, and the original results shown to be accurate or not. See, e.g., *State v. Fukusaku*, 946 P.2d 32, 43–44 (Haw. 1997) ("The principles and procedures underlying ... fiber evidence are overwhelmingly accepted as reliable.") (listing cases and secondary sources); Strengthening Forensic Science, at 161–63.

2

Protho next challenges the testimony of Anthony Imel, an FBI photographic technologist who analyzed surveillance videos that were admitted at trial. Imel testified on the image enhancements he made to the surveillance videos and on the subjects captured in those videos. The court also allowed Imel to testify about visual characteristics of the kidnapper's vehicle, Protho's vehicle, the kidnapper, and Protho.

Protho argues that the testimony did not rest on any reliable or generally accepted scientific standards and did not employ peer-reviewed methods. But Imel had extensive experience and specialized expertise in reviewing visual evidence (which Protho has not challenged), and "no one denies that an

expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire*, 526 U.S. at 156, 119 S.Ct. 1167; see Fed. R. Evid. 702 advisory committee's note to 2000 amendments ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."); *United States v. Parkhurst*, 865 F.3d 509, 516– 17 (7th Cir. 2017) (holding scientific methodologies and peer review unnecessary for expert's experience-based testimony on online strategies used by child predators); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761–62 (7th Cir. 2010) ("An expert's testimony is not unreliable simply because it is founded on his experience rather than on data[.]").

Protho also argues that Imel usurped the jury's role. But Imel testified about demonstrative videos he created as pedagogical summaries to aid the jury in its understanding of admitted evidence. See *United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013). And for demonstrative exhibits allowed by a district judge under Federal Rule of Evidence 611(a), the testifying witness may generally offer conclusions, opinions, and "reveal inferences drawn in a way that would assist the ***823** jury." *Id.* (citation omitted). Imel's testimony thus only aided—not usurped—the jury's factfinding task.

3

Last, Protho challenges the admission of testimony from Matthew Fyie, a manager of the Design Analysis Engineering Department at Ford. Fyie testified about the make, model, and year of the kidnapper's vehicle identified in the surveillance videos. On appeal, Protho argues that the district court abused its discretion by allowing Fyie to testify because he lacked expertise on Ford products.

Yet we fail to see how that could be. Fyie has a master's degree in mechanical engineering from the University of Michigan and has worked for Ford for nearly 30 years. Fyie's position, engineering education, and nearly three decades at Ford make him abundantly qualified to opine on the appearance and identity of Ford's products. And nothing suggests any unreliability in Fyie's straightforward, experience-based testimony identifying a specific Ford vehicle. See *Kumho Tire*, 526 U.S. at 156, 119 S.Ct. 1167; Fed. R. Evid. 702 advisory committee's note to 2000 amendments; *Parkhurst*, 865 F.3d at 516–17; *Metavante Corp.*, 619 F.3d at 761–62.

B

We next review Protho's contention that the government struck two prospective Black jurors based on their race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Prosecutors "may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, —— U.S. ——, 139 S. Ct. 2228, 2234, 204 L.Ed.2d 638 (2019); see *United States v. Hughes*, 970 F.2d 227, 230 (7th Cir. 1992) (noting that *Batson* "extends to the federal government through the Due Process Clause of the Fifth Amendment"). To determine whether such discrimination has occurred, courts use the familiar, three-step *Batson* framework. First, the defendant can establish a rebuttable presumption of purposeful racial discrimination by showing that: (1) he is a member of a cognizable racial group; (2) the prosecution exercised peremptory challenges to remove potential jurors of the defendant's race; and (3) other facts support an inference that the prosecutor used its peremptory strikes to exclude potential jurors on account of their race. *Batson*, 476 U.S. at 96, 106 S.Ct. 1712. Second, if a defendant makes that showing, the government has the burden to come forward with a neutral, reasonably specific explanation for striking the juror. *Id.* at 97–98, 106 S.Ct. 1712 & n.20. Third, once the government satisfies its step two burden, the trial court then has the duty to determine whether the government was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (citation omitted); see *Batson*, 476 U.S. at 98, 106 S.Ct. 1712.

Protho raised *Batson* challenges to peremptory strikes of Jurors 16 and 46, both of whom were Black. Because the seated jury included no Black jurors, the district court found that Protho had cleared the "low bar" for establishing a prima facie *Batson* violation, which shifted the burden to the government to offer a race-neutral reason for striking the two challenged jurors.

The government stated that it struck Juror 16 because she worked from 11:00 p.m. to 7:00 a.m., served as the primary caretaker for four children, was "too stoic" after hearing the criminal allegations, and gave one-word answers to most questions at voir dire. And second, the government stated that it struck Juror 46 (a 75-year-old ***824** Black woman with a Ph.D.) because she had her eyes closed during voir dire, seemed to have trouble hearing, did not seem to follow along, and trailed off during answers to the court's questions.

Finding that the government had met its burden at step two, the district court turned to the key question: had Protho established purposeful discrimination? The court found that he had not, giving several reasons. The court found the government's desire to have a juror who reacts more strongly to criminal allegations than Juror 16 a race-neutral (if not entirely judicious) reason for exercising the peremptory strike. The court found the two white jurors identified by Protho as "stoic" differently situated because, unlike Juror 16 who stated that she participated in "no activities," the two white jurors shared more about their activities and interests on their juror forms. And the court found Juror 46 similarly situated to another 75-year-old white juror with an advanced degree for whom the government also exercised a peremptory strike.

On appeal, Protho argues that the district court erred in making these findings. We review a district court's factual findings about a prosecutor's discriminatory intent in a *Batson* challenge for clear error. See *United States v. Lovies*, 16 F.4th 493, 500 (7th Cir. 2021); *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) ("On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error.").

Starting with Juror 16, Protho repeats his argument made below about two similarly "stoic" white jurors not struck by the government. But the district court credited the government's account that it had more information about those jurors' activities and interests than Juror 16, and we see no basis in the record to hold that factual finding clearly erroneous.

Second, Protho argues that the government's insistence that it struck Juror 16 because she did not react strongly enough to the alleged crime reveals pretext for race discrimination. In his view, this explanation contradicts the government's stated commitment to being fair and impartial during the trial. We do not necessarily see anything inconsistent with striking jurors who seem unsympathetic to one's view of the case and wanting a trial to be fair. And although we share Protho's concerns about the wisdom of permitting stoicism alone to support striking a prospective juror, there's nothing inherently race-based in that explanation. We understand that a decision to strike a Black woman as a prospective juror based on stoicism alone could, in some cases, arise from racial and gender biases. But the district judge also independently observed that Juror 16's demeanor was "stoic," and we have not been given reason to question that finding. See *United States v. Tsarnaev*, —— U.S. ——, 142 S. Ct. 1024, 1034, 212 L.Ed.2d 140 (2022) ("[J]ury selection falls particularly within the province of the trial judge" "because a trial judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record, such as a prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty") (citations omitted and cleaned up). Besides, stoicism alone was not the sole motivation for the government's strike of Juror 16. The government expressed concern that she worked as a night-shift manager at McDonald's (indeed, she worked until 3:00 a.m. on the day of the voir dire), was the primary caretaker for four children, and did not offer information about her outside activities on her juror form. For these reasons, we hold that the district court did not ***825** clearly err in denying Protho's *Batson* challenge to Juror 16.

As for Juror 46, Protho sees pretext in the government's explanation that it struck her for inattentiveness. If that were so, Protho argues, then the government would have struck her for cause. But the government explained that it did not challenge Juror 46 for cause because it had thought the effort futile. The district court had already denied one of its for-cause strikes with a stronger foundation (the potential juror had said that he generally didn't believe law enforcement). The district court had a right to credit that neutral explanation. In short, the district court did not clearly err in handling either of Protho's *Batson* challenges.

C

Pursuant to 18 U.S.C. § 3509, the district court allowed Amani (who was twelve years old at the time of trial) to testify via closed-circuit television from another location within the courthouse. When Amani first tried to take the witness stand, outside the jury's presence, she saw Protho and broke down. Her breakdown required her to exit the courtroom and, after reaching the hallway, she collapsed.

On appeal, Protho contends that the district court improperly applied § 3509 and that this manner of testimony also violated the Sixth Amendment's Confrontation Clause. We review legal issues relating to § 3509 and the Sixth Amendment's Confrontation Clause de novo and any factual determinations underlying these legal issues for clear error. See *United States v. Jackson*, 940 F.3d 347, 351 (7th Cir. 2019); *United States v. Bell*, 925 F.3d 362, 375–76 (7th Cir. 2019) (reviewing

factual findings for alleged Sixth Amendment speedy trial right violation for clear error).

1

"In a proceeding involving an alleged offense against a child," a court may "order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television." 18 U.S.C. § 3509(b)(1). To do so, the court must make a factual "find[ing] that the child is unable to testify in open court in the presence of the defendant" for any of four specified reasons, including an inability to testify "because of fear." *Id.*

The day after Amani broke down on the stand, the district court held an evidentiary hearing on this issue and heard testimony from two witnesses who were with Amani during her courtroom appearance and subsequent breakdown. After the evidentiary hearing, the court made the following factual findings. In her preparations for trial (including a visit to the courtroom), Amani had an upbeat disposition and expressed an interest in courtroom proceedings. On the day of the incident, Amani entered the courtroom, took the witness stand (outside the presence of the jury), looked "right at Protho," started having trouble breathing, and "broke down into tears." After several minutes, "it was apparent that [Amani] would not be able to testify," and she was escorted out of the courtroom. Upon exiting the courtroom, Amani "collapsed to the floor," "sobbed," and "appeared to be in a state of shock." Amani was then taken to an empty courtroom nearby, and the adults caring for her noticed that "[h]er eyes were darting all over the place" and that she "repeatedly" stated that "she felt like she was back in the car in which she was kidnapped." Amani later stated that "she was shocked upon seeing Protho and could not control herself" and that she was expecting him to be wearing an orange prisoner jumpsuit. Given these facts, the district court found ***826** Amani "afraid not just of testifying but of testifying in the same room as Protho" and that testimony by two-way CCTV was "necessary to protect [Amani's] welfare" because calling her to testify in Protho's presence "would cause her substantial emotional trauma."

Protho argues that the evidentiary record is at best ambiguous as to what happened and why or how it happened. But we cannot overturn a district court's factual findings based on an alleged ambiguity; only a clear error allows for that. In any event, we see no error—let alone a clear error—in the district court's findings. It's obvious what happened in this case. A twelve-year-old girl was quite certain she saw the man who had kidnapped and sexually assaulted her sitting before her in the courtroom, and she understandably suffered severe fear, which rendered her unable to testify in his presence.

Protho also argues that the district court relied on hearsay statements in making these findings. Yet he failed to object to any statements at the evidentiary hearing on hearsay grounds, so he has forfeited any objection absent plain error. *United States v. Franklin*, 197 F.3d 266, 270 (7th Cir. 1999). And Protho has shown no such plain error because hearsay rules do not apply to preliminary examinations in a criminal case. See Fed. R. Evid. 1101(d)(3).

Finally, Protho contends that the district court should have required Amani to testify about her breakdown. Again, Protho did not object to the district court holding the evidentiary hearing in Amani's absence, so we review only for plain error. See *Franklin*, 197 F.3d at 270. Protho cites no authority requiring a child's direct testimony before entering a § 3509(b) order, and as we noted above, hearsay is admissible, so we see no plain error. The district court did not err in finding that Amani was prevented from testifying in person "because of fear" under § 3509(b)(1).

2

The Sixth Amendment guarantees the accused in a criminal prosecution "the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Constitution thus protects a defendant from the admission of testimonial evidence absent confrontation. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Protho argues that Amani's out-of-court testimony violated his confrontation right, which includes the opportunity to cross-examine an adverse witness, *id.*, and generally requires a witness's physical presence at trial under oath and the chance for the jury to observe the witness's demeanor, see *Maryland v. Craig*, 497 U.S. 836, 845–46, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Amani's testimony had all but one of these components. She was under oath and cross-examined in person by Protho's counsel, who was in the same room with Amani. Protho, the judge, and the jury contemporaneously viewed Amani's testimony in the courtroom, and Amani, in turn, could see and hear the judge and Protho. And Protho had the opportunity to text his attorney during Amani's testimony to ask questions and express his thoughts. Amani's physical presence in the courtroom was the only thing missing.

