NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1185

UNITED STATES OF AMERICA

v.

PETER FRATUS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 2-20-cr-00270-001)
District Judge: Honorable Gerald J. Pappert

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on February 7, 2023

Before: CHAGARES, *Chief Judge*, SCIRICA, and RENDELL, *Circuit Judges.*

(Filed: March 30, 2023)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SCIRICA, *Circuit Judge*

Peter Fratus was convicted of transmitting threats in interstate commerce, 18 U.S.C. § 875(c), after sending Philadelphia's police commissioner racist and threatening emails. He was sentenced to four years of imprisonment and three years of supervised release. Fratus now appeals his conviction and sentence, challenging the admission of certain evidence, the sufficiency of the evidence underlying his conviction, and the District Court's application of the Sentencing Guidelines. We find no error and will affirm.

I.[1]

On the night of June 6, 2020, Peter Fratus, using a false name, sent two emails to Philadelphia Police Commissioner Danielle Outlaw. The first email said: "Calling the police now for an emergency. No answer. Dirty n****r! Find a n****r hang a n****r. Jews into the ovens!!!"[2] Fratus Br. 5. The second, sent one minute later, began with a subject line of "Find a n****r kill a n****r." *Id.* It read: "Where does police chief live?" JA47. He sent these emails to the address police.comissioner@phila.gov after searching online for the Philadelphia Police Department and visiting its website.

Just minutes later, Fratus called the Jewish charity Kars4Kids. He spoke to a representative of the charity and said, "Find a Jew, Kill a Jew. I'll find out where that fucking day camp is and I'll find out where they are and I'll kill all those fucking kids, how about that?" Fratus Br. 14. Fratus called Kars4Kids three more times that night and the next

[1] We write solely for the parties and so only briefly recite the essential facts.
[2] Following the practice of the parties and the District Court, "[t]his Court has censored Fratus's racial slurs. Fratus did not." *United States v. Fratus*, No. 20-CR-270, 2021 WL 3145732, at *1 n.1 (E.D. Pa. July 26, 2021).

day. *Fratus*, 2021 WL 3145732, at *1. He left voicemails threatening to "Find a Jew, Kill a Jew" and promising to put Jews "in [the] oven." *Id.* Fratus said in one voicemail that he wanted to "blow up the Jewish heritage" and added in two more that he was "trying to find out where Jews live so I can kill them." *Id.*

As a result of his emails to the police commissioner, Fratus was arrested by the FBI at his Massachusetts home on June 16, 2020. A grand jury in the Eastern District of Pennsylvania charged Fratus for sending those emails, indicting him for a single count of transmitting an interstate threat in violation of 18 U.S.C. § 875(c).

Fratus' trial began shortly after his indictment. The Government sought to introduce against Fratus "eight prior incidents in which Fratus threatened or assaulted individuals in a racist, misogynistic, or antisemitic manner." United States Br. 17. Fratus objected, and so the District Court heard argument on the issue and allowed the Government to introduce only two. *Fratus*, 2021 WL 3145732, at *4-5. First, the court allowed the government to introduce recordings of the previously described phone calls Fratus made to Kars4Kids. *Id.* at *1. Second, the court admitted evidence of a voicemail that Fratus left for Congresswoman Maxine Waters two years earlier replete with racial slurs and references to lynching. *Id.* at *2, 4. The court gave proper limiting instructions regarding this evidence both when it was introduced and before the jury's deliberations.

At his trial, Fratus did not deny that he sent the emails he was charged with sending. His principal defense was that his threats were the result of his longstanding "problem with alcohol consumption." Fratus Br. 8-9. Fratus testified that he was not aware of the

commissioner's race (she is Black) and did not intend to threaten her. The jury unanimously convicted him.

The District Court denied Fratus's post-trial motions for acquittal and for a new trial and proceeded to sentencing. Fratus faced a statutory maximum of five years. The court calculated an advisory range for Fratus's sentence under the Sentencing Guidelines of 41 to 51 months. Ultimately, the court considered the relevant factors under 18 U.S.C. § 3553 and imposed a sentence of 48 months imprisonment and three years supervised release.

II.[3]

A.

