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FILED
United States Court of Appeals
Tenth Circuit

October 24, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD JOSEPH PARSON,

Defendant - Appellant.

No. 22-5056

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:21-CR-00112-CVE-1)

Jared T. Guemmer, Assistant Federal Public Defender (Julia L. O'Connell, Federal Public Defender, and Robert A. Ridenour, Assistant Federal Public Defender, with him on the briefs), Northern District of Oklahoma, Tulsa, Oklahoma, for Defendant – Appellant.

Thomas Duncombe, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, and Shelley K.G. Clemens, Assistant United States Attorney, on the brief), Northern District of Oklahoma, Tulsa, Oklahoma, for Plaintiff – Appellee.

Before **MORITZ**, **BALDOCK**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

A jury found Edward Parson guilty of aggravated sexual abuse of a child, in violation of 18 U.S.C. §§ 1151, 1153, 2241(c). Parson raises on appeal two challenges to his conviction. He first claims the district court erred in admitting expert testimony about the process of child-sexual-abuse disclosures and the characteristics and behaviors of children who make such disclosures. The district court did not abuse its discretion in admitting this testimony. Parson further claims the district court erred in admitting specific testimony of the expert that children are four times more likely to omit facts than to make up facts in the process of disclosing abuse. This claim of error is unpreserved and Parson has failed to demonstrate an entitlement to relief under the difficult-to-satisfy plain error standard. Thus, exercising jurisdiction pursuant to 28 U.S.C § 1291, we **affirm** the district court's judgment of conviction.

II. BACKGROUND

A. S.S. Alleges Parson Sexually Abused Her

Parson began living with K.S. and her daughters, S.S. and W.S., in late 2016. At the time, S.S. was five-years-old. In 2018, S.S. told K.S. Parson was sexually abusing her. K.S. did not believe the allegation and told S.S. not to tell anybody else. At Parson's urging, K.S. kept S.S. out of school for fear S.S. would disclose the alleged abuse. Later, S.S. disclosed the abuse to Parson's mother and sister. Judy Nelson, the mother of Parson's sister's boyfriend, reported the allegation to authorities. The authorities assigned Martyn Widdoes to investigate. Widdoes talked

to both S.S. and K.S. and, thereafter, arranged for S.S. and W.S. to live with their maternal grandmother, L.W. Widdoes also scheduled a forensic interview. S.S. did not disclose any sexual abuse at that interview. After S.S. eventually told L.W. about the abuse, two more forensic interviews took place. During these interviews, S.S. described how Parson sexually assaulted her. A federal grand jury charged Parson with aggravated sexual abuse of a minor.

B. Pretrial Notices

Prior to trial, the government gave Parson notice of its intent to call Rachel Murdock, a Federal Bureau of Investigation Child/Adolescent Forensic Interviewer, as an expert witness. The government expected Murdock would testify about: (1) "disclosure of child sexual abuse, with specific references to delays in disclosing, non-disclosure, and partial disclosures"; (2) factors that may cause delays in disclosure or partial disclosures, including "child characteristics, family environment, community influences, and societal attitudes"; and (3) the significance of a child's ability to describe events like an erection or ejaculation. There is no indication in the government's disclosure that Murdock would provide any kind of statistical evidence. Parson provided the government with his own expert notice, indicating he intended to call Dr. Susan Cave, Ph.D., an expert in clinical and forensic psychology, to testify about the reliability of child sexual abuse reports. Cave would comment directly on S.S.'s allegations by testifying that the techniques used by the forensic

interviewers, together with "outside and familial influences" on S.S., "increased the likelihood" her recollection was "inaccurate" and "enhanced."

Parson moved to exclude Murdock's testimony, claiming it would amount to improper vouching. The district court denied the motion, ruling (1) the testimony met the requirements of Fed. R. Evid. 702 and 403 and (2) testimony about the disclosure process, forensic interviewing, and "psychology of child sexual abuse victims" would not amount to vouching. It noted Parson intended to call his own expert "to testify that the forensic interview process made S.S.'s testimony unreliable." It concluded "Murdock's anticipated testimony would add context and specialized knowledge regarding S.S.'s disclosure process" and "whatever prejudice, if any, . . . does not substantially outweigh the probative value of adding context and nuance to . . . S.S.'s testimony."

C. The Trial

1. Opening Statements

The government's opening statement acknowledged that only Parson and S.S. knew whether the alleged abuse occurred. It asked the jury to focus on S.S. and argued "[o]nly S.S. can tell you what the defendant did to her." It noted the jury would hear from Murdock, who "works with child victims nearly every day." It indicated Murdock would help the jury "understand childhood trauma," "how children may talk about and process sexual abuse," and "how children may disclose

after they've been abused," thereby giving the jury "a foundation to understand child sexual abuse victims."

Parson emphasized credibility as the central issue. He identified his previous abuse of K.S. as a motive on the part of L.W. to remove Parson from S.S.'s life. He highlighted S.S.'s denial of abuse in the first forensic interview and noted L.W. nevertheless placed S.S. in therapy in the hopes of obtaining a disclosure. Parson identified allegedly inappropriate interview techniques during the forensic interviews and said Cave would testify regarding the forensic interviewing process. He noted that Cave, who had worked in the field of child psychology for forty-five years, believed S.S.'s forensic interviews were tainted by leading and suggestive questions.

2. The Government's Case

a. Murdock's Expert Testimony

Murdock testified about her experience and training as a forensic interviewer. She explained the purpose of a forensic interview is to gather information "in a nonleading and child friendly manner." The job was "to provide a developmentally appropriate and child sensitive interview to allow the child to talk about what may or may not have happened."

Murdock testified there is no typical way children respond to sexual abuse. It is normal for a child to be around their abuser and act like nothing happened. Such conduct arises out of needs to pretend the abuse did not happen and for normalcy. These needs make delayed reporting of abuse common. When and how much a child discloses depends on the child's age, shyness, shame/embarrassment, and pressure

from the perpetrator or family. This is particularly true when the abuser holds a position of power over the victim. "[W]hen children experience a traumatic event, they may checkout or be focused on . . . a minor detail during an abuse incident and because of that they may not have . . . a lot of detailed information" adults might expect. Abused children often cannot recall specific dates and times of abuse, instead connecting the abuse to a specific event. If time has passed since the abuse occurred, children are more likely to remember only the core event, not the peripheral details. Disclosure is often "a process." A child may need multiple interviews before fully disclosing the abuse and disclosure is commonly piecemeal. A child who is punished or not believed upon disclosure is less likely to attempt to disclose again.

During Murdock's testimony, the government asked if there were statistics relating to the likelihood of a child omitting details during the process of disclosing abuse. She responded that "the research suggests . . . children are four times more likely to omit details about things that really did happen to them, so leave those out, versus an error of commission, which is an error where they would make up something that didn't happen." She continued, "[s]o, it's a four-to-one ratio more likely that they will not talk about something that happened versus [make up] something that didn't." Parson did not object to this line of questioning. Instead, on cross-examination, he revisited this testimony and asked follow-up questions. Murdock asserted the ratio referred to "errors of omission versus errors of commission[,] so its errors of leaving details out that did happen versus inserting

details that didn't happen." She agreed this meant that "80 percent of kids are honest but . . . 20 percent include details that didn't happen."

Murdock did not provide an opinion as to S.S.'s credibility, noting she never spoke to S.S. When defense counsel asked her about "this specific case" and case documents, she stated she had not reviewed any documents relating to S.S. Finally, she stated she did not know whether Parson molested S.S.

b. S.S.'s Testimony

S.S. gave detailed, age-appropriate testimony as to four specific instances of sexual abuse she suffered at Parson's hands. Importantly, she testified as to one such event that occurred when K.S. took W.S. to the emergency room and she was alone with Parson. Parson told S.S. not to tell anyone about the abuse. She did, however, tell K.S. K.S. did not believe S.S., held S.S. out of school, and told S.S. not to tell anyone else. K.S.'s reaction made S.S. "very sad" because school was S.S.'s "only way to escape the house." Despite K.S.'s instructions, S.S. told Parson's mother and sister about the abuse. K.S. convinced Parson's mother that S.S. was lying. K.S. then talked to S.S., making S.S. feel scared and alone.

S.S.'s first forensic interview took place in September 2018. S.S. did not disclose any sexual abuse at the first interview. She explained she "lied" (i.e., failed to disclose Parson was sexually abusing her) in this interview because K.S. told her not to tell and because she was afraid of what K.S. would do if she disregarded those instructions. In early 2019, while on vacation with L.W., S.S. "let loose" and

disclosed the sexual abuse. L.W. believed S.S.'s allegations. In two follow-up forensic interviews, S.S. disclosed that Parson physically and sexually abused her.

c. Other Prosecution Evidence

Jessica Stombaugh testified she conducted S.S.'s second and third forensic interviews. She described her education and experience, including having performed 1300 forensic interviews and having testified as an expert witness. The government moved, without objection, to qualify Stombaugh as an expert witness as to the process of conducting forensic interviews of children. Stombaugh testified, as had Murdock, that there were many reasons a child could be hesitant to disclose abuse. It is not unusual for a child to refuse to disclose abuse during an initial interview because "[m]ost people don't disclose abuse until they feel safe." She testified that studies show most children never disclose abuse but, instead, disclose only after they become adults. She indicated the goal of a forensic interview is to talk to children in a "non-leading," "non-suggestive," "child-led" manner. Stombaugh discussed some "rules" with S.S., including telling the truth, correcting any misstatements, and saying, "I don't know" if she did not know the answer to a question. Thereafter, S.S. disclosed Parson physically abused her. Parson would also choke S.S., leaving her "tired" and "weak." As to sexual abuse, S.S. told Stombaugh that Parson would "lick her teetee" and "make [her] lick his." S.S. reported Parson "would sometimes mostly like put his teetee in mine." In a third forensic interview, S.S. disclosed that Parson would do "kissing lips" on her body and lick her "private" parts. Stombaugh testified

S.S. was consistent between the two interviews and used terminology appropriate for her age.

Widdoes testified she removed S.S. and W.S. from K.S.'s home, placed them with L.W., and arranged the forensic interviews. She also testified it was the mother of Parson's sister's boyfriend, not L.W., who first reported the alleged abuse to the authorities.

K.S. testified about her relationship with Parson. She admitted they used methamphetamine almost daily, sometimes to the point of being incapacitated. She testified physical abuse made her relationship with Parson "rough." K.S. confirmed her daughters were often alone with Parson while she was at work and she left S.S. in Parson's custody when she took W.S. to the emergency room. Parson frequently choked K.S. and she once saw Parson place his hands around S.S.'s neck and lift her off the ground. She did not intervene because she "honestly lived in fear of [Parson] and [she] thought that they were playing. There wasn't hardly anything that I could do because of retaliation of what would happen." K.S. admitted S.S. told her Parson was sexually abusing her and confirmed Parson was nearby during this disclosure. K.S. refused to believe S.S. and told S.S. not to tell anyone. At Parson's urging, she kept S.S. out of school to prevent S.S. from repeating the allegations. Parson told K.S. that if S.S. repeated the allegations, S.S. could be taken away from her.

L.W. testified about how S.S. ended up in her care and about S.S.'s eventual disclosure of sexual abuse. L.W. said they were on vacation and watching a television show that prompted a discussion about "bad guys." L.W. said Parson was a

bad guy and S.S. agreed. S.S. "got really quiet" and went outside onto the balcony. After a short period of time, S.S. came back inside and asked to talk to L.W. S.S. told L.W. that Parson had made her kiss his "tee-tee" and then he kissed her "tee-tee."

3. The Defense Case

Cave testified as an expert on the reliability of child witnesses and interviewing techniques. She reviewed each of S.S.'s three forensic interviews. Cave was concerned about the number of interviews because more interactions could contaminate S.S.'s statements. As to the first forensic interview, Cave said the questioning was suggestive and introduced topics S.S. had not brought up, possibly contaminating S.S.'s answers. Cave explained L.W. placed S.S. in a therapy program because L.W. suspected sexual abuse. Cave reviewed the therapy records, which indicated the therapist's job was "to try to get S.S. to talk about the purported sex abuse." Cave asserted (1) S.S.'s allegations kept "getting bigger and bigger with every telling" as she went through the forensic interviews and (2) the nature of the contact between S.S. and Parson changed between interviews. She testified S.S.'s claims about whether someone directed her not to talk about abuse changed: sometimes Parson told her not to talk about it, sometimes it was K.S., and sometimes she denied that anyone told her not to talk about the abuse. Cave identified an incident in which S.S. simply parroted an answer back to an interviewer after the interviewer asked a question. She believed the questions posed by the forensic

interviewers were suggestive and concluded, based on her professional experience, that S.S.'s statements were not reliable.

