UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1830

United States of America

Plaintiff - Appellee

v.

Descart Austin Begay, Jr.

Defendant - Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:21-cr-00119-NEB-1)

JUDGMENT

Before BENTON, GRASZ, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 10, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Court of Appeals
For the Eighth Circuit

No. 23-1830

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Plaintiff - Appellee

v.

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Appeal from United States District Court
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Submitted: April 10, 2024
Filed: September 10, 2024

Before BENTON, GRASZ, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

A jury found Descart Begay, Jr., guilty of both sexual abuse and aggravated sexual abuse. *See* 18 U.S.C. §§ 2241(a)(1), 2242(1). Although he challenges the evidence the jury heard and the sentence he received, we affirm.

I.

S.S. had not heard from Begay, a former coworker, in over a decade. Yet one day she received a Facebook message trying to strike up a conversation. The discussion quickly fizzled out, so it was a surprise when he showed up later that afternoon at her home on the Red Lake reservation in northern Minnesota. The two chatted for a while before heading inside, where they began looking at her artwork. The subject of painting with an airbrush came up, so he went home to grab one.

When he returned, the situation took a turn for the worse. With S.S.'s son playing video games in the living room, Begay began rubbing her arm in the hallway. She said no, but he would not stop. He said that he had "wanted this since [he] was 21 years old," shoved her into the bedroom, and raped her.

At some point, her son called out. It distracted Begay long enough for S.S. to scramble out to the living room, where she managed to grab her son and get to the front door. But as she tried to leave, Begay caught up with her and slammed it shut. Although S.S. cried out and pleaded with him to stop, he began sexually assaulting her again.

This time, S.S. managed to break free completely and drive away with her son. When she arrived at her mother's house, she spent a few minutes outside sobbing near her father's grave. Once she mustered the courage to go inside, she revealed to her mother why she was so upset: Begay had raped her.

While driving back home several hours later, she spotted Begay, who began following her on his bicycle. Shortly after she arrived home, he began pounding on the front door. In response, she locked herself in a room, called her estranged husband to tell him that Begay had raped her, and contacted the police.

When officers arrived, they saw Begay "duck and dive" in an attempt to hide. Then he tried to leave on his bicycle, but he did not get far before they arrested him.

Following a five-day trial, a jury found him guilty of two counts each of sexual abuse, *see* 18 U.S.C. §§ 2242(1), 1151, 1153(a), and aggravated sexual abuse, *see id.* §§ 2241(a)(1), 1151, 1153(a). The district court[1] sentenced him to 200 months in prison.

II.

Begay first challenges what happened at trial. He argues that the jury heard too much from the government and too little from him. We review evidentiary rulings "for an abuse of discretion, keeping in mind that we will reverse only if an error affected the defendant's substantial rights or had more than a slight influence on the verdict." *United States v. Streb*, 36 F.4th 782, 788 (8th Cir. 2022) (citations omitted).

A.

During redirect examination, S.S. testified that she told others that Begay had raped her. The general rule is that a witness's prior consistent statements are inadmissible hearsay when "offered for the truth of the matter asserted." *United States v. Mallory*, 104 F.4th 15, 20 (8th Cir. 2024); *see* Fed. R. Evid. 801(c).

In two situations, however, they are "not hearsay." Fed. R. Evid. 801(d)(1)(B). One is when "rebut[ting] an express or implied charge that the declarant recently fabricated [her testimony] or acted from a recent improper influence or motive in so testifying." *Id.* (B)(i). And the other is when "rehabilitat[ing] the declarant's credibility as a witness when attacked on another ground." *Id.* (B)(ii).

[1]The Honorable Nancy E. Brasel, United States District Judge for the District of Minnesota.

S.S.'s testimony fits into both categories. At trial, she withstood multiple attacks on her credibility. One recurrent theme was that she had a motive to lie because she feared that her estranged husband would become violently angry if he found out that she had consensual sex with another man. During cross-examination, Begay's counsel tried to convince the jury that she made up the story about the rape to avoid angering him. This is an example of a category-one situation: a "charge" that a witness fabricated a story based on a motive to lie. *See* Fed. R. Evid. 801(d)(1)(B)(i); *see also Tome v. United States*, 513 U.S. 150, 158 (1995) (discussing this type of situation).

The other line of attack was that the jury could not trust S.S.'s recollection because she had a faulty memory, both from past drug use and her mental-health struggles. Cross-examination uncovered several details she could not remember. Some were from after the assault, like when she put on her socks and the identity of the officer who helped her. Others were about what happened during the rape, like whether Begay choked her. These raised a category-two situation: credibility "attack[s] on another ground." Fed. R. Evid. 801(d)(1)(B)(ii).

The prosecutor highlighted her prior consistent statements in response to both types of impeachment. *See* Fed. R. Evid. 801(d)(1)(B). S.S. testified on redirect that she told multiple people—her mother, her estranged husband, and the officers who interviewed her—about the rape. In response to additional questioning, she also agreed that she told an FBI agent and the examining nurse about it. And then she summed up by saying that she had "repeatedly told law enforcement that Mr. Begay [had] raped [her]."