Fratus contends the District Court erred in allowing the jury to hear evidence about his threatening phone calls to Kars4Kids and Congresswoman Waters. We conclude that the court did not abuse its discretion in admitting this evidence. *See United States v. Fattah*, 914 F.3d 112, 175 (3d Cir. 2019) ("This Court reviews a district court's application of Rule 404(b) for abuse of discretion.").

The Federal Rules of Evidence generally prohibit introducing evidence of a defendant's "prior bad acts" to show his "propensity to commit the charged crime." *United States v. Caldwell*, 760 F.3d 267, 275 (3d Cir. 2014). But "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

[3] The District Court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

We apply a four-part test to determine whether such evidence may be admitted. *United States v. Garner*, 961 F.3d 264, 273 (3d Cir. 2020). Evidence of prior bad acts "is admissible only if it is (1) offered for a proper purpose under Rule 404(b)(2); (2) relevant to that purpose; (3) sufficiently probative under the Rule 403 balancing requirement; and (4) accompanied by a limiting instruction, if requested." *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013); *accord Garner*, 961 F.3d at 273.

The District Court carefully considered the issue and concluded that Fratus's calls to Kars4Kids and Congresswoman Waters passed this test. We agree.

Fratus's other calls were offered for and relevant to many proper purposes. "The plain text of Rule 404(b) allows for the admission of other-acts evidence to show knowledge and intent as the Government proffered here." *United States v. Repak*, 852 F.3d 230, 242 (3d Cir. 2017). The Government was required to prove that Fratus intended to threaten his victim. *United States v. Elonis*, 841 F.3d 589, 595-96 (3d Cir. 2016). Fratus testified at trial that he did not intend his emails to be threats. JA260. In doing so, he "put his mental state at issue in this case." *Repak*, 852 F.3d at 242. We agree with the District Court that Fratus's calls were relevant to "determining whether Fratus had the requisite intent to threaten." *Fratus*, 2021 WL 3145732, at *4. The fact that Fratus sent racist threats on other occasions seriously weakened his claim that he did not mean to threaten the police commissioner. The calls also helped prove Fratus's racist motive in sending the threats. *See United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006) ("Rule 404(b) explicitly makes motive relevant, and establishing motive tends to prove a crime was committed."). Relatedly, the evidence of Fratus's prior calls tended to show that Fratus had not sent his

threats by mistake. *See United States v. Cordero*, 973 F.3d 603, 620 (6th Cir. 2020) ("[A]bsence of mistake is in issue where a defendant admits involvement in a specific event but asserts that he acted unwittingly or with honest intent." (alteration in original)). This too was a permissible purpose.

Nor did the District Court err in its Rule 403 analysis. That rule allows the court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. Evidence of Fratus's other racist threats was highly probative. Fratus's other actions were strong evidence that he was motivated to make racist threats, that he intended his emails to be threatening, knew they would be perceived as threats, and did not send them by mistake. This would justify its admission even if there were a "large risk of unfair prejudice." *United States v. Cross*, 308 F.3d 308, 323 (3d Cir. 2002).

Fratus objects that hearing about his prior threats would improperly "instill in the jury 'an intense disgust'" for him. Fratus Br. 18 (quoting *United States v. Cunningham*, 694 F.3d 372, 391 (3d Cir. 2012)). But the jury would have heard about Fratus's racist and violent emails to the police commissioner in any event. The content of those emails was broadly similar to the content of Fratus's phone calls. Since the unquestionably admissible evidence regarding Fratus's emails was "similar in character" to the evidence of Fratus's phone calls, "there is no reason to suspect the jury was inflamed by admission" of the calls. *Sebolt*, 460 F.3d at 917. Besides, the District Court carefully parsed these risks, excluding six of the Government's proposed eight bad acts on the grounds that "each act seriously risks unfairly prejudicing Fratus." *Fratus*, 2021 WL 3145732, at *5.

Fratus faults the District Court for giving "too much weight to [the] similarity of the communications and their underlying racist content." Fratus Br. 18. But these factors were precisely the ones the court should have taken into account. "[T]he more similar the prior act is . . . to the act being proved, the more relevant it becomes." *United States v. Williams*, 740 F.3d 308, 314 (4th Cir. 2014) (quoting *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1992)); *accord United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000). Any remaining risk of prejudice was reduced by the court's proper limiting instructions. *United States v. Lee*, 612 F.3d 170, 191-92, 191 n.25 (3d Cir. 2010).

