NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID LEROY EARLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Scott A. Graham
Federal Public Defender

/s/ Stuart W. Southerland
Stuart W. Southerland
Assistant Federal Public Defender
Counsel of Record
112 N. 7th Street
Muskogee, Oklahoma 74403
(918) 687-2430

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA
v.
DAVID LEROY EARLS

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-21-00136-001-RAW

USM Number: 40876-509

Richard Koller & Stuart Southerland, AFPDs
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(s) 1, 2 & 3 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
18:2242(2)(A), 2246(2)(A), 1151 & 1153	Sexual Abuse in Indian Country	February 11, 2020	1
18:2242(2)(A), 2246(2)(C), 1151 & 1153	Sexual Abuse in Indian Country	February 11, 2020	2
18:2242(2)(A), 2246(2)(B), 1151 & 1153	Sexual Abuse in Indian Country	February 11, 2020	3

The defendant is sentenced as provided in pages 2 through 7 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.

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.

October 5, 2022
Date of Imposition of Judgment

Ronald A. White
United States District Judge
Eastern District of Oklahoma

October 6, 2022
Date

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

140 months on each of Counts 1, 2 & 3 of the Indictment. The terms of imprisonment imposed on each count shall be served concurrently with one another.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at FCI Texarkana.

The Court shall be informed in writing as soon as possible if the Bureau of Prisons is unable to follow the Court's recommendations, along with the reasons for not following such recommendations made by the Court.

☒ 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

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
5 years on each of Counts 1, 2 & 3 of the Indictment. The terms of supervised release imposed on each count shall run concurrently with one another.

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, not to exceed eight (8) drug tests per month.
   ☐ 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.

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

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, after obtaining Court approval, 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 _____

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration and Notification Act, or any applicable state registration law.

2. The defendant shall attend and participate in a mental health treatment program and/or sex offender treatment program as approved and directed by the Probation Officer. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing to determine if you are in compliance with the conditions of release. The defendant may be required to contribute to the cost of services rendered in an amount to be determined by the probation officer, based on the defendant's ability to pay. Any refusal to submit to assessment or tests as scheduled is a violation of the conditions of supervision.

3. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of probation/supervised release. Failure to submit to a search may be grounds for revocation.

4. The defendant shall participate in a program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if he has reverted to the use of drugs or alcohol and may include outpatient treatment.

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ 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 restitution and a fine 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 ☐ fine ☐ restitution.

☐ the interest requirement for ☐ 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.

DEFENDANT: David Leroy Earls
CASE NUMBER: CR-21-00136-001-RAW

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 $ _____ 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 60 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:

Said special assessment of $300 shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402, and is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	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.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR-21-136-RAW**
	)	
DAVID LEROY EARLS,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Defendant, David Leroy Earls, appeals to the United States Court of Appeals for the Tenth Circuit from the final Judgment in a Criminal Case (Dkt. No. 120) which was entered on the docket and filed on October 6, 2022.

Date: October 18, 2022

Respectfully submitted,

s/ *Stuart W. Southerland*
Stuart W. Southerland
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Research and Writing Specialist
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(918) 687-2430
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant: Sarah McAmis, counsel for Plaintiff.

s/ *Stuart W. Southerland*
Stuart W. Southerland

CLERK'S CERTIFICATE

I, BONNIE HACKLER, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the foregoing pages are copies of original pleadings, orders, papers and transcripts of the court reporter, in a case lately pending in this court, wherein

UNITED STATES OF AMERICA	)	
	)	
	)	
Appellee	)	
	)	USDC No. 6:21-CR-00136-RAW-1
	)	
vs.	)	
	)	USCA No. 22-7051
	)	
DAVID LEROY EARLS	)	
	)	
	)	
Appellant	)	
	)	

IN TESTIMONY to the above, I do hereunto sign my name and affix the seal of the Court at Muskogee, Oklahoma.

DATED: 01/05/2023

BONNIE HACKLER, CLERK

By: /A. Winkle
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

February 21, 2025

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID LEROY EARLS, Defendant - Appellant.	No. 22-7051

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00136-RAW-1)

Stuart W. Southerland, Research and Writing Specialist (Scott A. Graham, Interim Public Defender, and Richard Koller, Assistant Federal Public Defender, with him on the briefs) Office of the Federal Public Defender, Eastern District of Oklahoma, Muskogee, Oklahoma, for Defendant-Appellant David Leroy Earls.

Lauren S. Zurier, Special Assistant United States Attorney (Christopher J. Wilson, United States Attorney, and Linda A. Epperley, Assistant United States Attorney, with her on the brief) Muskogee, Oklahoma, for Plaintiff-Appellee United States of America.

Before **HARTZ**, **EBEL**, and **CARSON**, Circuit Judges.

EBEL, Circuit Judge.

A jury convicted Defendant David Leroy Earls on three counts of "engag[ing] in a sex act with [a] person . . . incapable of appraising the nature of the conduct," 18 U.S.C. § 2242(2)(A)—the eighteen-year-old intellectually disabled daughter of Earls' long-time girlfriend. In this direct criminal appeal, Earls challenges his convictions and the resulting 140-month prison sentence. Because Earls admitted to having sex with the victim, C.P., the primary questions for the jury at trial were whether C.P. was "incapable of appraising the nature of the conduct" between her and Earls and, if so, whether Earls knew of C.P.'s incapacity. The jury resolved both of those fact questions against Earls. On appeal, he argues that there was insufficient evidence for a reasonable jury to make either of those findings beyond a reasonable doubt. We disagree. We also reject several alleged trial errors that Earls asserts and, therefore, uphold his convictions. The Government, however, correctly concedes that the district court erred in calculating Earls' sentence. Thus, having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we AFFIRM Earls' three convictions but REMAND this case to the district court with instructions to vacate Earls' sentence and to resentence him consistent with this opinion.

I. BACKGROUND

Viewed in the light most favorable to the Government, see United States v. Stepp, 89 F.4th 826, 831–32 (10th Cir. 2023), the evidence presented at trial indicated the following: Thirty-five-year old Earls, an enrolled member of the Cherokee Nation, lived with his girlfriend, Gayla, in a home located within the exterior boundaries of the Cherokee Indian Reservation. Gayla's daughter, C.P., as well as

several other family members, also lived in the home. C.P. has a mild to moderate intellectual disability and suffers from, among other things, schizophrenia affective disorder and bipolar disorder with psychotic features. C.P.'s great grandmother, Barbara, who lived in the same house, was C.P.'s guardian until C.P. turned eighteen.