Begay's position is that these statements were hearsay because they all came after her motive to lie arose. That is, if she was worried about angering her estranged husband, then she had a motive to lie right from the start. For support, he relies on *Tome v. United States*, 513 U.S 158 (1995).

In *Tome*, the Supreme Court considered whether "rebut[ting] an express or implied charge . . . of recent fabrication" or acting from a recent "improper influence or motive" is available only when the prior consistent statement *precedes* "the alleged influence, or motive to fabricate." *Id.* at 157–58. The answer was yes: only pre-motive prior consistent statements qualified. *Id.* at 160. On its own, *Tome* suggests that the jury should not have heard *any* of S.S.'s prior consistent statements because her alleged motive to lie already existed at the time she made them. *See United States v. Bercier*, 506 F.3d 625, 629 (8th Cir. 2007) (holding that prior consistent statements were inadmissible under *Tome* when the "defense at trial was that [the victim] fabricated her story of non-consensual sexual assault immediately after leaving his bedroom").

Tome, however, is not the end of the story. A 2014 amendment to the Federal Rules of Evidence added the second category of admissible prior consistent statements. *See* Fed. R. Evid. 801(d)(1)(B)(ii). It applies any time a credibility attack involves "another ground," something other than an allegedly fabricated statement arising out of a motive to lie or improper influence. For its part, *Tome* interpreted an earlier version of the rule that included only the first category. *See United States v. Burch*, 809 F.3d 1041, 1046 (8th Cir. 2016) (recognizing that *Tome* still applies to that subparagraph). The question presented here is whether the *Tome* pre-motive-statement requirement applies to the second category too.

A step back into the common law of hearsay, the body of law that the Supreme Court relied on in *Tome*, provides the answer. Courts have long recognized that an out-of-court statement used to rehabilitate a witness is not hearsay. *See United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001); *United States v. Rubin*, 609 F.2d 51, 70 (2d Cir. 1979) (Friendly, J., concurring). It shows that a witness is reliable, not that the statement is true. *See* 2 Robert P. Mosteller et al., *McCormick on Evidence* § 251, at 225 (8th ed. 2020) (noting that "consistent statements are often admitted to explain what would otherwise appear to be an inconsistency in the witness's testimony and to rebut a charge of faulty memory").

This case is a good example: the prosecution offered S.S.'s prior consistent statements to prove that she did not change her story. *See* 5 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 801.22[1][a] (2d ed. 2009) (explaining that prior consistent statements "tend[] to show that the witness is telling the truth at trial, since the trial testimony matches what the witness said earlier"). If the reason for admission, on the other hand, was to show that Begay had raped her, then it would be classic hearsay, offered for the "truth of the matter asserted." *See* Fed. R. Evid. 801(c)(2). Under the common law, the former would be admissible, and the latter would not be. *See id.* advisory committee's notes to original rule ("Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence."); *United States v. Kenyon*, 397 F.3d 1071, 1081 (8th Cir. 2005) (explaining that prior consistent statements could be submitted to the jury when "offered only for purposes of rehabilitation" and not "for the truth of the matter[] asserted").

The 2014 amendment changed the landscape by getting rid of this common-law distinction. *See generally* Fed. R. Evid. 801 advisory committee's notes to 2014 amendment. A rehabilitative use now provides a gateway to across-the-board admissibility, both as a response to a general credibility attack and as substantive evidence of guilt. *See id.* ("[P]rior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well."); *McCormick on Evidence*, *supra*, § 251, at 225 (8th ed. 2020) (observing that "if a statement is admitted to rehabilitate a witness's credibility . . . the statement is admissible, not only to affect credibility, but also for its truth and is considered not hearsay"). The rationale for the change is that the prior consistent statement necessarily must match what the witness has already said in court. *See* Fed. R. Evid. 801 advisory committee's notes to proposed rules para. (d)(1) ("If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem."); *see also Weinstein's Federal Evidence*, *supra*, § 801.22[1][a] (2d ed. 2009). In other words, the testifying witness is basically adopting the earlier prior consistent statements, so it would be confusing for the jury to try to differentiate between the hearsay and non-hearsay uses of them. *See* Fed. R. Evid. 801 advisory

committee's notes to 2014 amendment (explaining that when "[t]he prior statement is consistent with the testimony given on the stand, and . . . the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally"). Once again using this case as an example, S.S. testified at trial that Begay raped her, so she has, in a sense, adopted her earlier statements saying the same thing.

Now back to *Tome*. The rationale for a pre-motive-statement limitation in category-one cases is that a prior consistent statement only becomes "a square rebuttal of the charge that the testimony was contrived as a consequence of that motive" if the witness had been saying the same thing all along, even before the motive to lie arose. *Tome*, 513 U.S. at 158. The rehabilitative force disappears, on the other hand, if the prior consistent statement came later. *Cf. id.* If time 1 is when the motive to lie arose, then we would expect statements made at time 2 and time 3 to be consistent. After all, the same motive to lie existed at those points. A consistent statement at time 0, in contrast, squarely rebuts the motive-to-lie charge.