Yet face-to-face confrontation at trial "is not the *sine qua non* of the confrontation right." *Id.* at 847, 110 S.Ct. 3157. And the Supreme Court has "never insisted on an actual face-to-face encounter in *every* instance in which testimony is admitted against a defendant." *Id.*; see *California v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); ***827** *Mattox v. United States*, 156 U.S. 237, 243–44, 15 S.Ct. 337, 39 L.Ed. 409 (1895). Nor have we found a lower court holding that, under similar circumstances, a witness's physical absence from the courtroom violates the Confrontation Clause. In fact, the Supreme Court has upheld a state's more restrictive alternative to the procedure used here against a Confrontation Clause challenge. In *Craig*, the Supreme Court upheld a state law allowing child witnesses to testify against defendants via a one-way closed-circuit television (the witness could not see the defendant) rather than the two-way closed-circuit television procedure here (Amani and Protho could see one another). 497 U.S. at 851–52, 110 S.Ct. 3157. The Court held that the government has a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment. *Id.* at 852–58, 110 S.Ct. 3157. It also held that this interest outweighs a defendant's right to face his accuser when a district court makes three findings: (1) the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.*, more than mere nervousness or excitement or some reluctance to testify." *Id.* at 852–58, 110 S.Ct. 3157 (citation omitted). The district court made those findings here. It found testimony by two-way CCTV "necessary to protect [Amani's] welfare" because calling her to testify in Protho's presence "would cause her substantial emotional trauma." And it found that Amani was "afraid not just of testifying but of testifying in the same room as Protho."

Protho's contrary argument asks this court to ignore the holding in *Craig* based on the Supreme Court's later decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But "*Crawford* did not overturn *Craig*." *United States v. Wandahsega*, 924 F.3d 868, 879 (6th Cir. 2019). And we lack power to depart from an on-point Supreme Court precedent. See, e.g., *Bosse v. Oklahoma*, —— U.S. ——, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.") (citation omitted). *Crawford* involved a declarant's tape-recorded statement to the police describing the stabbing for which the defendant was on trial. 541 U.S. at 38, 124 S.Ct. 1354. The trial court allowed the jury to hear the tape even though the defendant had no opportunity for cross-examination of the declarant, and the Supreme Court held that this violated the defendant's right to confrontation. *Id.* at 38, 68, 124 S.Ct. 1354. In contrast, Protho's counsel had the ability to (and did) fully cross-examine Amani, as required by the Confrontation Clause. So *Crawford* is inapt, and *Craig* governs here. To that end, we hold that Protho suffered no Sixth Amendment violation.

D

Next, we address Protho's Commerce Clause challenge. After the government rested its case, Protho moved for acquittal. In his view, the prosecution failed to offer evidence of a nexus between his actions and interstate commerce. Protho also objected to the government's tendered instruction on the Federal Kidnapping Act's interstate-commerce element on a similar ground. The district court rejected both arguments. We review whether a criminal statute is constitutionally applied and whether a challenged jury instruction accurately summarizes the law de novo. See ***828** *United States v. Burrows*, 905 F.3d 1061, 1062–63 (7th Cir. 2018); *United States v. Erramilli*, 788 F.3d 723, 730 (7th Cir. 2015).

The Constitution vests Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority "[t]o regulate Commerce ... among the several States." U.S. Const. art. I § 8. This power allows Congress to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (listing cases); see *Cleveland v. United States*, 329 U.S. 14, 19, 67 S.Ct. 13, 91 L.Ed. 12 (1946) ("The power of Congress over the instrumentalities of interstate commerce is plenary[.]"). Wielding this authority, Congress amended the Federal Kidnapping Act in 2006 to criminalize any person who:

> unlawfully ... kidnaps, abducts, or carries away ... and holds for ransom or reward or otherwise any person ...

> when ... the offender ... uses ... any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense.

18 U.S.C. § 1201(a)(1); see Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 616–17.

Convicting Protho thus required answering whether he "use[d] any means, facility, or instrumentality of interstate ... commerce in committing or in furtherance of the commission of" Amani's kidnapping. The answer was yes, according to the district court, if the jury found that Protho had used a vehicle to commit the kidnapping. The court thus gave the following jury instruction:

> The defendant used a means, facility, or instrumentality of interstate commerce if he used an automobile in committing or in furtherance of the commission of the offense.

Protho agrees that automobiles are generally treated as instrumentalities of interstate commerce. Even so, he argues that an automobile can only qualify as an instrumentality of interstate commerce when evidence shows that the specific automobile at issue was, at some point, used for that purpose. In other words, he argues that courts must view automobiles individually—rather than as a class—when deciding their instrumentality status.

Even if we were to accept Protho's legal argument, however, there's no doubt that the Ford Explorer at issue was used in interstate commerce. On the day of the kidnapping, Protho drove the Ford Explorer interstate (from his home in East Chicago, Indiana, to the site of the kidnapping in Calumet City, Illinois). Protho also testified that, on the same day, he crossed state lines in the Ford Explorer to conduct a drug deal in Illinois and to obtain medical services at an Indiana hospital. And Protho regularly drove the Ford Explorer from his home in Indiana to his employer in Illinois. So the Ford Explorer at issue was used in interstate commerce.

But we do not agree with Protho's view that the Commerce Clause asks us to consider each automobile's specific use in interstate commerce. Instead, it's the *nature* of the regulated object's class (here, automobiles) rather than the particular *use* of one member of that class (Protho's Ford Explorer) that matters. We made this clear when interpreting a similar statute, 18 U.S.C. § 1958(a), which criminalizes the use of "any facility of interstate or foreign commerce" in a murder-for-hire scheme. See *United States v. Mandel*, 647 F.3d 710, 720, 722 (7th Cir. 2011) ("[F]ederal jurisdiction is supplied by the nature of the ***829** instrumentality or facility used, not by separate proof of interstate movement.") (citation omitted).

Nearly all circuits have followed this course when faced with similar questions, and no circuit has adopted Protho's proposal. See, e.g., *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) ("conclud[ing] that motor vehicles are instrumentalities of interstate commerce"); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (holding that "[c]ars, like trains and aircraft" are instrumentalities of interstate commerce because they are "inherently mobile and indispensable to the interstate movement of persons and goods"); *United States v. McHenry*, 97 F.3d 125, 126–27 (6th Cir. 1996) (holding that cars are instrumentalities of interstate commerce); *United States v. Robinson*, 62 F.3d 234, 236–37 (8th Cir. 1995) (holding that motor vehicles are "item[s] in interstate commerce"); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) ("[C]ars are themselves instrumentalities of commerce, which Congress may protect."); cf. *United States v. Morgan*, 748 F.3d 1024, 1034 (10th Cir. 2014) (holding that cellphones, the internet, and GPS devices are instrumentalities of interstate commerce for purposes of the Federal Kidnapping Act); but see *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250 (11th Cir. 2008) (passing over the question of whether automobiles are "per se instrumentalities of commerce"). We thus have no trouble holding that the district court correctly denied Protho's motion of acquittal on this basis and properly instructed the jury on the interstate-commerce element of the Federal Kidnapping Act.

E

Protho's next argument relates to a comment made by the prosecutor during closing arguments. During the government's closing rebuttal argument, the prosecutor stated:

> And I'm sorry that a 12 -- a 12-year-old girl doesn't want to be in the same room as the man who took her off the street and sexually assaulted her. Next time pick an older victim.

Protho's counsel objected, and the district court sustained that objection in front of the jury:

> Yeah, I'm going to sustain that objection, and I'm going to instruct the jury to disregard that portion of the argument. And, [prosecutor], you're getting close to the line there. I think that was actually a little across the line. Don't do that again.

Protho moved for a mistrial based on the prosecutor's comment. In his view, the comment deprived him of his right to due process. The district court found the prosecutor's comment improper but denied the motion for mistrial based on a lack of prejudice because: (1) the court sustained the objection and issued a curative instruction for the jury to disregard the comment; (2) the jury had heard multiple times that the lawyers' arguments did not qualify as evidence; (3) the prosecutor's comment lacked specificity and was encompassed within an argument on a different point; and (4) "[t]he evidence at trial overwhelmingly indicated that Protho committed the crime and his alibi defense was, to put it lightly, less than convincing."

On appeal, Protho contends that the district court erred by denying his motion for a mistrial. We review a district court's decision to issue a cautionary instruction after sustaining a defendant's objection to a comment in closing argument and to deny a defendant's motion for a new trial based on that comment for abuse of discretion. See *United States v. Chavez*, 12 F.4th 716, 727–28 (7th Cir. 2021); ***830** *United States v. Miller*, 199 F.3d 416, 421–24 (7th Cir. 1999). In evaluating whether a prosecutor's comments made during closing arguments violate a defendant's Fifth Amendment right to due process, this court asks first "whether the comments themselves were improper" and, if so, whether the statements, "taken in the context of the entire record, deprived the defendant of a fair trial." *United States v. Sandoval*, 347 F.3d 627, 631 (7th Cir. 2003); see *United States v. Common*, 818 F.3d 323, 331 (7th Cir. 2016). Like the parties, we assume (without deciding) that the prosecutor's arguments were improper. So we focus on prejudice. To determine whether a prosecutor's comment is prejudicial, we assess, after considering the entire record, (1) the nature and seriousness of the prosecutorial misconduct; (2) whether defense counsel invited the misconduct; (3) the adequacy of the district court's jury instructions; (4) the defense's opportunity to counter the improper argument; and (5) the weight of the evidence supporting the conviction. See *Common*, 818 F.3d at 332–33; *Sandoval*, 347 F.3d at 631.

Protho focuses on the first prejudice factor: the nature and seriousness of the prosecutorial misconduct. He argues that the comments wrongfully suggested that Amani was both familiar with and fearful of him. But Amani's testimony—not the prosecutor's comment—already made it abundantly clear that she feared Protho, whom she had identified as her attacker. Protho also argues that the prosecutor's comment provided an excuse and explanation for Amani's failure to identify Protho in court. Yet the district court had instructed the jury that Amani was testifying by videoconference from another location because of her age. So the jury already had an explanation for why Amani was not present in the courtroom to make an in-court identification. We see little reason for thinking the jury made much of this passing comment.

For the other factors, Protho's counsel didn't invite this error (factor 2) and didn't get the chance to counter the prosecutor's argument since it was made in rebuttal (factor 4). But the other remaining factors strongly weigh against finding prejudice here. The district court promptly instructed the jury to disregard the comment and reprimanded the prosecutor in front of the jury (factor 3). Cf. *United States v. Warner*, 498 F.3d 666, 683 (7th Cir. 2007) ("There is a general presumption that juries follow their instructions."). And we agree with the district court that overwhelming evidence supports Protho's guilt (factor 5). A surveillance video captured the kidnapping; that video and others showed a Ford Explorer with distinctive features matching Protho's, the one in which he was arrested one week later; and Protho admitted that he drove it near the area within minutes of the kidnapping. Amani described her attacker in a way that generally matched Protho's appearance on the day of the kidnapping (as captured in surveillance footage), and she correctly identified Protho as her kidnapper in a photo array. Moreover, the FBI's fiber expert testified

about potential fiber transfer between clothing from Protho and Amani.

But even with all of this evidence, what makes us most confident about Protho's guilt is his own trial testimony. Protho's tale was, in the district court's words, "patently unbelievable." Protho testified about a three-location, attempted but ultimately failed, marijuana purchase from a childhood friend named "Ell" (with an unknown last name and no evidence of his existence) on the day of the kidnapping. That friend happened to match the kidnapper's appearance to the "T." Two years after the kidnapping, Protho remembered ***831** the color of the drawstrings on Ell's sweatshirt worn on the day Amani was kidnapped. Ell also happened to borrow—for the first time in their fifteen-year friendship—Protho's Ford Explorer, the vehicle used by the kidnapper, on the day, and indeed, during the very period the kidnapping took place. To boot, Protho also could not keep his story straight. A week after the kidnapping, Protho told investigators that no one had used his Ford Explorer the prior week. Yet at trial, he testified that Ell had borrowed it on the day of the kidnapping. And when Protho visited an emergency room on the night of the kidnapping, he told them he had hurt his hand on his car's hood. But on the stand, he testified that his fingernail came loose after a fight with Ell. And even if we could accept Protho's version of events suggesting that Ell —not Protho—really kidnapped Amani, a jury would have to believe that Amani wrongly picked Protho out in the photo array but happened to correctly select the man whose Ford Explorer was used by her real kidnapper. None of that makes sense. So even if the prosecutor's comment were improper (an issue we do not decide), we agree with the district court that Protho suffered no prejudice from it. We thus hold that the district court did not abuse its discretion in denying Protho's motion for a mistrial.

F

For the last alleged trial error, Protho argues that the district court improperly responded to an evidentiary question during jury deliberations. We "review a decision to answer a question from the jury as well as the language used in the response for an abuse of discretion." *United States v. Hewlett*, 453 F.3d 876, 880 (7th Cir. 2006).