"When a court engages in a Rule 403 balancing and articulates on the record a rational explanation, we will rarely disturb its ruling." *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992). The record indicates the District Court did just that. We decline to disturb its rulings.

B.

Fratus also challenges the sufficiency of the evidence underlying his conviction. His argument recapitulates his trial defenses—that he did not intend to threaten anyone because he was drunk, and that his emails were not "true threats." Fratus Br. 21-24. The jury's "verdict must be upheld as long as it does not 'fall below the threshold of bare rationality.'" *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431 (3d Cir. 2013) (en banc) (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)). This jury's verdict easily clears that bar.

Fratus reprises his voluntary intoxication defense from trial. But Fratus admits that "[t]he District Court correctly instructed the jury" on this defense. Fratus Br. 21. Of course, the jury was not required to accept Fratus's defense.

Fratus also contends that the Government failed to prove that his communications were "true threats." Fratus Br. 23. He describes them instead as "nonsensical, racist, tirades—not expressions of harm or threats." *Id.* To reiterate, Fratus's emails said (among other things) "[f]ind a n****r, hang a n****r," and "[w]here does [the] police chief live?" It was reasonable for the jury to find that these emails were "serious expression[s] of an intent to inflict bodily injury" on the commissioner. *See Elonis*, 841 F.3d at 597.

The jury was entitled to conclude from the openly violent and racist nature of the emails that Fratus intended those emails to threaten Commissioner Outlaw. *See id.*, 841 F.3d at 596-97. And the evidence of Fratus's other threats similarly allowed the jury to conclude that he meant what he said. *See United States v. Jongewaard*, 567 F.3d 336, 341-42 (8th Cir. 2009) (evidence of other threats properly used to "show the seriousness of later threats" (cleaned up)). The evidence at trial was amply sufficient to justify Fratus's conviction.

III.

Finally, Fratus argues that the District Court erred in calculating his sentence. We "review factual findings relevant to the [Sentencing] Guidelines for clear error" and "exercise plenary review over a district court's interpretation of the Guidelines." *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (en banc). We conclude that the District Court applied the Guidelines correctly.

Fratus argues that the District Court made two mistakes in calculating the applicable Guidelines range. First, he objects to the imposition of a three-level increase under U.S.S.G. § 3A1.2(a), which applies when "the victim was a government officer or

employee" and "the offense of conviction was motivated by such status." Fratus says that the Government failed to show that he "knew of Commissioner Outlaw's official position" in sending his emails. Fratus Br. 26. This argument is not credible. Fratus sent threats to the email address police.commissioner@phila.gov. He wrote in those emails "Where does [the] police chief live?" JA47. The District Court did not err in determining that Fratus was motivated by his victim's official position.

Second, Fratus argues that the District Court should have reduced his sentence because his crime "involved a single instance evidencing little or no deliberation." U.S.S.G. § 2A6.1(b)(6); Fratus Br. 27-28. But the court, which had before it evidence of many of Fratus's threats, was entitled to conclude that Fratus's crime involved more than a single instance. *See United States v. Osborn*, 12 F.4th 634, 639-40 (6th Cir. 2021) (affirming district court's decision to deny reduction where defendant "had a pattern of calling government officials . . . and threatening them"); *United States v. Freeman*, 176 F.3d 575, 578 (1st Cir. 1999) (denying reduction where defendant "made at least two threatening communications"). The court also did not clearly err in finding that Fratus—who researched his intended victim and took steps to avoid detection—"demonstrate[d] sufficient deliberation" in committing his crime. *United States v. Cothran*, 286 F.3d 173, 179 (3d Cir. 2002).

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We will affirm the judgment of conviction and sentence.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	
v.	CRIMINAL ACTION
PETER FRATUS,	NO. 20-270
Defendant.	

PAPPERT, J. **December 28, 2021**

MEMORANDUM

On September 15, 2021, a jury convicted Peter Fratus of transmitting a threat in interstate commerce in violation of 18 U.S.C. § 875(c). (ECF 68.) He now moves for a judgment of acquittal or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33. (ECF 78 and 79.) The Court denies both motions.