There is no similar rationale for importing a pre-motive-statement requirement into the second category. The main reason is the nature of the attack. First, if the charge is a lack of credibility based on a faulty memory or any "[]other ground," then a prior consistent statement made at *any* point—time 0, 1, 2, or 3—will "rehabilitate" the witness. Second, it is almost impossible to pinpoint a specific point in time when a faulty memory arises, unlike a motive to lie or other improper influence, so it would not "make[] . . . sense" to import a timing requirement. *Id*. And finally, timing has never mattered for category-two prior consistent statements, at common law or now. *See, e.g.*, *United States v. Andrade*, 788 F.2d 521, 532–33 (8th Cir. 1986) (admitting prior consistent statements to rehabilitate over a Rule 801(d)(1)(B) objection despite "the government . . . not show[ing] that the notes were created prior to [when] the motive to fabricate them arose"). Long story short, none of the conditions for a "common-law premotive requirement" are present in category-two situations. *Tome*, 513 U.S. at 160.

Begay's view is that this is not a category-two situation at all. He was trying "to make [the] broader point" that S.S. had a motive to lie, even if he attacked her credibility in multiple ways. *United States v. Portillo*, 969 F.3d 144, 174 (5th Cir. 2020). In these "mixed" situations, involving both category-one and category-two impeachment, he believes the pre-motive requirement from *Tome* must apply. That is, a rule of inadmissibility must trump one of admissibility to avoid circumvention of the *Tome* rule. Many situations, after all, involve both category-one and category-two impeachment.

The premise of the argument may be true, but the conclusion is not. Even if many cases involve both types of impeachment, the two categories of Rule 801(d)(1)(B) are joined by an "or," meaning a statement "is not hearsay" if it satisfies either condition.[2] And if the text were not clear enough, the evidentiary rules "generally favor the admission, rather than the exclusion, of evidence." *See United States v. Jiminez*, 487 F.3d 1140, 1145 (8th Cir. 2007); *see also Moore v. United States*, 648 F.3d 634, 639 (8th Cir. 2011) (explaining that the Federal Rules of Evidence "favor admitting relevant evidence absent a specific reason to exclude it"). To take an example, a hearsay statement may qualify as an excited utterance but not a present-sense impression. We do not exclude it as hearsay in that situation. *See, e.g.*, *United States v. Boyce*, 742 F.3d 792, 797–98 (7th Cir. 2014) ("We need not definitively decide whether . . . [the] statements fail to qualify under the present[-]sense impression exception because even if they did, they would still be admissible as an excited utterance."); *see also* Fed. R. Evid. 803(1)–(2) (listing each as an independent reason "not [to] exclude[]" the statement).

The same goes here. S.S. may well have had a motive to lie at the time of the rape, making the post-rape statements inadmissible under Rule 801(d)(1)(B)(i). But the statements were still admissible to counter the "attack[s] on another ground,"

[2]The impeachment must truly be "on *another* ground" to qualify, one not covered by the first category. Fed. R. Evid. 801(d)(1)(B)(ii) (emphasis added). Only when a party impeaches a witness on a ground "[]other" than—or in addition to—a motive to lie does the second category kick in. *Id.*

like her allegedly faulty memory. *Id.* (B)(ii); *see United States v. Flores*, 945 F.3d 687, 705 (2d Cir. 2019) (concluding there was no error in admitting prior consistent statements under subparagraph (ii) in response to challenges to both a witness's faulty memory *and* a motive to fabricate); *cf. United States v. Peneaux*, 432 F.3d 882, 891 (8th Cir. 2005) (admitting prior inconsistent statements as substantive evidence under Rules 807 and 803(4) despite the government "not refut[ing] [the] argument" that the statements "[could not] be admitted as substantive evidence under Rule 801(d)(1)(A)"). They then became fair game for the prosecutor and the jury to use as substantive evidence of Begay's guilt. *See United States v. Purcell*, 967 F.3d 159, 196–97 (2d Cir. 2020) (affirming the substantive use of non-hearsay statements admitted under Rule 801(d)(1)(B)(ii)).[3]

B.

Begay's other evidentiary objection covers what he thinks the jury should have heard. He wanted to explore S.S.'s sexual history in detail, but the district court placed limits on how far he could go. Although he could argue that somebody else was behind the injuries and the sperm fragments, prior inconsistent statements about her sexual history were off-limits. *See* Fed. R. Evid. 412(a) (limiting evidence about a victim's sexual behavior).