Earls had lived with Gayla since C.P. was approximately seven years old. At about the time that C.P. turned eighteen, Earls began inviting her to play "sex games" with him. (I R. 334.) These "sex games" would occur in Earls' attic bedroom after C.P.'s mother went to sleep. Earls admitted having sex with C.P. several times.

On that basis, a federal grand jury indicted Earls on three counts of violating 18 U.S.C. § 2242(2)(A), which prohibits "knowingly . . . engag[ing] in a sexual act with another person if that other person is . . . incapable of appraising the nature of the conduct."[1] Each of the three counts charged a different sex act: Count 1 charged

[1] 18 U.S.C. § 2242, entitled "Sexual abuse," states in relevant part:

> Whoever, in the special maritime and territorial jurisdiction of the United States . . . , knowingly--
>
> . . . .
>
> **(2)** engages in a sexual act with another person if that other person is--
>
> **(A)** incapable of appraising the nature of the conduct;
>
> . . . .
>
> or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

"penetration, however slight, between the penis and vulva of C.P."; Count 2 charged "penetration, however slight, of the genital opening, by finger with the intent to abuse, humiliate, harass, degrade, arouse, and gratify the sexual desire of any person, of C.P."; and Count 3 charged "contact between the mouth of the defendant and the vulva of C.P." (I R. 14–15.) The indictment further alleged that Earls was an "Indian" and that each of these three offenses occurred "in Indian Country," "[b]eginning on or about January 1, 2019[,] and continuing until on or about February 11, 2020." (Id.)

Because Earls admitted having sex with C.P., the primary fact questions at trial were whether C.P. was "incapable of appraising the nature of the conduct" between her and Earls and, if so, whether Earls knew of C.P.'s incapacity. The Government presented the following evidence: Helen Dudley, C.P.'s great aunt, testified that a state court had appointed Dudley and her husband to be C.P.'s guardians after the events at issue in this case occurred. The state court determined that the guardianship was necessary because C.P.

> is impaired by reason of reduced intellectual abilities, Schizophrenia Affective Disorder, bipolar with psychotic features and Hypothyroidism and that this impairment results in her inability to receive and evaluate information effectively, meet the essential requirements for her physical health and safety and in her inability to manage her financial resources. She has been found disabled by Social Security Administration and she receives SSI benefits. [The Dudleys] are already the payee of her SSI benefits. [C.P.] is currently unable to properly handle her person, her property and her general affairs, without assistance.

(Supp. R. 1–2.)

Dudley also testified as follows about C.P.'s functional limitations: As a result of her intellectual disability and mental illnesses, C.P. will never be able to live independently. Regarding her mental illnesses, C.P. cannot be left alone for very long because she hears voices that tell her to kill herself. C.P. twice spent a week in a mental hospital after attacking relatives with weapons. Regarding her intellectual disability, C.P. "cannot absorb information like other people. She has to do [something] repetitively for a really long time for her to learn it." (I R. 238.) She is easily confused. C.P. has received Social Security disability payments since she was quite young. C.P. can use a microwave, but she has difficulty with microwaving instructions; she cannot cook on a stove; is unable to make Kool-Aid; can do simple chores but only when prompted; has no concept of time and lacks the hand-eye coordination to drive or use a riding mower. C.P can do second-grade math and reads at a fifth-grade level. She plays with eight- and ten-year-old children as peers. C.P. is a "follower," and "just wants to make people happy." (I R. 237.) "[I]f she wants someone to be her friend, she will either give them stuff or she will do whatever they ask her to do." (Id.)

The Government also presented testimony from three experts. Dr. Kathleen Ward, Ph.D., a clinical psychologist, testified about assessments she conducted of C.P. in 2015 and again in 2019. In 2015, when she was approximately fourteen, C.P. scored 50 on the Wechsler IQ test; in 2019, she scored 59. "[A] score of 50 or a 55 is extremely low," indicative of moderate intellectual disability (I R. 280), while 59 indicates mild intellectual disability. Both scores placed C.P. in the lowest one

percentile of the population as a whole. In both 2015 and 2019, C.P.'s "adaptive behavior" test scores—which measure a person's "[d]ay-to-day living skills, judgment, problem solving, communication, coping skills, habilitation skills, bathing, dressing, laundry, cooking" (I R. 287)—were "[v]ery low" (I R. 283), again in the lowest one percentile of the population.

Dr. Ward's 2015 and 2019 written evaluations were admitted into evidence. In addition to corroborating Dr. Ward's testimony about C.P.'s intellectual disability, the written evaluations indicated that C.P. has "difficulties in reality testing" (Supp. R. 9, 18) and,

> [t]hough she appears "present" and connected when in momentary conversation, she appears to "drift" and seems, at times, to be responding to internal stimuli. . . . She makes alarming claims that do not have the ring of authenticity, as the details ebb and flow and grow as she appears to become emotionally invested in them.

(Id. at 13.) In 2019, Dr. Ward opined that C.P. "has a significant developmental delay and her social demeanor has a vacancy, a disconnect that is not fully explained by cognitive impairment. . . . Her spontaneous writing . . . suggests difficulties in reality testing and severe emotional dysregulation." (Id. at 18.)

The second Government expert, Jerry Dawn Dennis, a licensed professional counselor, testified that she counseled C.P. for approximately three years, beginning in 2009, when C.P.'s school referred then nine-year-old C.P for counselling because of problems she was having in the classroom. Dennis counselled C.P. at that time for social skills, confidence, self-esteem, and depression. Dennis began counselling C.P. again, in March 2020, after the charged sexual conduct between C.P. and Earls had

occurred, to "overcome the trauma" "following a rape" involving Earls. (I R. 304.) Dennis opined that C.P. would not be able to function without supervision and that she is easily manipulated. Dennis further testified that C.P.'s development and ability to care for herself had not improved during the ten years that Dennis, off and on, had counselled her.