A few hours after starting deliberations, the jury submitted the following note to the court:

> Can someone ask the US Attorney to confirm which video shows the defendant getting out of his car, walking around for a few seconds, then getting back in car[?] Showed him from waist down. Could be an extract of an original video.

Protho agreed that Government's Exhibit 13 addressed this request. Over Protho's counsel's objection, the court decided to substantively respond to the note. Otherwise, the jury would have to "go on sort of a hunt for truffles amongst all of the videos to try to find the one that they're looking for when they seem to have a very specific item in mind." The judge then proposed language responding to the note, and Protho's counsel did not object to it. The court sent the jury the following note:

> The third file of Government Exhibit 13 shows an individual from the waist down exiting and subsequently reentering a vehicle as described in juror note No. 2.

On appeal, Protho contends that no substantive response to a jury's evidentiary question is permissible and, alternatively, even if a response is generally permissible, the court's response here was not. To Protho's first argument, the district court has discretion on both whether and how to answer a jury's question. See *Hewlett*, 453 F.3d at 880. As Protho points out, a district court cannot "attempt[ ] to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). But Protho has provided no authority supporting his argument that merely identifying an exhibit which the jury specifically requested somehow interferes with the jury's independence.

***832** As to his second argument, Protho has waived any challenge to the instruction's language by failing to object below. After the court decided to provide a substantive response to the note, Protho's counsel agreed with the

response's proposed language. Indeed, Protho's counsel even requested a change to the court's proposed instruction, which the court then made. This approval of the instruction's language waived any appellate challenge to it. Cf. *United States v. Edgeworth*, 889 F.3d 350, 355 (7th Cir. 2018) (approval of a jury instruction waives appellate challenge to that instruction). We thus hold that the court did not abuse its discretion in responding to the jury's note.

III

Having found no error at or before trial, we next consider Protho's sentence. He contends that the district court erred by awarding $87,770 in restitution based on the projected cost of Amani's psychotherapy. A district court's restitution order may require the defendant to pay any victim harmed by the defendant's offense the cost of necessary medical and related professional services for psychiatric and psychological care. See 18 U.S.C. §§ 3663, 3663A; *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (holding that similar language in 18 U.S.C. § 2259 "allows for restitutionary damages for the future costs of therapy"). We review a district court's restitution calculation for abuse of discretion, taking the evidence in the light most favorable to the government. *United States v. Alverez*, 21 F.4th 499, 502–03 (7th Cir. 2021) (citation omitted).

On Amani's need for psychotherapy, the district court found the government's expert, Dr. Diana Goldstein, a licensed clinical neuropsychologist, "very well qualified in her field" and thus gave her testimony a "significant amount of weight." Dr. Goldstein's expert report noted that a child in Amani's position would require, as a conservative estimate, 24 months of outpatient treatment. But Dr. Goldstein also testified that some patients in Amani's position could need treatment and struggle for the rest of their lives. Moreover, Dr. Goldstein testified that Amani may have suffered a dissociative experience (a type of psychosis related to post-traumatic stress disorder) during her trial breakdown. Amani had already received more than 24 months of treatment, and the district court found it "pretty clear that an additional period of time [wa]s warranted" because Amani was still suffering the effects of the trauma based on her reaction to seeing Protho. The court found that Amani would need a substantial amount of therapy going forward based on her age and the event's traumatic nature. The district court therefore projected that Amani would need therapy for eight more years (ten years total), which would cost $87,770.

On appeal, Protho does not contest the estimated annual therapy cost ($8,777) or dispute that Amani had undergone treatment for two years. But he argues that the district court's estimate that Amani would need treatment for eight more years lacked adequate evidentiary support. After viewing the evidence in the light most favorable to the government, we find that the district court did not abuse its discretion in projecting that Amani would require treatment for eight more years. See *Alverez*, 21 F.4th at 502–03. Determining the duration of future psychological treatment, as a prediction, necessarily prevents any conclusion based on mathematical certainty. Cf. *Danser*, 270 F.3d at 455–56 (rejecting the defendant's argument that restitution calculation for the victim's future psychiatric therapy "was not determined with a degree of reasonable certainty"). ***833** And the district court's finding that Amani would require treatment at least until she was 20 years old does not strike us as an unreasonable duration for someone in her position, as a child snatched by a total stranger on her walk home from school, threatened with death, and sexually assaulted. Indeed, Dr. Goldstein's expert testimony and report suggested that Amani may have suffered from a form of psychosis when she first tried to testify in court, even after two years of therapy, and that some similar patients may require treatment for life.

AFFIRMED

Jackson-Akiwumi, Circuit Judge, concurring in part.

I agree with much of the lead opinion's analysis, except that I would hold that the district court abused its discretion when it admitted the testimony of the government's fiber-analysis expert, FBI Forensic Examiner Ashley Baloga. Although the court reasonably concluded that Baloga was qualified to give opinions about fiber comparison, the government failed to make any showing that the methods she employed were reliable. I nonetheless join my colleagues in affirming Protho's conviction because Baloga's testimony was only a small part of the evidence supporting the jury's guilty verdict, rendering the error harmless.

As with the lead opinion, my analysis starts with Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Rule 702 has four requirements: (a) the witness must be qualified as an expert with scientific, technical, or other specialized knowledge that will help the jury; (b) the testimony must be based on sufficient facts or data; (c) the testimony must be "the product of reliable

principles and methods"; and (d) the expert must have reliably applied those principles and methods to the facts of the case. Fed. R. Evid. 702(a)–(d). The government satisfied requirements (a), (b), and (d): it supplied evidence of Baloga's qualifications, that she relied on data culled from the crime scene, and that she applied a "five-step process" to reach her conclusions. But the government failed to present any evidence regarding the reliability of that "five-step process." When a proponent of expert testimony fails to satisfy Rule 702(c)'s requirement of showing that an expert's methods are reliable, Rule 702's remaining requirements are meaningless. Even the most assiduous adherence to an established method will not produce reliable results if the underlying method is flawed. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (explaining that the application of methods generally accepted within a discipline will not establish reliability if "the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy").

To assess the reliability of an expert's methods, courts apply the standards described in *Daubert*. The Supreme Court outlined four factors that govern a court's evaluation: (1) whether the scientific theory can be and has been tested; (2) whether the theory has been subjected to peer-review or academic publication; (3) whether the theory has a known or potential rate of error; and (4) whether the theory is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. This list is "neither exhaustive nor mandatory"; reliability is assessed on a case-by-case basis. *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015).

***834** None of the *Daubert* factors were present here. Baloga's expert report is barebones. It does not explain whether her fiber-comparison methods have been tested, have been peer reviewed or published in an academic journal, or have a known error rate. Nor does it provide any evidence from which the district court could conclude that her methods are generally accepted in the scientific community. Baloga's report does not even clarify whether she followed all five steps in her five-step method; the report merely states that "[m]icroscopic examination of textile fibers is accomplished by *using one or more* analytical techniques [mentioned in the report]" (emphasis added). And although Baloga describes each step of her process, she does so only in an attached slideshow presentation and only in broad, jargon-laden terms. For example, her presentation notes that "fluorescence microscopy" means to "[i]lluminate fiber with various wavelengths of light to observe color and intensity of fluorescence." She provides no further explanation, and it is not clear whether "fluorescence microscopy" involves more than simply shining a light on fibers while magnifying them.

The district court nonetheless concluded that Baloga's methods were reliable for two reasons: (1) her conclusions are falsifiable; and (2) fiber-evidence experts with similar qualifications have been admitted in other cases. Both reasons fall well below the *Daubert* standard.

First, the district court's finding that Baloga's conclusions are falsifiable was insufficient on its own to conclude that her methods were reliable. Falsifiability is the idea that a prediction can, in principle, be proven to be false. *United States v. Mitchell*, 365 F.3d 215, 235 (3d Cir. 2004). It is a cornerstone of modern science and part of what separates science from other fields of human inquiry. *See Daubert*, 509 U.S. at 593, 113 S.Ct. 2786. I agree with the district court that Baloga's fiber-analysis methods are falsifiable in the abstract sense that they *could* be disproven by showing that two matched fibers did not come from the same source. But falsifiability alone is not an indicator of reliability. Consider a real-life example: History is rife with failed doomsday predictions from religious leaders and others who predicted with confidence the date of the end times. [1] These predictions were falsifiable because one could simply wait to see if the world ended on the predicted date. Often, the prognosticators relied on what they claimed were rigorous methods, such as astrology or esoteric readings of the Bible. The falsifiability of the predictions, however, did not make those methods reliable. Testing showed they were not.

Accordingly, the Supreme Court did not refer to only hypothetical falsifiability when it described falsifiability as an indicium of reliability in *Daubert*. Rather, it explained that a scientific methodology "is based on generating hypotheses *and testing them* to see if they can be falsified," and so a "key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (*and has been*) tested." *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786 (emphasis added). *See also Nease v. Ford Motor Co.*, 848 F.3d 219, 232 (4th Cir. 2017) (holding that court erred in admitting expert testimony because, although expert had a plausible hypothesis for car's mechanical failure, expert had not tested that hypothesis). Maybe Baloga or the FBI conducted tests to determine the error rate of their fiber-analysis process,

but the government did *835 not provide any evidence of such testing to the district court. The falsifiability of Baloga's methods is meaningless without some indication of further testing.

The district court's only other, and primary, reason for finding Baloga's opinions reliable was that similar fiber evidence has been admitted in other cases. The lead opinion and the government also adopt this position. I disagree that any of the fiber-evidence cases presented by the government or cited in the lead opinion are evidence of Baloga's reliability. I see nothing in those decisions to suggest that the expert in each case applied the same five-step method used by Baloga.[2] And court rulings on the reliability of *other* experts, who may or may not have applied the same methods, do not establish the reliability of Baloga's analysis. Even when the *same* witness has been qualified as an expert in prior cases, we have warned courts not to assume the reliability of that witness's testimony in a new case. *See United States v. Godinez*, 7 F.4th 628, 637–38 (7th Cir. 2021) (court erred by concluding that witness's qualification as expert in prior case weighed toward reliability when prior case did not include challenge to expert's methods).

The lead opinion relies on a 2009 report from the National Academy of Sciences as an additional ground for finding that the relevant scientific community generally accepts fiber evidence. *See* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 162–63 (2009). This report is not the slam dunk the lead opinion suggests. The report actually highlights the *lack* of research determining the error rate of certain fiber-comparison methods. And rather than suggesting that Baloga's five-step method is a "standardized procedure" used by all fiber-evidence technicians, the report notes that a variety of methods are used. The lead opinion is correct that the report states that fiber analysis can be used to associate a given fiber with a class of fibers; that is, whether two fibers came from the same broad type of fabric. *Id.* at 161. The report further clarifies, however, that "none of the[ ] characteristics [identified during fiber analysis] is suitable for individualizing fibers (associating a fiber from a crime scene with one, and only one, source)." *Id.* To Baloga's credit, she did not explicitly state that any two fibers "matched" or claim to predict the likelihood that they came from a common source with any statistical precision. But she implied as much by repeatedly insisting during her testimony that one would not expect two random fibers to have all the common characteristics that she identified.

The lead opinion's reliance on the 2009 report—as well as its reliance on other authorities that predate that report—also overlooks the sea change that has occurred in forensic science over the last decade. The 2009 report was the first in a series of federal studies on the use of forensic science in criminal investigations. It revealed systemic problems plaguing the forensic science community and led to a series of reform initiatives and further review of how forensic evidence is used. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, 34–35, §§ 2.7 and 2.8 (2016) (describing 2009 report's impact). Hair and fiber evidence came under particular scrutiny. To be *836 clear, Baloga did not testify about hair; she conducted both fiber-and hair-comparison analysis for her report, but the government decided to present only the fiber analysis at trial. Nonetheless, Baloga's report suggests that her methods for fiber and hair analysis are similar, with at least some overlapping steps. The government likewise conflates fiber and hair analysis in its appellate brief, suggesting that the government also sees these fields as interrelated. Studies about both types of evidence are thus relevant to my analysis.

A 2015 review of the use of forensic evidence by the FBI and the Department of Justice concluded that forensic experts had overstated the strength of forensic hair matches in more than 95 percent of cases.[3] This revelation was followed by a 2016 report from the President's Council of Advisors on Science and Technology, which dug deeper into the history of hair analysis and concluded that the DOJ's foundational studies on hair comparison were flawed. *See* FORENSIC SCIENCE IN CRIMINAL COURTS, 118, § 5.7. Public concern about potentially unreliable forensic evidence has only grown since then, garnering significant media coverage.[4]

The disintegrating consensus around hair and fiber evidence further highlights the problem with the district court's assumption that Baloga's opinions are reliable because similar experts have testified in other cases. Science, by its nature, is always evolving. Forensic testimony that seemed reliable at one time may later be shown to have been founded in speculation. Courts do the parties a disfavor when they assume that an expert is reliable merely because her testimony seems superficially similar to testimony admitted in the past.