[3]S.S.'s mother testified at trial that she heard S.S. say that Begay had raped her. Her recollection of what S.S. said was not admissible as a prior consistent statement because she testified before S.S. did. *See United States v. Lanier*, 578 F.2d 1246, 1256 (8th Cir. 1978) ("[W]e recognized that the testimony of a third party may be used to introduce the prior consistent statement of a witness *after* impeachment has been used to assail the witness' testimony as a fabrication." (emphasis added)). Still, the fact that S.S.'s prior consistent statements came in anyway, through S.S. herself, means any error in admitting the hearsay statements through her mother was surely harmless, especially when considered against the backdrop of the overwhelming evidence of guilt. *See United States v. Wipf*, 397 F.3d 677, 682 (8th Cir. 2005) (noting that hearsay "testimony was merely cumulative and did not likely influence the jury" when it "mirrored" other testimony).

In his view, those limitations violated his Sixth Amendment right to confront his accuser. Even if we assume they did—a question we need not decide today—any error was harmless beyond a reasonable doubt. *See United States v. Campbell*, 986 F.3d 782, 794 (8th Cir. 2021); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (listing the factors for determining whether a Confrontation Clause violation is harmless). For one thing, the district court allowed Begay's counsel to ask her about other sexual partners, which led to the admission of much of the evidence he wanted the jury to hear, including her sexual activity around the time of the rape. *See United States v. Arias*, 74 F.4th 544, 551 (8th Cir. 2023) (noting that the extent of cross-examination otherwise permitted is an important factor). Second, "impeach[ing] her general credibility" with inconsistent stories of her sexual behavior, the only type of evidence that was off-limits, had "little or no probative value on the question of whether she falsely accused [Begay] of rape." *United States v. White Buffalo*, 84 F.3d 1052, 1054 (8th Cir. 1996). And third, the evidence of guilt here was overwhelming, particularly given the detailed testimony of multiple witnesses, the physical evidence corroborating that the rape occurred, and Begay's suspicious behavior afterward.[4] Any error in limiting the cross-examination had, at most, "a slight influence on the verdict." *Streb*, 36 F.4th at 789 (citation omitted).

III.

Next, we move on to sentencing. Begay asks us to vacate two enhancements he received. "In evaluating each, we review the district court's construction and application of the sentencing guidelines de novo and its factual findings for clear error." *Id.* at 790 (citation omitted).

[4]For these same reasons, the evidence was sufficient to convict him. *See United States v. DeCoteau*, 630 F.3d 1091, 1097 (8th Cir. 2011).

A.

The first one was for causing "serious bodily injury," U.S.S.G. § 2A3.1(b)(4)(B), which the district court imposed because of the impact of the rape on S.S.'s "mental facult[ies]." *Id.* § 1B1.1, cmt. n.1(M). As she explained, it left her unable to sleep; ruined her marriage, friendships, and relationships; and made her feel like she was "fight[ing a] battle in [her] head constantly." In her words, "[t]he pain of that day never went away."

We have approved of serious-bodily-injury enhancements in similar circumstances. In one case, it was "depression and PTSD." *United States v. Guy*, 340 F.3d 655, 658–59 (8th Cir. 2003). In another, "continued psychological problems such as recurring nightmares." *United States v. Kills in Water*, 293 F.3d 432, 436 (8th Cir. 2002). And in a third, "[i]rrational, debilitating fear, night terrors and nightmares, depression, [and] anxiety attacks that generalized into all other areas of life management." *United States v. Rodgers*, 122 F.3d 1129, 1133 (8th Cir. 1997). We agree with the district court that S.S.'s lasting psychological damage fits within this line of cases.

It makes no difference that she had no specific medical diagnosis from the rape, *cf. Kills in Water*, 293 F.3d at 436 (approving the enhancement for recurring nightmares without discussing a diagnosis), or that she had preexisting mental-health issues. It is enough that the district court believed her when she blamed Begay for bringing on some new problems and making her existing mental-health struggles worse. *See United States v. Bruguier*, 161 F.3d 1145, 1153 (8th Cir. 1998). Add the fact that her mother described a profound change in her daughter *after* the rape, and we cannot say that the serious-bodily-injury finding was clearly erroneous. *See United States v. Gibson*, 840 F.3d 512, 514 (8th Cir. 2016).

B.

The second one was for "physically restrain[ing] [the victim] in the course of the offense." U.S.S.G. § 3A1.3. Begay's position is that it duplicates an element of aggravated sexual abuse, so it "double counts" the same conduct. *Compare id.*, *with* 18 U.S.C. § 2241(a).

We have encountered this double-counting argument before and rejected it. *See United States v. Long Turkey*, 342 F.3d 856, 859 (8th Cir. 2003) ("Victim restraint is not an element of aggravated sexual abuse"); *see also Arcoren v. United States*, 929 F.2d 1235, 1247–48 (8th Cir. 1991) ("[A]lthough 'physically restrained' requires the use of force, use of force does not necessarily entail physical restraint."). We do the same today.

IV.

