

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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ADAM JASON POITRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eighth Circuit**

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**APPENDIX**

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**United States Court of Appeals**  
**For the Eighth Circuit**

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No. 21-3262

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United States of America

*Plaintiff - Appellee*

v.

Adam Jason Poitra

*Defendant - Appellant*

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Appeal from United States District Court  
for the District of North Dakota - Eastern

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Submitted: October 20, 2022

Filed: February 21, 2023

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Before SMITH, Chief Judge, BENTON and STRAS, Circuit Judges.

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BENTON, Circuit Judge.

A jury convicted Adam Jason Poitra of aggravated sexual abuse in violation of 18 U.S.C. §§ 2241(c) and 1153. The district court sentenced him to 440 months in prison. Poitra appeals his conviction. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Adam Poitra lived with his wife Samantha Poitra and her daughter K.P., whom he adopted, from 2010 to 2018. In 2018, Samantha moved out. Later that year, K.P. disclosed to a friend, T.H., that Poitra sexually abused her. She did not share any specific details. T.H. convinced K.P. to tell her mother. K.P. texted her mother, who took her to the sheriff's department. Shannon Hilfer, a forensic interviewer with Northern Plains Children's Advocacy Center, interviewed her.

At trial, K.P. testified that Poitra sexually abused her when she was 11- and 12-years-old. She said that he would tell her that he was in pain and his penis was bleeding because Samantha was not touching him. Samantha testified that he used the same tactic with her, sending her text messages asking her to have sex with him "for the pain." Samantha testified that she never discussed these messages with her daughter. T.H. testified about K.P. disclosing the abuse to him. Hilfer testified that abusers often work up to sexual abuse by breaking down a child's boundaries and isolating them from others. Poitra testified he never sexually abused K.P. After a three-day trial, the jury convicted him. He appeals the conviction.

## I.

Poitra claims the district court erred "by failing to instruct the jury that it had to agree on the specific act of sexual abuse in order to convict." Poitra did not request a specific unanimity instruction and did not object to the instructions given. This court reviews for plain error. *United States v. Keepseagle*, 30 F.4th 802, 810 (8th Cir. 2022). Under plain error review, Poitra must show an error, that was plain, that prejudiced him, and that seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Id.*

"This court has repeatedly held that a general unanimity instruction is usually sufficient to protect a defendant's sixth amendment right to a unanimous verdict." *United States v. James*, 172 F.3d 588, 593 (8th Cir. 1999). Only where there is a "genuine risk of jury confusion," might a specific unanimity instruction be required. *Id.*

Here, the district court gave a general unanimity instruction, stating multiple times that the verdict “must be unanimous.” Relying on *United States v. Keepseagle* and *United States v. Two Elk*, Poitra argues that the term “sexual act” as defined in 18 U.S.C. § 2246(2) includes four distinct types of sexual acts, and thus a specific instruction was required. *Keepseagle*, 30 F.4th at 813; *United States v. Two Elk*, 536 F.3d 890, 898-99 (8th Cir. 2008) (holding that aggravated sexual abuse under 18 U.S.C. § 2241(c) is a separate-act offense). See *United States v. Karam*, 37 F.3d 1280, 1286 (8th Cir. 1994) (discussing unanimity in a drug distribution case). But *Keepseagle* addressed a South Dakota statute, not 18 U.S.C. § 2241(c). And *Two Elk* addressed 18 U.S.C. § 2241(c) in the context of double jeopardy, not jury instructions.

Poitra cites no authority that failure to give a specific unanimity instruction under 18 U.S.C. § 2241(c) is error. To the contrary, this court has held that jurors need not agree on a specific sexual act to reach a unanimous verdict. See *United States v. DeMarce*, 564 F.3d 989, 1000 (8th Cir. 2009) (upholding district court’s general instructions on attempted aggravated sexual abuse despite defendant requesting a specific instruction). See generally *Richardson v. United States*, 526 U.S. 813, 817 (1999) (“[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.”). Absent authority directly supporting his position, there was no plain error.

## II.

Poitra contends the district court erred in admitting hearsay statements from Samantha and T.H. about K.P.’s reports of abuse. This court reviews for abuse of discretion and will reverse only if an improper ruling affected Poitra’s substantial rights or influenced the verdict. See *United States v. Wright*, 540 F.3d 833, 843 (8th Cir. 2008). Poitra thinks that under Federal Rule of Evidence 801, these statements were inadmissible as prior consistent statements to rebut a charge of fabrication. See *United States v. Bercier*, 506 F.3d 625, 629 (8th Cir. 2007); *United States v.*

*Kenyon*, 397 F.3d 1071, 1080-81 (8th Cir. 2005); *United States v. Beaulieu*, 194 F.3d 918, 919-20 (8th Cir. 1999).