See FORENSIC SCIENCE IN CRIMINAL COURTS, 143–44 § 9.2 (describing how an overreliance on past precedent has led courts to erroneously assume that various forensic methods are reliable). The cost of such assumptions can be high: According to statistics compiled by The National Registry of Exonerations at Michigan Law School, about a quarter of all exonerations involve false or misleading forensic evidence as a contributing factor for the wrongful conviction. [5]

I agree with the lead opinion that district courts have broad discretion in how they determine the reliability of scientific testimony. And I reiterate that *Daubert* does not impose a checklist; the absence of any one *Daubert* factor does not necessarily make evidence unreliable. *Smith v. Ford Motor Co.*, 215 F.3d 713, 720 (7th Cir. 2000). But here, not merely one of *Daubert*'s factors for assessing reliability was missing—all were. I am not suggesting that fiber evidence is inadmissible in all cases, nor do I claim to predict whether the government could establish that such evidence is reliable in a future case under the proper standard. Perhaps the lead opinion is right that the scientific community would still rally around the methods ***837** employed by Baloga and similar experts. But the government did not make that showing in the district court. And on that basis, the district court abused its discretion by admitting Baloga's testimony.

I nonetheless join the lead opinion in affirming Protho's conviction because, as the lead opinion has aptly explained, the evidence against Protho was overwhelming. An error at trial is harmless when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Parker*, 11 F.4th 593, 596 (7th Cir. 2021) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17–18, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003)). Because the government introduced video and testimonial evidence identifying Protho as the perpetrator and establishing that Amani was inside Protho's car, the fiber evidence ended up being a relatively small part of the government's case. Its exclusion would not have made the government's case significantly less persuasive in the mind of the average juror. *See id.* (citing *United States v. Stewart*, 902 F.3d 664, 683 (7th Cir. 2018)).

All Citations

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Footnotes

1 *See* Encyclopedia Britannica, *10 Failed Doomsday Predictions*, https://www.britannica.com/list/10-failed-doomsday-predictions (last visited July 13, 2022).

2 *See United States v. Santiago Santiago*, 156 F. Supp. 2d 145, 152 (D.P.R. 2001), *United States v. Barnes*, 481 F. App'x 505, 514 (11th Cir. 2012), *United States v. Lujan*, No. CR 05-0924 RB, 2011 WL 13210238, at *4 (D.N.M. July 14, 2011), and *State v. Fukusaku*, 946 P.2d 32, 44 (Haw. 1997).

3 *See* Press Release, Federal Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, (Apr. 20, 2015), https://www.fbi.gov/news/press-releases/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review.

4 *See Forensic Hair Analysis: A Curated Collection of Links*, The Marshall Project, https://www.themarshallproject.org/records/1234-forensic-hair-analysis (last visited July 13, 2022) (collecting articles from various publications).

5 *See % Exonerations by Contributing Factor*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Ex-onerationsContribFactorsByCrime.aspx (last visited July 13, 2022).

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APPENDIX B

2021 WL 1020999
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES of America
v.
Bryan PROTHO

No. 17-cr-00827
|
Signed 03/17/2021

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MEMORANDUM OPINION AND ORDER

Andrea R. Wood, United States District Judge

*1 On December 20, 2017, Minor A [1] was kidnapped while walking home from school in Calumet City, Illinois. The perpetrator dragged her into his car, drove her into a back alley, sexually assaulted her, let her out of the vehicle, and drove off. Defendant Bryan Protho was subsequently arrested for the crime, tried before a jury, and convicted of one count of kidnapping in violation of the Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1). Because the jury also found that Minor A was under 18 years old, Protho was over 18 years old, and Protho was not related to Minor A, Protho is subject to an enhanced penalty—specifically, a mandatory minimum sentence of 20 years' imprisonment—pursuant to 18 U.S.C. § 1201(g)(1). Protho has now filed post-trial motions for judgment of acquittal and for a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, respectively. (Dkt. Nos. 150, 152.) For the following reasons, the Court denies Protho's motions.

BACKGROUND

Protho was convicted of kidnapping Minor A after a two-week trial, during which the jury heard testimony from 30 witnesses and saw more than 100 exhibits admitted into evidence. The following summarizes the trial evidence.

The victim, Minor A, testified regarding her kidnapping and assault. [2] (Tr. 1004–63.) She stated that on December 20, 2017, a person in a red truck started following her as she was walking home from school. (Tr. 1010–12.) The driver pulled into a driveway, got out of the car, pretended to be talking on the phone, and then grabbed Minor A and pulled her into the car. (Tr. 1012–13.) The driver hit her, threatened her, and drove into an alley. (Tr. 1014–18.) He sexually assaulted Minor A and then let her out of the car. (Tr. 1018–23.) Minor A ran down the alley and started knocking on doors to get help, ultimately flagging down a woman who assisted her. (Tr. 1023.) The woman who stopped to assist Minor A after she escaped from her attacker also testified to the jury regarding her interactions with Minor A following these events. (Tr. 618–39.)

At trial, Minor A described for the jury her assailant's race, facial features, bald head, and clothing, including a purple hat. (Tr. 1026.) Minor A also testified about how she had identified her assailant in a photo array seven days after her assault and again when shown photographs a few weeks later. (Tr. 1026–29.) Law enforcement officers testified that the images Minor A identified depicted Protho, and those images were admitted into evidence. (Tr. 696–97, 701, 934–95, 1029.) According to these witnesses, Minor A initially described her attacker as a heavy-set African-American male, with little moles near his eye and a short beard, wearing a black jacket and dark pants, and driving a red SUV. In a later interview, she added that he also wearing the aforementioned purple hat and had a scar on his cheek.

*2 That Minor A was grabbed off the street by a male attacker in the manner she described was not seriously disputed at trial, as the abduction was captured on video by a security camera at a nearby residence, the video was played for the jury, and a witness was called to authenticate the footage. (Tr. 592–600.) However, the images of Minor A's attacker on the video were not sufficiently clear to permit ready identification. Thus, the Government's case-in-chief focused on proving that Protho was the perpetrator.

The Government called several witnesses to present evidence placing Protho and his vehicle in the vicinity of the kidnapping on December 20, 2017. Even putting aside Minor A's identification of him from the photo array and photographs, the Government presented ample evidence that

the vehicle used in the kidnapping was Protho's red Ford Explorer, that Protho himself was present with his Ford Explorer at a gas station in Calumet City less than two miles from where the kidnapping occurred and less than half and hour before the kidnapping occurred, and that later on the day of the kidnapping, Protho went to a hospital wearing clothes (a black hooded sweatshirt, white t-shirt, dark pants, and hat) similar to the clothing worn by the kidnapper. For example, Robert Strobo, the general counsel for Paysign, a company that issues prepaid credit cards, testified regarding records showing where and when a prepaid card issued to Protho was used on the day of the crime. (Tr. 756–64.) Rod Smith, an employee at the Illinois Secretary of State's Department of Information Technology, testified regarding temporary license plate records related to Protho's vehicle. (Tr. 765–73.) Debbie Swanson, the director of health information management at St. Catherine Hospital, testified about medical records showing that Protho checked into the hospital on the day of the kidnapping after the kidnapping occurred. (Tr. 860–64.) Protho was also recorded by the hospital video cameras while he was there. Matthew Fyie, a manager of design analysis engineering at Ford Motor Company, testified that certain features on Protho's car (including nonstandard wheels and a missing passenger-side step-up bar) that could be seen on the vehicle in the surveillance video of the kidnapping, represented custom modifications (*i.e.*, not standard features) for a Ford Explorer. (Tr. 864–91.) Lorena Martinez, a supervisor at the staffing agency where Protho worked, testified that he was not at work on the day of the kidnapping or the following day. (Tr. 1149–60.)

In addition, the Government called as witnesses five Calumet City Police Department employees, who testified regarding the investigation of the kidnapping and the evidence collected. (Tr. 640–701, 734–55, 891–97.) Craig Golucki, a Chicago Police Department officer, testified that he extracted data from Protho's phone and indexed its contents following his arrest. (Tr. 1194–1208.) Several Federal Bureau of Investigation ("FBI") agents and task force officers also testified regarding the investigation, including their interviews with Minor A, her identification of Protho as the assailant, and other details. (Tr. 773–812, 931–49, 1216–97, 1513– 22.) The investigation included the collection of surveillance video from various sources in the community, including red-light camera and security video showing the path driven by the vehicle involved in the kidnapping and providing a clear image of the vehicle's yellow temporary license plate as well as other identifying characteristics.

***3** Other FBI employees provided expert testimony. Ashley Baloga, an FBI forensic examiner, testified that certain fibers found on Minor A's clothing were consistent with fibers found on Protho's clothing and vice versa. (Tr. 897–926, 949–60.) Anthony Imel, another FBI forensic examiner, explained how the jury could use matching "class characteristics" to compare photographs of Protho and his Ford Explorer with images from video footage from the day of the kidnapping of the attacker and his vehicle. (Tr. 1305–1402, 1429–53.) Joseph Raschke, an FBI special agent with expertise in cellular analysis, testified that "cell-site information" showed that Protho's phone was off or unable to connect to service between 12:52 p.m. and 3:45 p.m. on December 20, 2017, a period of time that overlapped with the time of the kidnapping. (Tr. 1114– 48.)

After the Government rested its case-in-chief, Protho testified in his own defense. His testimony focused on what he claims to have been doing at the time of Minor A's kidnapping, including suggesting an explanation for how his car could have been present at the crime scene even though he was not there. Specifically, Protho testified that he had lent his car to his friend "Ell" during the time when the kidnapping occurred. (Tr. 1549–51.) Protho explained that Ell was his marijuana dealer and that he did not know "Ell's" last name, although he had known Ell for 15 years. (Tr. 1536–37.) Protho also stated that Ell had arranged to meet Protho at a parking lot to deliver marijuana to him (for which Protho had already paid), that Ell then told Protho that he did not have the drugs with him and wanted to borrow Protho's car to pick them up, and that Protho loaned Ell his car for that purpose. (Tr. 1543–50.) Protho explained that he fought with Ell physically, injuring one of his own fingers. (Tr. 1549.) Protho claims that he initially waited in Ell's car while Ell went to pick up the drugs, but ultimately he decided to drive home in Ell's car after Ell failed to return. (Tr. 1555–57.) According to Protho, Ell later drove to Protho's home (again without bringing any marijuana), the two men got into a "scuffle," and Ell left. (Tr. 1557–58.) Protho also described Ell's physical appearance, which happened to be consistent with the description of her attacker given by Minor A. (Tr. 1552–54.) Furthermore during his cross-examination by the Government, Protho attempted to explain why he did not provide the story regarding Ell to law enforcement officers investigating the kidnapping at any time from his initial interview up until he took the stand at trial. Specifically, Protho testified that when he was first interviewed about the crime, he was worried that the officers might be lying to him

about their investigation of a sexual assault to get him to admit something about his drug transactions. (Tr. 1796–97.)

In further support of his claim that someone else must have kidnapped and assaulted Minor A, Protho also called to the witness stand several police officers, who testified regarding certain purported inconsistencies in Minor A's statements describing her attacker, including that she at times described the kidnapper's hat as black, not purple or maroon. (Tr. 1481–1522.)

The Government presented two rebuttal witnesses. First, Breanna Barajas, a program supervisor and forensic interviewer at La Rabida Children's Advocacy Center who interviewed Minor A the day after she was assaulted, testified that the victim described the kidnapper's hat as purple during their interview. (Tr. 1809–13.) Second, the Government recalled Golucki, who testified that a photograph on Protho's phone appeared to have been deleted—the inference being that Protho deleted it to hide his involvement in the crime. (Tr. 1814–22.)

LEGAL STANDARDS

*4 Protho has filed post-trial motions under Federal Rules of Criminal Procedure 29 and 33. Rule 29 requires the Court to enter a judgment of acquittal where the evidence presented at trial "is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "[A] defendant seeking a judgment of acquittal faces a nearly insurmountable hurdle...[but] the height of the hurdle depends directly on the strength of the government's evidence." *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019) (internal quotation marks omitted). Great deference is given to the jury's determination: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). While this analysis requires that evidence be viewed in the light most favorable to the Government, Protho need not establish that no evidence supports his convictions. *Id.* at 320. Instead, "[a] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317.

