No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER KEELING,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX A

NOT FOR PUBLICATION

FILED

DEC 12 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROGER KEELING, AKA Roger Vance Keeling, Defendant-Appellant.	No. 21-30259 D.C. No. 4:21-cr-00005-RRB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted December 6, 2022**
Seattle, Washington

Before: McKEOWN, MILLER, and MENDOZA, Circuit Judges.

Roger Keeling appeals his jury conviction for one count of murder for hire (18 U.S.C. § 1958) and one count of cyberstalking (18 U.S.C. §§ 2261A(2)(B), 2261(b)(6)). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

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

I.

Over Keeling's objections, the district court admitted Alaska State Trooper Sailer's lay testimony that i) law enforcement quickly responded to the cellmate's murder for hire allegation against Keeling because of an immediate, severe, and possibly realistic threat to Keeling's ex-girlfriend, and ii) the evidence seized from Keeling's apartment corroborated the murder for hire allegation. Finding that Keeling's objections to both instances of testimony were sufficiently preserved for appeal, we review for abuse of discretion. *United States v. Lloyd*, 807 F.3d 1128, 1151 (9th Cir. 2015).

Even if Trooper Sailer's testimony transgressed Federal Rule of Evidence 701's limitations, we conclude that any errors were harmless. Any error in admitting lay testimony under Rule 701 may be harmless "if in light of the evidence as a whole, there was a 'fair assurance that the jury was not substantially swayed by the error.'" *United States v. Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014) (quoting *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007)). Here, there is ample additional evidence of guilt, including incriminating documents seized from Keeling's apartment (which were presented in detail to the jury), as well as evidence that Keeling transferred money in excess of the cellmate's bail amount to the cellmate's mother. Given this other evidence, as well as the curative jury instruction to which the defense agreed, Trooper Sailer's

testimony did not substantially sway the jury to convict Keeling.

II.

Pointing to the same testimony, Keeling also alleges that the prosecutor improperly elicited these vouching statements from Trooper Sailer. Because Keeling failed to lodge a vouching objection in both instances, we review these challenges for plain error. *United States v. Pino-Noriega*, 189 F.3d 1089, 1097 (9th Cir. 1999) (a party fails to preserve an issue for appeal by making the wrong specific objection).

As a general rule, a prosecutor may not make vouching remarks or elicit vouching testimony from witnesses. *Cheney v. Washington*, 614 F.3d 987, 996 n.4 (9th Cir. 2010). "Improper vouching occurs when the prosecutor places the prestige of the government behind the witness by providing personal assurances of the witness's veracity," and "where the prosecutor suggests that the testimony of government witnesses is supported by information outside that presented to the jury." *United States v. Stinson*, 647 F.3d 1196, 1212 (9th Cir. 2011) (citation omitted).

The first instance of alleged vouching occurred when the prosecutor asked Trooper Sailer why law enforcement responded quickly to the cellmate's allegations, to which Trooper Sailer answered because of the immediate, severe, and possibly realistic threat to Keeling's ex-girlfriend. We see no plain error in this

testimony. Trooper Sailer's response did not imply any extra-record knowledge, nor did Trooper Sailer personally assure the jury of, or express any belief in, the cellmate's truthfulness. Rather, Trooper Sailer merely testified that law enforcement responded swiftly given the immediate, severe, and *possibly* realistic allegation.

The second instance of alleged vouching occurred when the prosecutor asked Trooper Sailer whether the evidence recovered from Keeling's apartment corroborated the cellmate's allegation. To this question, Trooper Sailer answered "[a]bsolutely." Assuming without deciding that this constitutes impermissible vouching, this instance, on balance, does not warrant reversal for plain error. "'To ascertain whether the . . . vouching amounts to plain error, the court balances the seriousness of the vouching against the effectiveness of any curative instruction and the closeness of the case.'" *United States v. Brooks*, 508 F.3d 1205, 1211 (9th Cir. 2007) (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). Any prejudice to Keeling was mitigated by the curative instruction directing the jury to make its own assessment of evidence and to determine Keeling's innocence without regard to a witness's comment on what the evidence means. And most importantly, given the substantial independent evidence of Keeling's guilt, we cannot say this was a close case that rose or fell on the cellmate's credibility. *See Brooks*, 508 F.3d at 1211 ("The strongest factor in concluding there is no plain

error here is that this was not a close case.").

III.

Keeling next argues that the district court erred in failing to exclude certain of the prosecutor's remarks that, in Keeling's view, diluted or shifted the government's burden of proof. Keeling concedes that he forfeited these objections at trial, so we review for plain error. *United States v. Chung*, 659 F.3d 815, 833 (9th Cir. 2011).

During closing arguments, the prosecutor contrasted the government's case with the defense's case and asked the jury: "[w]hich of those things seem more likely to you, folks?" This comment was well within the bounds of what we have permitted in other cases. Put in context, this remark was simply an "isolated moment" amidst the prosecutor's explanation of the legal elements of the charges and multiple reminders to the jury about the correct burden of proof. *United States v. Moreland*, 622 F.3d 1147, 1163 (9th Cir. 2010) (citation omitted); *see United States v. Wilkes*, 662 F.3d 524, 541 (9th Cir. 2011) (concluding it was not improper burden shifting where prosecutor stated that the jury had to believe the defendant in order to find he was not guilty because the statement was nothing more than an isolated moment in the trial).

Keeling also contends that the prosecutor improperly implied that the government was allied with the district court when the prosecutor told the jury that

to accept the defense's theory, it would have to "ignore reason and common sense." The prosecutor continued, "[b]ut as the judge is going to instruct you, that is not the standard here." Unlike in *United States v. Frederick*, 78 F.3d 1370, 1379 (9th Cir. 1996), the prosecutor here did not mention the government and the court in the same breath or otherwise imply an allyship between the two, nor did the prosecutor imply that defense counsel was asking the jury not to seek the truth. This was nothing more than a standard, inoffensive reminder to the jury that they would receive controlling instructions from the district court.

AFFIRMED.