During his testimony, Parson denied physically or sexually abusing S.S., though he admitted choking her "in a playful manner." He blamed the allegations on L.W., asserting she was angry he was abusing K.S. He admitted he repeatedly beat and choked K.S.; he was often left alone with S.S. and W.S when K.S. was at work; he used drugs and was high most of the time; and S.S. reported the abuse to K.S., who told S.S. to "not say these kind of things."

Two of S.S.'s teachers testified they did not notice any indication of abuse. A victim liaison (1) testified about S.S.'s responses to questions from a state prosecutor and how those responses were possibly inconsistent with statements S.S. made in other interviews and (2) recounted how W.S. contradicted a statement made by L.W. K.S.'s attorney was subpoenaed and testified during the defense case. As to K.S.'s interactions with prosecutors, K.S.'s attorney categorically rejected any assertion the prosecutor coerced K.S. to give false testimony. A social services specialist testified that, during an interaction with S.S. before one of S.S.'s forensic interviews, she told S.S. she was "proud of her for getting all of the bad things off her chest." She also told S.S. "she just has to go [to the interview] and [make her disclosures] and she won't have to keep repeating it over and over again." A child welfare specialist testified about interactions she had with L.W. and S.S. on an occasion prior to the instant sexual abuse allegations. These interactions were prompted by reports Parson was physically abusing K.S. L.W. told the child welfare specialist at that time that

she did not have any concerns about K.S.'s drug use or about the safety of S.S. and W.S. in K.S.'s home. S.S. also indicated she felt safe in the home. A police officer testified that, during his interactions with L.W., she told him she wanted to "nail" Parson for sexually abusing S.S. Parson's niece testified she had lived with Parson, he had never been abusive to her, and she did not believe he abused S.S. She also testified S.S. admitted to lying about Parson abusing her.

4. Closing Arguments

At closing, the government told the jury that "if you believe S.S., the defendant is guilty." The government emphasized core details—where the abuse happened and the form it took—stayed the same throughout S.S.'s disclosures. Inconsistencies in peripheral details were as to be expected from a child sexually abused multiple times years earlier. In this regard, the government described Murdock's testimony as "corroborat[ing] S.S.'s process of disclosure."

Parson asserted Cave's testimony raised questions about the reliability of S.S.'s disclosures during the forensic interviews. He discussed how S.S.'s terminology changed over time. He also emphasized S.S. disclosed new abuse over time as she spent more time with L.W., an individual explicitly hostile toward

Parson. Parson asserted S.S.'s alleged physical abuse should have left physical signs visible to others, yet none of her teachers ever observed signs of abuse.

D. The Verdict

The jury found Parson guilty of aggravated sexual abuse of a minor. The district court sentenced Parson to life in prison.

III. DISCUSSION

Parson raises on appeal two distinct challenges to the district court's admission of Murdock's testimony. He first claims the district court erred in admitting expert testimony about the process of child-sexual-abuse disclosures and the characteristics and behaviors of children who make such disclosures. He further claims the district court erred in admitting Murdock's testimony that children are four times more likely to omit facts than to make up facts in the process of disclosing abuse. This court will consider each of these assertions.

A. Process of Disclosure and Characteristics of Abused Children

Parson makes a narrow argument in asserting the district court erred in admitting Murdock's expert testimony as to the process of child-sex-abuse disclosures and the characteristics of abused children. He asserts such testimony was not relevant because its sole purpose was to vouch for S.S.'s credibility. That is, Parson challenges the district court's determination that Murdock's testimony would "help the trier of fact," Fed. R. Evid. 702(a), not its determinations that Murdock qualified as an expert or that her testimony is reliable. *See Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1216–17 (10th Cir. 2016) (summarizing the gatekeeping

requirements for the admission of expert testimony mandated by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). "The 'help the trier of fact' language of Rule 702 is a relevance test for expert testimony." *Etherton*, 829 F.3d at 1217 (citing *Daubert*, 509 U.S. at 591).[1]

We review the district court's relevancy determination for abuse of discretion. *United States v. Chapman*, 839 F.3d 1232, 1238–39 (10th Cir. 2016). A district court abuses its discretion only if its decision "is arbitrary, capricious, whimsical or manifestly unreasonable, or [if] we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1237 (quotation omitted). Relevant evidence is "that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

[1] This court has made clear expert testimony that vouches for the credibility of another witness lacks "relevance [under rule 401] and would not assist the trier of fact as required by Rule 702." *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (quotation omitted). This is the exclusive basis upon which Parson challenges the admission of Murdock's testimony and it is the exclusive issue this court considers in resolving this appeal. That is not to say, however, that expert testimony that vouches for the credibility of a witness does not potentially implicate other evidentiary rules. *See United States v. Charley*, 189 F.3d 1251, 1267 n.21 (10th Cir. 1999) (noting such testimony could potentially implicate Federal Rules of Evidence 403 and 608(a)(1)).

the evidence.'" *Daubert*, 509 U.S. at 587 (quoting Fed. R. Evid. 401). The relevancy standard set out in the Federal Rules of Evidence "is a liberal one." *Id.*

The district court did not abuse its discretion in ruling that Murdock's expert testimony would "help the trier of fact" and was, therefore, relevant. This court has made clear that testimony regarding the characteristics of sexually abused children does not, invariably, amount to vouching for the credibility of an alleged victim. *Charley*, 189 F.3d at 1264–65; *see also United States v. Koruh*, No. 99-2138, 210 F.3d 390 (table), at *2–3 (10th Cir. 2000) (unpublished disposition cited solely for its persuasive value). This is so because the average juror often lacks expertise on the characteristics of victims of child sex abuse, particularly in the process of disclosing such abuse. *United States v. Lukashov*, 694 F.3d 1107, 1116–17 (9th Cir. 2012); *United States v. St. Pierre*, 812 F.2d 417, 419–20 (8th Cir. 1987); *United States v. Baker,* No. CR-22-034-RAW, 2022 WL 16950492, at *2 (E.D. Okla. Nov. 15, 2022); *United States v. Heller*, No. 19-cr-00224-PAB, 2019 WL 5101472, at *2 (D. Colo. Oct. 11, 2019); *United States v. Perrault*, No. 17-02558-MV-1, 2019 WL 1318341, at *3 (D.N.M. Mar. 22, 2019); *Reyna v. Roberts*, No. 10-3254-SAC, 2011 WL 4809798, at *8 (D. Kan. Oct. 11, 2011). Thus, Parson is simply wrong in arguing that testimony like that given by Murdock is categorically inadmissible in criminal trials involving contested allegations of child sex abuse.

Murdock testified generally, and without regard to S.S., that it is not uncommon for child victims to delay disclosure; to disclose abuse in a piecemeal fashion; to underreport sexual abuse; and that several factors, both external and

internal, may cause delayed reporting and underreporting. This court has held that the admission of such evidence is not a per se violation of Rule 702. *Charley*, 189 F.3d at 1264. Other courts have similarly permitted testimony about characteristics common to child sex abuse victims, provided such testimony is limited to "a discussion of a class of victims generally." *United States v. Antone*, 981 F.2d 1059, 1062 (9th Cir. 1992) (holding that expert testimony about general behavioral characteristics of sexually abused children did not constitute improper vouching but instead assisted jury in understanding the evidence); *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993) (holding that qualified experts can, inter alia, inform the jury of characteristics of sexually abused children).

Nor can it legitimately be argued that the district court acted unreasonably in concluding Murdock's testimony would be helpful to the jury in the context of this particular case. Parson's defense sought to discredit S.S.'s disclosures because of delayed reporting and inconsistencies between her later disclosures and earlier denial. The expert notice Parson's defense disclosed to the government specifically asserted that "[b]ased on her education and experience" and her review of the evidence, Cave would testify as follows: "Her opinion is that the interviewers and the interviewers' technique, multiple interviews, suggestive and leading questioning, and outside and familial influences have increased the likelihood of inaccurate and enhanced recollection by the child." Indeed, in denying Parson's in-limine request to exclude Murdock's testimony, the district court noted that Parson's defense involved "attacking the forensic interview process, including the credibility of . . . Stombaugh,

who interviewed S.S., and the alleged victim's credibility." This state of affairs undoubtedly bears on the reasonableness of the district court's decision to admit Murdock's expert testimony. *See United States v. Bighead*, 128 F.3d 1329, 1331 (9th Cir. 1997) (holding that an expert's testimony had "significant probative value in that it rehabilitated (without vouching for) the victim's credibility after she was cross-examined about the reasons she delayed reporting and about the inconsistencies in her testimony").

In arguing for a contrary result, Parson relies on this court's decisions in *Charley*, 189 F.3d at 1270, and *United States v. Hill*, 749 F.3d 1250, 1267 (10th Cir. 2014). Neither case helps Parson's cause. It is certainly true that *Charley* held inadmissible expert testimony by a pediatrician and mental health counselors crediting the victims' allegations of abuse. 189 F.3d at 1270 (noting that expert testimony the victims were truthful was "manifestly" outside the counselors' direct knowledge and "unquestionably prejudicial"). And *Hill* held that testimony of a law enforcement official who claimed to be "specially trained in ferreting out lies" and opined on the defendant's credibility was inadmissible because it invaded the province of the jury. 749 F.3d at 1267. Thus, in both *Hill* and *Charley*, the expert explicitly commented on the credibility of the witnesses. In contrast, Murdock did not opine about S.S.'s credibility or about whether a crime had been committed.

Murdock testified she never spoke with S.S., had not reviewed any documents relating to S.S., and did not know whether Parson molested S.S.

Murdock's testimony was limited to describing the general process of disclosure, the different types of disclosures, and the reasons why disclosures may vary depending on internal and external factors. Such expert opinions in child sex-abuse cases are appropriate and commonly accepted. *See Charley*, 189 F.3d at 1264–65; *Bighead*, 128 F.3d at 1331; *St. Pierre*, 812 F.2d at 419. In the end, "the jury was free to determine whether the victim delayed disclosure or simply fabricated the incidents." *Bighead*, 128 F.3d at 1331. Thus, the district court's decision to admit Murdock's testimony was not "arbitrary, capricious, whimsical or manifestly unreasonable" and must be affirmed.

B. Statistical Evidence

Parson asserts the district court erred when it allowed Murdock to give the following statistical evidence during the direct examination: "[T]he research suggests . . . children are four times more likely to omit details about things that really did happen to them . . . versus an error of commission, which is an error where they would make up something that didn't happen. . . . [S]o, it's a four-to-one ratio more likely that they will not talk about something that happened versus [make up] something that didn't." Parson admits he did not object to this testimony at trial. He

asserts, however, that he preserved the issue for appellate review by filing his pre-trial motion in limine. This court is not convinced by Parson's preservation argument.

In arguing he preserved his appellate objection to Murdock's statistical evidence, Parson relies on this court's decision in *United States v. Mejia-Alarcon*, 995 F.2d 982, 986–88 (10th Cir. 1993). *Mejia-Alarcon* held that a "pretrial motion in limine to exclude evidence" "may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *Id.* at 986. Parson's preservation argument falters at the first step of the *Mejia-Alarcon* test. He asserts that "[w]hile a statistical quantification concerning errors in disclosures was not explicitly part of the Government's Rule 16 expert notice, the testimony in question was nonetheless a subset of the anticipated testimony presented in the Government's notice." That is true, according to Parson, because the statistical evidence at issue on appeal fell within the general scope of Murdock's proposed testimony about delayed disclosures on the part of child victims of sexual abuse.

If this court were to accept Parson's appellate arguments—that a motion in limine objecting to the introduction of evidence regarding delayed disclosures preserves an objection to evidence regarding the relative proportion of false disclosures—we would stretch the rule in *Mejia-Alarcon* beyond any reasonable boundary. As *Mejia-Alarcon* made clear, preservation under the rule set out therein is the exception. 995 F.2d at 988 ("[M]ost objections will prove to be dependent on trial context and will be determined to be waived if not renewed at trial."). Adopting

Parson's test would defeat *Mejia-Alarcon*'s requirement that an issue be "fairly presented to the district court" before it is capable of preservation by a definitive and unequivocal district court ruling on admissibility. *Id.* at 986. Indeed, Parson recognized at trial that some of Murdock's testimony could potentially fall outside the limits of the district court's in-limine ruling by objecting repeatedly during Murdock's direct examination. Because Parson failed to adequately object to Murdock's statistical testimony, his appellate argument is unpreserved.