Protho also seeks a new trial under Rule 33, pursuant to which "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. The Seventh Circuit has cautioned that Rule 33 motions should be granted only in "the most extreme cases." *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998) (internal quotation marks omitted); *see also United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) (explaining that jury verdicts in criminal cases are "not to be overturned lightly"). "A new trial is warranted only where the evidence preponderates so heavily against the defendant that it would be a manifest injustice to let the guilty verdict stand." *United States v. Conley*, 875 F.3d 391, 399 (7th Cir. 2017). Accordingly, "[t]he court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable...The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989) (internal quotation marks omitted).

DISCUSSION

I. Acquittal Based on the Sufficiency of the Evidence

In his Rule 29 motion, Protho argues that he is entitled to a judgment of acquittal based on the purportedly insufficient evidence supporting the jury's guilty verdict. When evaluating a challenge to a guilty verdict based on the sufficiency of the evidence, the Court must "view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Salinas*, 763 F.3d 869, 877 (7th Cir. 2014) (citing *Jackson*, 443 U.S. at 319). To overturn a jury verdict, the Court must conclude that "the record is devoid of the evidence from which a reasonable jury could find guilt beyond a reasonable doubt." *United States v. Mire*, 725 F.3d 665, 678 (7th Cir. 2013).

Protho contends that no reasonable jury could have credited the eyewitness identification by Minor A because her description and recollection of the kidnapper differed from Protho's actual appearance. Specifically, among other things, Minor A did not initially describe the kidnapper as having a beard, did not mention certain marks on Protho's face (including his tattoos), and stated that the kidnapper had a pattern of what appeared to be little moles all around his face. Protho further notes that his DNA was not found on the victim or her clothes to a reasonable degree of scientific certainty, and no fingerprint or DNA evidence linked him to the offense. Finally, Protho points out that no one other than Minor A identified him as the kidnapper.

Contrary to Protho's assertions, however, the jury in this case saw and heard plenty of evidence pointing to his guilt. First, the jury learned that Minor A identified Protho in a six-person photo array seven days after the kidnapping. A few weeks later, she viewed additional images (which were admitted into evidence at trial) and told law enforcement that she was 100 percent certain that the person pictured was the man who kidnapped her. (Tr. 1030.) The jury heard Minor A's testimony, including the cross-examination by Protho's counsel, and was able to assess her credibility and the reliability of her memory.

***5** The jury also heard evidence indicating that Protho's car was used in the kidnapping and suggesting that he was in the vicinity as well. The jury viewed numerous surveillance videos that captured the kidnapping as well as events leading up to and following the crime. Credit card records placed Protho within around two miles from the scene of the kidnapping 22 minutes before it occurred. (Tr. 1918–19.) Cell-site and telephone records showed that Protho's phone had no activity during and around the time of the kidnapping. (Tr. 1156.) Employment records and testimony from Protho's supervisor confirmed that Protho did not attend work, yet did not call off of work on the day of the kidnapping. (Tr. 1156–60.)

The testimony from the Government's fibers expert provided a basis for the jury to conclude that fibers were transferred between Protho's clothing and Minor A's clothing. (Tr. 897–926, 949–60.) Video of Protho at a hospital showed that, on the evening of the kidnapping, he was wearing clothing that matched the victim's description of the kidnapper, including a purple hat. (Tr. 696–701.) And finally, a reasonable jury could have discounted Protho's testimony suggesting that the real kidnapper was his marijuana dealer, who looked similar to Protho, wore similar clothing to him, and had borrowed Protho's car to pick up drugs. The jury had the opportunity to assess Protho's own credibility and could have reasonably determined that he was not telling the truth.

Simply put, there was ample evidence to support the jury's guilty verdict. In asking the Court to conclude otherwise, Protho beseeches the Court to draw inferences in his favor and to find that his attempts to impeach the Government's case were so successful that no reasonable jury could have found him guilty. But the Court, as it must, draws all reasonable inferences in the Government's favor. Based on the record, a reasonable jury easily could have found against Protho on all elements of the charged crime.

II. Acquittal or New Trial Based on the Constitutionality of the Federal Kidnapping Act

Protho also has renewed post-trial his argument that the Federal Kidnapping Act unconstitutionally exceeds Congress's authority under the Commerce Clause. He challenges the statute as unconstitutional on its face and as applied to the circumstances of this case. Protho further contends that even if the statute is constitutional, his Ford Explorer does not constitute an instrumentality of interstate commerce and the jury instruction permitting the jury to reach that conclusion was given in error.

The Federal Kidnapping Act makes it a federal crime to seize, confine, or kidnap any person for ransom, reward, or "otherwise," when the perpetrator, as relevant here, "uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense." 18 U.S.C. § 1201(a). Pursuant to the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. This power includes the ability to "regulate the use of the channels of interstate commerce . ..regulate and protect the instrumentalities of interstate commerce ... [and] regulate those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Nonetheless, the Commerce Clause does not grant Congress unlimited authority to regulate or criminalize behavior carrying any link whatsoever to interstate commerce. *See United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress could not provide a civil remedy for victims of domestic violence under the Commerce Clause); *Lopez*, 514 U.S. 549 (finding that the Gun-Free School Zones Act, which criminalized the possession of firearms within a certain distance of schools, was not within the scope of Congress's power under the Commerce Clause).

***6** The scope of the Federal Kidnapping Act, however, is specifically limited to kidnappings involving the mail or means, facilities, or instrumentalities of interstate or foreign commerce. By its terms, the statute does not extend beyond the limits of the Commerce Clause. Numerous appellate and district courts have upheld the constitutionality of the statute, while the Court has found no caselaw finding it unconstitutional. *See United States v. Chambers*, 681 F. App'x 72, 81–82 (2d Cir. 2017) (unpublished), *cert. granted,*

judgment vacated on other grounds, 138 S. Ct. 2705 (2018) (denying facial and as-applied challenges to the Act); *United States v. Morgan*, 748 F.3d 1024, 1031–32 (10th Cir. 2014) (rejecting as-applied challenge to the Act); *United States v. Davis*, No. 16 CR 570, 2019 WL 447249, at *2 (N.D. Ill. Feb. 5, 2019) (collecting cases). The Federal Kidnapping Act fits the second category of permissible regulation under the Commerce Clause, "which includes regulation aimed at local, in-state activity involving instrumentalities of commerce." *Morgan*, 748 F.3d at 1031.[3] The Court therefore rejects Protho's facial challenge to the act's constitutionality.

With respect to the application of the kidnapping statute in this case, Protho argues that a local, intrastate action cannot be criminalized merely because the vehicle used to commit it was manufactured in another state. But the Government here contends that Protho's car is an instrumentality of interstate commerce, not because of the location of its manufacture or its manner of use, but rather because it can carry people and goods across state lines. *See United States v. Richeson*, 338 F.3d 653, 660–61 (7th Cir. 2003) ("[F]ederal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement." (internal quotation marks omitted)).

The Seventh Circuit has in a similar context—evaluating the constitutionality of the federal murder-for-hire statute—held that a car is an instrumentality of interstate commerce even when used in an intrastate manner. *See United States v. Mandel*, 647 F.3d 710, 722 (7th Cir. 2011) (denying Commerce Clause challenge under plain error standard and noting that automobiles "play a crucial role in interstate commerce"); *see also United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (holding that automobiles are instrumentalities of interstate commerce); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (same). This Court finds the reasoning of *Mandell* persuasive in disposing of Protho's argument that his Ford Explorer was not an instrumentality of interstate commerce. If Protho's vehicle had been gutted of its operating components, or even stripped of its wheels and put up on blocks in his backyard, he might have an argument that it could no longer be used to move goods or people and thus could not form the basis for criminal liability under the federal kidnapping statute. As the record stands, however, there is no reasonable dispute that his vehicle qualifies as an instrumentality of interstate commerce.

Protho relatedly argues that he is entitled to a new trial because the Court erred in instructing the jury that "[t]he defendant used a means, facility, or instrumentality of interstate commerce if he used an automobile in committing or in furtherance of the commission of the offense." (Jury Instructions, Dkt. No. 124 at 25.) But, as discussed above, an automobile is an instrumentality of interstate commerce. The Court has discretion to formulate jury instructions so long as the instructions "represent[ ] a complete and correct statement of law." *United States v. Matthews*, 505 F.3d 698, 704 (7th Cir. 2007). Here, the Court correctly stated the law in instructing the jury. There was no error and certainly not one warranting a new trial.

III. New Trial Based on Improperly Admitted Expert Testimony

*7 Prior to trial, the Court denied Protho's motions *in limine* to bar testimony from expert witnesses Ashley Baloga and Matthew Fyie. The Court also denied in part and granted in part Protho's motion to bar testimony from Anthony Imel. Protho contends that the Court erred with its rulings allowing these experts to testify, causing him prejudice and entitling him to a new trial.

Federal Rule of Evidence 702 governs the admissibility of expert evidence. It provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Under this rule, expert testimony must both assist the trier of fact and demonstrate sufficient reliability. *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 834 (7th Cir. 2015). Accordingly, "the district court serves as a 'gatekeeper' whose role is to ensure that an expert's testimony is reliable and relevant." *Stuhlmacher v. Home Depot USA, Inc.*, 774 F.3d 405, 409 (7th Cir. 2014). To be admissible, expert testimony must also reveal something that is not "obvious to the lay person." *Dhillon v. Crown Controls Corp.*,

269 F.3d 865, 871 (7th Cir. 2001) (internal quotation marks omitted).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court laid out four factors that courts may use to evaluate the reliability of expert testimony: (1) whether the expert's conclusions are falsifiable; (2) whether the expert's method has been subject to peer review; (3) whether there is a known error rate associated with the technique; and (4) whether the method is generally accepted in the relevant scientific community. 509 U.S. 579, 593–94 (1993). This list is neither exhaustive nor mandatory and, ultimately, reliability is determined on a case-by-case basis. *Textron, Inc.*, 807 F.3d at 835. And the Court wields substantial discretion in carrying out its gatekeeping function: "The trial court must have the same kind of latitude in deciding ***how*** to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides ***whether or not*** that expert's relevant testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). The proponent of the expert testimony bears the burden of demonstrating that the testimony satisfies the *Daubert* standard. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009).

A. Ashley Baloga

Baloga testified at trial as an expert in fiber analysis. With his present motion, Protho does not challenge Baloga's qualifications but instead renews his pretrial argument that fiber analysis is insufficiently reliable to satisfy the *Daubert* standard and that Baloga's testimony was not relevant.

To be relevant, expert testimony must assist the trier of fact. *Textron*, 807 F.3d at 834. The evidence presented by Baloga at trial tended to show that fiber evidence recovered from Protho's car and clothing was consistent with fiber evidence from Minor A's clothing. Baloga's testimony was relevant because it tended to make it more likely that Minor A was in Protho's car and that Protho had physical contact with her. Baloga further testified that, although there was no way one could determine a percentage likelihood of random fibers matching, it was unlikely that the fibers on two random pieces of clothing would show a match.

***8** As the Court noted in its prior ruling, appropriately credentialed fiber analysis experts are regularly qualified as expert witnesses in federal courts. The Court further found that, based on the parties' representations, the conclusions of fiber analysis are falsifiable and that the methods of fiber analysis are generally accepted in the relevant scientific community. The Court also reviewed Baloga's expert report, which detailed the items that she reviewed, the methodology she employed, and the results of her examinations. Even though the Government did not show that fiber analysis techniques had been subjected to peer review or were subject to a known error rate (indeed, Baloga testified that she could not provide an error rate), the Court was presented with enough indicia of reliability to admit the testimony. Then, at trial, Baloga described her methodology in detail while acknowledging its limitations, allowing the jury to properly weigh her testimony. Protho tested her methodology further through cross-examination. The Court had no obligation to hold a separate *Daubert* hearing to decide whether to admit Baloga's testimony; as discussed above, the Court has discretion to determine how it will evaluate the reliability of a proposed expert. And finally, even if Baloga's testimony was admitted in error (which it was not) the evidence against Protho was strong enough that he would not have been prejudiced by the admission of the testimony, a conclusion that the Court also draws regarding Imel and Fyie.

B. Anthony Imel

Imel testified as an expert in forensic video and photograph analysis. As with Baloga, Protho does not challenge Imel's qualifications but renews his pre-trial challenge that Imel's testimony did not meet the standards of Federal Rule of Evidence 702 and *Daubert*.[4]

Imel's testimony involved the comparison of images and videos to determine identity—a task that often does not require specialized expertise. Here, however, the Court reviewed Imel's expert report and curriculum vitae and determined that his testimony based on his "knowledge, skill, experience, training or education" would likely "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Imel, an expert in enhancing and comparing photographs and videos, testified regarding how the jury could use distinguishing features to compare enhanced video images of people, as well as how to locate and compare those features in the images and videos available in this case. The central questions for the jury were whether the vehicle depicted in the footage was Protho's car and whether the person shown in security camera footage of the kidnapper was Protho. Imel's testimony added something that was not obvious to the jury: what to look for when comparing enhanced images of persons and vehicles in surveillance footage. Notably, Imel did not opine on whether Protho

actually was the kidnapper or whether his car was actually used in the kidnapping. Instead, he merely provided tools for the jury to make those determinations itself.