The third expert to testify was Cynthia Sanford, a nurse practitioner trained to perform sexual assault nurse examinations ("SANEs"). As discussed below, Earls challenges her testimony in this appeal. Nurse Sanford testified about the February 11, 2020, SANE she conducted on C.P., after her sexual relationship with Earls came to light. SANEs generally involve physically examining and interviewing an alleged sexual abuse victim. Nurse Sanford testified that, although C.P. was chronologically eighteen years old, her answers to the nurse's questions and her demeanor were more like that of a child of ten to twelve years of age. C.P. told Nurse Sanford about playing "sex games" with Earls in his attic bedroom. (I R. 334.) According to C.P., this happened "a lot." (I R. 336.) C.P. further told Nurse Sanford that C.P. was afraid of Earls because "he had told her he had friends that would kill her" and that, one time when Earls came into C.P.'s bedroom, she pretended to be asleep because "she was afraid he would have a weapon"; "she had seen him pull a knife before." (I R. 335.) Nurse Sanford's physical examination corroborated that C.P. had been penetrated vaginally.

Sheriff's Deputy Lori Chips Bray testified about interviewing Earls concerning his sexual relationship with C.P. In addition, a videorecording of that interview was

admitted into evidence. During that interview, Earls admitted having sex with C.P. twice after she turned eighteen. Earls stated that C.P. constantly badgered him to have sex with her. He acknowledged that C.P. had a mental disability but asserted that she is smart, even brilliant at times; yet on other days she withdraws into her own world.

Finally, C.P. testified. She testified as follows: She was able to identify the body parts involved in sex and to use those body parts to describe the "sex games" Earls played with her. According to C.P., Earls told her not to tell her great grandmother Barbara about the sex games so they would not get into trouble, but C.P. could not remember what kind of trouble that might be. C.P. also testified that she did not know what "sex is," she "keep[s] forgetting what that means," and that her Aunt Gina "usually explains to me what sex means." (I R. 407–08.) But C.P. knew that sex could result in pregnancy, which was when a woman has a baby in her uterus, and that she herself could not get pregnant because she had a birth control patch on her arm.

Earls did not testify or present any evidence. A jury convicted him of all three charged offenses. The district court sentenced Earls to 140 months in prison on each count, to run concurrently.

II. DISCUSSION

A. There was sufficient evidence to support Earls' convictions

The trial court instructed jurors that, to convict Earls of each of the charged sexual abuse offenses, they had to find beyond a reasonable doubt, among other things, the following elements:

> **First:** beginning on or about January 1, 2019, and continuing until on or about February 11, 2020, the defendant knowingly caused C.P. to engage in a sexual act, as defined for each count below;
>
> **Second:** C.P. is a person who is incapable of appraising the nature of sexual conduct;
>
> **Third:** at the time of the sexual act, the defendant knew that C.P. was incapable of appraising the nature of sexual conduct;
>
> **Fourth:** the defendant is a recognized member of an Indian tribe; and
>
> **Fifth:** the sexual act took place within the Eastern District of Oklahoma, in Indian country, which is within the territorial jurisdiction of the United States.

(I R. 198–99.[2]) On appeal, Earls asserts there was insufficient evidence from which the jury could have found the second and third elements beyond a reasonable doubt.

1. Standard of review

> We review the sufficiency of the evidence to support a conviction de novo to "determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt." United States v. Gordon, 710 F.3d 1124, 1141 (10th Cir. 2013). In conducting this review, "we consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses." United States v. Griffith, 928 F.3d 855, 868–69 (10th Cir. 2019) (quotation marks omitted). Thus, our review is limited and deferential; "we may reverse only if no rational trier of fact could have found the essential

[2] Earls does not challenge this instruction and neither party requested a different one.

> elements of the crime beyond a reasonable doubt." Id. at 869 (quotation marks omitted).

Stepp, 89 F.4th at 831–32.

2. There was sufficient evidence for a rational jury to find beyond a reasonable doubt that C.P. was incapable of appraising the nature of the sexual conduct between her and Earls

Whether C.P. was incapable of appraising the nature of the charged sexual conduct between her and Earls is a fact question. See United States v. Freeman, 70 F.4th 1265, 1279 (10th Cir. 2023). "Appraising" means "to judge and analyze the . . . significance" of something. Webster's Third New Int'l Dictionary (1986); see also https://www.merriamwebster.com/dictionary/appraise (last visited Feb. 5, 2025). To appraise—that is, to judge and analyze the significance of—the nature of the charged sexual conduct requires more than simply being able to describe the physical act of sex. It also requires, for example, the ability to judge and analyze the consequences of the sexual conduct on the victim, to be sure, but also upon the human environment surrounding the victim which will have an impact upon the victim.

There was evidence that C.P. could recite some of the possible consequences of the sexual conduct: that it could result in pregnancy, pregnancy was when a woman had a baby in her uterus, and that she herself could not get pregnant because she had a birth control patch. But there was also evidence that C.P. was unable to judge and analyze other consequences, including the likely objectionable, or disruptive, nature of the charged sexual conduct to C.P.'s personal life and her

surrounding family and community.[3] This does not suggest, however, that jurors make religious or moral judgments about the charged conduct, deciding when it is religiously or morally right or wrong for a person to have sex and with whom. In that regard, we agree with Earls that § 2242(2)(A) does not commission juries to make a moral judgment about whether he should have had sex with C.P.[4]

Deciding whether a person is unable to judge and analyze the "nature" of the charged sexual conduct, however, must include consideration of the context in which that conduct occurred. Here, that context required the jury to determine whether C.P. was incapable of appraising the consequences and disruptive impact to her family and community of having sex with her mother's long-term live-in boyfriend Earls. There was evidence from which a rational jury could find beyond a reasonable doubt that C.P. lacked this capacity. C.P. testified, in particular, that Earls told her not to tell her guardian at about that time—her great grandmother Barbara—because, if Barbara found out, Earls and C.P. would be in trouble. But C.P. did not know what trouble they would be in. The evidence of C.P.'s limited intellectual functioning and

[3] We agree with the district court that what the jury had to determine in this case was not whether C.P. can ever consent to sex, but instead whether she was "incapable of appraising the nature of the conduct" that occurred between her and Earls specifically.

[4] Cf. Model Penal Code § 213.1 commentary pp. 321–23 (1980) (rejecting requiring proof that victim lacked "the ability to comprehend the moral nature of the act" in favor of standard requiring proof that the person was "incapable of appraising the nature of her conduct"; "[b]y specifying that the woman must lack ability to assess the 'nature' of her conduct, the statute is intended to avoid questions of value judgment and of remote consequences of immediate acts").

adaptive behavior, as well as her trouble testing reality, bolstered C.P.'s testimony that she did not understand why she and Earls would be in trouble for playing sex games. Lastly, but importantly, the evidence before the jurors included their direct observation of C.P. during her testimony.