To obtain appellate relief on this unpreserved claim of error, Parson must demonstrate the district court committed plain error. *United States v. Rosales-Miranda*, 755 F.3d 1253, 1257–58 (10th Cir. 2014). To satisfy this "demanding" standard, Parson must "demonstrate: (1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights. If he satisfies these criteria, this Court may exercise discretion to correct the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1258 (quotation omitted). "[R]elief on plain error review is difficult to get, as it should be." *Id.* (quotations omitted). "Accordingly, we will find plain error only when an error is particularly egregious and the failure to remand for correction would produce a miscarriage of justice." *Id.* (quotation omitted). Here, the government did not brief the question whether the district court erred in admitting Murdock's statistical testimony. Given the absence of such helpful briefing, this court concludes it is difficult to address whether any such error is "plain." Accordingly, we proceed directly to assess whether the alleged error, assuming it is plain, affected Parson's

substantial rights. *See United States v. Penn*, 601 F.3d 1007, 1012 (10th Cir. 2010) (assuming existence of an error that is plain and proceeding to a substantial-rights analysis). To prove the assumed plain error affected his substantial rights, Parson must "demonstrate a reasonable probability that but for the error claimed, the result of the proceeding would have been different." *Hill*, 749 F.3d at 1263 (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations omitted). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 1263–64 (quotations omitted).

Parson has not demonstrated a reasonable probability that, absent Murdock's statistical testimony, the result of his trial proceeding would have been different. In so holding, we begin by noting that the evidence of Parson's guilt was strong. *See Charley*, 189 F.3d at 1271–72. In arguing to the contrary, Parson notes that the trial represented a credibility contest between S.S.'s version of events and his denial that he abused S.S. That fact, however, does not mean the government's case was not strong. S.S described for the jury in detail four separate times that Parson sexually abused her. Her testimony was clear, direct, and forceful. She provided details about, and used terminology regarding, sexual acts that would be inconsistent with the knowledge of a six-to-eight-year-old child. Many aspects of S.S.'s testimony were corroborated by the testimony of other witnesses. K.S. corroborated numerous details about how S.S. first disclosed the abuse to her, including that Parson was initially

nearby; that she took S.S. out of school; that S.S. told Parson's mother and sister about the abuse; and that K.S. specifically ordered S.S. not to repeat the allegations against Parson. This latter fact, especially when coupled with the expert testimony of Stombaugh and Murdock, explained why it was not unusual S.S. did not disclose any abuse in her first forensic interview. Parson and K.S. both corroborated S.S.'s testimony that S.S. was often left alone with Parson, specifically including the night K.S. took W.S. to the hospital. Thus, S.S.'s testimony regarding an episode of sexual abuse was corroborated by a specific, real-world event. Parson and K.S. both corroborated S.S.'s statement that Parson had done something that S.S. could have perceived as being choked. Again, this corroboration weighs significantly on S.S.'s credibility.

Nor did the case rest solely on S.S.'s credibility. Because Parson testified in his own defense, his credibility was also at issue. Parson admitted he was using methamphetamine during this time, which caused him to make "poor decisions." He also admitted he lied to authorities about physically abusing K.S. and that he did so to avoid consequences for his conduct. Furthermore, even setting aside the proper aspects of Murdock's testimony discussed above in Section III.A., Stombaugh's testimony as an expert witness fully placed at issue any contrary testimony provided by Cave. Stombaugh had recent, extensive experience in the process of conducting forensic interviews of children and adolescents. She testified the path S.S. took to disclosure was typical, that S.S.'s forensic interviews were valid and non-leading, and that S.S.'s disclosures were consistent across her second and third interviews.

Although Cave testified to the contrary, her recent experience with child forensic interviews was significantly more limited than was Stombaugh's experience. In the end, after a full and conscientious review of the trial transcript, this court concludes the case against Parson was strong.

Equally important, Murdock's statistical testimony was minimal in the context of the entire record. *See Charley*, 189 F.3d at 1271 (noting that "only a small, albeit important, portion of the testimony admitted at trial was erroneously admitted"). It occupies approximately one page of an 850-page trial transcript. Furthermore, Murdock did not interview S.S. and did not provide an opinion about her credibility, which added "a further layer of removal from [S.S.'s] statements." *See United States v. Magnan*, 756 F. App'x 807, 815 (10th Cir. 2018) (unpublished disposition cited solely for its persuasive value). Cave, on the other hand, testified extensively about factors weighing against the reliability of S.S.'s statements. And Cave's testimony, entirely unlike Murdock's, was specific to S.S. Additionally, the government did not reference Murdock's statistical testimony again. Indeed, the government did not reference Murdock's testimony at all in its first closing. In its rebuttal closing, the government effectively minimized Murdock's role, telling the jury that "Murdock did not corroborate S.S." and that "[s]he was not here to say S.S. is telling the truth."

Finally, Parson's use of the now-challenged statistical testimony for his own purposes demonstrates that testimony was not unduly prejudicial. On cross-examination, Murdock agreed that her statistical testimony suggested that 20% of child abuse accusers fabricated details. She also admitted she had personally

encountered a false report, but that she did not know, or try to find out, whether a child's statement at the time of an interview turned out to be true or false. Thus, defense counsel was able to effectively limit or eliminate any prejudice from this small piece of evidence by effectively cross-examining Murdock.

Viewing the record as a whole, this court concludes Parson failed to carry his burden of demonstrating the district court's failure to sua sponte exclude Murdock's statistical testimony affected his substantial rights. *Magnan*, 756 F. App'x at 814–15 (holding that an error in admitting far-more-prejudicial statistical testimony did not affect the defendant-appellant's substantial rights when numerous witnesses testified consistently, expert's brief statement occupied a small portion of a large record, and prosecution did not reference statement in closing). Despite the case primarily revolving around the credibility of Parson and S.S., the evidence of guilt was strong. The statistical testimony was insignificant in the context of the entire record. And, finally, Parson was able to effectively use the unobjected-to testimony for his own purposes, eliminating or minimizing its prejudicial nature.

IV. CONCLUSION

For those reasons set out above, the judgment of guilt entered by the United States District Court for the District of Northern Oklahoma is hereby **AFFIRMED**.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

October 24, 2023

Mr. Jared Guemmer
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Northern District of Oklahoma
One West Third Street, Suite 1225
Tulsa, OK 74103

Mr. Robert Allen Ridenour
Office of the Federal Public Defender
Northern and Eastern Districts of Oklahoma
627 West Broadway
Muskogee, OK 74401

RE: 22-5056, United States v. Parson
Dist/Ag docket: 4:21-CR-00112-CVE-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Leena Alam
Shelley Kay-Glenn Clemens
Thomas Duncombe

CMW/art

FILED
United States Court of Appeals
Tenth Circuit

October 24, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD JOSEPH PARSON,

Defendant - Appellant.

No. 22-5056
(D.C. No. 4:21-CR-00112-CVE-1)
(N.D. Okla.)

JUDGMENT

Before **MORITZ**, **BALDOCK**, and **MURPHY**, Circuit Judges.

This case originated in the United States for the Northern District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed.

If defendant, Edward Joseph Parson, was released pending appeal, the court orders that, within 30 days of this court's mandate being filed in District Court, the defendant shall surrender to the United States Marshal for the Northern District of Oklahoma. The District Court may, however, in its discretion, permit the defendant to surrender directly to a designated Bureau of Prisons institution for service of sentence.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

November 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD JOSEPH PARSON,

Defendant - Appellant.

No. 22-5056
(D.C. No. 4:21-CR-00112-CVE-1)
(N.D. Okla.)

ORDER

Before **MORITZ**, **BALDOCK**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 22-5056

UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.

EDWARD JOSEPH PARSON,
Defendant/Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE CLAIRE V. EAGAN, U.S. DISTRICT JUDGE, PRESIDING,
CASE NO. 4:21-CR-00112-CVE.

PETITION OF DEFENDANT/APPELLANT FOR REHEARING AND REHEARING EN BANC

Julia L. O'Connell
Federal Public Defender

Robert A. Ridenour
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Counsel for Defendant/Appellant
Attachments electronically filed in native PDF format

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ATTACHMENTS

Attachment 1: Panel Opinion and Judgment

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PETITION FOR REHEARING AND REHEARING EN BANC

The Defendant-Appellant, Edward Joseph Parson, requests rehearing of this appeal by the panel and by the en banc court as authorized by Federal Rules of Appellate Procedure 35(a)(1) and 40. The panel affirmed the appealed district court judgment in a published Opinion filed on October 24, 2023. Attachment 1, Opinion. This Petition for Rehearing and Rehearing En Banc is timely filed within 14 days from the date of the Opinion.

STATEMENT OF GROUNDS FOR REHEARING

The panel Opinion merits rehearing because its holding does not take into account, and ultimately contradicts, the holding of a prior published opinion. Specifically, it did not consider this Court's prior opinion in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008), which Mr. Parson discussed in his Opening Brief, his Reply Brief, and at oral argument. There, this Court held that even where an expert would not opine on the credibility of a defendant's claim that his confession was false, the testimony "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations." *Id.* at 995. The panel Opinion does not explain how the testimony of the expert in this case would not do the same. If *Benally* correctly stated that an expert's testimony is properly excluded because it "inevitably would encroach" on the jury's role to make credibility determinations, then Mr. Parson's conviction should be vacated. If, on the other hand, *Benally*'s rationale was not an appropriate basis for exclusion, then *Benally* should be overturned. In either case, this Court should grant en banc rehearing to resolve this inconsistency.

STATEMENT OF THE CASE

1. District Court Proceedings

Edward Joseph Parson was convicted following a jury trial of a single count of Aggravated Sexual Abuse of a Minor in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153 and 2241(c). (Vol. 1, at 280, 303). Prior to trial, Mr. Parson filed a motion in limine challenging the admissibility of the proffered expert testimony of Rachel Murdock on the grounds that Ms. Murdock's testimony would amount to nothing more than vouching for the credibility of S.S.'s disclosures of sexual abuse. (*Id.* at 131–33). The district court denied Mr. Parson's motion, concluding that "Ms. Murdock's testimony . . . about the disclosure process, the forensic interviewing process, the psychology of child sexual abuse victims, and so forth, does not amount to impermissible vouching for another witness' credibility. The Court finds that defendant's motion in limine to preclude Ms. Murdock's anticipated testimony because it is improper vouching should be denied." (*Id.* at 189).

2. Statement of Facts

During opening statements, the Government acknowledged that the only people who knew what happened were Mr. Parson and S.S. (Vol. 3, at 63). Throughout its statement, the Government emphasized that the jury should "[f]ocus on S.S." (*Id.* at 63, 64, 65). It argued to the jury that "[o]nly S.S. can tell you what the defendant did to her alone in the dark when no one was around to protect or to see." (*Id.* at 64).

The Government then explained that before hearing from S.S., the jury would hear the testimony of Ms. Murdock, who "works with child victims nearly every day," and that she would help the jury "understand childhood trauma," "how children may talk about and

process sexual abuse," and "how children may disclose after they've been abused." (*Id.*). It explained to the jury that Ms. Murdock would give it "a foundation to understand child sexual abuse victims" before it heard from S.S. (*Id.*). Its concluding remarks urged the jury, "if you believe S.S., then the defendant is guilty," and stated that it would "ask [the jury] to believe her and if you believe her, we will ask you to return the only verdict that makes sense, guilty." (*Id.* at 66–67).

Ms. Murdock's testimony covered a litany of issues concerning child sexual abuse disclosures, but perhaps most pertinent was her discussion of delayed disclosures. Ms. Murdoch testified that children often delay disclosing sexual abuse "[b]ecause talking about that abuse is uncomfortable. It's not something that people want to remember and discuss." (*Id.* at 120–21). She explained that "it is not uncommon for children to tell a little bit about what happened and take time to talk." (*Id.* at 121). Ms. Murdock further testified that, because disclosures can be a slow process over time, multiple forensic interviews may be needed. (*Id.* at 122). Ms. Murdock connected this to a trauma response, and she discussed how children may focus on smaller details or have a confused chronology. (*Id.* at 123–24). This led Ms. Murdock to testify regarding the concept of "piecemeal disclosure," which she explained as a child disclosing sexual abuse in "bits and pieces" with more information "coming out as time goes by." (*Id.* at 125). In connection with such disclosures, Ms. Murdock explained that "it is common for children's disclosures to evolve over time," because abuse is "difficult to talk about," and depending on their development they may not be able to fully understand or explain what happened. (*Id.*). Ms. Murdock further discussed "core details" and "peripheral details," with respect to what children

recall about abuse; she explained that peripheral details are those smaller details like clothing, which children are more likely to forget, and that core details are usually more "substantive." (*Id.* at 126). Ms. Murdock also testified that it is "common for victims of sexual abuse to not be able to recall specific dates, times and durations," because unless the date or time is meaningful to a child they are unlikely to associate events with them. (*Id.* at 129). With respect to suggestibility during forensic interviews, Ms. Murdock explained that younger children are more susceptible to suggestion but that once a child is nine or ten, they are no more suggestible than an adult. (*Id.* at 132–33). This testimony played a vital role in the trial because S.S.'s disclosure were inconsistent as to whether abuse happened at all, the form the abuse took, and where in the house the abuse occurred.