As noted above, the Court has discretion to determine how best to assess the reliability of proposed expert testimony. Here, the Court considered Imel's unchallenged qualifications as a highly experienced forensic examiner. It also considered his expert report, which explained that certain surveillance videos and images had been electronically processed and enhanced to make it possible to compare the depicted vehicle with Protho's Ford Explorer and the depicted person with Protho himself (who, of course, was present in court as well as presented still images). Imel also described how certain class characteristics—this is, distinguishing marks—could be used to compare images and videos. Based on the record, the Court concludes that Imel's conclusions were falsifiable and his method was generally accepted in the relevant expert community. Specifically, his conclusions regarding matching class characteristics in images could have been rebutted by identifying other class characteristics or reasons other than shared identity to explain shared characteristics. Further, the general acceptance of Imel's method was supported by the fact that Imel had testified as a forensic video and photography analysis witness around 50 times prior to this trial. The Government did not present evidence of peer review or a known error rate in Imel's method; nevertheless, the Government met its burden of showing that Imel's conclusions were reliable and would be helpful to the jury.

*9 Moreover, Imel's testimony did not improperly usurp the fact-finding role of the jury. In his testimony, Imel explained that he created a composite video by putting side-by-side a video of an individual at a gas station and a video of Protho at the hospital later that day. (Tr. 1398.) The purpose of this video was to portray the gait—that is, the manner in which the persons walked. This comparison video was shown to the jury as a demonstrative exhibit. (Tr. 1722–23.) Imel noted that the person in each of the videos appeared to point his feet outward as he walked. The Government later played a video of Minor A's kidnapping and invited the jury to use the tools described by Imel to determine whether the gait of the person in the kidnapping video matched that of Protho. While Protho contends that Imel's testimony was highly prejudicial and lacked foundation, he was qualified to opine on the class characteristics related to Protho's manner of walking, and he gave no further opinion on whether the gait of the kidnapper actually matched Protho's gait. That was left for the jury to determine. While Protho contends that the danger of prejudice and confusion outweighed the probative value of Imel's testimony, the Court did not find Imel's testimony confusing or misleading and it was appropriately contextualized for the jury's consideration.

Lastly, Protho complains that the Government described Imel's testimony inaccurately in closing arguments. During closing arguments, the Government contended that the victim's identification of Protho was solid, and that her failure to remember every detail about him consistently over the course of multiple interviews was best explained as normal for a young child who had endured a frightening and traumatic experience and due to the fact that she was only with her kidnapper for a short time. As the Government argued:

> [W]hen she's talking to the police, she's crying; she's still afraid. Okay. When that's your opportunity to view [the kidnapper], that's a very particular type of opportunity to view. When that's your opportunity to view, you don't get an exhaustive list of every detail of this person's physical appearance and their clothing. That's not what you get. That's Tony Imel's job.

(Tr. 1903.)

Protho contends that the Government's reference to "Tony Imel's job" improperly suggested that the expert witness, not the jury, was responsible for deciding the identity of the perpetrator. But an equally reasonable characterization Government's argument is simply that a minor victim of kidnapping and sexual assault would not be expected to recall identifying details with the same level of precision as an FBI forensic examiner. The Government's attorney did not state that Imel had identified Protho as the kidnapper, and the closing argument did not imply that the jury had been relieved of its fact-finding responsibility. Furthermore, the Government's stray statement about "Tony Imel's job," even if improper, was harmless in light of the copious evidence of Protho's guilt.

C. Matthew Fyie

Fyie, a manager of design analysis engineering at Ford Motor Company, testified that Protho's Ford Explorer was manufactured in Kentucky and had two step-up bars at the time of manufacture. He relied on business records from Ford that were entered into evidence. Protho contends that this testimony should have been excluded because Fyie's testimony was not timely disclosed, he was not an expert in Ford vehicle products, and he had no personal knowledge of where the vehicle was manufactured. Finally, Protho argues that he was prejudiced because the Government relied on Fyie's testimony to show that the vehicle used in the kidnapping was manufactured in Kentucky to satisfy the interstate commerce element of the criminal charge.

But the jury was properly instructed that the interstate commerce element of the crime with which Protho was charged would be satisfied if Protho used an automobile to commit the offense. The location of the vehicle's manufacture was not the basis for the Government's argument, and Protho could not have been prejudiced by such testimony because it did not impact any element of the offense. Further, Fyie's extensive experience in designing and engineering Ford vehicles qualified him to testify regarding Ford vehicles in general and the manufacture of Protho's vehicle in particular. An experienced Ford engineer could testify regarding on where a vehicle was manufactured by reviewing the business records used to track that information; the rules of evidence do not require that only someone who personally witnessed a truck being built can opine on where it was manufactured.[5] And as the Court previously noted, Fyie's testimony was disclosed to Protho sufficiently in advance of trial for Protho to prepare.

IV. New Trial Based on *Batson v. Kentucky*

***10** Protho also seeks a new trial based on *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* prohibits racial discrimination in jury selection, holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. Protho is black. The venire initially included six black potential jurors. (Tr. 532, 535–36.) After the Court ruled on the parties' challenges for cause, only four of the remaining thirty-eight potential jurors were black. The Government used its peremptory strikes to strike three of those four black jurors, including two jurors who would have been on the jury and one who would have been an alternate. Protho also used one peremptory strike on a black potential juror. The resulting jury, including alternates, consisted entirely of white jurors.

The Court evaluates a *Batson* challenge to the use of a peremptory strike through a three-step analysis: first, the defendant must make a *prima facie* showing of discriminatory motive on the part of the prosecutor; if the defendant does so, then the prosecutor must provide a race-neutral reason for the challenged strike; and finally, if the prosecutor provides a race-neutral reason, the defendant must demonstrate "that the proffered justification was pretextual" or "otherwise establish that the peremptory strike was motivated by a discriminatory purpose." *United States v. Stephens*, 421 F.3d 503, 510 (7th Cir. 2005) (citing *Batson*, 476 U.S. at 98). "To survive a *Batson* challenge, unlike a challenge for cause, a peremptory strike need not be based on a strong or good reason, only founded on a reason other than race or gender." *United States v. Brown*, 34 F.3d 569, 571 (7th Cir. 1994) (emphasis omitted).

As the Court found during jury selection, the Government's use of its peremptory strikes in a manner that had the effect of eliminating the only remaining black jurors in the venire established a *prima facie* case of discriminatory motive. Thus, the burden shifted to the Government to provide race-neutral reasons for its strikes. The first black juror (Juror No. 45) had been shot in the head by a Calumet City police officer and stated that it was the norm for police officers not to be truthful. (Tr. 453–54.) Notably, the Government planned to call several Calumet City police officers as witnesses, and so Protho declined to pursue its challenge to this strike further. The Government stated that the second black potential juror (Juror No. 16) seemed "too stoic" because she showed little emotional response to the description of a kidnapping and sexual assault of a child even though she was a mother, and she further stated that her employment at a night-shift job might affect her ability to concentrate during trial. (Tr. 454, 471.) The third Black potential juror (Juror No. 16), according to the Government, had trouble hearing and was not following the proceedings. (Tr. 455.)

Because the Government provided race-neutral reasons, the Court proceeded to the third *Batson* inquiry, where Protho had the burden of demonstrating purposeful discrimination by the Government. Regarding the "too stoic" juror, the Court accepted the Government's explanation as race-neutral and did not find any pretext behind the strike. (Tr. 486–87.) Regarding the remaining juror, the Court noted that the Government struck a white juror who was similar in

some regards, including his age and his holding an advanced degree. (Tr. 487.) Ultimately, the Court concluded that Protho did not meet his burden.

Renewing his argument post-trial, Protho contends that the Government's proffered race-neutral reasons were plainly pretextual because the Government did not strike similarly situated white jurors who were also stoic and because the Government did not give a good reason for striking the black juror who appeared, in the Government's account, to have trouble hearing and following the proceedings. The Court stands by its prior ruling that Protho failed to establish purposeful discrimination by the Government. The Court critically questioned the Government's asserted reasons at trial and found then, as it finds now, that the Government provided reasonable race-neutral reasons. Moreover, the Court notes that due to its procedure by which the parties submitted their peremptory strikes simultaneously and without knowing the other sides strikes, the Government would not have known that Protho would strike the fourth remaining black juror. And it was only due to a combination of the Government's strikes and the defense's strike that the jury was devoid of black jurors. Although the Government gave additional reasons for its strikes as the *Batson* hearing occurred and in its post-trial motions, the Court does not find any inconsistencies in the Government's reasoning. Protho has not met his burden of establishing purposeful discrimination as necessary for a *Batson* violation.

V. New Trial Based on Minor A's Testimony by Closed-Circuit Television

***11** Protho also claims that he is entitled to a new trial based on the Court's decision to allow Minor A to testify via closed-circuit television. On the first day of the trial, the Government called Minor A to the witness stand. She entered the courtroom without the jury present. Almost immediately, she appeared to suffer what can only be described as a breakdown and had to leave the room. Various options were explored to allow Minor A to testify. The Government ultimately filed a motion for her to testify by two-way closed-circuit television pursuant to 18 U.S.C. § 3509 (Dkt. No. 107), which the Court granted (Dkt. No. 111). Protho contends that the federal statute authorizing remote testimony under certain circumstances violates his Sixth Amendment right to confront the witnesses against him and that, in any case, the Court erred in finding that Minor A met the requirements to testify remotely under that statute.

The Crime Control Act of 1990, as amended, provides for special procedures when a child who was the victim of a crime of physical abuse, sexual abuse, or exploitation is called to testify in a criminal case. *See* 18 U.S.C. § 3509. Under the statute, the Government may apply for an order allowing a child victim's testimony to be taken outside the courtroom and televised by two-way closed-circuit television. *Id.* § 3509(b)(1)(A). The Court may allow a child to testify in this manner if it finds that the child is "unable to testify in open court in the presence of the defendant" for any of four specified reasons, including, as relevant here, because "[t]he child is unable to testify because of fear." *Id.* § 3509(b)(1)(B). The Court must support its ruling on the child's inability to testify "with findings on the record." *Id.* § 3509(b)(1)(C). Ordinarily, the Government must apply for an order under § 3509 at least seven days before the trial date. *Id.* § 3509(b)(1)(A). But the Court may also grant such an order if it "finds on the record that the need for such an order was not reasonably foreseeable." *Id.*

Protho contends that his Sixth Amendment rights were violated by the invocation of § 3509 to allow Minor A to testify remotely. The Court disagrees. In *Maryland v. Craig*, the Supreme Court affirmed the constitutionality of a state statute that allowed a victim of child abuse to testify via one-way closed-circuit television. 497 U.S. 836, 855–56 (1990). In that case, the Supreme Court held that the trial court had to make a case-specific finding that the defendant's presence would cause the minor trauma and fear, that testimony by closed-circuit television was necessary to protect the welfare of the child, and that the minor's emotional distress is more than *de minimis*. *See id.* Although *Craig* did not involve § 3509, the state statute at issue there was sufficiently similar to § 3509 that the Court finds its guidance instructive. In finding no constitutional violation, *Craig* specifically addressed the compelling state interest in protecting children from enduring a "face-to-face confrontation" with their alleged abuser in cases involving child abuse. *Id.* at 855. Protho contends that the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), undermined its holding in *Craig*. But *Crawford* did not overturn *Craig*, and this Court is not free to depart from established Supreme Court precedent. *See, e.g.*, *United States v. Wandahsega*, 924 F.3d 868, 879 (6th Cir. 2019) (holding that *Crawford* did not overturn *Craig*); *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018) (same). Protho also contends that *Craig* has been undermined because the Supreme Court decided not to amend Federal Rule of Criminal Procedure 26 to expand the use of two-way video testimony. But this argument has no merit, as the Supreme

Court cannot be understood to have overturned precedent merely by choosing not to amend a procedural rule.