We accordingly affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. DESCART AUSTIN BEGAY, JR., Defendant.	Case No. 21-CR-119 (NEB/LIB) ORDER ON RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL

A jury found Defendant Descart Austin Begay, Jr. guilty of two counts of aggravated sexual abuse in violation of 18 U.S.C. Sections 2241(a)(1), 1151, and 1153(a), and two counts of sexual abuse in violation of Sections 2242(1), 1151, and 1153(a). At trial, the Court denied Begay's motion for an acquittal. He now renews his motion. (ECF No. 161.) In the same filing, Begay moves in the alternative for a new trial. (*Id.*) For the reasons below, the Court denies the motions.

BACKGROUND

Begay was charged in an eight-count Superseding Indictment with four counts of aggravated sexual abuse and four counts of sexual abuse for the alleged rape of S.S. (ECF No. 133.) The government sought to prove that on or about July 3, 2020, Begay raped S.S. in her home on the Red Lake Indian Reservation. The Court held a jury trial from August 29 to September 2, 2022. The government called several witnesses, including law-

enforcement officers, the EMT who took S.S. to Indian Health Services, S.S.'s mother, the sexual-assault nurse examiner ("SANE") who treated S.S., forensic experts, and S.S. herself. The Court received into evidence a DNA analysis as well as numerous photographs of S.S.'s body purporting to show injuries from the assault. The DNA analysis found Begay's Y-chromosomal profile on vaginal, perineal, and rectal area swabs taken from S.S.'s body.

In his defense case, Begay called his own forensic scientist as well as a SANE examination expert, who criticized the nurse who examined S.S. The jury ultimately convicted Begay on Counts 1, 4, 5, and 8—two counts for penile-vaginal rape, and two counts for digital-penetration rape. (ECF No. 152.)

ANALYSIS

The Court must resolve two motions: (1) Begay's renewed motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure based on insufficient evidence, and (2) Begay's motion for a new trial under Rule 33 based on the Court's evidentiary rulings on excited utterances, prior hearsay statements, expert testimony, and Rule 412 impeachment.

I. Begay's Renewed Motion for Judgment of Acquittal

Under Rule 29(a), "on the defendant's motion [courts] must enter a judgment of acquittal for any offense for which the evidence is insufficient to sustain a conviction." "[H]owever, a district court has very limited latitude to do so and must not assess witness

credibility or weigh evidence." *United States v. Hassan*, 844 F.3d 723, 725 (8th Cir. 2016). Courts "look at the evidence in the light most favorable to the verdict and accept as established all reasonable inferences supporting the verdict." *United States v. Cruz*, 285 F.3d 692, 697 (8th Cir. 2002) (citation omitted). "A verdict will only be overturned if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Weaver*, 554 F.3d 718, 720 (8th Cir. 2009).

Begay contends that the evidence at trial could not sustain his convictions. He emphasizes that the forensic evidence contradicted the government's allegations and that S.S.'s testimony was not credible. As for the forensic evidence, Begay asserts that the photographs of S.S. taken during her SANE examination show no evidence of strangulation, contrary to S.S.'s statements. He also argues that the photographs do not depict a violent encounter, with only a handful of "superficial marks" and "small bruises" on S.S.'s body. And Begay emphasizes that no sperm-cell fraction was found on S.S.'s body that could be attributed to him. As for S.S.'s credibility, Begay asserts that the government's case "rested *solely* on the testimony of S.S.," and that she contradicted her prior statements and attempted to mislead the jury. (ECF No. 162 at 5 (emphasis in original).) For example, he highlights alleged inconsistencies about whether S.S. screamed during the incident, her son's statement that he did not see any inappropriate conduct, and her marijuana use that day.

The Court denies Begay's motion for an acquittal. The Court may not reassess S.S.'s credibility on a Rule 29 motion. *Hassan*, 844 F.3d at 725. And S.S.'s "testimony alone is sufficient to persuade a reasonable jury of the defendant's guilt beyond a reasonable doubt." *United States v. Gabe*, 237 F.3d 954, 961 (8th Cir. 2001). In addition, beyond S.S.'s testimony, the government introduced evidence that corroborated her story. For example, law enforcement officials testified that Begay avoided them when they arrived at S.S.'s house. (ECF Nos. 172–76 ("Tr. Trans.") at 148.) Numerous photographs were admitted depicting injuries on S.S.'s body, which she attributed to Begay. (*Id.* at 554–58; *see also* Gov't Exs. 14L, 14M, 14V, 14AA, 14CC, 14DD.) And a forensic scientist from the Minnesota Bureau of Criminal Apprehension testified that Begay's Y-chromosomal DNA profile was found on the vaginal, perineal, and rectal area swabs taken from S.S.'s body. (Tr. Trans. at 479–82.) The jury heard and saw ample evidence to find Begay guilty beyond a reasonable doubt on Counts 1, 4, 5, and 8.