It was alleged that S.S. made initial disclosures to her own mother, and to Mr. Parson's mother and sister. (*Id.* at 210–213). However, at her first forensic interview, S.S. denied abuse; at trial S.S. claimed her mother told her to deny abuse. (*Id.* at 214–15, 291). At a second forensic interview, S.S. disclosed sexual abuse by Mr. Parson. (*Id.* at 216–16, 314). But before that second interview, she spoke with a DHS employee named Jessika Davis (*Id.* at 729–32). Ms. Davis met with S.S. in anticipation of the second interview, and during that interaction Ms. Davis told S.S. that "she was proud of her for getting all of the bad things off of her chest," and that S.S. "just ha[d] to go there and tell those things to the people again and she won't have to keep repeating it over and over again." (*Id.* at 730–32).

At closing, the Government pinned its case to S.S.'s credibility and whether the jury believed her: "[I]f you believe S.S., the defendant is guilty." (*Id.* at 874; *see also id.* at 877). And the Government relied on Ms. Murdock's testimony in its closing: It emphasized that

the core detail—the abuse happened at S.S.'s mother's house—stayed the same throughout her disclosures (*Id.* at 879); that peripheral details changed or were delayed as might be expected from a child sexually abused multiple times years earlier (*Id.*); and that certain core details about the form of the abuse remained the same (*Id.* at 879–80). The Government tellingly described Ms. Murdock's testimony as "corroborat[ing] S.S.'s process of disclosure." (*Id.* at 880).

GROUND FOR REHEARING

The panel Opinion is directly in tension—to the point of contradiction—with this Court's prior published decision in *United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008). However, the panel Opinion does not mention *Benally* or seek to distinguish it, even though *Benally* was discussed in both of Mr. Parson's briefs and at oral argument. That absence is striking given the three cases the panel Opinion relies upon for its final conclusion—that expert opinions like Ms. Murdock's are "appropriate and commonly accepted." *United States v. Charley* is inapplicable to the kind of testimony Ms. Murdock provided. *United States v. Bighead* barely even broached the topic of improper vouching, as it addressed the issue in five sentences, but its rationale is at odds with this Court's statements in *Benally*. And *United States v. St. Pierre* sought to lower the bar for admissibility of certain kinds of testimony touching on the credibility of victims in child sexual abuse cases, which is a practice explicitly rejected by the Supreme Court.

1. The panel Opinion does not adequately account for, or otherwise address, this Court's prior opinion in *Benally*.

Even when an expert witness's proffered testimony would not explicitly, or even implicitly, opine on the credibility of a witness, this Court has nonetheless held that an expert's testimony is properly excluded if it would "inevitably encroach on the jury's role to determine the credibility of witnesses." *United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008). In other words, where expert witness testimony is aimed at bolstering or rehabilitating the credibility of a witness's claims in the abstract, it runs afoul of the rule against vouching.

In *Benally*, a defendant sought to introduce expert testimony concerning the frequency of false confessions and interrogation techniques that can cause them. *Id.* at 993–94. The expert would have offered no testimony on the facts of the case, and she would not have opined on the credibility of the defendant's claim that his confession was false. *Id.* at 995. This fact distinguished the proffered testimony in *Benally* from the expert testimony in *United States v. Adams*, which involved a psychologist testifying as to a defendant's neurocognitive impairments and the credibility of his statements to police. *Id.* at 994–95 (citing 271 F.3d 1236, 1244–45 (10th Cir. 2001)). A unanimous panel in *Benally* nonetheless held that the district court properly excluded the expert's testimony because it "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations." *Id.* at 995. It noted that the function of the expert's testimony would be the same as if the expert directly opined on the confession: it would direct the jury to "disregard the confession and credit the defendant's testimony that his confession was a

lie." *Id.* The *Benally* panel noted that such testimony concerning credibility "is often excluded because it usurps a critical function of the jury and because it is not helpful to the jury, which is capable of making its own determination regarding credibility." *Id.* (quoting *United States v. Call*, 129 F.3d 1402, 1406 (10th Cir. 1997)).[1]

The *Benally* panel distinguished its facts from those of other courts that reversed the exclusion of false confession expert testimony. *Id.* at 995–96. In rejecting the defendant's arguments, the *Benally* panel pointed out that those other cases "stand only for the proposition that expert testimony regarding the voluntariness of a confession is admissible when the expert will testify to the existence of the defendant's identifiable medical disorder that raises a question regarding the defendant's cognitive voluntariness." *Id.* at 996.

Ms. Murdock's testimony bears a striking resemblance to that of the expert in *Benally*, yet the panel Opinion does not wrestle with the challenges *Benally* poses to its rationale. Indeed, the panel Opinion does not even cite *Benally* or otherwise acknowledge its existence.

[1] The *Benally* panel also discussed the impact of Federal Rule of Evidence 403 and concluded that the evidence was further properly excluded because its prejudicial effect substantially outweighed its probative value. *Id.* While the panel Opinion briefly mentions Rule 403 in a footnote, it explains that "expert testimony that vouches for the credibility of a witness" implicates other evidentiary rules. Attachment 1, Opinion at 14 n.1. Mr. Parson agrees that such testimony does implicate other rules of evidence, but he notes that the panel Opinion concluded Ms. Murdock's testimony was not vouching. *Id.* at 18 (concluding that Ms. Murdock's testimony was of a type that is "appropriate and commonly accepted"). If the panel concluded Ms. Murdock's testimony constituted vouching, it should have been excluded under Rule 702; Rule 403 would simply serve as an additional evidentiary basis for its exclusion.

The panel Opinion implicitly declares that Ms. Murdock's testimony merely concerned the characteristics of sexually abused children. *See* Attachment 1, Opinion at 15 (citing *United States v. Charley*, 189 F.3d 1251, 1264–65 (10th Cir. 1999); *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993); *United States v. Antone*, 981 F.2d 1059, 1062 (9th Cir. 1992)). But this is not an accurate assessment of Ms. Murdock's testimony. Ms. Murdock did not testify about the general characteristics of sexually abused children, she testified about the general characteristics of disclosures and the disclosure processes of sexually abused children.

Ms. Murdock's testimony bears little similarity to the testimony this Court approved of in *Charley*. One expert in *Charley* provided testimony concerning the medical symptoms often experienced by sexual abuse victims. 189 F.3d at 1262–64. Two other experts offered opinions concerning the psychological treatment needs of the child victims as well as discussing their symptoms. *Id.* at 1269. While one expert did note that traumatized children can be slow to trust adults, that was the only statement that bore even a passing resemblance to Ms. Murdock's testimony, and it was not the focus of *Charley*. *Id.*

The panel Opinion's lack of discussion of *Benally* creates an apparent conflict between key published decisions of this Court concerning the admissibility of expert testimony in criminal cases. The absence of *Benally* from the panel Opinion's analysis leaves an open question as to what, exactly, makes *Benally* different from this case when Ms. Murdock's testimony not only "inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations," but the Government essentially invited the jury to allow that encroachment through its opening and closing statements. If

a defendant cannot bring in an expert to explain false confessions and how they occur, why is the government allowed to bring in an expert to explain the process of child sexual abuse disclosures and why they can be inconsistent? This Court should grant en banc rehearing to resolve the conflict between the panel Opinion and *Benally*.

2. The panel Opinion further relies upon outdated precedents from other circuits that either failed to adequately address the issue before this Court or relied upon a rationale rejected by the Supreme Court.

The panel Opinion concludes its discussion by stating that "Murdock's testimony was limited to describing the general process of disclosure, the different types of disclosures, and the reasons why disclosures may vary depending on internal and external factors. Such expert opinions in child sex-abuse cases are appropriate and commonly accepted." Attachment 1, Opinion at 18. In doing so, it cites three cases: *Charley*, 189 F.3d at 1264–65, *United States v. Bighead*, 128 F.3d 1329, 1331 (9th Cir. 1997), and *United States v. St. Pierre*, 812 F.2d 417, 419 (8th Cir. 1987). The prior section addressed why *Charley* does not analogize well to the facts of this case. The remaining two cases the panel Opinion relied upon are flawed in their own right.

Bighead can hardly be said to have analyzed the issue of expert vouching in child sexual abuse cases. It dedicated a single paragraph—five sentences—to the topic, and its recitation of the expert's testimony is practically nonexistent. 128 F.3d at 1330–31. It also bears note that the expert in *Bighead* testified in rebuttal, *id.*, while Ms. Murdock was the very first witness to take the stand and her testimony immediately preceded that of S.S. Even so, the *Bighead* court did not elaborate on how the expert's testimony was rehabilitative of the victim's credibility without vouching—or otherwise improperly

buttressing—for her credibility. *Id.* at 1331. Given that this Court has previously held that expert testimony that "inevitably" encroaches on the jury's role to make credibility determinations is properly excluded, *Benally*, 541 F.3d at 995, it would seem that expert testimony specifically aimed at rehabilitating a victim's credibility by explaining the behavior (rather than merely identifying common characteristics or traits) of those like the victim should fall squarely into the kind of testimony this Court deemed inappropriate in *Benally*. For all of these reasons, the panel Opinion's reliance on *Bighead* was misplaced.

St. Pierre suffers from a different infirmity: the rationale supporting its holding was expressly rejected by the Supreme Court. The Eighth Circuit premised its ruling on four interrelated ideas: (1) "These cases present difficult problems for the jury. The testimony of the accused and the victim is generally in direct conflict"; (2) "[J]urors are at a disadvantage when dealing with sexual abuse of children"; (3) "[T]he common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse; and (4) "[T]he special concerns arising in the prosecution of child abuse cases have not been fully met by the development of new methods of practice." *St. Pierre*, 812 F.2d at 419–20. Taken together, these statements reflect a determination that the bar for admissibility must be lowered when dealing with child sexual abuse victims and attacks on their credibility.

In *United States v. Salerno*, the Supreme Court explained, "This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular set of cases." 506 U.S. 317, 321–22 (1992) (rejecting an argument that "adversarial fairness" should have allowed admission of testimony that did not satisfy former testimony

exception to hearsay rule). And in *United States v. Tome*, the Supreme Court exhorted courts to "be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness," but it also reiterated its statement in *Salerno* that courts "cannot alter evidentiary rules merely because litigants might prefer different rules in a particular set of cases." 513 U.S. 150, 166 (1995) (internal quotation marks omitted). Yet that is precisely what the Eighth Circuit sought to do with *St. Pierre*. The rationale laid out by the Eighth Circuit essentially held that because jurors were less capable of resolving credibility issues, the government could offer evidence that would otherwise be inadmissible in a different case. That approach has been rejected by the Supreme Court. Therefore, the panel Opinion should not have relied upon *St. Pierre* to support its conclusion.

CONCLUSION

This Court should grant Mr. Parson's Petition for Rehearing and for Rehearing En Banc to resolve the contradictory determinations of the panel Opinion and *Benally*.

Respectfully submitted,

Julia L. O'Connell, Federal Public Defender

s/ Jared T. Guemmer
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that the digital version of this brief and attachment is an exact copy of any paper copy required to be submitted to the court. It has been scanned by the most recent version of Symantec Endpoint Protection and according to the program is free of viruses. All required privacy redactions have been made.

s/ Jared T. Guemmer

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limitations of Federal Rules of Appellate Procedure 35 and 40 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3132 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Word 2016 in 13 point Times New Roman.

Date: November 7, 2023 s/ Jared T. Guemmer

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2023, I electronically filed this brief, with attachments, in the Tenth Circuit using the ECF System, which transmitted a Notice of Docket Activity to the following ECF registrant: Thomas Duncombe, Leena Alam, and Shelley Kay-Glenn Clemens, Assistant United States Attorneys, counsel for Plaintiff/Appellee.

s/ Jared T. Guemmer

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA
v.
EDWARD JOSEPH PARSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:21CR00112–1

USM Number: 39620-509

Robert Allen Ridenour, Alexis Gardner and Jared Guemmer
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the Court.

☒ was found guilty on count One of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1151, 1153, and 2241(c)	Aggravated Sexual Abuse of a Minor in Indian Country	3/20/19	1

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

June 10, 2022
Date of Imposition of Judgment

Claire V. Eagan
Signature of Judge

Claire V. Eagan, United States District Judge
Name and Title of Judge

June 14, 2022
Date

a045

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life.

☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in a facility that will allow him the opportunity to participate in the most comprehensive sex offender treatment available.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By

_____
DEPUTY UNITED STATES MARSHAL

a046

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

SUPERVISED RELEASE

Should you be released from imprisonment, you will be on supervised release for a term of: Life.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervision, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abide by the "Special Sex Offender Conditions" previously adopted by the Court, as follows:

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration Notification Act (SORNA) (Public Law 109-248) and any applicable state registration law.
2. The defendant shall participate in and successfully complete sex offender treatment, to include a risk assessment and physiological testing, at a program or by a therapist and on a schedule approved by the probation officer. The defendant shall abide by the rules, requirements, conditions, policies and procedures of the program to include specific directions to undergo periodic polygraph examinations or other types of testing as a means to ensure that the defendant is in compliance with the requirements of his/her supervision or treatment program. The defendant shall waive any right of confidentiality in any treatment or assessment records to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant may be required to contribute to the cost of services rendered (co-payment) in an amount to be determined by the probation office, based on the defendant's ability to pay.
3. Except for immediate family members,[1] the defendant shall have no contact with persons under the age of 18 unless approved by the probation officer. The defendant will immediately report any unauthorized contact with persons under the age of 18 to the probation officer. The defendant will not enter or loiter within 100 feet of schools, parks, playgrounds, arcades, or other places frequented by persons under the age of 18.
4. The defendant shall not possess or view photographs, images, books, magazines, writings, drawings, videos, or video games depicting or describing sexually explicit conduct or child pornography, as defined in 18 U.S.C. § 2256(2) or § 2256(8), or patronize places where such materials or images are available.
5. The defendant shall submit his/her person, property, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), electronic communication devices, data storage devices, or media, to a search, conducted by the probation officer at a reasonable time and in a reasonable manner, based on a reasonable suspicion of contraband or evidence of a violation of a condition of release (except as set forth in the Computer and Internet Restriction Condition (Paragraph 7(b)), if imposed). Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall abide by the following computer restrictions and monitoring conditions:
    a. The defendant shall disclose all electronic communications devices, data storage devices, e-mail accounts, internet connections and internet connection devices, including screen names, user identifications, and passwords, to the probation officer; and shall immediately advise the probation officer of any changes in his/her email accounts, connections, devices, or passwords.
    b. The defendant shall allow the probation officer to install computer monitoring software on any computer, as defined by 18 U.S.C. § 1030(e)(1), that the defendant owns, utilizes or has the ability to access. The cost of remote monitoring software shall be paid by the defendant. To ensure compliance with the computer monitoring condition, the defendant shall allow the probation officer to conduct periodic, unannounced searches of any computer subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. Additionally, the defendant shall warn other people who use these computers that the computers may be subject to searches pursuant to this condition.
    c. The defendant shall not access any on-line service using an alias, or access any on-line service using the internet account, name, or designation of another person or entity; and shall report immediately to the probation officer access to any internet site containing prohibited material.
    d. The defendant is prohibited from using any form of encryption, cryptography, stenography, compression, password protected files or other methods that limit access to, or change the appearance of, data and/or images.
    e. The defendant is prohibited from altering or destroying records of computer use, including the use of software or functions designed to alter, clean or "wipe" computer media, block monitoring software, or restore a computer to a previous state.

[1] "Immediate family member" is defined as siblings, children, grandchildren, persons to whom the offender stands in *loco parentis,* and persons living in the offender's household and related by blood or marriage.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

SPECIAL CONDITIONS OF SUPERVISION

2. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.

3. The defendant shall successfully participate in a program of testing and treatment, to include inpatient treatment, for drug and alcohol abuse, at a treatment facility and on a schedule determined by the probation officer. The defendant shall abide by the policies and procedures of the testing and treatment program to include directions that the defendant undergo urinalysis or other types of drug testing consisting of no more than eight tests per month if contemplated as part of the testing and treatment program. The defendant shall waive any right of confidentiality in any records for drug and alcohol treatment to allow the probation officer to review the course of testing and treatment and progress with the treatment provider.

U.S. Probation Officer Use Only

A U.S Probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

a050

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100	Not Ascertainable	N/A	N/A	Not Imposed

☐ The determination of restitution is deferred until
An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to Plea Agreement $ _____

☐ The defendant must pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

a051

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Edward Joseph Parson
CASE NUMBER: 4:21CR00112-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this Judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 90 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of $50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

a052

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 21-CR-112-CVE**
	)	
EDWARD JOSEPH PARSON,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Before the Court is defendant's motion in limine to exclude plaintiff's expert witness, Rachel Murdock (Dkt. # 87) and plaintiff's response (Dkt. # 91). On March 24, 2021, a grand jury returned a one-count indictment charging defendant with aggravated sexual abuse of a child who had not attained the age of 12 in Indian country. Dkt. # 4. On November 3, 2021, plaintiff sent defendant Fed. R. Crim. P. Rule 16 expert witness notice and the anticipated testimony of Federal Bureau of Investigation (FBI) Child/Adolescent Forensic Interviewer Rachel Murdock (Dkt. # 87-1). On November 9, 2021, defendant moved in limine to exclude Ms. Murdock's expert testimony. Dkt. # 87. Defendant argues that Ms. Murdock's testimony should be precluded because 1) plaintiff's notice does not establish that the proffered expert testimony would be admissible under Fed. R. Evid. 702; 2) "Ms. Murdock's testimony runs afoul of Rule 403"; and 3) "Ms. Murdock's testimony should be excluded as improper vouching." Dkt. # 87, at 2-8.

I. Adequacy of the Expert Witness Notice

Defendant argues that plaintiff's Rule 16 expert witness notice did not "establish that the proffered evidence would be helpful to the jury, that it is based on sufficient facts and data, that it is the product of reliable principles and methods, or that Ms. Murdock applied those principles and

methods to this case." Dkt. # 87, at 3. Rule 16(a)(1)(G), which governs expert witness notice requirements for the United States, states: "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under [Rule 702] during its case-in-chief at trial . . . . The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). Further, unlike civil cases, "the written summary required by Rule 16 "falls far short of the 'complete statement' require[ment]. . . . Rule 16 does not require experts in criminal cases to provide written reports explaining their opinions or to make a written proffer containing the information required under the civil rules." United States v. Nacchio, 555 F.3d 1234, 1262 (10th Cir. 2009). Thus, defendant creates too high a burden for what is required of plaintiff's Rule 16 notice. Plaintiff is merely required to describe Ms. Murdock's opinions, bases and reasons for her opinions, and her qualifications. Plaintiff's Rule 16 notice (Dkt. # 87-1) details Ms. Murdock's anticipated testimony, notes that she has conducted more than 2,500 forensic interviews, and that her testimony as to her expertise working with child sexual abuse victims is based on her training and experience. Dkt. # 87-1, at 1. Further, Ms. Murdock's CV, which plaintiff included in its Rule 16 notice to defendant (Dkt. # 91-2, at 3-5), plainly establishes her qualifications as an expert in the field of child psychology, the disclosure process, and assessing child sexual abuse allegations. Ms. Murdock received a Bachelor of Science in psychology; a Master of Science in clinical psychology; her Master's thesis pertained to the forensic interviews of children; she has worked for the FBI as a Child/Adolescent Forensic Interviewer for nearly 10 years; and Ms. Murdock's publications include topics such as the disclosure process, forensic child psychology, and assessing alleged child sexual abuse allegations. Dkt. # 91-2, at 3-5. Therefore,

the Court finds that plaintiff has met the notice requirements of Rule 16(a)(1)(G), and denies defendant's motion in limine as to the adequacy of plaintiff's Rule 16 notice as to Ms. Murdock.

II. Admissibility of Ms. Murdock's Testimony under Rules 401 and 403

Next, defendant argues that Ms. Murdock's testimony lacks relevance,[1] creates unfair prejudice, and is needlessly cumulative. Dkt. # 87, at 8-9. Plaintiff responds that the alleged child victim, S.S., "did not disclose the abuse for some number of months or years . . . . During her first forensic interview, S.S. recanted her prior disclosure. Once S.S. was removed from the home and no longer exposed to defendant or her mother, she disclosed again[.]" Dkt. # 91, at 9. Further, plaintiff notes that defendant wishes to call his own expert to testify that the forensic interview process made S.S.'s testimony unreliable. Dkt. # 91-3, at 1.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Defendant is attacking the forensic interview process, including the credibility of Tulsa County forensic interviewer Jessica Stombaugh, who interviewed S.S., and the alleged victim's credibility. Id. Thus, Ms. Murdock's testimony regarding the psychology of the disclosure process in child sexual abuse victims is plainly relevant as to Ms. Stombaugh and the alleged victim's credibility, "allow[ing] the jury to evaluate the delayed and partial disclosures at issue in this case." Dkt. # 91, at 9.

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[1] Although defendant does not argue with specificity that Ms. Murdock's testimony should be precluded under Fed. R. Evid. 401, defendant argues that her testimony should be precluded in part because it lacks relevance, Dkt. # 87, at 7; thus, the Court will address this as a Rule 401 argument in addition to defendant's Rule 403 argument.

Moreover, under Rule 403, the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury . . . or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Defendant argues that Ms. Murdock's "general lecture to the jury" would create unfair prejudice and distract the jury. Dkt. # 87, at 7-8. The Court disagrees. Ms. Murdock's anticipated testimony would add context and specialized knowledge regarding S.S.'s disclosure process. The Court finds that whatever prejudice, if any, to defendant resulting from Ms. Murdock's more general discussion of the psychology of child sex abuse victims does not substantially outweigh the probative value of adding context and nuance to Ms. Stombaugh and S.S.'s testimony.

Finally, defendant argues that Ms. Murdock's testimony would be cumulative to Ms. Stombaugh's testimony. Id. at 8. Plaintiff responds that Ms. Murdock's testimony will be "distinct from Ms. Stombaugh's . . . . Ms. Stombaugh will testify to the forensic interview process employed by Tulsa County. She will discuss blocks to disclosure as they relate to her observations in interviewing S.S.. Ms. Stombaugh will not discuss the child psychology of disclosure or other topics" outlined in Ms. Murdock's Rule 16 notice. Dkt. # 91, at 11. "Cumulative evidence is defined as evidence which goes to prove what has already been established by other evidence." Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 829 (10th Cir. 1995) (internal quotations omitted). The Court finds that Ms. Murdock's testimony is distinct from Ms. Stombaugh's. Ms. Stombaugh is testifying as a fact and expert witness regarding her direct observations of S.S. and any "blocks" she observed during the interview, while Ms. Murdock is testifying as an expert on child psychology and the disclosure process of child sex abuse victims generally. The respective testimonies are not duplicative or probative of the same issues; thus, the Court finds that Ms.

Murdock and Ms. Stombaugh's testimonies are not cumulative. In sum, the Court finds that defendant's motion in limine as to precluding Ms. Murdock's testimony under Rules 401 and 403 should be denied.

III. Improper Vouching

Defendant argues that 1) plaintiff's Rule 16 notice "does not include any statement that Ms. Murdock will not vouch for or otherwise opine on any witness's credibility or whether their actions are consistent with child sexual abuse"; and 2) Ms. Murdock's testimony should be precluded "because her testimony seems to serve no purpose *other* than vouching." Dkt. # 87, at 9 (emphasis in original). With respect to defendant's second argument, plaintiff responds that Ms. Murdock "will not opine on whether S.S. has been truthful. She will provide the jury with context to judge S.S. for themselves." Dkt. # 91, at 8.

First, as the Court found in part I, supra, defendant places too high a burden on what is required of plaintiff under Rule 16. Plaintiff has no obligation to state in its Rule 16 notice that their proffered expert will not vouch for any other witness; rather, all that is required in plaintiff's Rule 16 notice is that they state the witness's opinions, the basis for their opinions, and their qualifications. Fed. R. Crim. P 16(a)(1)(G). Second, as to whether Ms. Murdock's anticipated testimony amounts to impermissible vouching, the Tenth Circuit has found that "[t]he credibility of witnesses is generally not an appropriate subject for expert testimony." United States v. Toledo, 985 F.2d 1462, 1470 (10th Cir. 1993). Accordingly, in United States v. Charley, 189 F.3d 1251, 1263-1267 (10th Cir. 1999), the Tenth Circuit held that admitting a pediatrician's testimony that sexual abuse could provide a unifying diagnosis for an alleged victim's physical and emotional problems was proper, but found that another expert's unconditional conclusion that the alleged victims were

sexually abused, based solely on the alleged victims' statements, amounted to "essentially vouching for their truthfulness." As the court found in Charley, an expert may "summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent" with allegations of child sexual abuse. Id. at 1264 (internal quotations omitted). However, the expert may not unconditionally opine that an alleged victim was sexually abused based on nothing more than the alleged victim's statements. Therefore, Ms. Murdock's testimony, based on evidence and experience, about the disclosure process, the forensic interviewing process, the psychology of child sexual abuse victims, and so forth, does not amount to impermissible vouching for another witness' credibility. The Court finds that defendant's motion in limine to preclude Ms. Murdock's anticipated testimony because it is improper vouching should be denied.