Further, the Court made the detailed factual findings required under § 3509 and *Craig* in its February 17, 2020 Order. (Dkt. No. 111.) As explained in that Order, the Court held an evidentiary hearing and heard testimony from Felice Weiler, the United States Attorney's Office's victim witness coordinator, and Christopher Dammons, a senior inspector for the United States Marshals Service. Weiler's testimony indicated that Minor A intended to testify (and appeared ready to do so) but started crying when she came to the door of the courtroom, had difficulty breathing on the stand, and appeared to go into shock. Further, Minor A looked at Protho while she was on the stand. After she left the courtroom, she collapsed on the floor and sobbed, stating that she felt like she was back in the car where she was sexually assaulted. Dammons's testimony corroborated these facts. In sun, based on the evidence presented at the evidentiary hearing and the Court's own observations of Minor A's actions and demeanor when she was in the courtroom with Protho, the Court concluded that the Government could not have foreseen that closed-circuit testimony would be needed, and that Minor A feared testifying in a courtroom with Protho and would suffer emotional trauma from doing so.

*12 Protho contends that the Court should have questioned Minor A directly to confirm whether and why she was afraid of testifying. But the Court had more than enough evidence from which to conclude that the requirements for testimony by closed-circuit television had been met. While Protho complains that the Court's ruling prevented him from confronting and cross-examining Minor A, he was able to (and did) cross-examine Minor A effectively. The Court also implemented procedures allowing Protho to consult instantaneously with his attorney—who was in the room with Minor A while she testified and during cross-examination—during Minor A's testimony, thereby protecting his right to participate in his own defense.

In short, the Court finds no error, constitutional or otherwise, in its decision to permit Minor A to testify remotely by closed-circuit television.

VI. New Trial Based on Improper Comments During Closing Arguments

Protho next contends that he is entitled to a new trial because of certain improper remarks by the Government's attorney during closing arguments.

Specifically, during the Government's rebuttal argument, the Government's attorney stated: "And I'm sorry that a 12—a 12-year-old girl doesn't want to be in the same room as the man who took her off the street and sexually assaulted her. Next time pick an older victim." (Tr. 1974.) Protho objected, and the Court sustained the objection and immediately instructed the jury to disregard the objectionable statement. Notably, both at the beginning of the trial and again shortly before the start of closing arguments, the Court had also instructed the jury that lawyers' statements and arguments are not evidence and should not be relied upon. Given the brevity and lack of specificity of the objectionable statement during closing arguments, the Court determined that any further instruction would only serve to draw unnecessary attention to a matter that otherwise would be unlikely to make an impression on the jury. Nonetheless, Protho moved for a mistrial. The Court denied the motion, finding that the statement, while improper, was not ultimately prejudicial.

In this Circuit, courts engage in a two-step inquiry to evaluate whether prosecutorial misconduct warrants a new trial. "We first determine whether the prosecutor's conduct was improper, and if so, we then evaluate the conduct in light of the entire record to determine if the conduct deprived the defendant of a fair trial." *United States v. Tucker*, 714 F.3d 1006, 1012 (7th Cir. 2013). "[I]t is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks and citations omitted).

Turning to the first step of the inquiry, the Government's statements during closing argument regarding Minor A not wanting to be in the same room as Protho were clearly improper. The jury had heard no evidence that the victim feared testifying in front of Protho. To the contrary, the resolution of the Government's motion under 18 U.S.C. § 3509 was purposely decided outside of the jury's presence with no mention of the reason for the remote testimony provided to the jury. All parties understood that the jury was not to hear that Minor A was testifying from a remote location because she was afraid of Protho. Nonetheless, the Government's attorney suggested precisely that with his remarks. The Government maintains that the comment was merely a response to Protho's closing argument, which emphasized, among other things, the lack of a "live" in-person

identification of Protho by the victim. But the Court is not persuaded by this purportedly innocent justification.

*13 Nonetheless, turning to the second step, the Court cannot conclude that in the context of the entire record the Government's inappropriate remarks deprived Protho of a fair trial. The evidence at trial overwhelmingly indicated that Protho committed the crime and his alibi defense was, to put it lightly, less than convincing. Further, the Court's instruction and admonishment allowed the jury to place the brief improper remarks in proper context: a bit of inflammatory rhetoric, not a summation of the evidence in the case. The trial was fair, and Protho suffered no prejudice from the Government's remarks during closing.

VII. New Trial Based on the Court's Response to a Jury Note

Protho also seeks a new trial based on what he perceives as the Court's improper response to a jury note received during deliberations.

The evidence admitted in this case included many hours of video surveillance footage. During their deliberations, the jury sent a note to the Court that read: "Can someone ask the U.S. attorney to confirm which video shows the defendant getting out of his car, walking around for a few seconds, then getting back in car, showed him from the waist down? Could be an extract of an original video." (Tr. 2005.) The Government recognized this request as referring to Exhibit Number 13, as the jury's description of the video matched the description of the video at trial. (Tr. 651–52.) Protho's counsel also acknowledged that Exhibit 13 was the only video showing an individual getting out of the car, walking around, and reentering the car, where the video captured the person only below the waist. (Tr. 2018.) While acknowledging that it could not confirm the jury's apparent conclusion that the person portrayed in the video was Protho, the Court found no need to force the jurors to spend dozens of hours shifting through voluminous videos to locate a specific exhibit that they had identified as wanting to review in the jury room. The Court ultimately sent the following response to the jury: "The third file of Government Exhibit 13 shows an individual from the waist down exiting and subsequently reentering a vehicle as described in juror note No. 2." (Tr. 2021.)

Trial courts exercise discretion in administering trials and managing jury deliberations. *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946); *Quercia v. United States*, 289 U.S. 466, 469–70 (1933). However, courts must take special care not to intrude on the jury's fact-finding function. "[I]n a jury trial the primary finders of fact are the jurors....The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977). "[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Remmer v. United States,* 350 U.S. 377, 382 (1956).

In other contexts, appellate courts have found error where the trial court intruded on the jury's fact-finding authority. For example, in *United States v. Miller*, the trial court responded to the jury's questions with information endorsing the jurors' "preliminary, possibly non-unanimous, interpretation of the indictment," and identifying for the jury evidence that, in the Court's opinion, related to certain charges. 738 F.3d 361, 384 (D.C. Cir. 2013). The D.C. Circuit found reversible error because the trial court's response constituted "confirmatory agreement" and even "affirmative advocacy," tainting the deliberative process. *Id.* at 386. Here, however, there was no disputed fact at issue. The jury simply asked for help locating a particular piece of evidence among many hours of video footage. Having confirmed with the parties that only one video exhibit corresponded to the request, the Court identified that exhibit for the jury.

*14 While Protho claims that the Court provided substantive evidence directly to the jury through its response to the jury's request, the Court did no such thing. The parties conceded that the Court's description of the video's contents was accurate and not at issue. Although the Court's response did not further instruct the jurors that it was their responsibility to determine the identity of the person depicted in the video, it also did not endorse the jury's apparent conclusion that the video pictured Protho and instead carefully described the contents of the video without making such an identification. The Court finds no error, no prejudice, and no basis to order a new trial.

VIII. New Trial Based on Superseding Indictments and Enhanced Penalty

Protho also challenges the procedures by which the Government charged him and pursued an enhanced penalty for his offense.

Because Protho was convicted pursuant to 18 U.S.C. § 1201(g)(1), he is subject to a mandatory minimum sentence of 20 years' imprisonment. The mandatory minimum applies

when the victim is under 18 years old, the perpetrator is 18 years old or older, and the perpetrator is not a parent, grandparent, brother, sister, aunt, uncle, or individual having legal custody of the victim. *Id.* Shortly prior to the originally scheduled trial date, Protho filed a motion *in limine* to prevent the Government from seeking an enhanced sentence based on the fact that none of the required elements under § 1201(g)(1) were charged in the indictment. (Dkt. No. 66.) In response, the Government obtained a Superseding Indictment, which Protho then moved to dismiss on speedy trial and due process grounds. (Dkt. Nos. 67, 72.) The Court denied Protho's motion to dismiss, finding that dismissal would be justified only if the Government had acted vindictively in response to Protho's assertion of his rights and finding no such evidence.

Protho now contends that because the Government did not seek to obtain the Superseding Indictment until Protho filed his motion *in limine*, the Court should infer vindictive retaliation based on the sequence of events. Protho further contends that because he raised "reasonable doubt that the government acted properly," an evidentiary hearing should have been held. *See United States v. Falcon*, 347 F.3d 1000, 1006 (7th Cir. 2003). But Protho did not raise reasonable doubt as to the propriety of the Government's actions. To the contrary, Protho knew from the time the charges were first instituted against him that the Government intended to seek an enhanced penalty. In fact, the original grand jury indictment, returned on January 25, 2018, explicitly alleged that Protho violated 18 U.S.C. § 1201(g)(1)—the 20-year mandatory minimum clause. That the original indictment failed to allege the elements necessary to obtain that sentencing enhancement was an oversight by the Government—one that it sought to correct by obtaining the Superseding Indictment. Rather than showing that the Government acted vindictively after receiving Protho's motion *in limine*, the timing of the relevant events indicates that the Government acted to correct its unintentional omission of the allegations necessary for the penalty enhancement once that omission was brought to its attention by the motion *in limine*. [6]

CONCLUSION

***15** For the above reasons, Protho's motions for a new trial and for a judgment of acquittal (Dkt. Nos. 150, 152) are denied.

All Citations

Slip Copy, 2021 WL 1020999

Footnotes

1 The victim is referred to as "Minor A" throughout this opinion.

2 As discussed in greater detail below, Minor A testified via closed-circuit television pursuant to 18 U.S.C. § 3509.

3 Protho contended in his initial motion for acquittal (Dkt. No. 114) that the kidnapping statute can only be sustained under the third category enumerated in *Lopez* concerning "activities having a substantial relation to interstate commerce." 514 U.S. at 558–59. But the act, by its language, targets instrumentalities of interstate commerce specifically and does not criminalize the broader category of ***activities*** relating to interstate commerce; thus, it is more reasonably construed as regulating instrumentalities of interstate commerce, the second *Lopez* category.

4 Protho also contends that Imel was not timely disclosed as an expert witness. But the substance of Imel's testimony was timely disclosed (he stepped in for another FBI employee who would have testified similarly), and the trial date was continued by more than three months after Imel had been disclosed as a witness, meaning that Protho had ample time to prepare.

5 Notably, the business records at issue were admitted pursuant to Federal Rule of Evidence 803(6)(b) and Protho's counsel did not contemporaneously object to their admittance on hearsay grounds (although he did assert a continuing objection as to their relevance.) (Tr. 877.)

6 With his present motions, Protho also has renewed and incorporated his past motions and arguments, which included a prior motion for new trial and motion in arrest of judgment pursuant to Federal Rule of Criminal Procedure 34. (Dkt. Nos. 126, 127.) Those motions are denied for the reasons given in this opinion. Protho's first motion for new trial, in particular, contains only a bulleted list of decisions by this Court that Protho disagrees with and the contention that the Court "erred" in each one; for example, by denying Protho's motion for attorney voir dire and refusing to ask some of Protho's voir dire questions. By failing to develop these arguments, Protho has waived them. *United States v. Foster*, 652 F.3d 776, 792 (7th Cir. 2011) ("As we have said numerous times, undeveloped arguments are deemed waived.") (internal quotation marks omitted). The Court has also reviewed the alleged errors and finds that, to the extent they are not directly addressed in this opinion, they do not rise to the level of prejudice that would warrant a new trial, which, as discussed above, is reserved for "the most extreme cases." *Linwood*, 142 F.3d at 422. Finally, Protho's motion in arrest of judgment contends that the Court lacked jurisdiction over Protho's offense because Congress lacked authority to regulate his actions under the Commerce Clause, a position that the Court has rejected in this opinion.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 17-cr-00827
v.	)	
	)	Judge Andrea R. Wood
BRYAN PROTHO	)	

ORDER

The Government has filed a motion [107] asking the Court to allow Minor A to testify at trial via two-way closed-circuit television pursuant to 18 U.S.C. § 3509(b)(1). The Court now issues findings of fact with respect to the statute's requirements for the requested alternative means of testimony. The Court finds that the requirements are satisfied; nonetheless, the Court reserves ordering that the testimony may proceed pending briefing and ruling on Defendant's objection to the motion on constitutional grounds. See the accompanying Statement for details.

STATEMENT

Minor A is a twelve-year-old child and the victim of the alleged offense in this criminal proceeding.[1] According to the allegations in the Second Superseding Indictment, Defendant Bryan Protho kidnapped Minor A in 2017. The Government now seeks to call Minor A as a trial witness in its case-in-chief. But when the Government called Minor A to the witness stand on February 12, 2020, she left the courtroom before being placed under oath and did not testify. After Minor A was unable to testify in open court, the Government filed a motion asking that she be allowed to testify by two-way closed-circuit television ("CCTV") pursuant to 18 U.S.C. § 3509(b)(1). (Dkt. No. 107.) Protho opposes the request.