II. Begay's Motion for a New Trial

Begay also moves for a new trial. Under Rule 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Unlike a motion for an acquittal, "the court has broad discretion in deciding motions for new trial" and "is permitted to weigh the evidence and evaluate the credibility of the witnesses." *Hassan*, 844 F.3d at 725–26. Still, "motions for new trials based on the weight of the evidence generally are disfavored, and [a] district court's

authority to grant a new trial should rarely be exercised." *Id.* at 726. "[A] new trial motion based on insufficiency of the evidence is to be granted only if the weight of the evidence is heavy enough in favor of acquittal that a guilty verdict may have been a miscarriage of justice." *United States v. Camacho*, 555 F.3d 695, 705 (8th Cir. 2009).

Begay contends that he should receive a new trial for four reasons. He argues that the Court erred when it (A) ruled that S.S.'s statements to her mother after the incident were excited utterances, (B) allowed the government to introduce S.S.'s prior consistent hearsay statements, (C) allowed the government to introduce improper expert testimony, and (D) did not allow Begay to impeach S.S. for truthfulness with her inconsistent statements to law enforcement about her other sexual activity within days of the alleged incident. The Court addresses each argument in turn.

A. S.S.'s Excited Utterances

Under Rule 803(2) of the Federal Rules of Evidence, statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" are excepted from the hearsay rule. Fed. R. Evid. 803(2). "The rationale behind this particular exception derives from the teaching of experience that the stress of nervous excitement or physical shock stills the reflective faculties, thus removing an impediment to truthfulness." *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 817 (8th Cir. 2010) (quotation marks and citation omitted). For the exception to apply, "the declarant's condition at the time of making the statement must be such that the statement

was spontaneous, excited or impulsive rather than the product of reflection or deliberation." *Id.* (quotation marks and citation omitted). Put another way, the statement must be "made under the stress of excitement caused by" a "truly startling event." *Id.* at 817–18.

To establish whether someone was under the stress of excitement, courts consider several factors: (1) "the lapse of time between the startling event and the statement," (2) "whether the statement was made in response to an inquiry," (3) "the age of the declarant," (4) "the physical and mental condition of the declarant," (5) "the characteristics of the event," and (6) "the subject matter of the statement." *Id.* at 818 (citation omitted). "None of these factors is dispositive, and some of the factors may not be relevant in every case." *United States v. Graves*, 756 F.3d 602, 605 (8th Cir. 2014).

Approximately 30 minutes after the alleged rape, S.S. told her mother, Robyn Isham, about the incident. Begay argues that S.S. was not under the stress of excitement, that 30 minutes is too long for a statement to be an excited utterance, and that S.S.'s statements were not "spontaneous, excited or impulsive." (ECF No. 162 at 9.) The government asserts that there was not a 30-minute gap—S.S. testified that she "blaz[ed] to her mother's house, which was "two or three miles down the road," and that she stopped at her father's grave for "not even five minutes" before speaking with her mother. (ECF No. 166 at 14.) Even so, the government contends, the statements' circumstances suggest that S.S. was under substantial stress.

"[T]he lapse of time between the startling event and the statement is not always dispositive in determining whether testimony should be admitted under the excited utterance exception." *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999). It is true that 30 minutes is "seemingly long for the typical application of the excited utterance exception." *Graves*, 756 F.3d at 605–06. But such statements may still be admissible. In *Graves*, for example, a 30-minute time lapse was not so long when the declarant was shaking and crying in response to a "general inquiry" into what happened. *Id.* The Eighth Circuit has held that statements made between 45 minutes and 1 hour 15 minutes after an assault may even qualify as an excited utterance. *Id.* (citing *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980)).

Even assuming that 30 minutes elapsed between the incident and S.S.'s statements to Isham, the statements still fall within the Rule 803(2) exception. As in *Graves*, Isham testified that S.S. was "uncontrollably crying" when she responded to a general question about what had happened. (Tr. Trans. at 205.) Isham said that she had never seen her daughter react this way, not even when S.S.'s father died. (*Id.* at 207.) And she explained that when S.S. "was crying that day, it was like a hurt cry. I don't know if you can understand the difference of being sorrow and hurt, but I knew something had happened, and I finally got her to tell me what happened." (*Id.*) S.S.'s statements were excited utterances, and the Court properly admitted them.

B. S.S.'s Prior Consistent Hearsay Statements

The Court permitted the government to introduce S.S.'s prior consistent hearsay statements to law enforcement. (Tr. Trans. at 664–66.) Begay's counsel repeatedly impeached S.S. on cross-examination about inconsistencies in her testimony, casting doubt on her credibility. Then on redirect, government asked S.S. whether she "repeatedly told law enforcement that Mr. Begay raped" her on the day of the incident. (*Id.* at 667.) She affirmed that she did. (*Id.*) Under Rule 801(d)(1)(B), prior hearsay statements that are "consistent with the declarant's testimony" and offered either to (i) "rebut an express or implied charge that the declarant recently fabricated it," or (ii) "to rehabilitate the declarant's credibility as a witness when attacked on another ground," are admissible.