I

On the night of June 6, 2020, Philadelphia Police Commissioner Danielle Outlaw received two emails. (Trial Tr., Vol. I, at 30:25–31:7, 32:20–35:7, ECF 75). The first had the subject line "Answer the phone," followed by the message "calling the police now for an emergency. No answer. Dirty n*****! Find a n***** hang a n*****. Jews into the ovens!!!" (Gov. Ex. 2.) A second message with the subject line "Find a n*****

kill a n*****" arrived less than a minute later. (Gov. Ex. 4.) It asked one question: "Where does the police chief live?"[1] (*Id.*)

While these emails were sent under the alias "Kevin Johnson," law enforcement quickly tied them to Fratus. The emails came from an IP address associated with his home in West Dennis, Massachusetts, (Trial Tr., Vol. I, at 58:12–13; 61:23–25; 63:18–64:13), and the email account from which they were sent was linked by phone number and cookie to an account bearing Fratus' name, (*Id.* at 69:15–19; Gov. Exs. 10, 13). The "Kevin Johnson" account also contained personal details and pictures of Fratus. (Trial Tr., Vol. I., at 75:15–21; Gov. Exs. 41, 42, 43.)

Two days after Fratus sent the emails, FBI Special Agent Geoffrey Kelly visited him at his home. *See* (Trial Tr., Vol. II, at 31:24–32:5, ECF 77). Fratus initially told Kelly he didn't remember whether he sent the emails, though he added that if he had sent them, he was "merely exercising [his] First Amendment right." (*Id.* at 39:13–24.) In Kelly's experience, that type of hypothetical is "usually . . . some kind of admission." (*Id.* at 39:24–40:1.) Indeed, after Kelly expressed his exasperation with Fratus' evasion, Fratus admitted he had sent the emails. *See* (*id.* at 41:13–42:25).

These emails were not an isolated outburst. About twenty minutes after he sent them, Fratus left three antisemitic, threatening voicemails for Karz4Kids, a Jewish charity. (Gov. Exs. 31–34; Trial Tr., Vol. I, at 91:13–20; 92:19–93:1.) He made a similar racist call to Congresswoman Maxine Waters two years earlier, (Gov. Ex. 35; Trial Tr., Vol. II, at 85:8–21; 90:23–25), and the Google search histories associated with his email

[1] The Court has censored Fratus' slurs. He did not.

accounts were littered with hateful queries, (Gov. Exs. 22, 23; Trial Tr., Vol. I, at 82:2–24).

On the second day of trial, Fratus took the stand. He admitted sending the emails to Commissioner Outlaw. (Trial Tr., Vol. II, at 121:21–24.) He also admitted leaving the voicemails for Congresswoman Waters and Karz4Kids. (*Id.* at 147:14–148:6.) He claimed, however, that he was too drunk to have intended the emails as threats. (*Id.* at 134:1–135:19, 146:17–22.)

Fratus testified about his heavy drinking and regular blackouts. *See e.g.* (*id.*, Vol. II, at 116:20–21; 121:13–14; 122:15–123:1; 127:14–17). He claimed to be able to complete complex tasks during these blackouts without remembering what he had done. (*Id.* at 127:14–128:6.) He believed he sent the emails in a similar state. (*Id.* at 134:1–135:19; 146:17–22.) Because he could not remember sending them, he "couldn't tell you what [his] intention was." (*Id.* at 146:20–22.) He also explained he never would have consciously sent the emails from the account associated with the alias Kevin Johnson because he used that email to engage in sexual activities he found shameful. (*Id.* at 137:11–138:21.)

II

A

Rule 29 of the Federal Rules of Criminal Procedure provides that a court, "on the defendant's motion[,] must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Evidence is insufficient if no "rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Caraballo-*

Rodriguez, 726 F.3d 418, 430 (3d Cir. 2013) (en banc) (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)). This standard is "highly deferential." *Id.* It requires courts to view the entire record—not just isolated parts—"in the light most favorable to the prosecution." *Id.* (quoting *Brodie*, 403 F.3d at 133). Courts "must be ever vigilant not to usurp the role of the jury by weighing credibility and assigning weight to the evidence." *Id.* (ellipsis omitted) (quoting *Brodie*, 403 F.3d at 133). To avoid "act[ing] as a thirteenth juror," a court must uphold any verdict that "does not 'fall below the threshold of bare rationality.'" *Id.* at 431 (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)); *see also United States v. Jacobs*, No. 20-1200, 2021 WL 5934672, at *4 (3d Cir. Dec. 16, 2021).