The testimony by Samantha and T.H. was limited in scope to K.P.’s disclosure of the abuse, not the specifics of it. But even if the statements were inadmissible hearsay, their admission would be harmless given the other evidence against Poitra. K.P. herself testified to the abuse, including the details. *See United States v. Robertson*, 606 F.3d 943, 957 (8th Cir. 2010) (holding that inadmissible hearsay statements were not prejudicial because the government had “ample evidence” of guilt). *See also Kenyon*, 397 F.3d at 1076 (holding that a “victim’s testimony alone can be sufficient to support a guilty verdict”). Because the evidence of guilt is strong, this court believes the alleged error did not influence the verdict. *See United States v. Marrowbone*, 211 F.3d 452, 455 (8th Cir. 2000) (an evidentiary error “does not effect a substantial right and is harmless” if it “did not influence or had only a slight influence on the verdict”).

### III.

Poitra believes the district court erred in admitting the testimony of forensic interviewer Hilfer to “vouch for the credibility of the alleged victim.” This court reviews evidentiary rulings for abuse of discretion. *Wright*, 540 F.3d at 843. The government argues review should be for plain error because Poitra did not object on this basis at trial. This court need not decide the issue because Poitra’s claim fails under either standard.

Hilfer did not testify to anything specifically about Poitra’s case or K.P.’s abuse. Rather, she provided general testimony about forensic interviewing. She testified that the family is not allowed to watch the forensic interview and that children often delay disclosure of sexual abuse. This testimony is admissible to help the jury understand the process of investigation and typical behaviors of sexual assault victims. *See United States v. Zephier*, 989 F.3d 629, 635 (8th Cir. 2021) (discussing 30 years of precedent allowing witnesses to talk about “characteristics

of sexually abused children in general”); *United States v. Smith*, 591 F.3d 974, 983 (8th Cir. 2010) (holding that a forensic interviewer could “give her lay opinion based on her personal knowledge and perception” of a minor and describe “her experience observing other sexually abused children”).

#### IV.

Poitra maintains he was deprived of his Fifth Amendment right to a fair trial because the government’s closing argument “distorted its burden of proof and unfairly mischaracterized Poitra’s theory of the case.” Poitra did not object. The parties agree that review is for plain error. This court must first determine if the closing was improper. *See United States v. Miller*, 621 F.3d 723, 729-30 (8th Cir. 2010). Reversal is then appropriate if the improper comments deprived Poitra of “a fair trial.” *Id.* at 730. In making this determination, the court considers “the cumulative effect of the improprieties, the strength of the evidence against the defendant, and whether the district court took any curative action.” *United States v. Darden*, 688 F.3d 382, 388 (8th Cir. 2012).

It is a close call whether the closing argument here was improper. Poitra argues the government distorted the defense’s theory of the case, impermissibly shifted the burden of proof, and intimated the burden was by a preponderance of the evidence. It said, in part:

[T]o believe the defendant’s version of facts you can’t just state that there’s a nasty divorce and a motivation to lie. Nasty divorce does not equal making up very serious accusations. That might be enough for a cheesy drama. Just think of all the pieces that have to align to believe what the defendant is selling.

He also argues the government called the defense’s theory a “conspiracy theory” and improperly suggested the jury had to find that Samantha fabricated her story to find Poitra’s theory more credible than the government’s theory. *See Miller*, 621 F.3d at 729-33 (finding, in a case where the evidence “may be sufficient” but is “not

overwhelming,” a closing statement improper where the government said that to “acquit the defendant, you have to think that Officer Smith made a huge mistake, and you have to wonder what his motivation was for making that mistake”); **Darden**, 688 F.3d at 388-90 (finding the government’s comment in closing argument—that to acquit, the jury would have to believe all the officers got together in a conspiracy to lie—was improper, but declining to reverse because review was for plain error). Here, no individual statement may have been as clearly improper as in *Miller* or *Darden*. But the overall theme of the government’s closing may have had the same effect of improperly distorting Poitra’s case and shifting the burden. On the other hand, the government explicitly stated its “reasonable doubt” burden five times in its closing.<sup>1</sup> See **United States v. Boesen**, 541 F.3d 838, 846 (8th Cir. 2008) (declining to reverse despite a questionable comment during closing in part because the prosecutor “repeatedly and accurately informed the jury of the government’s burden of proof”). This is a close case.

Even if the closing were improper, under plain error review, this court will “reverse only under exceptional circumstances,” which requires that Poitra show “a reasonable probability that the outcome would have been different absent the alleged error.” **Darden**, 688 F.3d at 388-89. This is not an exceptional circumstance. Like in *Darden*, the strength of the evidence supporting the conviction “indicates that the

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<sup>1</sup>The government said: “But I will take this opportunity to go through some of the elements—go through the elements of what Mr. Poitra’s charged with, how some of the evidence fits with those charges and to briefly discuss why the evidence you’ve heard and seen proves beyond a reasonable doubt that Mr. Poitra is guilty of aggravated sexual abuse.”; “Our burden is to prove beyond a reasonable doubt that at least one occurrence happened before [K.P.’s] 12th birthday.”; “As we discussed, the government has the burden of proving beyond a reasonable doubt the defendant committed at least one sexual act.”; “As I said in my opening, I would have a chance to come back before you and argue that the United States has proven its case beyond a reasonable doubt.”; “Ladies and gentlemen of the jury, I do ask you to look critically and analytically at everything in this trial and then if you conclude—and I believe the evidence does show this crime is proved beyond a reasonable doubt, that the defendant’s story is unbelievable.”



result at trial would not have been different absent the prosecutor’s rebuttal comments.” *Id.* at 390.