IT IS THEREFORE ORDERED THAT defendant's motion in limine to exclude plaintiff's expert witness, Rachel Murdock (Dkt. # 87) is **denied**.

DATED this 19th day of November, 2021.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

DEPUTY COURT CLERK: Just have a seat right there on the witness stand.

THE COURT: All right. Ms. Murdock, when you sit down, the microphone in front of you is directional so it will be best if you spoke directly into it. You may remove your mask if you wish. It's probably a little easier for the court reporter to hear if you do that.

And I don't know what that noise is. Does anybody know and is it going to be here all day long?

DEPUTY COURT CLERK: I'm going to check on it right now.

THE COURT: Okay. Sorry.

And, ladies and gentlemen of the jury, like I told you during jury selection, if at any time you can't hear, would you please raise your hand because it is crucial that you hear the witnesses and their testimony.

Ms. Dial, you may proceed.

MS. DIAL: Thank you, Your Honor.

RACHEL MURDOCK,

having been called as a witness on behalf of the government, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. DIAL:

Q. Please state your name and spell your last for the record.

A. Rachel Murdock, M-u-r-d-o-c-k.

Q. Ms. Murdock, what do you go for a living?
A. I'm a child and adolescent forensic interviewer for the FBI.
Q. How long have you done that?
A. I've done forensic interviewing for 15 years but I've been with the FBI for nine.
Q. And before the FBI where did you work?
A. I was at a Children's Advocacy Center in Springfield, Missouri.
Q. Outside of being a child forensic -- a child and adolescent forensic interviewer, are you a licensed counselor?
A. Yes, I am.
Q. Could you please describe your educational background for the jury?
A. Yes. I have a master of science degree in clinical psychology from Missouri State University and so I'm licensed in Missouri and Kansas as a clinical professional counselor.
Q. What is a clinical professional counselor?
A. Prior to joining the FBI I was performing therapy services so I was doing psychotherapy with children and adolescents who were victims of sexual and physical abuse. I'm not currently in that role but I have kept my license current.
Q. Have you ever taught before?
A. Yes.

Q. Where?
A. I've been teaching for Missouri State University for the last 17 and a half years.
Q. And what subjects do you teach?
A. I started teaching in Introduction to University Life back in 2004, but since 2007 I've taught in the Department of Psychology.
Q. What types of courses?
A. Right now, I teach Psychology of Child Abuse and Exploitation, but I've taught Introductory Psychology, Abnormal Psychology, Childhood Psychology and Developmental Psychology.
Q. And you say you've taught it. Who do you teach? Undergrad, graduate, something else?
A. So right now, I've got an undergraduate and graduate section of Psychology of Child Abuse and Exploitation and that's what I've taught since 2007. While I was full time at the university I was teaching undergraduate students.
Q. Approximately how many students do you have in a course?
A. Right now I've got about 30 in a course, my introductory psychology course had about 300 but the upper division courses are sort of smaller.
Q. Yesterday I accidentally or wrongfully called you an associate professor to the jury. Could you say what your position actually is?

A. Yeah. So because I am a master's level instructor, I'm not tenure track, so I'm considered an instructor versus a professor. It's just the title that they provide us at the university.
Q. So you don't have your doctorate?
A. I don't.
Q. Why not?
A. Because the graduate program that I went through was rigorous and provided the academic and clinical training that I needed for the type of work that I wanted to do.
MR. RIDENOUR: Objection. Lack of foundation.
THE COURT: I'm going to overrule the objection at this point. I think that you might want to follow up to explain the nature of the program a little bit more.
MR. RIDENOUR: Thank you, sir.
Q. (By Ms. Dial) Ms. Murdock, could you explain a little bit more about your master's program?
A. Sure. My master's program was through Missouri State University and they accept eight students a year and it's approximately 47 hours of graduate work and so the courses include individual intelligence testing, psychopathology assessment and diagnostic courses as well as a thesis and internship and practicum.
Q. And tell us about your internship and practicum.
A. I did two different internships, and internship and

practicum really can be used as the same term, and for that program one was at a victim's center in Springfield, Missouri, who provides no-cost counseling to victims of crimes.

And the other was at Burrell Center which is a behavioral health facility in Springfield, and I taught psycho-educational skills to children with autism and autism spectrum disorders.

Q. And you said as part of your master's program you also did a thesis?

A. Yes.

Q. Could you tell us about that?

A. Yes. I wrote my thesis on preconceived information or interviewer bias in forensic interviews.

Q. What does that mean?

A. So I wrote about whether or not having information prior to going into an interview impacted the way the questions were asked. It was in an academic setting and so my subjects, or those that I studied, were college students.

Q. Have you been published before?

A. Yes.

Q. Could you briefly describe your publications?

A. Yes. I have cowritten a textbook and some chapters in that textbook. Also have co-authored a textbook chapter in another book and then a couple of research articles mostly on forensic psychology or forensic interviewing but also a couple

of documents on course redesign which was more when I was a full-time academic person.
Q. Now, earlier you stated you were a licensed counselor and that you don't still work as a counselor; is that right?
A. Correct.
Q. But you're still licensed?
A. Yes.
Q. When did you work primarily as a counselor?
A. I was in private practice from January of 2011 -- I'm sorry, January of 2010, I believe, until January of 2013. I do maintain my licensure by continuing education and things like that but I haven't been practicing since beginning of 2013.
Q. As a counselor was there a specific age group or demographic that you worked with?
A. Yes. I at the time was primarily seeing children who had been alleged victims of physical abuse, sexual abuse, or witnesses to those type of crimes. I would say on average probably between 8 and 17. I did see some younger kids but mostly, you know, young children and teenagers.
Q. Now, I would like to discuss your current roles. So let's start with your job with the FBI. You said you're a forensic interviewer; right?
A. Yes.
Q. Will you please describe for the jury what a child

adolescent forensic interviewer is?
A. Yes. So my job with the FBI as a forensic interviewer is to conduct an investigative interview whenever a child is an alleged victim of a -- typically a federal crime so that would include sexual abuse, human trafficking, online exploitation and things like that.
Q. What type of training did you have to have to become a forensic interviewer with the FBI?
A. With the FBI I had previously been doing forensic interviews for about six years and so I had some of the basic training completed. Since joining the FBI I went through on-the-job training with the other FBI interviewers and then throughout the years have attended continuing education type trainings and courses related to forensic interviewing and things of that nature.
Q. And approximately how many forensic interviews have you conducted over the course of your whole career?
A. Approximately 2,500.
Q. What's what the purpose of a forensic interview?
A. The purpose of a forensic interview is to gather information from an alleged victim or witness in a nonleading and child friendly manner.
Q. You keep saying alleged victim. Is it your job to prove anything in the case?
A. It's not.

Q. What's your job?
A. My job is to provide a developmentally appropriate and child sensitive interview to allow the child to talk about what may or may not have happened.
Q. And where are forensic interviews used? Is this just a federal thing?
A. No. Forensic interviews are used at the federal level, the state level, the tribal, civil. It can be in criminal and civil situations.
Q. Now, if these kids are alleged victims and people are trying to figure out what happened, why aren't the children interviewed by police officers or law enforcement?
A. It is important for people who are conducting forensic interviews to be trained because it is more than just a conversation with children.

There's a lot of considerations regarding child development type of questions, suggestibility and things like that, so it is a very specialized interaction and so we want to make sure the people that are conducting the interviews are trained to do so.
Q. We're going to get to suggestibility and the types of questions. Before we get to that, though, what type of protocols are used generally across the country by people who conduct these interviews?
A. So there are a number of available protocols and the

important thing with these protocols is that they are research based and peer reviewed. And so I may not remember all of them offhand but I'll just give you a couple of examples of some of the protocols that I am familiar with that I hear about people using.

The FBI does have our own interviewing protocol and that's because it's what works best for the type of cases that we work. It is based off the Michigan Protocol for interviews.

A couple of other popular protocols are Child First. It was formerly called Finding Words. National Children's Advocacy Center has a protocol as well. National Institute for Child Health and Human Development, ICHD, has a protocol. APSAC, which is the American Professional Society for the abuse of Children has protocol. And there's also a variation of NICHD called Ten Steps.

So I know that was a lot of examples but essentially there are multiple available protocols that have the peer review and research based foundation.

Q. I probably should have asked this first, but what is a protocol?

A. A protocol is either a structured or semi-structured method of interview -- forensically interviewing a child or a witness.

Q. So the different ones you described are all different ways

of interviewing children?
A. Yes.
Q. What are -- what do those interviews have in common? Or those protocols, excuse me. What do those protocols generally have in common?
A. I would say that the protocols are honestly more similar than they are different. A couple of them are more structured than others versus semi-structured where you would follow, you know, a decision tree kind of line of questioning versus, you know, following more the lead of the child.
But they all discourage leading questions and they all encourage certain types of questions and certain ways of interacting with children.
Q. I want to talk about leading questions, but before that you said some are more structured. What do you mean?
A. So a structured interviewing protocol would be more where you would kind of follow if the child says this, then ask this. If the child says that, then ask that. So it's more of like a decision tree kind of a yes, no, if this happens, this is the way would you respond. Versus semi-structured where there's not a designated list of questions that you would ask during each interview.
Q. So if there's not a designated list, then what would an interviewer today?
A. So an interviewer would use their training and experience

to phrase the questions in a forensically sound way based upon the way that the child is communicating.

Q. So more reactive to the child?

A. Correct.

Q. And then leading questions. You said all of the protocols have in common that leading questions shouldn't be used.

A. Correct.

Q. What's a leading question?

A. A leading question is something that provides information to the child prior to the child giving that information or it begs for agreement. So an example would be if I said, you know, mommy made you take your clothes off to take pictures; right. So I'm not only suggesting what happened but also asking for the child to agree with me based upon my statement.

Q. So leading questions are not proper in the interviews. What types of questions are?

A. So there are preferred questions in forensic interviews and those would be open-ended questions. Things that allow the child to narrate and provide information about what they may have experienced.

You can also include focused questions where you might say, where did that happen or where were you when this occurred. Multiple choice and yes-no questions are also permitted.

But again, leading questions are going to be discouraged by every protocol.

Q. So when -- or where were you when this occurred, why is that not a leading question?

A. Because it's still inviting the child to provide the information. It's a focused question because we do want to ask information that directs the conversation but doesn't direct the answer.

Q. And then you said multiple choice as well. Wouldn't that be leading? Aren't you giving the child the answer then?

A. So there's couple of different types of multiple choice or option posing. So multiple choice questions, what you'll often hear a forensic -- a forensic interviewer do is say something like did it happen in the bedroom or the kitchen or something else, and that or something else is really important because it provides them with an alternative if the options we posed were incorrect.

Yes-no, is obviously more of a forced choice because it's a yes or a no, and while those are allowed, I would say they're less preferred than the other question choices because it does limit that communication.

Q. Do any of the protocols require that an interviewer use just one type like just use focused questions?

A. I don't believe so.

Q. So there's some flexibility in even the more structured

potentially in responding to the child or what comes next?
A. I will say that I am not as well versed in the structured protocols to know all of the nuances, so I don't want to misspeak, but it is my understanding that all of the protocols do allow for all of the question types to be utilized.

MR. RIDENOUR: Object. Lack of foundation. The lady testified.

THE COURT: I'll overrule the objection. The answer itself was qualified about being not as well versed and I think that that's something that the jury may weigh as they consider the opinion.

MR. RIDENOUR: Thank you, sir.

Q. (By Ms. Dial) One last question on your professional time. How do you divide your professional time? You said you teach and you're an interviewer.
A. Yes. So teaching is a separate employment and so that's a very small percentage of my time. It's a very part-time position. It's one course right now. My primary duties are conducting forensic interviews.

I would say I spend, you know, over 95 percent of my time doing that. I also conduct trainings. That's lessened a little bit because of the pandemic but we still -- the in-person has, but we do conduct trainings online and in person, but I would say the overwhelming majority of my professional career is doing interviews.

Q. And who do you interview?
A. Right now we do interviews of children and adolescents 3 to 17, and we have seen an increase of interviews of young adults as well, but primarily it's going to be individuals under the age of 18.
Q. And you -- you mentioned the FBI's protocol, excuse me, that fits with your type of cases. What type of cases do you work?
A. So we are typically involved if there is a potential federal jurisdiction. So that would include in Oklahoma because of the *McGirt* Supreme Court ruling a lot of the area is now Indian land and so we have jurisdiction down here that we haven't previously, but that will also include cases like child exploitation, online exploitation, for example. Human trafficking, abduction, crimes that happen on cruise ships or airplanes where, you know, you're kind of in the middle of the sky or the middle of the water and don't necessarily have jurisdiction, bank robberies and things like that.
Q. And did you just -- are those cases that you've -- or types of cases that you've worked on?
A. Yes, all but bank robberies.
Q. Okay. Based on your educational background, your training and experience, have you become knowledgeable in the process of victimization and the disclosure process?
A. Yes.