B

A more deferential standard of review applies to motions for a new trial under Rule 33. That rule permits district courts to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Courts need "not view the evidence favorably to the Government," *United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). That said, Rule 33 motions are "disfavored and should be 'granted sparingly and only in exceptional cases.'" *Id.* (quoting *Gov't of Virgin Islands Y. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)). A court may "order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) (quoting *Johnson*, 302 F.3d at 150). And a court may grant a new trial to cure an

error at trial only if the error (or errors) "had a substantial influence on the outcome of the trial." *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019) (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)).

C

18 U.S.C. § 875(c) criminalizes transmitting in interstate commerce a communication containing a threat to kidnap or injure another person. The offense contains both an objective and a subjective component. *United States v. Elonis*, 841 F.3d 589, 596 (3d Cir. 2016). The Government must prove (1) that a reasonable person would view the communication as a threat and (2) that the defendant transmitted it "for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat." *Id.*

III

A

In his motion for acquittal, Fratus contends no reasonable juror could have concluded he had the subjective intent to communicate a threat to Commissioner Outlaw because the Government offered "scant evidence . . . to overcome" his testimony that he was blackout drunk when he sent the emails. (Mem. Supp. Mot. Acquittal at 5–6, ECF 78.)

Fratus' argument proceeds from a faulty premise. The only evidence of his purported intoxication when sending the emails was his own testimony, which the jury was not required to credit. The Court cannot acquit him on the theory that evidence

sufficient to establish his intent had he been sober was insufficient to convict him because he claimed to be drunk.

Fratus does not dispute that he sent the emails, (Trial Tr., Vol. II, at 121:21–24; 170:16–18), or even that a reasonable person would understand them as a threat, (Mem. Supp. Mot. Acquittal at 4). He merely asserts that his testimony regarding his alcoholism and his ability to "blackout, yet still function" undercut an otherwise reasonable inference about his intent. (*Id.* at 5). But assessing his intoxication defense requires "weighing credibility and assigning weight to the evidence." *Brodie*, 403 F.3d at 133. It is not a proper basis for a Rule 29 motion.

B

Fratus raises two arguments in his motion for a new trial. Again, he claims his testimony regarding intoxication left him without the *mens rea* required to convict him. He also argues that the court erred in allowing Special Agent Kelly to testify that he interpreted Fratus' hypothetical about exercising his First Amendment rights as an admission. Neither argument has any merit.

1

The Government presented ample evidence that Fratus intended his communications as threats. Indeed, the violent nature of the emails was enough for the jury to so conclude. *See United States v. Elonis*, 841 F.3d at 599–600. The jury also heard voicemails in which Fratus levelled similarly disturbing threats at a Jewish charity and a Black congresswoman. Those messages strengthened the inference that

Fratus's emails were intended to threaten Commissioner Outlaw. *See* (Mem. Op. at 7–10, ECF 46).

Fratus' own admissions were further evidence of his intent. According to Agent Kelly, Fratus acknowledged he "crossed the line" when he emailed Commissioner Outlaw. (Trial Tr., Vol. II, at 42:23–24; 43:15–17.) And at trial, Fratus testified that he "lash[ed] out" at Commissioner Outlaw and others because he "wanted the world to feel the pain, the hurt, the disgust that [he] felt inside." (*Id.* at 121:21–122:1.)

Fratus' attempted intoxication defense did little to blunt the force of this evidence. Even if the jury believed every word of Fratus' testimony, it could still convict him. What matters is what he knew or intended at the time he sent the emails, not what he remembered the next day. *See United States v. Wandahsega*, 924 F.3d 868, 885 (6th Cir. 2019) (distinguishing between the ability to form memories and the ability to act intentionally or knowingly); *Breakiron v. Horn*, No. 00-300, 2008 WL 4412057, at *38 (W.D. Pa. Sept. 24, 2008) (same), *rev'd in part on other grounds*, 642 F.3d 126 (3d Cir. 2011).