Begay contends that subsection (i) does not apply; the government appears to agree and argues instead the statements are admissible under subsection (ii). Subsection (ii) was added to Rule 801 in 2014, and it "allows for the substantive use of prior consistent statements that are probative for rehabilitative purposes other than those specifically enumerated in subsection (i)." *United States v. Purcell*, 967 F.3d 159, 196 (2d Cir. 2020). "The intent of the amendment [wa]s to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charge[] of inconsistency . . . ." Fed. R. Evid. 801 advisory committee's note to 2014 amendment. A large portion of Begay's cross-examination of S.S. attacked her credibility by impeaching

her with inconsistencies. Under Rule 801(d)(1)(B)(ii), the government could ask S.S. on re-direct examination about her prior consistent statements to "rebut" those attacks. *Id.* The Court concludes that S.S.'s statements were properly admitted.

C. Lovette Robinson's Expert Testimony

Begay called Lovette Robinson, a SANE examination expert, to the stand. On cross-examination, the government asked Robinson about the Department of Justice's best practices on psychological evidence. (Tr. Trans. at 821–24.) Begay objected, arguing that his witness is not a rape-trauma expert. (*Id.* at 824.) The Court allowed the questions. (*Id.*) Begay maintains that the Court erred when it admitted the statements because insufficient foundation established that the best practices were within her expertise.

The Court disagrees for two reasons. First, Begay opened the door to discussing the DOJ's best practices. *United States v. Beason*, 220 F.3d 964, 968 (8th Cir. 2000) ("It is fundamental that where the defendant 'opened the door' and 'invited error' there can be no reversible error." (citation omitted)). On direct examination, when establishing Robinson as an expert, Begay's counsel asked Robinson whether the DOJ publishes best practices, their purpose, and whether they are widely published within the SANE examination community. (Tr. Trans. at 757.) Robinson explained that she is aware of the best practices, they aim to ensure that SANE examinations are conducted consistently, and that they are widely published within the community. (*Id.*) Robinson also explained that she trains her supervisees on the best practices as well. (*Id.*) Second, based on that

colloquy and Robinson's answers to the government's questions during cross-examination, Robinson was qualified to discuss the DOJ's best practices on sexual-assault victims' trauma. (*Id.* at 757–58, 821–24.)

D. Rule 412 and the Confrontation Clause

Last, Begay argues that the Court erred when it denied his pretrial motion in limine requesting to impeach S.S. on her contradictory statements to law enforcement and others about her other sexual partners near the time of the incident. (*See* ECF No. 139 at 10–14, 23.) Under Rule 412, the Court ruled that Begay may ask about S.S.'s prior sexual history to show that someone else was the source of biological material or physical injuries, but not to impeach S.S.'s truthfulness. (*Id.*) Begay maintains that the Court's pretrial ruling violated his Confrontation Clause rights.

To begin, the government argues that Begay waived this argument during trial. The Court disagrees. Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Begay requested the Court's permission to ask about S.S.'s prior sexual history at trial. (Tr. Trans. at 679.) He asserted that he had the right to impeach S.S. with her prior inconsistent statements, and the Court denied his request. (*Id.* at 680–81.) Begay then asked the Court the following question: "[I]f I were to ask [S.S.], [a]t around the time of July 3rd, you're also having sexual relations with Justin Smith, and she were to say no, could I then ask her, [d]idn't you tell the FBI that around this time, you were having sexual relations with Justin Smith?" (*Id.*

at 681.) As the Court stated during trial, that is a different issue than impeaching S.S. with contradictions between her responses on the SANE examination and statements to law enforcement. Begay stated that he would raise the issue about Smith "if we get to that issue." (*Id.*) The issue was never reached because Begay's counsel did not ask S.S. about her other sexual partners at all, though under the Court's ruling, they could have. (ECF No. 139.) That is not an intentional relinquishment by Begay of his asserted right to impeach S.S. about her contradictory statements during the SANE examination and to law enforcement.

As for the merits of the Court's pretrial ruling, the Eighth Circuit is clear that "impeaching a witness's character for truthfulness is not a recognized exception to Rule 412's general prohibition on evidence of sexual history." *United States v. Tail*, 459 F.3d 854, 860 (8th Cir. 2006); *see also United States v. Withorn*, 204 F.3d 790, 795 (8th Cir. 2000) ("[I]mpeaching the victim's truthfulness and showing her capability to fabricate a story are not recognized exceptions to Rule 412." (quotation marks and citation omitted)). The rule makes sense: a "victim's statement about unrelated sexual intercourse [has] little or no probative value on the question of whether she falsely accused [the defendant] of rape." *United States v. White Buffalo*, 84 F.3d 1052, 1054 (8th Cir. 1996). Excluding contradictory evidence about a victim's other sexual partners for truthfulness purposes does not deprive a defendant of a constitutional right. *Id.*

Begay cites *United States v. Barnes*, 798 F.2d 283 (8th Cir. 1986), to argue otherwise. *Barnes* is distinguishable for two reasons: first, it did not involve a victim's sexual history, so Rule 412 did not apply; second, the Court did not cut off "*all* inquiry" into Begay's ability to cross-examine S.S. about her other sexual partners or truthfulness. *Id.* at 289–90 (citation omitted). Rather, the Court expressly permitted Begay to ask about S.S.'s sexual history to show that someone else was the source of biological material or physical injuries. (ECF No. 139 at 14.) And Begay was of course permitted to impeach S.S. with inconsistencies in her allegations against Begay that were unrelated to her other sexual partners around the incident.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, Begay's Renewed Motion for Judgment of Acquittal and Motion for New Trial (ECF No. 161) is DENIED.