Legal Standard

The Crime Control Act of 1990, as amended, provides special procedures for when a child who was the victim of a crime of physical abuse, sexual abuse, or exploitation is called to testify in a criminal case. *See* 18 U.S.C. § 3509. The parties do not dispute that Minor A qualifies for the protections of the statute. *See id.* § 3509(a)(2)(A). Because she falls within the statute's protections, the Government may apply for an order that her testimony be taken outside the courtroom and televised by two-way CCTV. *Id.* § 3509(b)(1)(A). Ordinarily, the Government must apply for such an order at least seven days before the trial date. *Id.* But the Court may still grant an order requested after that deadline if "the court finds on the record that the need for such an order was not reasonably foreseeable." *Id.*

The Court may order that a child be permitted to testify via CCTV if the Court finds that the child is "unable to testify in open court in the presence of the defendant" for any of four

[1] For purposes of this Order, the Court will refer to the minor victim witness as Minor A.

specified reasons. *Id.* § 3509(b)(1)(B).[2] The only one of those reasons upon which the Government relies to justify its request is that "[t]he child is unable to testify because of fear." *Id.* § 3509(b)(1)(B)(i). Because the Government's motion only addresses that ground, this Court will not consider the other grounds set forth in the statute. The Court must support its ruling on the child's inability to testify "with findings on the record." *Id.* § 3509(b)(1)(C).

In *Maryland v. Craig*, the Supreme Court affirmed the constitutionality of a state statute that allowed a victim of child abuse to testify via one-way CCTV. 497 U.S. 836, 855–56 (1990). In that case, the Supreme Court held that the trial court had to make a case-specific finding that the defendant's presence would cause the minor trauma and fear, that testimony by CCTV was necessary to protect the welfare of the child, and that the minor's emotional distress is more than *de minimis*. *See id.* While *Craig* did not address § 3509, the state statute it addressed is sufficiently similar that the Court here will make both the findings set out in the statute and the findings set out in *Craig*. *Cf. United States v. Sandoval*, No. CR 04-2362 JB, 2006 WL 1228953, at *12–13 (D.N.M. Mar. 7, 2006).

Section 3509 is not entirely clear as to what the basis of the child's fear must be for that subpart to apply. At least two circuits have concluded that a district court must find that the child is specifically afraid of testifying in the same room as the defendant, as opposed to being afraid of testifying in a courtroom generally, for example. *See United States v. Bordeaux*, 400 F.3d 548, 553–54 (8th Cir. 2005); *United States v. Turning Bear*, 357 F.3d 730, 736 (8th Cir. 2004); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993). That conclusion is in accord with the Supreme Court's analysis in *Craig*. The Seventh Circuit has not construed the fear provision of 18 U.S.C. § 3509(b)(1)(B). But as discussed below, the Court finds that Minor A is afraid not just of testifying but of testifying in the same room as Protho, so the Government can prevail on that element whether or not the Eighth and Tenth Circuit's construction of the statute is correct. Therefore, the Court will assume without deciding that the statute requires a finding that the minor victim is afraid of testifying in the same room as the defendant.

If the Court orders the taking of testimony by CCTV, counsel for the Government and the defendant must be present in the room where the child is testifying. *Id.* § 3509(b)(1)(D). The child must be placed under oath, and she must be subject to direct and cross examination as if she were in the courtroom. The only other people who may be in the room with the child are the child's attorney or guardian ad litem, persons necessary to operate the CCTV equipment, a judicial officer appointed by the Court, and any "other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant." *Id.* § 3509(b)(1)(D)(i)–(iv).

The child's testimony must be transmitted by CCTV to the courtroom, such that it can be seen and heard by the defendant, the jury, the judge, and the public. *Id.* § 3509(b)(1). The

[2] Pursuant to 18 U.S.C. § 3509(b)(1)(B), testimony by CCTV is permissible "if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons: (i) The child is unable to testify because of fear. (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying. (iii) The child suffers a mental or other infirmity. (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying."

defendant must be provided with the means of "private, contemporaneous communication" with his counsel who is in the room with the child. *Id.* The CCTV must "relay into the room in which the child is testifying the defendant's image, and the voice of the judge." *Id.*

Findings of Fact

In connection with the Government's motion, the Court held an evidentiary hearing on February 13, 2020. The Court heard testimony from two witnesses regarding their personal experiences with Minor A before, during, and after she took the stand during trial on February 12, 2020. Based on the testimony and the Court's personal observation of Minor A in court on February 12, the Court issues the following findings of fact.

1. Felice Weiler is the victim witness coordinator for the United States Attorney's Office for the Northern District of Illinois ("USAO").[3]

2. Christopher Dammons is a Senior Inspector for the United States Marshals Service.

3. Minor A is the victim of the alleged kidnapping charged in the Second Superseding Indictment in *United States v. Protho*, No. 1:17-cr-00827.

4. Weiler met Minor A several times for prep sessions with the USAO. When Weiler met Minor A for those sessions, she was smiling, upbeat, and easygoing. Minor A was less upbeat after the prep sessions were over, but she was still in good spirits.

5. Weiler assisted the Government's attorneys in bringing Minor A into the courtroom in November 2019 to prepare for her testimony. Minor A was interested in seeing the courtroom, and she expressed an interest in becoming an attorney when she grows up. She expressed no fear of testifying at that time, and she asked several questions about the process. Through the time when she left the courthouse, she appeared to be in good spirits and did not express fear of testifying.

6. Weiler waited with Minor A in a specially-designated witness room with support animals on February 11, 2020—the first day of the Government's case-in-chief at trial. Minor A was not called to the stand on February 11, 2020, however. During that day and until she left the courthouse, Minor A appeared content. Dammons escorted Minor A around the courthouse building that day. To him, she appeared cooperative, talkative, upbeat, and positive.

7. Weiler sat with Minor A in the designated witness room with support animals again on February 12, 2020. Minor A appeared calm and happy that morning. Dammons also saw Minor A that morning and to him she appeared smiling and talkative.

[3] Because this hearing addressed a preliminary question, most of the Federal Rules of Evidence—including the rules on hearsay—did not apply. Fed. R. Evid. 104(a). The Court does not analyze here the admissibility of the evidence received at the hearing under the Federal Rules of Evidence.

8. On the afternoon of February 12, 2020, the Government called Minor A to testify. As Weiler walked with Minor A down the hallway from the waiting room to the courtroom, Weiler noticed that Minor A's steps were getting slower. Weiler tried to comfort Minor A, and Minor A expressed some doubts about whether she was strong enough to testify. Dammons observed Minor A crying when she got to the door of the courtroom and heard her express doubt about her own strength. With Weiler's help, Minor A calmed down enough to go into the courtroom, although she still appeared stressed.

9. When Minor A got on the stand, she had difficulty breathing. Weiler and Dammons testified that it looked as if Minor A was going into shock. Minor A started to cry and was having trouble breathing.

10. Weiler, who was watching Minor A closely, saw Minor A look right at Protho, who was at the defense table, while she was on the stand.

11. Weiler tried to get Minor A to calm down over the course of several minutes. When Minor A was unable to calm down, Weiler and a social worker from the YWCA escorted Minor A out of the courtroom into the hallway. Once she was in the hallway, Minor A collapsed to the floor and sobbed. Dammons testified that Minor A only made it about three–five steps out of the room. She appeared to be in shock. The adults with Minor A escorted her to an empty courtroom nearby.

12. The adults with Minor A attempted to calm her down. Her eyes were darting all over the place, and she expressed repeatedly that she felt like she was back in the car in which she was kidnapped. Minor A's father entered the room. Minor A expressed to him that she thought she was nothing. Her father helped the other adults try to calm Minor A down. But for a while, Minor A was not breathing well, and she kept expressing that she felt like she was back in the car. Dammons testified that Minor A looked similar to people he had seen go into shock. Sometime after Minor A left the courtroom, she told Dammons that she could not see Protho again. She was a little better as she was leaving the courthouse, but she was still shaken.

13. The descriptions provided by the witnesses are in accord with the Court's observations of Minor A. The Court observed Minor A enter the courtroom. She appeared hesitant upon crossing the threshold but was able to step up into the witness stand. After initially facing in Protho's direction, Minor A was unable to look in his direction and broke down into tears. Her breathing became increasingly heavy and erratic, and she was visibly shaking. Despite Weiler's efforts to calm Minor A over several minutes, her condition did not improve and it was apparent that she would not be able to testify. The Court did not observe Minor A before she entered the courtroom or after she was escorted back into the hallway.

14. Weiler saw Minor A again at a meeting with the USAO on the night of February 12. Minor A appeared to be coherent and was able to answer questions, although Weiler reported that some of the spark was out of her eye.

15. Minor A told Weiler that when she got into the courtroom, she was looking for her father. Instead, she saw Protho. Minor A said she thought he would be wearing orange—as in an

orange prisoner jumpsuit—but he was not. Minor A said she was shocked upon seeing Protho and could not control herself. She said she would be able to testify with less fear if Protho were not in the room, even if she could see him and the courtroom on a television screen.

16. Because of her walkthrough with the Government's attorneys, Minor A knew that Protho would be at the defense table. It is unclear from the record whether Minor A knew that Protho was in federal custody during the trial.

17. Weiler considered Minor A's trouble testifying to be completely unexpected because of Minor A's prior openness and participation throughout the process.

18. Having considered Weiler's testimony, Dammons's testimony, and the Court's own observations of Minor A, the Court finds that:

a. The Government could not reasonably have foreseen the necessity of an order allowing Minor A to testify by means of two-way CCTV.

b. Testimony by two-way CCTV is necessary to protect Minor A's welfare.

c. Minor A is unable to testify in court with Defendant Protho in the room because she is afraid to testify in his presence. Minor A is not afraid of testifying in a courtroom generally; rather, she fears testifying while in the same room with him.

d. The emotional trauma Minor A would suffer from testifying in the same room as Defendant Protho is more than *de minimis* and more than mere nervousness, excitement, or an unwillingness to testify. Calling Minor A to testify in Protho's presence would cause her substantial emotional trauma.

e. The presence of Minor A's parents and an adult attendant, as defined by 18 U.S.C. § 3509, is necessary to Minor A's welfare and well-being while she testifies.

f. A method of instant, text-based communication on two cellphones would constitute a private and contemporaneous method of communication between Protho and his counsel who is examining Minor A.

Therefore, based on the evidence presented at the evidentiary hearing on February 13, 2020 and the Court's own observations of Minor A's actions and demeanor when she was in the courtroom with Defendant Protho on February 12, 2020, the Court finds that the Government has established all the requirements necessary for Minor A to testify by two-way CCTV under 18 U.S.C. § 3509(b)(1) and *Maryland v. Craig*, 497 U.S. 836 (1990).

After the evidentiary hearing, the Court set a briefing schedule on Protho's objection that the application of 18 U.S.C. § 3509(b) to this case would violate his rights under the Sixth Amendment's Confrontation Clause. The Court reserves ruling on Protho's constitutional objection.

Procedures

Provided that the Court overrules Protho's constitutional objection, the Court plans to implement the following procedures for Minor A's testimony.

Court staff will set up a two-way videoconference connection between Judge Wood's courtroom and a remote location in the Dirksen federal courthouse. Both parties have given their consent to the remote location, which is a courtroom located on another floor; however, the Court will not put the room number on the public docket in order to protect Minor A's privacy. Judge Wood, the jury, Defendant Protho, one attorney for the Government, and one defense attorney will be in Judge Wood's courtroom. Minor A, one attorney for the Government, and one defense attorney will be at the remote location with Minor A. An adult attendant, as defined by § 3509, and Minor A's parents may accompany Minor A while she testifies. A court reporter designated by the Court will be in the room with Minor A. That court reporter will place Minor A under oath, and counsel will proceed with direct and cross examination as normal. The room where Minor A will testify will be closed to the public.

Video and audio of Minor A's testimony will be broadcast to Judge Wood's courtroom. That courtroom will be open to the public, and members of the public will be able to hear the examination conducted in the other room. To protect Minor A's identity, however, the Court will not play video from Minor A's room on any monitor that can be seen from the gallery, and the remainder of the Court's protective order in this case will apply as normal. Protho will have the ability to communicate contemporaneously with his counsel in the room with Minor A via a text-based communications platform between two smartphones. Video and audio from Judge Wood's courtroom will be broadcast to the remote location where Minor A is testifying. Judge Wood will address any objections or motions made during the testimony from her courtroom. Judge Wood will provide appropriate instructions or admonishments to the jury before Minor A's testimony begins.

Dated: February 17, 2020

Andrea R. Wood
United States District Judge