No. 16-3845

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MONTA GROCE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
(Hon. William M. Conley, No. 3:15-cr-00078)

BRIEF OF THE UNITED STATES AS APPELLEE

JEFFREY M. ANDERSON
Acting United States Attorney

ALICE H. GREEN
JULIE S. PFLUGER
Assistant United States Attorneys
United States Attorney's Office
Western District of Wisconsin
222 West Washington Avenue
Suite 700
Madison, WI 53703
(608) 264-5158

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
JENNIFER LEVIN EICHHORN
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington D.C. 20044-4403
(202) 305-0025

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

RULES (continued): **PAGE**

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-3845

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MONTA GROCE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
(Hon. William M. Conley, No. 3:15-cr-00078)

BRIEF OF THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The appellant's jurisdictional statement is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), the United States submits the following jurisdictional statement.

This appeal is taken from a district court's final, amended judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291. On November 2, 2016, the district court signed an Amended Judgment of conviction and sentence, and it was

docketed on November 3, 2016. R.156.[1] No post-judgment motion has the effect of tolling the time within which to appeal. On November 4, 2016, defendant filed a timely Notice of Appeal. R.158. This case is not a direct appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

1. Whether, by barring defendant from cross-examining the sex trafficking victims about their alleged prior prostitution, the district court committed plain error.

2. Whether the district court abused its discretion in limiting defendant from cross-examining a victim about her prior prostitution after she testified that she had not engaged in prostitution before meeting the defendant.

3. Whether, assuming plain error in the jury instruction on the "reckless disregard" element for Counts 1-3 (sex trafficking), that error affected defendant's substantial rights.

---

[1] "R.__, at __" refers, respectively, to the document recorded on the district court docket sheet and page number. "A_" refers to the Appellant's Appendix by page number. "SA__" refers to Appellant's Short Appendix by page number. "__A Tr. __" and "__P Tr. __" refers, respectively, to the morning or afternoon volume and page number of the trial transcript. (There is only one session for Volume 4 of the trial transcript.) The corresponding district court docket number precedes a transcript citation. "Gov. Exh. __, at _" refers, respectively, to the United States' exhibit admitted at trial by number and page number. "Br. __" refers to the original page number of appellant's opening brief and not the pagination set by this Court.

4. Whether the district court's admission of testimony concerning the defendant's role in the charged conspiracy to transport an individual in interstate commerce for prostitution, including forcibly taking money earned in a prostitution transaction, constitutes plain error.

5. Whether the jury instruction on Count 9 (retaliation against a witness) constitutes plain error that affected defendant's substantial rights.

6. Whether defendant has established cumulative error.

STATEMENT OF THE CASE

1. Procedural History

In December 2015, a federal grand jury in the Western District of Wisconsin returned a nine-count Superseding Indictment charging Monta Groce (defendant or Groce) with various offenses in connection with his sex trafficking of three women. Counts 1-3 charged defendant with sex trafficking in violation of 18 U.S.C. 1591(a)(1) (Counts 1-3). R.49, at 1-2. Each of these counts referred to a different sex trafficking victim.[2] Count 4 charged defendant with conspiracy to engage in interstate transport for purposes of prostitution in violation of 18 U.S.C.

[2] While the Indictment and Superseding Indictment did not identify the victims by name, the victims were identified at trial. "Jane Doe #1" is Ms. Lisa Tischer (Count 1); "Jane Doe #2" is Ms. Mirika Stuhr (Count 2); and "Jane Doe #3" is Ms. Amanda Ryan (Count 3). Given their identification in district court, we refer to the victims by name.

371. R.49, at 2-4. Count 5 charged defendant with the interstate transportation of individuals for purposes of prostitution in violation of 18 U.S.C. 2421 and 18 U.S.C. 2. R.49, at 4. Count 6 charged defendant with maintaining a drug house for the purpose of distributing and using a controlled substance in violation of 18 U.S.C. 856(a)(1). R.49, at 4. Count 7 charged defendant with using or carrying a firearm in relation to maintaining the drug house in violation of 18 U.S.C. 924(c)(1)(A). R.49, at 5. Count 8 charged defendant with attempted sex trafficking of Ms. Tischer in violation of 18 U.S.C. 1591(b)(1) and 1594(a). R.49, at 5. Finally, Count 9 charged defendant with retaliation against Ms. Tischer in violation of 18 U.S.C. 1513(b)(2). R.49.