Dated: November 10, 2022

BY THE COURT:

s/Nancy E. Brasel
Nancy E. Brasel
United States District Judge

UNITED STATES DISTRICT COURT

District of Minnesota

UNITED STATES OF AMERICA

v.

DESCART AUSTIN BEGAY, JR

JUDGMENT IN A CRIMINAL CASE

Case Number: **21-CR-119-NEB-LIB (1)**
USM Number: **47572-509**
Michael E Rowe and John Marti
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 counts 1s, 4, 5 and 8 of the Superseding Indictment after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:2241(a)(1), 1151, and 1153(a) AGGRAVATED SEXUAL ABUSE	07/03/2020	1s
18:2241(a)(1), 1151, and 1153(a) AGGRAVATED SEXUAL ABUSE	07/03/2020	4
18:2242(1), 1151, and 1153(a) SEXUAL ABUSE	07/03/2020	5
18:2242(1), 1151, and 1153(a) SEXUAL ABUSE	07/03/2020	8

The defendant is sentenced as provided in pages 2 through 5 of 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.

☒ $400.00 Special Assessment is due and payable immediately.

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.

April 4, 2023
Date of Imposition of Judgment

s/Nancy E. Brasel
Signature of Judge

NANCY E. BRASEL
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

April 10, 2023
Date

DEFENDANT: DESCART AUSTIN BEGAY, JR
CASE NUMBER: 21-CR-119-NEB-LIB (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: 200 months as to count 1s, 4, 5 and 8 of the Superseding Indictment. Terms to run concurrent.

☒ The court makes the following recommendations to the Bureau of Prisons: The Defendant shall be placed in a BOP facility as close to the Red Lake Reservation as possible so he can be near his family. Defendant shall participate in the Residential Drug and Alcohol Program.

☒ 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 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 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

DEFENDANT: DESCART AUSTIN BEGAY, JR
CASE NUMBER: 21-CR-119-NEB-LIB (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years on Counts 1s, 4, 5 and 8. Terms to run concurrent.**

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 which 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*)

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

DEFENDANT: DESCART AUSTIN BEGAY, JR
CASE NUMBER: 21-CR-119-NEB-LIB (1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, 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 your 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 you must 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 your 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 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 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.
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 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.

U.S. Probation Office 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 _____

Probation Officer's Signature _____ Date _____

DEFENDANT: DESCART AUSTIN BEGAY, JR
CASE NUMBER: 21-CR-119-NEB-LIB (1)

SPECIAL CONDITIONS OF SUPERVISION

a. The defendant shall abstain from the use of alcohol and other intoxicants and not frequent establishments whose primary business is the sale of alcoholic beverages.

b. The defendant shall complete an immediate assessment and/or participate in a program for substance abuse as approved by the probation officer. That program may include testing and inpatient or outpatient treatment, counseling, or a support group.

c. The defendant shall submit his person, residence, office, vehicle, or an area under the defendant's control to a search conducted by a United States Probation Officer or supervised designee, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a supervision violation. The defendant shall warn any other residents or third parties that the premises and areas under the defendant's control may be subject to searches pursuant to this condition.

d. The defendant shall participate in sex offender and/or mental health treatment as approved by the probation officer and shall submit to risk assessment which may include but is not limited to physiological testing and polygraph/truth verification testing. Polygraph testing may be used following completion of primary treatment as directed by the probation officer to monitor adherence to the goals and objectives of treatment. Sex offender assessments and treatment are to be conducted by a therapist approved in advance by the probation office.

e. The defendant shall have no contact with the victim (including letters, communication devices, audio, or visual devices, visits, or any contact through a third party) without prior consent of the probation officer.

f. If not employed at a regular lawful occupation, as deemed appropriate by the probation officer, the defendant may be required to perform up to 20 hours of community service per week until employed. The defendant must also participate in training, counseling, daily job search, or other employment-related activities, as directed by the probation officer.

g. The defendant shall participate in educational programming as approved by the probation officer to obtain a high school diploma or General Equivalency Diploma.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1830

United States of America

Appellee

v.

Descart Austin Begay, Jr.

Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:21-cr-00119-NEB-1)

ORDER

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

October 15, 2024

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

/s/ Maureen W. Gornik