Here, Fratus' testimony showed he could and did act intentionally during his alleged blackouts. He gave examples of complex tasks he completed while in a blackout state, including looking up and following "labor intensive recipes." (Trial Tr., Vol. II, at 127:23–128:6.) During one blackout, he told his partner that he was going to Provincetown, forty-five minutes from his home, then proceeded to drive there and

back. (*Id.* at 127:18–22, 182:8–183:10). These vignettes undermined his claim that a blackout prevented him from intending to threaten Commissioner Outlaw.

Fratus' intoxication defense was also inconsistent with his conduct on the night of June 6. That night, Fratus searched for and sent harassing emails or voicemails to three different targets: Commissioner Outlaw, Karz4Kids, and Massachusetts Attorney General Maura Healey. (*Id.*, Vol. I, at 83:4–84:24, Vol. II, at 170:14–172:5, 176:14–10; Gov. Exs. 2, 4, 23, 31–34, 26, 27.) His methodical and repeated conduct showed he was in control of his actions, even if he did not remember them.

2

Nor was it error to admit Agent Kelly's interpretation of Fratus' remark about exercising his First Amendment rights. Federal Rule of Evidence 701 permits a lay witness to offer an opinion if it is rationally based on his perception, helpful to the jury, and not based on scientific, technical, or other specialized knowledge. Because "personal interaction is nuanced and nonliteral," it is often useful to hear what one participant in a conversation understood the other to be saying. *United States v. Stadtmauer*, 620 F.3d 238, 265 n.32 (3d Cir. 2010) (quoting Mueller & Kirkpatrick, *Federal Evidence* § 7:5, at 775). Therefore, a witness may testify about the "context and meaning of conversations to which he was a party," including his "understanding of the thoughts that were being communicated to him." *Id.* (quoting *United States v. Kozinski*, 16 F.3d 795, 809 (7th Cir.1994)).

Kelly has worked as an FBI Special Agent for more than twenty-five years. (Trial Tr., Vol. II, 31:4–8.) He testified that in his experience, hypothetical remarks like the one Fratus made were "usually . . . some kind of admission." (*Id.* at 39:24–40:1.)

He drew on his own perceptions to conclude Fratus was being "deceptive and disingenuous," and his opinion was helpful to the jury, who otherwise might not have understood that when Fratus used hypotheticals to "skirt[] around the issue," he meant something other than what he actually said. (*Id.* at 41:16–18.)

Even if Kelly's opinion should not have been admitted, the error was harmless. Kelly testified that later in the same conversation, Fratus admitted he sent the emails to Commissioner Outlaw. (*Id.* at 42:5–25.) That explicit confession made the meaning of the hypothetical far less significant. No rational juror would disbelieve Kelly's testimony that Fratus explicitly confessed to sending the emails while still crediting his interpretation of Fratus' hypothetical.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1185

UNITED STATES OF AMERICA

v.

PETER FRATUS,
Appellant

(D.C. Crim. No. 2-20-cr-00270-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, SCIRICA, and RENDELL, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: May 1, 2023
PDB/KR/cc: All Counsel of Record

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1185

USA v. Peter Fratus

(U.S. District Court No. 2-20-cr-00270-001)

ORDER REGARDING APPOINTMENT OF COUNSEL

Joseph T. Schutz, Esq. is hereby appointed to represent Peter Fratus on appeal. The appointment will be created in the Court's eVoucher program. Counsel is directed to the eVoucher page for information regarding the appointment terms and procedures.

CJA 20, 30, 21 and 31 vouchers are submitted for payment through the Court's eVoucher program. Upon receiving separate email notification of this appointment from the Court's CJA staff, counsel may create CJA 20, 30, 21 and 31 vouchers for use in maintaining time and expense records and paying for expert services.

Authorization for preparation of transcripts must be obtained in the District Court. Deadlines for ordering and filing the transcripts will be set by this Court. Counsel is required to file the transcript purchase order in this Court and should indicate in Part 1B of the form that the "CJA form submitted to District Court Judge". Counsel must complete the transcript request by filing an "Auth-24" request in the District Court's eVoucher program. Financial arrangements for the transcripts will not be considered complete until counsel has submitted an "Auth-24" request through the District Court's eVoucher program.

For the Court,

s/ Patricia A. Dodszuweit
Clerk

Dated: February 03, 2022

kr/cc: Robert J. Livermore, Esq.
Joseph T. Schultz, Esq.
Sarah Wolfe, Esq.