The evidence of Poitra’s guilt was strong. See *United States v. Barrera*, 628 F.3d 1004, 1008 (8th Cir. 2011) (“If the evidence of guilt is overwhelming, an improper argument is less likely to affect the jury verdict.”). At trial, K.P.—almost 16-years-old—testified in detail about the abuse. See *United States v. Gabe*, 237 F.3d 954, 961 (8th Cir. 2001) (holding that “a victim’s testimony alone is sufficient to persuade a reasonable jury of the defendant’s guilt beyond a reasonable doubt”). Poitra also testified, denying the abuse. The jury’s verdict shows it judged the credibility of both K.P. and Poitra, and believed K.P. See *United States v. Colombe*, 964 F.3d 755, 758-59 (8th Cir. 2020) (“Assessing the credibility of the witnesses is the province of the jury.”). And her testimony was not the only evidence supporting the conviction. It was corroborated by text messages between Poitra and Samantha. These messages showed he used the same tactics in coercing Samantha to have sex as he did in coercing K.P.

This court also considers any instructions the court gave about the closing statements. The court did not give a curative instruction here because Poitra did not object to the statements made in the government’s closing. But it did instruct the jury that it must decide the case on the evidence, and that the attorneys’ arguments are not evidence. Before closing arguments, the court told the jury it was their “duty as jurors to decide from the evidence” whether Poitra was guilty or not guilty. The court then defined evidence, telling the jury: “Statements, arguments, questions, and comments by lawyers are not evidence.” “A jury is presumed to follow its instructions.” *United States v. Thomas*, 877 F.3d 1077, 1079 (8th Cir. 2017). There is no indication it failed to do so here.

The evidence and the court’s instructions show this is not the exceptional case where the conviction is overturned based solely on a prosecutor’s statements during closing argument. See *United States v. Kenyon*, 481 F.3d 1054, 1066 (8th Cir. 2007) (“It is well established, however, that not every impropriety of argument calls for a

new trial or for a reversal of the judgment of conviction.” (internal quotation marks omitted)). There was no plain error. *See Darden*, 699 F.3d at 388-89 (declining to reverse based on an improper comment under plain error standard of review).

\* \* \* \* \*

The judgment is affirmed.

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 21-3262

United States of America

Appellee

v.

Adam Jason Poitra

Appellant

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Appeal from U.S. District Court for the District of North Dakota - Eastern  
(3:19-cr-00170-PDW-1)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

April 14, 2023

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**ELEMENTS OF THE OFFENSE**

**F-7**

As charged in the Indictment, the crime of aggravated sexual abuse has four essential elements, which are:

- One,           the Defendant knowingly engaged in, or attempted to engage in,  
                  a sexual act with K.P.;
- Two,           At the time, K.P. was under the age of 12 years;
- Three,         the Defendant is an Indian; and
- Four,         the offense occurred in Indian country.

For you to find the Defendant guilty of the crime charged in the Indictment, the United States must prove all of these elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of this crime.

**“SEXUAL ACT” DEFINED**

**F-8**

As used in these instructions, “sexual act” means—

- (A) contact between the penis and the vulva or the penis and the anus and, for purposes of this definition, contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

**GENERAL CLOSING INSTRUCTIONS**

**F-17**

You will now go into the jury room and begin your deliberations. In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty as jurors to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the Defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the United States has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Sixth, you will set your own schedule for deliberations. Please inform the court security officer when you decide to take breaks, when you conclude deliberations for the day, and when you intend to reconvene.

Finally, a verdict form has been prepared for your convenience. This form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

You will now take this case, try it fairly and impartially between the parties, and return such a verdict as is warranted under all the evidence and these instructions.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
EASTERN DIVISION**

United States of America,	)	
	)	<b><u>VERDICT FORM</u></b>
Plaintiff,	)	
	)	
vs.	)	Case No. 3:19-cr-00170
	)	
Adam Jason Poitra,	)	
	)	
Defendant.	)	

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VERDICT

We the jury find the Defendant, Adam Jason Poitra,

0 Not Guilty                      12 Guilty

of the offense of Aggravated Sexual Abuse as set forth in the Indictment.

Dated this 23 day of April, 2021.

\_\_\_\_\_  
Foreperson

After you have completed this verdict form, have your foreperson sign and date it, and inform the court security officer that you have reached a verdict.