Q. And specifically disclosure process of child sex abuse victims?
A. Yes.
Q. Are you familiar, based on your training, experience and background, with the psychological and physical symptoms displayed by child abuse -- child sexual abuse victims?
A. Yes.
MS. DIAL: Your Honor, at this time the government would move to qualify Ms. Murdock as an expert in child and adolescent forensic interviews, sexual abuse disclosures, and victim behavior and response.
THE COURT: Any objection?
MR. RIDENOUR: No, sir.
THE COURT: The witness may testify on the topics identified.
MS. DIAL: Thank you, Judge.
Q. (By Ms. Dial) Have you testified as an expert before?
A. Yes.
Q. Approximately how many times?
A. I believe three. We don't testify very frequently at the federal level but that's what comes to mind.
Q. Let's talk about childhood responses to sexual abuse. Is there any typical way that children react or respond to sexual abuse?
A. Not necessarily.

Q. Why not?
A. Because the responses that children give that may be victimized are going to be just as different as the children themselves, so there's not necessarily a list of behaviors or things that I can provide to you that every child that is an abuse victim will display.
Q. Before we talk about some of those characteristics or some of those responses, I think it's important for us to define disclosure. So what do you mean by disclosures in the context of child sex abuse?
A. So a disclosure is a statement made by a child that may be used in -- for the purposes of criminal or civil investigation. So that could include court, but that could also include maybe placement with DHS or something like that as well. So it's a statement that could be used for decision making.
Q. And what is -- who -- let me go back.
Do children disclose abuse to the same person? Who might a child disclose to?
A. So again, that's going to vary dependent upon the child, but children will often make a disclosure to maybe a trusted family member or friend or school personnel or doctor. Sometimes I'm the first person that they've told, so it just varies but typically a child is going to -- if they come forward about what happened, they're going to find somebody

that they trust to talk to.
Q. So a disclosure is the child coming forward in some way?
A. Yes.
Q. Are disclosures, in your experience, usually a one-time event for child sexual abuse?
A. No.
Q. Why?
A. Because we view disclosure as more of a process versus a one-time event, so it's not just something that, you know, a child will say and then never speaks of again. Typically it's going to be something that's going to take a bit, almost like peeling the layers off of an onion. It's just going to take a bit to get to -- get through everything.
Q. What internal factors can influence a child's response or reaction to sexual abuse?
A. So the internal factors that can influence disclosure can include things like anything, you know, personality wise that might influence a child's ability to understand what may have happened. So that can include things like embarrassment or shame or shyness or even, you know, developmental -- even like brain development and things like that. So just individual characteristics that the person possesses that may influence their willingness to talk about what happened or not talk about what happened.
Q. Did you mention age?

A. I don't know that I did but that would be another factor, yes.
Q. So why would age be a factor?
A. So, you know, when children are developing, brains are developing really past, you know, age 20. It seems like the research keeps getting older and older for us as far as when our brains are fully developed. So certainly children's brains are still developing, and so if you've got a child who is, you know, younger versus, you know, a teenager, the way that they process what happened to them is going to vary. So their understanding of shame or embarrassment or maybe the need to keep things like this private are going to change based upon age and development.
Q. Let's talk about external factors then. What types of external factors might impact how a child would disclose?
A. So external factors can include anything outside of the child that would include maybe pressure from the alleged perpetrator or pressure from family or pressure from, you know, really anybody not to talk about what happened. So that can be another thing that may lead children to be, you know, more or less likely to come forward.
Q. In your training and experience would it be unusual for a child to be around her abuser and act like nothing happened?
A. No, that wouldn't be unusual.
Q. Why not?

A. Sorry about my voice. I don't know what's going on.

So it wouldn't be unusual because we have to understand that we all crave comfort and normalcy and so children are no different than that and so when -- even when something occurs that may be uncomfortable for them or something that they wish didn't happen, a lot of times they just want to pretend like it didn't happen or --

MR. RIDENOUR: Object. Lack of foundation. May we approach?

THE COURT: You may.

MR. RIDENOUR: Thank you, sir.

(THE FOLLOWING WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY:)

MR. RIDENOUR: Judge, I'm concerned that the prosecutor is leading the witness into something called child accommodation -- child sexual abuse accommodation syndrome, which is of the mind of thinking that because a person is trying to accommodate or to appease someone else that they're not going to disclose.

Now that's been determined by other courts to be speculative and may risk confusing the jury because there's no necessary science to support it and there's no proof and here -- so that's my objection.

MS. DIAL: Well, Judge, Mr. Ridenour knows more than I do because I've never heard of that syndrome. I'm willing

to talk about it to make sure I don't go down that route. That's not what I've heard of and that's not where I'm going intentionally.

MR. RIDENOUR: I'm sorry. In front of Judge Heil it was just an issue there so I was watching for it.

MS. DIAL: We are not going to talk about accommodation syndrome. That's basically my last question for her on a child --

MR. RIDENOUR: Thought processes?

MS. DIAL: No, not thought processes but --

MR. RIDENOUR: I think I'm done.

THE COURT: Okay. Well I'm going to overrule the objection.

MR. RIDENOUR: Yes, sir.

(THE FOLLOWING WAS HAD IN OPEN COURT WITHIN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: The objection is overruled. You may proceed.

MS. DIAL: Thank you, Your Honor.

Q. (By Ms. Dial) So I believe we were at, "Unusual for a child to be around her abuser and act like nothing happened."

A. Yes.

Q. And you had said, "No, that's not unusual;" right?

A. Correct.

Q. All right. Do sexually abused children in your experience

have a certain look or a certain behavior?
A. They don't.
Q. Could just look like a normal kid?
A. Yes.
Q. How might the relationship -- actually, instead, how does an abuser's individual characteristics and behavior influence a victim's response?
A. So we have to understand that children can be under different varying levels of pressure based upon who the abuser is to them. So is it a person in a position of power, is it a caregiver, is it someone close to the family, is it someone who, you know, financially supports. There's just a lot of dynamics that an abuser can -- and a lot of roles that an abuser can fill in a child's life and in a family's life, so that can impact disclosure as well.
Q. How might that impact disclosure?
A. Again, it's just additional pressure because kids are able to think about, you know, if I disclose about what happened, what the potential consequences might be, and some of those include, you know, things in the court system, but that also can include, you know, financial concerns if the person was helping support rent or things like that, then it also can be, you know, emotional concerns as well.
Q. Still thinking of external factors, are there events that may trigger disclosures of sexual abuse?

A. Yes.
Q. What types of things may trigger sexual disclosures?
A. So over the years I've seen a lot of different things. Sometimes a child attends a -- like a safe touch presentation. You know back when we were in school, they called it good touch, bad touch. They don't use that verbiage anymore but sometimes kids will learn about that and they'll realize something happened that they want to speak about.

Other times someone asks them about touches. And it's not uncommon or inappropriate for parents to have that conversation with children more than once over childhood just to check in and make sure they're safe and doing okay.

Sometimes children just get tired of keeping it a secret. I look at it as you can only fill a water bottle up so much before it overflows and you can only stuff down something that happened for so long before it comes out, and sometimes kids just get to a point where they're just ready to talk about it.

A lot of kids will say things like they thought that they told their parent about what happened even though the parent may totally be, you know, surprised when the disclosure comes about. And sometimes kids will say things like, I don't want to go hang out at Aunt Susie's anymore, and they think that's their way of disclosing about what happened but it's not a really outward cry. And so in those instances they may, you know, be shutdown for a bit until something else happens.

So that's a long response but it's just to say that there's a lot of different factors that might kind of trigger or precipitate a child being ready to talk about what happened.

Q. One of the factors you mentioned is parents asking about safe touches.

A. Yes.

Q. How -- is that a type of leading question? Isn't that a problem?

A. It's not a problem because parents should be talking to their children to make sure that they're in safe situations.

Q. Are there any statistics on how likely a child is to -- if a child is disclosing, omitting or not, omitting details or not?

A. Omitting, is that what you said?

Q. Yes.

A. Yes, so the research suggests that it's a four-to-one ratio that children are four times more likely to omit details about things that really did happened to them, so leave those out, versus an error of commission, which is an error where they would make up something that didn't happen. So it's a four-to-one ratio more likely that they will not talk about something that happened versus something that didn't.

Q. Why is that?

A. I think that children are like all of us where we want to

protect ourselves and we don't want to start off a conversation with --

MR. RIDENOUR: Objection. Relevance. Nonresponsive. We're talking -- the witness is speaking of adults now.

THE COURT: Perhaps you want to rephrase the question and you want to limit your answers to what the child was thinking and doing.

MS. DIAL: Okay.

THE COURT: Thank you.

Q. (By Ms. Dial) So why might -- based on your training and experience, why might children be more likely -- four times more likely to omit than to make up something?

A. Yes, and that research is on children so I do want to clarify that, and I apologize if I worded that poorly.

So when children disclose, they are going to try to still protect and save face to the extent that they can. We know that talking about private parts and genitals is socially not something that's accepted. You're not supposed to just go talk about that sort of thing publicly and so social cues tell us that -- tell children that they should not talk about private parts, that they are cuss words or something like that, so many children will not talk about everything initially to see how the reaction is, to see if something bad happens once they disclose, and then if not then they may

continue to talk once they get more comfortable with the situation and more willing to share what happened.

Q. Based on your training, education and professional experience, how do children react -- how do children generally react when they get into trouble for acting out sexually?

A. So a lot of times when children act out sexually, there is a consequence that occurs.

MR. RIDENOUR: Judge, objection. A lot of times is nonspecific.

THE COURT: Overruled.

THE WITNESS: So when children -- for example, let's say that an older brother starts sexually acting out on a younger sister. Typically the parents are going to react with a consequence. They're going to be in trouble, they're going to be embarrassed. Most parents are not going to be aware that that may be a reaction to victimization. It's not a guarantee that that's what's going on there, but many parents would not expect that and they would be upset that the child was being touched by the other child. And so there can be consequences in punishment that are similar to other times when they get in trouble and so they may, you know, be fearful of that information coming to light.

Q. (By Ms. Dial) Let's talk about disclosures and delayed disclosure since you discussed children may talk about it more as time goes on. First off, on delayed disclosures, is it

common for victims to delay the disclosure of sexual abuse?
A. Yes.
Q. Why?
A. Because talking about abuse is uncomfortable. It's not something that people want to remember and want to discuss. Excuse me, that children want to remember and want to discuss and so research supports that children delay disclosure well into childhood and also into adulthood as well.
Q. When a child does start to disclose sexual abuse, is it common for the child to disclose everything?
MR. RIDENOUR: Objection. Form of question. Is it common.
Q. (By Ms. Dial) Based on your training and experience do children generally disclose everything at once?
MR. RIDENOUR: Form of the question. Generally.
THE COURT: Overruled.
MR. RIDENOUR: Thank you, sir.
THE WITNESS: No.
Q. (By Ms. Dial) What in your training an experience do you see more of?
A. So, in my training and experience it is not uncommon for children to tell a little bit about what happened and take time to talk.
Now, by the time they come to the forensic interview with me, they may have already disclosed to other individuals and

so they may be more ready to talk by the time I'm involved. However, it is typically going to be a process and more details will be provided each time that they speak.

Q. When you're involved, do you always just do one interview?

A. I don't.

Q. Why not?

A. Because of the process of disclosure there are situations that can arise that would warrant a follow-up interview.

Q. So could a child be forensically interviewed more than one time?

A. Yes.

Q. Is there a professional view on multiple forensic interviews?

A. There is.

Q. Could you briefly describe that for us?

A. Yes. When forensic interviews first began, you know, 1985, there was more of a philosophy at that time for one forensic interview was appropriate. Since then experience and research tells us that some children may need more than one occasion to have a professional forensic interview. And so at this point the recommendation is to limit the number of interviewers to the extent that is possible and to minimize the number of interviews.

And so we don't want to be offering forensic interviews, you know, regularly, but there are situations that would be

appropriate to offer an additional forensic interview.
Q. What types of situations?
A. Those would be things like the child makes additional disclosures maybe in therapy or to a trusted adult and then they would approach and be prepared for that.
Additionally we see at the FBI often that we find additional evidence or there's additional information that we need to clarify and so then at that point we would ask the child to come back and just fill in those gaps. We would not ask them for another full complete forensic interview at that point.
Q. You've talked about children sharing more as time goes by. Let's talk about trauma responses and these evolving disclosures. Can the trauma of abuse impact disclosure?
A. Yes.
Q. How so?
A. Trauma is the experience that the child goes through based upon what has happened with him or her, and so because of trauma, that can mean that it impacts the way that information is taken in.
So when we -- when children experience a traumatic event, they may checkout or be focused on, you know, a specific detail or a minor detail during an abuse incident and because of that they may not have information -- a lot of detailed information that we might expect them to have.