A four-day trial began on July 11, 2016. After the United States' case-in-chief, defendant moved for a judgment of acquittal on all counts. R.129/4 Tr. 101. The district court denied defendant's motion. R.129/4 Tr. 101; see R.128/3P Tr. 159. The jury convicted defendant on all counts except Count 8. R.122. Defendant timely renewed his motion for judgment of acquittal and moved to dismiss the sex trafficking charges (Counts 1-3). R.125. The district court denied the motion. SA8-27.

The district court sentenced defendant to 25 years of incarceration followed by 20 years of supervised release. R.152, at 2-3. On November 3, 2016, the court issued an Amended Judgment. SA1-7.[3]

On November 4, 2016, defendant filed a timely notice of appeal. R.158. He challenges only his sex trafficking convictions (Counts 1-3), and his conviction for retaliation against a witness (Count 9).

2. Defendant's Commercial Sex Trafficking

Between December 2012 and April 2013, defendant engaged in a pattern of abusive behavior towards Ms. Tischer and Ms. Stuhr to cause them to engage in commercial sex for his benefit. Both women were heroin addicts when they met defendant and he became their sole heroin supplier. Defendant also preyed on Ms. Tischer's and Ms. Stuhr's romantic feelings for him to initially convince them to engage in prostitution. Defendant then exploited the women's heroin addictions by controlling their access to heroin, manipulated their financial debts to maintain their financial dependence on him, and physically abused and threatened them to

[3] Defendant was sentenced to 20 years' imprisonment on Counts 1-3, 6, and 9 (sex trafficking, drug distribution, and retaliation); five years' imprisonment for Count 4 (conspiracy for interstate transport for prostitution), and ten years' imprisonment for Count 5 (interstate transport for prostitution), all to be served concurrently. SA2. The district court also sentenced defendant to the mandatory, consecutive minimum sentence of five years' imprisonment on Count 7 (firearms offense). SA2.

cause them to continue to engage in prostitution involuntarily. Defendant similarly caused Ms. Ryan, another heroin addict, to prostitute for his benefit by controlling her access to heroin. Defendant's sex trafficking of these three women formed the bases of the three counts of sex trafficking (Counts 1-3) on which defendant was convicted.

A. Lisa Tischer

Ms. Tischer met defendant in November 2012, when she was 20 years old and a heroin addict. R.124/3A Tr. 53-54, 58, 67-68, 94. Initially, defendant was "very sweet" to Ms. Tischer and he told her that he would treat her right. R.124/3A Tr. 58-59. Ms. Tischer developed romantic feelings for defendant, and defendant led her to believe that he felt the same way. R.124/3A Tr. 59-60, 120; see R.127/2A Tr. 77; R.132/2P Tr. 79.

Shortly after their meeting, Ms. Tischer lost her job and moved in with defendant, who lived in the basement of a home in Sparta, Wisconsin (Sparta house). R.124/3A Tr. 59-60. Defendant became her heroin supplier and, in the beginning, sometimes gave her heroin for free. R.124/3A Tr. 59, 62-63; see R.127/2A Tr. 76; R.132/2P Tr. 79. But within a month, defendant asked her to engage in prostitution to get him money, and told her that if she "loved" him she would do so. R.124/3A Tr. 64; see R.124/3A Tr. 123. Initially, Ms. Tischer agreed. R.124/3A Tr. 64-65.

Defendant arranged and controlled every aspect of Ms. Tischer's commercial sex transactions. Defendant set up an advertisement on a website that included photographs of Ms. Tischer. R.124/3A Tr. 66-67; Gov. Exh. 18A. Defendant communicated with customers by his cell phone, and he set the terms for each transaction, including the time, duration, location, and price. *E.g.*, R.124/3A Tr. 65-68, 87-90, 126. Most of Ms. Tischer's commercial sex transactions took place at the Sparta house, where she engaged in prostitution up to 15 times a day. But defendant also arranged for Ms. Tischer to travel to other locations, including a private home in Winona, Minnesota, to engage in prostitution, paying a driver, Cody Nelson, in cash and drugs to drive Ms. Tischer. See, *e.g.*, R.132/2P Tr. 91, 135-138; R.124/3A Tr. 82, 86-90, 134-135.