This evidence was sufficient for a rational jury to find beyond a reasonable doubt that C.P. was incapable of appraising the nature of the sexual conduct between her and Earls. See United States v. R.D.A., No. 97-5145, 1998 WL 480158, *1 (10th Cir. Aug. 7, 1998) (unpublished[5]) (upholding juvenile delinquent adjudication based on commission of § 2242(2)(A) offense committed against juvenile victim who "function[ed] mentally at a younger age than his physical age" and who "did not understand that there might be anything objectionable about defendant's contact"—anally sodomizing the victim).

As a general principle, we agree with Earls that § 2242(2)(A) "does not prohibit all intellectually disabled persons from having sex" (Aplt. Reply Br. 1). But, contrary to Earls' assertion, here there was much more evidence to support a finding that C.P. was incapable of appraising the nature of the conduct between her and Earls, including its impact on her community and its disruptive consequences, than simply C.P.'s low IQ. There was also evidence of C.P.'s low adaptive behavior scores and her mental illnesses which distort her perception of reality, as well as her testimony that she did not know why she and Earls could get in trouble if her family

[5] R.D.A. is unpublished and therefore nonbinding, but we find its reasoning persuasive.

members found out about their sex games. We conclude, therefore, that there was sufficient evidence presented at trial from which a rational jury could find beyond a reasonable doubt that C.P. was incapable of appraising the nature of the charged conduct between her and Earls.

3. There was also sufficient evidence for a rational jury to find beyond a reasonable doubt that Earls knew that C.P. was incapable of appraising the nature of the sexual conduct between them

18 U.S.C. § 2242(2)(A) makes it a federal crime "knowingly" to "engage[] in a sexual act with a person if that person is . . . incapable of appraising the nature of the conduct." Earls next asserts that there was insufficient evidence for a rational jury to find, beyond a reasonable doubt, that he knew that C.P. was "incapable of appraising the nature of the [sexual] conduct" between them. As an initial matter, this circuit has not previously "addressed whether the 'knowingly' mens rea" in § 2242(2)(A) "extends to knowledge of the victim's incapacity or only to knowledge that the defendant was engaging in a sexual act." United States v. A.S., 939 F.3d 1063, 1079 n.6 (10th Cir. 2019). We conclude that the "knowingly" mens rea requires proof that the defendant had knowledge of the victim's incapacity. See United States v. Fast Horse, 747 F.3d 1040, 1041 (8th Cir. 2014) (citing United States v. Bruguier, 735 F.3d 754, 757–63 (8th Cir. 2013) (en banc)).

Here, we have no trouble concluding that there was sufficient evidence from which a rational jury could find beyond a reasonable doubt that Earls knew that C.P. was "incapable of appraising the nature of the [sexual] conduct" between them. That evidence included testimony from C.P.'s current guardian, Helen Dudley, that C.P.'s

functional limitations are "obvious"; "[m]ost people can see it within about five minutes." (I R. 243.) The jury also observed C.P. testify. Earls had been around C.P. for more than ten years, since she was approximately seven years old, and Earls indicated that he interacted with C.P. when he was around her. He described, for example, C.P. following him around like a little puppy and he stated that, when he tried to teach her things, C.P. would take the attention he gave her the wrong way. Earls acknowledged in his recorded interview that C.P. had been diagnosed with mental disabilities, for which she received Social Security disability payments, and that sometimes C.P. withdraws into her own world. This evidence was sufficient to support a rational jury finding beyond a reasonable doubt that Earls knew that C.P. was "incapable of appraising the nature of the conduct" between them.

B. Earls' challenges to Nurse Practitioner Cynthia Sanford's expert testimony do not warrant relief

Earl challenges Nurse Practitioner Sanford's expert testimony in two ways. Neither warrants relief.

1. The district court did not abuse its discretion in declining to conduct a pretrial Daubert[6] hearing

Earls first contends that the district court abused its discretion in declining to conduct a pretrial Daubert hearing on "the reliability or methodology" of Nurse Sanford's "assessment of C.P.'s cognitive abilities." (Aplt. Br. 33.) As we explain, Earls never asked the district court to conduct a pretrial hearing on that specific issue

[6] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

and the court otherwise properly determined that a pretrial Daubert hearing was unnecessary.

a. Relevant law

Federal Rule of Evidence 702 addresses expert testimony and provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Thus, Rule "702 requires the district court to 'ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" Bill Barrett Corp. v. YMC Royalty Co., 918 F.3d 760, 770 (10th Cir. 2019) (per curiam) (quoting Daubert, 509 U.S. at 597).

> Under Rule 702, the court must first decide whether the proffered expert is qualified "by knowledge, skill, experience, training, or education" to render an opinion. See Fed. R. Evid. 702. Then "the court must determine whether the expert's opinion is reliable by assessing the underlying reasoning and methodology, as set forth in Daubert." United States v. Nacchio, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc). "Where an expert testifies based on experience, the tribunal reviews the reliability of the testimony with reference to 'the nature of the issue, the expert's

> particular expertise, and the subject of the testimony.'" F & H Coatings, LLC v. Acosta, 900 F.3d 1214, 1222 (10th Cir. 2018) (quoting Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 148–50 (1999)).

Id. at 770. Next, the court must decide whether the proffered expert's opinion is relevant; that is, whether it "will help the trier of fact to understand the evidence or to determine a fact in issue." Rule 702(a).

A district court is not required to hold a pretrial Daubert hearing in order to make these determinations that Rule 702 requires. See United States v. Mathews, 928 F.3d 968, 979 (10th Cir. 2019); Bill Barrett, 918 F.3d at 772; Nacchio, 555 F.3d at 1251, 1253–54. "[T]he manner in which the court conducts its Rule 702 analysis is left to the court's sound discretion." United States v. Chapman, 839 F.3d 1232, 1239 (10th Cir. 2016). However,

> [t]he court, when faced with a party's objection, must "adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." United States v. Avitia-Guillen, 680 F.3d 1253, 1256 (10th Cir. 2012). "This gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is scientifically valid and applicable to a particular set of facts." Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000).