Q. Can trauma impact a victim's understanding of chronology?
A. Yes.
Q. How so?
A. Trauma and age can impact a child's ability to tell a story and in chronological order. Many times it's going to be disjointed and the -- their perception of time is not going to be as with it as an adult's would be.
Q. Why is that?
A. Some of that is because of brain development. Children just lack the capacity to put things in chronological order until brain development has increased, and trauma also can impact their ability to understand and remember things from start to finish because they may be checked out or thinking about something else during some of the incidents.

And when things happen chronically or maybe more than one time, events can start to blur for them and they may not be able to tease out what happened the first time versus the eighth time so it just depends on, you know, what the situation is that the child is dealing with.
Q. You've talked about delayed disclosure. Do you know the phrase "piecemeal disclosure"?
A. Yes.
Q. What does it mean?
A. So piecemeal disclosure is just --

MR. RIDENOUR: Judge, may we approach?

THE COURT: Yes.

MR. RIDENOUR: I misunderstood. I withdraw that, sir. Sorry.

Q. (By Ms. Dial) Do child victims -- or I believe you were explaining piecemeal disclosure.

A. Yes. So piecemeal disclosure is basically bits and pieces. So it will be small amounts of information kind of coming out as time goes by.

Q. Is it common for children's disclosures to come in piecemeal fashion?

A. It can be, yes.

Q. Is it common for children's disclosures to evolve over time?

A. Yes.

Q. Why wouldn't a child just say it all at once and be done?

A. Because it's difficult to talk about. For many children they experienced one of the hardest things that they will ever go through and it's uncomfortable to talk about things that hurt. And developmentally some children lack the words and the language to be able to describe what happened to them because they have limited sexual knowledge and so they don't understand how to explain to an adult or an investigator what their experience was.

Q. Can children forget details of abuse?

A. Yes.
Q. Could you explain what types of details they may forget?
MR. RIDENOUR: Judge, form of question. Overbroad.
THE COURT: It is quite broad.
MS. DIAL: I can narrow it, Your Honor.
THE COURT: What?
MS. DIAL: I can narrow it.
THE COURT: Please.
Q. (By Ms. Dial) Could you describe or -- so you said children can forget details of abuse?
A. Yes.
Q. And are there core details and peripheral details?
A. Yes.
Q. Which are children more likely to forget?
A. Peripheral details.
Q. What are peripheral details?
A. Peripheral details are the small details surrounding the event that happened to children, so they're going to be more minor details like maybe what a person was wearing or something of that nature versus the core details which are going to be like the more substantive and more specific things that occurred.
Q. How might a child respond if she's not believed after her first disclosure?
A. Anytime a child does not feel believed, it can lessen the

likelihood that they will want to talk again because they will fear that nobody will believe them or they're concerned about what the outcome will be.

Q. What about if a child is punished?

A. Similar reaction that they feel that it's inappropriate for them to talk about it and they may shutdown and not want to talk about it again.

Q. Is it unusual for an abuse victim to provide more detail as time goes on?

A. It is not unusual.

Q. Why not?

A. Because we've talked about disclosure being a process and children are often feeling out who can handle the disclosure and what's happening as they disclose. So if they are punished or if there's some sort of consequence, they may take a bit to continue talking about abuse.

Otherwise if they're supported or feel like it is appropriate for them to continue, then they can continue down that healing process.

Q. So if a child is disclosing in pieces across a period of time, do you expect a child's details to remain exactly consistent? Peripheral details.

MR. RIDENOUR: Objection. Form of question, leading.

THE COURT: Overruled. You may answer the question.

A. Can you repeat that? I'm sorry.
Q. (By Ms. Dial) If a child is disclosing in pieces over time, based on your training and experience, do you expect a child's details -- the peripheral details to remain exactly consistent?
A. No.
Q. Why not?
A. It depends on who the disclosure is happening to or given to. And if there's questions being asked and the training of the person. There's a lot of factors outside of the children that will impact the consistency of those statements. The core details will typically stay consistent but it's the peripheral details that may be different over time.
MS. DIAL: Could I have just a moment, Your Honor?
THE COURT: You may.
MS. DIAL: Thank you.
Q. (By Ms. Dial) How is the disclosure process affected if someone is disclosing something that happened months or years earlier?
A. So the disclosure process can be difficult for children who are delaying disclosure or something happened years before because they may have never talked about it and it may be the first time -- and I would say that that's for any child disclosing for the first time, but especially after some time has passed and essentially the children have tried to live

their life as if nothing happened or in a normal way, it can rip a Band-Aid off and really stir things up for children and make things pretty challenging for them once that disclosure comes to light.

Q. Based on your training and experience and education is it common for victims of sexual abuse not to be able to recall specific dates, times and durations?

A. Correct.

Q. Is that supported by the literature and research?

A. Yes, it is.

Q. Why is it common for sexual abuse -- child sexual abuse victims not to be able to recall specific dates and times?

A. Because unless the specific dates and times are meaningful to the children in some ways, they're not going to remember something like that. So with children, if we ask them, you know, what happened on January 3rd, they may remember that because maybe that's their birthday, so it's an -- a date that is salient as to them as is something that is meaningful to them. But otherwise, unless there is a specific reason for them to remember a date or a time, it is not something that children typically are going to keep track of or pay attention to because that's not the most meaningful thing that's happening to them at that time.

Q. Earlier you mentioned "child's words" in describing. I want to talk about language. When you're interviewing a

child, do you pay attention to the child's word and how they describe things?
A. Yes.
Q. Why is that?
A. Because that helps us as forensic interviewers understand the child's development and how they communicate, and so we want to pay attention to the words that they say and the way that they're answering questions so we can make sure that we're wording questions in a developmentally appropriate way.
Q. When you're talking about body parts, what might a child's words indicate to you?
A. So there are a lot of different names for body parts that children will use, and so when we are talking about body parts, if they are willing or not willing to name the body part, that just helps me understand where they're at in their disclosure process.
Q. Are there specific words that you would expect children to say or not say when they're describing body parts?
A. No, there's not.
Q. If a three year old came in and said penis, would that surprise you?
A. It would be uncommon but it wouldn't surprise me and it has been something that I've experienced before.
Q. And what would you do in that situation?

A. I would call it a penis during the forensic interview because that's what the child called it. I would say if they called it something more slang term, then I may ask a question about, you know, how do you know that word, but that's a really tough question for someone who is three, so I probably would just go with it and use that language during the interview.

Q. Let's talk about "suggestibility." You mentioned that earlier. What does suggestibility mean in the area of child sexual abuse?

A. Suggestibility means the degree to which a child is influenced from outside sources.

Q. What outside sources can affect suggestibility?

A. There are a lot, but suggestibility in the forensic interview, we are talking about the interviewer, question type, investigators can, you know, be suggestible. Parents, family members, anything that can influence the child's statements is considered suggestible.

Q. What do you mean "influence their statements"?

A. So when we talk about suggestibility with children, that could be like the leading question example that I gave you earlier where I'm asking a child to agree with what I'm saying. That would be considered a leading and suggestive question.

Q. How do forensic interviewers test a child's

suggestibility?

A. So when we are doing forensic interviews, we are wanting to let the child know that it is okay to tell us that they don't know something if they don't know, and that lessens suggestibility because we don't have them guessing or feeling like they have to provide a response if they truly don't know something.

Additionally we invite correction. So we ask the children to correct us if we make any mistakes, because, again, that lessens suggestibility because they are not just agreeing with everything that we say and they're willing to tell us and encourage to tell us if we make a mistake.

Q. Can suggestive questions in an interview plant a core detail?

A. Will ask you that again?

Q. That was a bad question.

A. That's okay.

Q. So how about I'll back up.

What are suggestive questions in the context of a forensic interview? Are they the same as leading questions?

A. Essentially. So leading questions are suggestive because they suggest an answer to a child prior to the child giving that response.

Q. And how -- how subject are children to suggestibility?

A. So research suggests that children are no more suggestible

than adults around age nine or ten. It is something that you want to be aware of for all children in the forensic interview, because children of any age can be susceptible, but research suggests that between the ages of nine and ten, they are no more suggestible than adults.

MR. RIDENOUR: Object to relevance. This child is not nine or ten.

THE COURT: I think that the child's age will eventually be out and about and before them and the jury may give it such weight as they deem appropriate. Overruled.

MR. RIDENOUR: Thank you, sir.

Q. (By Ms. Dial) We've talked a lot about disclosure so I don't want to belabor this point, but I want to hit a few more about how children disclose specifically in the forensic interview.

So in a forensic interview is there a way that you expect a child to emotionally react when they're disclosing?

A. No.

Q. Are there psychological or physical symptoms a victim of sexual abuse always displays?

A. No.

Q. Why not?

A. Because like we talked about earlier with the individual characteristics of children, the same rings true when it comes to how they will respond during the forensic interview both

physically and emotionally to what's being discussed.
Q. In your multiple interviews, how often do children cry when they're talking about sexual abuse?
A. So I can't provide a specific quantity but I can tell you that it would -- it would be surprising for people to understand how infrequently children cry during the interview. It's just not something that happens very often during the interview. I can't give you a percentage because that would be guessing, but it's not something I see very often and I do interviews weekly.
Q. That's fine. But you said it would be surprising to people. Does it surprise you that a child is not crying when disclosing sexual abuse?
A. Not at this point in my career, no.
Q. Why not?
A. Because I recognize that the forensic interview, when done appropriately, is a very comfortable situation that invites the child to speak freely without the reaction of the adult. So I am not in there reacting, getting emotional, it's a safe space for children and sometimes, like I said, we're the first person or I'm the first person that a child has told and it can be a very cathartic experience. It's not meant to be traumatizing or, you know, to elicit certain emotions.
Q. Outside of a forensic interview when children are forced to talk about sexual abuse are there certain responses that

you might expect?
A. If they're forced or --
Q. If they're uncomfortable with talking about it and being pushed to talk about?
A. There can be some responses, yes, that may take place.
Q. Such as?
A. So when children are not comfortable with the situation sometimes they'll try to change the subject. We see that in neutral events too. It's not just related to sexual abuse but it certainly is also seen with sexual abuse.

There can be displays of regressive behavior just as a self-soothing tactic. There may be some baby talk or things that are more comfortable for the child in an effort to kind of change the subject and move away from what they don't want to discuss.

MS. DIAL: May I have just a moment, Your Honor?

THE COURT: You may.

Q. (By Ms. Dial) Two last clarifying points. So earlier you'd said if a child isn't believed or punished, they may shutdown?
A. Yes.
Q. What would prompt a child to then disclose again?
A. So if a child is shutdown for any reason, what allows them the opportunity to disclose again is a safe, trusting environment by a professional that is trained to talk about --

to talk with them about what happened.
Q. Always safe, trusting, with a professional or could change of circumstances impact as well?
A. Certainly, yes.
MS. DIAL: No other questions, Your Honor.
THE COURT: Thank you.
Mr. Ridenour.
MR. RIDENOUR: Thank you, sir.

CROSS-EXAMINATION

BY MR. RIDENOUR:
Q. Ms. Murdock, have you talked to S.S?
A. I have not.
Q. Have you reviewed her statements?
A. I reviewed the forensic interviews but I don't know what's in the folder.
Q. So you haven't reviewed the entire documents concerning this case?
A. Correct.
Q. How many interviews have you reviewed?
A. Three.
Q. Were there more?
A. I'm not sure.
Q. Okay. Now, you've worked for the FBI for ten years; true? Nearly, ten years?
A. Just over nine.

Pertinent Constitutional Provisions

United States Constitution, Amendment Five:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Pertinent Statutory Provisions

18 U.S.C. § 2241(c):

Whoever . . . in the special maritime and territorial jurisdiction of the United States . . . knowingly engages in a sexual act with another person who has not attained the age of 12 years . . . or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life.

Pertinent United States Sentencing Guidelines Provisions

U.S.S.G. § 2A3.1(a) Base Offense Level:
(1) 38, if the defendant was convicted under 18 U.S.C. § 2241(c)

U.S.S.G. § 2A3.1(b) Specific Offense Characteristics:
(3) If the victim was (A) in the custody, care, or supervisory control of the defendant . . . increase by 2 levels.

U.S.S.G. § 4B1.5(b) Repeat and Dangerous Sex Offender Against Minors:
In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.