Bill Barrett, 918 F.3d at 770. On the other hand, "[w]hen no objection is raised, district courts are not required to make explicit on-the-record rulings." Mathews, 928 F.3d at 979.

b. Relevant background

In this case, the Government notified Earls that it intended to present expert testimony from Nurse Sanford about the sexual assault nurse examination ("SANE")

she conducted with C.P. on February 20, 2020. The notice indicated that the Government expected Nurse Sanford to testify as to her experience and training in conducting SANEs, that SANEs generally rely on a victim's statements and a physical examination of the victim, and about the specific findings Nurse Sanford made as a result of the SANE she conducted on C.P. The Government did not indicate that Nurse Sanford would testify about C.P.'s cognitive abilities. The Government also provided the defense with a copy of Nurse Sanford's report based on her SANE with C.P.

Earls then filed a motion for a pretrial Daubert hearing on Nurse Sanford's expert testimony.[7] In his motion for a hearing, Earls argued, among other things, that to the extent that Nurse Sanford would testify that her physical exam revealed that C.P. had been sexually penetrated, that testimony would be irrelevant because there was no dispute that Earls and C.P. had had sex. Earls further argued that, while, in a child sexual abuse case, a qualified expert like Nurse Sanford can inform the jury of the general characteristics of sexually abused children, her testimony was not relevant here because this was "not a child sexual abuse case." (I R. 107.)

Rather, Earls asserted that the primary question at trial was whether C.P. was incapable of appraising the nature of the sexual conduct. But, Earls noted, Nurse

[7] Earls also filed a motion in limine seeking to exclude Nurse Sanford's testimony. He does not specifically challenge on appeal the district court's decision to deny that motion.

"Stanford [sic] performed no testing relevant to" that question.[8] (Id. at 108.) Furthermore, Earls was "unaware of any training that would qualify Cynthia Sanford as an expert who can render an opinion as to C.P.'s cognitive abilities." (Id.) Therefore, Earls argued that Nurse "Sanford should not be permitted to either repeat what C.P. told her during her examination or render a conclusion of 'confirmed sexual abuse' as diagnosed in her report." (Id.)

In opposing a pretrial Daubert hearing, the Government noted that such a hearing is not required; instead, "a judge may fulfill his gatekeeper obligation when asked to rule on an objection during trial so long as the court has sufficient evidence to perform the task of ensuring reliability and relevance." (I R. 128 (quotation omitted).)

The district court determined that a pretrial Daubert hearing on Nurse Sanford's proffered expert testimony was unnecessary. It ruled, in response to Earls' argument that Nurse "Sanford should not be permitted to . . . render a conclusion of 'confirmed sexual abuse' as diagnosed in her report" (I R. 108), that that argument was moot: "The Government . . . informs the court that Ms. Stanford [sic] will not . . . state an opinion as to rape" (I R. 175). The district court also ruled that "statements made by C.P. to Ms. Sanford during the SANE examination are admissible under Fed. R. Evid. 803(4)" and noted that the Government had indicated

[8] In his pretrial motion in limine seeking to exclude Nurse Sanford's testimony, Earls again stated that "Cynthia Stanford [sic] performed no testing relevant to the question of C.P.'s ability to appraise the nature of a sexual act." (I R. 99.) The record supports that statement.

"that Ms. Stanford [sic] will not vouch for C.P.'s credibility." (I R. 175–76.) Further, the court ruled that "Ms. Sanford's findings during the SANE examination are relevant to the issues the Government must prove," notwithstanding Earls' admission to having sex with C.P. (I R. 175.) Finally, the court held that Nurse Sanford's curriculum vitae "listing her education and experience is sufficient to show that her testimony regarding the SANE examination of C.P. has a reliable basis in the knowledge and experience of her discipline, and a Daubert hearing is not necessary." (I R. 176.)

c. The district court did not abuse its discretion in declining to conduct a pretrial Daubert hearing as unnecessary

The district court did not abuse its discretion in denying a pretrial Daubert hearing. On appeal, Earls asserts a number of arguments challenging that decision. Earls first contends that the district court should have conducted a pretrial Daubert hearing on "the reliability or methodology" of Nurse Sanford's "assessment of C.P.'s cognitive abilities." (Aplt. Br. 33.) But, as just explained, Earls never requested that the district court consider the reliability or methodology of any assessment Nurse Sanford may have made of C.P.'s cognitive abilities.[9] See Mathews, 928 F.3d at 979 (noting district court is not required to make findings when litigant does not make Daubert

[9] As just explained, Earls instead challenged the relevance of Nurse Sanford's proffered testimony, which challenge the district court expressly rejected. See Avitia-Guillen, 680 F.3d at 1257 ("Where a party objects only to an expert's qualifications, he does not preserve an objection to the expert's methodology.") The district court also addressed the reliability of Nurse Sanford's proffered testimony as to the SANE exam she conducted. Earls does not challenge those rulings on appeal.

argument). In fact, Earls specifically acknowledged in his pretrial motions that Nurse Sanford did not assess C.P.'s capability in appraising the nature of the conduct between her and Earls. Furthermore, there is no indication in the record that Nurse Sanford ever assessed C.P.'s cognitive abilities.[10]

Earls' theory, asserted for the first time on appeal, is that, because Nurse Sanford diagnosed "sex abuse," and because that is the title of the offenses with which the Government later charged Earls, and because those offenses require proof that C.P. was incapable of appraising the nature of the sexual conduct between her and Earls, therefore when Nurse Sanford diagnosed "sexual abuse," she must have implicitly found that C.P. was incapable of appraising the nature of the sexual conduct. The district court did not abuse its discretion in not conducting a pretrial Daubert hearing on this implicit finding that Earls only now attributes to Nurse Sanford. Earls did not request that the district court make that determination prior to trial and the record does not suggest that Nurse Sanford ever made such an assessment.

To the extent Earls sought a pretrial Daubert hearing to preclude Nurse Sanford from testifying that she diagnosed sexual abuse, the Government asserted in its pretrial pleadings that Nurse Sanford would not "state a diagnosis that the victim

[10] At trial, Nurse Sanford testified, without objection, that C.P.'s responses to the interview questions were more like those of a ten- to twelve-year-old than an eighteen-year-old. Earls never challenged that assessment in his pretrial motions. Nor did he raise that argument on appeal until his reply brief, which is too late. See Ctr. for Biological Diversity v. U.S. E.P.A., 82 F.4th 959, 969 n.8 (10th Cir. 2023) (declining to consider argument raised for the first time in reply brief).

was raped by the Defendant." (I R. 138.) The district court did not abuse its discretion in relying on that Government assertion to conclude a pretrial Daubert hearing was unnecessary on Nurse Sanford's "sexual abuse" diagnosis.[11]

The district court did not otherwise abuse its discretion in declining to conduct a pretrial Daubert hearing. The district court, in its pretrial order denying a hearing, deemed Nurse Sanford "qualified" to testify as to her SANE of C.P. based on Nurse Sanford's curriculum vitae ("C.V."): "The court . . . finds that Ms. Stanford's [sic] C.V. listing her education and experience is sufficient to show that her testimony regarding the SANE examination of C.P. has a reliable basis in the knowledge and experience of her discipline, and a Daubert hearing is not necessary." (I R. 176 (record citation omitted). On appeal, Earls does not challenge that ruling.

Instead, Earls argues on appeal that Nurse Sanford was not qualified to testify as to C.P.'s cognitive abilities. But Earls never requested a pretrial hearing on that issue and there is no indication in the record that Nurse Sanford ever assessed C.P.'s cognitive abilities.

The district court also deemed Nurse Sanford's testimony about the SANE she conducted with C.P. to be relevant to the issues before the jury. Earls does not challenge that determination on appeal.

[11] We reach this conclusion even though Earls' motion sought to preclude Nurse Sanford from testifying that she diagnosed sexual abuse, while the Government, in responding, and the trial court, in ruling, referenced a rape diagnosis instead. The record indicates that the parties and the court were addressing the same potential diagnosis testimony from Nurse Sanford.

Earls has not established, therefore, that the district court abused its discretion in declining to conduct a pretrial Daubert hearing. That decision, however, did not foreclose Earls from making objections at trial to Nurse Sanford's testimony: "A Daubert hearing is not specifically mandated and a judge may fulfill his gatekeeper obligation when asked to rule on an objection during trial . . . so long as the court has sufficient evidence to perform the task of ensuring reliability and relevance." Bill Barrett, 918 F.3d at 770 (internal quotation marks omitted). But at trial, Earls did not object to Nurse Sanford's testimony on the basis that she was offering an opinion as to C.P.'s cognitive abilities that was not reliable. The trial court sustained two defense objections to questions seeking Nurse Sanford's opinion as to whether C.P. was capable of making legal or medical decisions for herself.

2. The trial court did not plainly err in allowing Nurse Sanford to testify that she "diagnosed" C.P. as having been sexually abused

At trial, at the end of her direct examination, the prosecutor asked Nurse Sanford, "did you reach a diagnosis for C.P.? A. I did. Q. And did you diagnose her as the victim of sexual abuse/sexual assault? A. Yes." (I R. 344.) Defense counsel did not object. Earls challenges that testimony now on appeal. This court reviews that argument for plain error. See Mathews, 928 F.3d at 979; see also Fed. R. Crim. P. 52(b). To obtain relief under a plain-error analysis, Earls must establish "(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." United States v. Parson, 84 F.4th 930, 940 (10th Cir. 2023) (quoting United States v. Rosales-Miranda, 755 F.3d 1253, 1258 (10th Cir. 2014)), cert. denied, 144 S. Ct. 1125 (2024).[12]

Earls may have established plain error because the Government had responded pretrial that Nurse Sanford would not testify as to her "diagnosis" of "rape[]." (I R. 138.) Even if Earls has shown plain error, however, he has not shown that the error affected his substantial rights; that is, that there is a reasonable probability that, without Nurse Sanford's testimony that she diagnosed "sexual assault/sexual abuse," the jury would have acquitted Earls. (I R. 320.) See Parson, 84 F.4th at 940. Nurse Sanford's diagnosis of "sexual assault/sexual abuse" appears to have been predicated on her physical examination of C.P., which confirmed that C.P. had had sex, and perhaps on Nurse Sanford's unobjected-to testimony that C.P. said she was afraid of Earls. There was no dispute that C.P. and Earls had had sex and Earls does not challenge Nurse Sanford's testimony that C.P. said she was afraid of Earls. More to the point, there was no objection, at trial or now, about Counselor Dennis's testimony, earlier in the trial, twice referred to her counselling C.P. in an effort to help her recover from the trauma of being raped by Earls. Under these

[12] Earls argues that he made this argument in his pretrial motions sufficient to preserve the argument for abuse-of-discretion, instead of plain error, review. We disagree. The district court did not definitively rule on Earls' pretrial motions seeking to exclude Nurse Sanford's sexual abuse diagnosis. The court instead deemed that pretrial request to be moot based on the Government's assertion that it would not present testimony of Nurse Sanford's sexual abuse diagnosis. When the Government did present that testimony at trial, Earls did not object.

circumstances, any plain error in allowing Nurse Sanford to testify that she "diagnosed" "sexual assault/sexual abuse" does not warrant relief at either the third or the fourth step of the plain-error analysis.[13]

C. The prosecutor's closing argument

Earls next asserts that the prosecutor deprived him of due process by arguing to the jury, in the Government's rebuttal closing: "You are the 12 members of our community who have been picked to say whether it was right or wrong for him to put his penis in her and his fingers in her and his slobber on her vagina." (I R. 473.) The trial court overruled Earls' objection to that remark as a misstatement of law. On appeal, Earls contends that the prosecutor intended this comment to urge jurors improperly to ignore the law and instead to determine whether Earls' conduct was morally right or wrong.

Where, as here, the defendant objects and the court overrules the objection, this court reviews the prosecutor's challenged comment de novo. See United States v. Currie, 911 F.3d 1047, 1056 (10th Cir. 2018). "Prosecutorial misconduct violates a defendant's due process rights if it infects a trial with unfairness and denies the defendant the right to a fair trial." Id. at 1055. "The misconduct analysis proceeds in

[13] Earls also argues on appeal that, even if Nurse Sanford's challenged testimony was generally admissible, its probative value was outweighed by its unfair prejudice to Earls. (Aplt. Br. 42 (citing Fed. R. Evid. 403).) He did not make that argument at trial, however, and he does not make a plain-error analysis on appeal. See United States v. McGlothin, 705 F.3d 1254, 1260 (10th Cir. 2013) (reviewing for plain error Rule 403 argument raised for the first time on appeal). He has, therefore, waived this argument. See United States v. Sumka, 81 F.4th 1153, 1159 n.3 (10th Cir. 2023).

two steps: (1) we decide whether the prosecutor's comments were improper, and (2) if they were, we examine the likely effect of the comments on the jury's verdict." Id. The Government must demonstrate that any improper remark was harmless beyond a reasonable doubt. Id. at 1057.

Here, when read in light of the prosecutor's entire closing argument, the challenged comment was not improper. See generally id. at 1056 ("We examine alleged improper comments in context."). It was arguably ambiguous. Jurors may have understood the prosecutor's "right or wrong" comment to reiterate that, simply and accurately, it was their job to determine whether or not Earls had violated the law by having sex with C.P., instead of urging jurors to make a moral judgment as to the charged sexual conduct. See id. (stating that "courts 'should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning'" (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)); see also United States v. Woods, 764 F.3d 1242, 1247 (10th Cir. 2014).

Even if the prosecutor's remark was improper, however, it was harmless beyond a reasonable doubt. See Currie, 911 F.3d at 1057. The trial court instructed jurors generally that Earls was "not on trial for any act, conduct, or crime not charged in the indictment" (I R. 187), and that jurors "must not substitute or follow your own notion or opinion as to what the law is or ought to be" (I R. 184). The court further instructed jurors:

> You must make your decision based only on the evidence that you saw and heard here in court. . . .

> The evidence in this case includes only what the witnesses said when they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.
>
> Nothing else is evidence. The lawyers' statements and arguments are not evidence. . . .

(I R. 190.) See United States v. Anaya, 727 F.3d 1043, 1059 (10th Cir. 2013) (indicating that prosecutor's improper remark was harmless beyond a reasonable doubt where the court instructed jurors that attorneys' statements were not evidence (citing United States v. Rogers, 556 F.3d 1130, 1142–43 (10th Cir. 2009))). The trial court also instructed jurors exactly what elements they had to find beyond a reasonable doubt in order to convict Earls. "The jury is presumed to follow its instructions, even when there has been misleading argument." Currie, 911 F.3d at 1056 (quoting Bland v. Sirmons, 459 F.3d 999, 1015 (10th Cir. 2006)).

D. Sentencing error

Lastly, the Government correctly concedes that the district court erred in calculating Earls' advisory guideline sentencing range. The district court incorrectly added two criminal history points under U.S.S.G. § 4A1.1(d) (2021) for "committ[ing] the instant offense[s] while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." On appeal, the Government, after reviewing the record and Oklahoma precedent, concedes that "Earls was . . . no longer serving a criminal justice sentence during the time frame in which he assaulted the victim in this case." (Appellee

United States' Notice Regarding Confession of Error dated Nov. 14, 2023, at 2.) In light of this conceded sentencing error, we remand for resentencing.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Earls' convictions, but we REMAND this case to the district court with instructions to vacate Earls' sentence and to resentence him consistent with this opinion.

FILED
United States Court of Appeals
Tenth Circuit

April 7, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID LEROY EARLS,

Defendant - Appellant.

No. 22-7051
(D.C. No. 6:21-CR-00136-RAW-1)
(E.D. Okla.)

ORDER

Before **HARTZ**, **EBEL**, and **CARSON**, 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

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 30, 2025

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: David Leroy Earls
v. United States
Application No. 24A1290
(Your No. 22-7051)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on June 30, 2025, extended the time to and including August 5, 2025.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Sara Simmons
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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THE COURT: Okay. Thank you. Ms. McAmis. You-all divide up the case so well between yourselves, I never know who to call on. So forgive if I'm anticipating incorrectly.

MS. McAMIS: No, not at all. Your Honor, the argument that defense counsel makes in support of their motion that the -- C.P., the victim in this case, is -- apprises -- is capable of understanding the nature of sex is that she knows her --

THE COURT: Let me stop you right there. I'm sorry. What's the definition of appraise?

MS. McAMIS: Your Honor, I believe that that is ultimately for the -- for the jury to determine the question of fact.

THE COURT: Well, now, have we looked it up?

MS. McAMIS: I do not believe that it is defined in the jury instructions.

THE COURT: And that could be a problem. What does appraise mean? Throughout the pretrial of this case, the defense has always argued that it's not consent. And it's not. If you look up -- if you look up the word "appraise," it means --

MS. McAMIS: I agree. It's not consent. I agree with that.

THE COURT: If you look up the word "appraise,"

it's defined as to place some value upon.

MS. McAMIS: Uh-huh.

THE COURT: Okay. Now, if you have some contrary authority for me, I'd love to hear it, but -- and we also got to talk about the word "apprise" because apprise is not the same as appraise; correct?

MS. McAMIS: Correct.

THE COURT: Apprise means to notify. Did you know the indictment says "apprise"?

MS. McAMIS: I was unaware of that.

THE COURT: Now, I don't know if that makes a difference or not. Let's assume it doesn't, because it's just, I think, incorrect usage. But appraise is a different matter. Appraise is to put a value upon. It's not to consent. So how -- how has the government proven beyond a reasonable doubt, taking the evidence in the light most favorable to the government, that C.P. is unable to place a value upon the sexual conduct?

MS. McAMIS: Your Honor, I think the government has proven beyond a reasonable doubt that C.P. functions at the level of a child, that she has 59 IQ, which is in the bottom 1 percent of the entire population, and that her adaptive living skills are even lower than that. I think that the government has proven simply through the testimony of C.P., and the observations that the jury is able to make

of her, and the way that she responds, and the way that she answers, that is she is not someone who is capable of appraising or apprising the nature of sexual conduct.

I think when the comparisons were made that she is childlike and like a ten-year-old child in her mental capacity, Your Honor, you can absolutely teach a ten-year-old child or a five-year-old child the names for body parts, what sex is, that a man will put his penis in a vagina and a girl gets pregnant. You can teach all of those things to a child, but that doesn't mean that the child has the capability of then apprising or appraising the nature of the --

THE COURT: No, it's definitely appraising. That's what the statute says. It's definitely appraising. Okay. So that doesn't mean the child -- and I'm a little -- you're calling her child.

MS. McAMIS: No, I'm comparing the two situations because I'm saying when think about this victim -- and she is a grown adult. She is 20 years old. However, she has the mind of a child, and that's what the testimony has been. And so, therefore, I think you can make the comparison as to her intellectual capacity and her developmental level being that as of a child.

THE COURT: Okay. Well, when does one start to be able to appraise the nature of the sexual conduct? There

was no testimony as to that.

MS. McAMIS: Your Honor, the testimony was from Dr. Ward, I believe, that her intellectual capabilities and her life-skills capabilities will stay consistent, and that this is not a situation where she is going to be able to improve or become -- have a higher IQ, or to --

THE COURT: Okay. She won't improve, but does that mean she can't appraise the nature of the sexual conduct now? Because you haven't told me when she would be able to -- I mean, the question is had she obtained that level, and there's been no testimony that she has or hasn't because -- I mean, there's not some -- at 13 you cannot appraise -- well, that means to place some value upon. I'm completely lost. And perhaps because the statute is so broad, that's why I'm completely lost. And this isn't a criticism, but I think you're having a little trouble answering my questions too, and that maybe because they're confusing, but go ahead. I've rattled on long enough.

MS. McAMIS: Your Honor, I think that the government is reviewing this and would ask the Court to review this in the same way that the ultimate finder of fact would, that you can have circumstantial evidence, you can have direct evidence. And of all the evidence that has been presented, this is a physical adult who will never achieve greater than the childlike mind that she has, the 1 percent

of the population. And if this law was not designed to protect that 1 percent part of the population, then who on earth would it be designed to protect.

THE COURT: Well, I mean, it may be designed to do that, but that doesn't mean with statutory language it's accomplished its feat -- its feat -- its goals. You still haven't told me what appraise means. While it's fresh in your mind, I'll let you go ahead and -- after your consultation with Mr. Youll, go ahead and say before you forget, if there's something you want to add.

MS. McAMIS: Your Honor, I don't feel like the Court is satisfied with my answer to the first part of the question. However, again, the government would rely upon all of the evidence that has been presented, not only the fact that she is under a legal guardianship and has been found by a court of law -- there is specific language in that guardianship that talks about her inability to make appropriate decisions, her inability to -- I'm sorry. I don't have the language here in front of me, but I think you're familiar with it. We have had the testimony of the counselor who has treated her, we have had the testimony of the doctor who performed the IQ testing on her, and we've had the testimony of the guardian, and the jury has been able to see and assess for themselves as the ultimate triers of fact whether or not they believe the testimony from her

shows or demonstrates that she's a person who can or cannot appraise the nature of the sexual act.

THE COURT: Well, but I'm really asking more the meaning. I understand the evidence that's been put on. I've heard it all. And I think that taking the evidence in the light most favorable to the government, you may be able to prove something, but that something you're saying is covered by a statute that covers everything. I mean, we know a lot of people who cannot or -- appraise the nature of sexual conduct, appraising defined as to place a value upon -- who are perfectly adult with IQs of 120, 130, 140. How are we supposed to instruct the jury on what appraise means, because that's the key. To place a value upon. And I know there's lots of evidence that, well, she's childlike, or, you know, she doesn't have intellectual capabilities to fulfill certain activities of daily living. But in the area of sex, which she knows about, how do we know she can't place some value on that? I mean, what evidence has there been that she can't place some value on that?

MS. MCAMIS: Well, again, Your Honor, the government would assert that the evidence has been because she is so childlike and because she is so limited. And while Your Honor talks about different people of different ages being able to appraise or not appraise, I don't think anyone would put that ability upon the mind of a child.

And if -- the way I understand it, Your Honor is concerned about the breadth of the way that the statute is written. And while I appreciate Your Honor's concern, I also think that the way the statute is written is clear in that it is a subcategory of defining who is a victim of sexual assault, and it is defining -- you know, there's different categories that say by age, that say when you're intoxicated, that say, you know, the different age levels. And this is one of those that makes it clear that if the finder of find believes that she is too limited to engage in this activity, then she shouldn't be allowed to be taken advantage of the way that she was.

THE COURT: Okay.

MS. McAMIS: May I -- with respect -- I don't think you're satisfied with respect to the first question and that concerns me. But with respect to the second question, and counsel talking about what evidence did we have that this defendant knew that, I would state to the Court that this defendant lived with her for nine years. He knew she was under the purview of a legal guardianship. He knew she had been diagnosed with a mental disability, and he -- with all due respect, her guardian testified that within five minutes of meeting her, you can tell. He lived with her for nine years and knew that she was under these different guidelines.

THE COURT: All right. Thank you.

MR. KOLLER: Your Honor, may I have -- may I be able to address the Court just a little bit about a couple of things that Ms. McAmis spoke of?

THE COURT: Yes.

MR. KOLLER: First, I just wanted to mention, and it has been talked about a little bit or discussed, but this statute seems to address more so a situation where people are unconscious due to a level of intoxication, or maybe they have been drugged or something, and that's why they are unable to appraise the nature of the conduct.

As it relates to this particular situation, first of all, the statute doesn't really directly address intellectual disability. Counsel for the government continues to talk -- continues to state that all of her witnesses said that she had the mind of a child. Well, my memory serves me well, and they asked a lot of their experts, and they didn't really agree with the mind of a child assessment, if you will.

THE COURT: They were reluctant to make that assessment.

MR. KOLLER: They were very reluctant to make that particular assessment. And, in fact, I believe the government asked a couple of them multiple times, and they refused to give a specific grade or age range and kind of

explained that's not really what we do. And so I would state that.

I would further, along those lines, because the government kept bringing it up, a child is certainly capable of appraising the nature of sexual conduct, but as it relates to sex, children and sex and those types of crimes are prosecuted under different statutes. So while a child can appraise the nature of sex, when some sort of sexual abuse or molestation happens with a minor child, they are charged differently. Same thing goes with an inmate, right, at a correctional facility. While they are able to appraise the nature of conduct, they are not able to have sex with guards because of the power dichotomy, and so they're charged under a different statute.

This is how Mr. Earls is charged, and it's -- there are a lot of issues with it, and I believe the evidence is insufficient. I will rest with that. Thank you.

THE COURT: Okay. Thank you. Ms. McAmis.

MS. MCAMIS: I didn't know if you were looking to me to respond any further, Your Honor. I didn't know if you were -- I'm sorry.

THE COURT: I don't know. I don't know. I wasn't looking at you. Whether I was looking for you, I don't know. Let me --

Ms. Mauldin, you made statements in the beginning of