Defendant forced Ms. Tischer to continue to engage in prostitution, against her will, by controlling her access to heroin. R.124/3A Tr. 76. Defendant would not give Ms. Tischer heroin before she had a prostitution date, and sometimes she received heroin as payment for prostitution. R.124/3A Tr. 76, 90. Defendant also withheld heroin from Ms. Tischer as punishment when she violated his rules, such as trying to keep extra money from prostitution transactions or trying to leave the Sparta house without his permission. R.124/3A Tr. 76-77, 130. Ms. Tischer did not want to continue to engage in commercial sex, but she did so because she

wanted to make defendant happy and avoid going through heroin withdrawal. R.124/3A Tr. 77, 79.[4]

Defendant also controlled Ms. Tischer by reducing her earnings from her prostitution – her only source of income at that time – from 40% per transaction to zero. R.124/3A Tr. 65, 69, 75, 124. When defendant gave Ms. Tischer cash, she gave that cash back to defendant to buy heroin. R.124/3A Tr. 69, 90-91. After defendant stopped paying Ms. Tischer for her prostitution dates, he limited her access to a debit card for buying cigarettes and "hygiene goods." R.124/3A Tr. 69-70, 73.

Further, defendant controlled Ms. Tischer through violence. When Ms. Tischer violated defendant's rules, he became physically violent and forced her to engage in additional prostitution transactions as punishment. See R.124/3A Tr. 70-77, 79. And when defendant saw Ms. Tischer's bags packed, he slapped her and physically blocked her from leaving the Sparta house. R.124/3A Tr. 73-74, 79; see R.132/2P Tr. 80. Ms. Tischer stayed not only because she cared for him, but

---

[4] James Sauer, an expert on substance abuse treatment and counseling, testified that a heroin addict will suffer anxiety and physical pain as a result of heroin withdrawal, including sweating, tremors or shakes, and vomiting. R.128/3P Tr. 58, 66-68. An addict's symptoms can become worse depending on the time of day and the extent of the individual's addiction. R.128/3P Tr. 67. The most expedient way for an addict to stop the symptoms of heroin withdrawal is to have the drug. R.128/3P Tr. 62, 67-68.

because she was "scared." R.124/3A Tr. 138. Ms. Tischer knew defendant kept a gun in the house, and she and another victim (Ms. Stuhr) were present when defendant beat Cody Nelson and threatened to kill him with his gun. R.124/3A Tr. 80-82; see also, *e.g.*, R.127/2A Tr. 94-98; R.132/2P Tr. 140-144. During that assault, defendant ordered Ms. Tischer to retrieve his gun, and she complied because she feared defendant would harm her if she did not. R.124/3A Tr. 80-81.

Ms. Tischer lived at the Sparta house for about two months. R.124/3A Tr. 94, 98. In approximately January 2013, defendant burned Ms. Tischer's face with a cigarette when he learned that she had withheld money she had earned from a prostitution transaction. R.127/2A Tr. 78; R.124/3A Tr. 77. After this incident, Ms. Tischer was able to escape from the Sparta house. R.124/3A Tr. 98.

B. Mirika Stuhr

Mirika Stuhr's experience with defendant mirrors that of Ms. Tischer. When Mirika Stuhr met defendant in November 2012, Ms. Stuhr was 21 years old and a heroin addict. Although she had relatives living nearby, they did not provide viable places for her to live so she was living at a friend's house. R.127/2A Tr. 63-66. Shortly after their meeting, Ms. Stuhr began buying heroin from defendant. Subsequently, she was arrested and held in custody. R.127/2A Tr. 68; R.132/2P Tr. 39.

In late December 2012, a few days after she was released from jail, Ms. Stuhr cut off her GPS monitor, contacted defendant, and moved in with him in the Sparta house basement. R.127/2A Tr. 67-71. In the beginning, defendant was "nice" to Ms. Stuhr and she had a "crush" on him. R.127/2A Tr. 79; R.132/2P Tr. 104. But at this time, she was addicted to heroin and defendant was her sole supplier. R.127/2A Tr. 79, 86. Because of her addiction, Ms. Stuhr could not "go without it [heroin]" and she "w[ould] do anything at any cost to make sure that [she] ha[d] it." R.127/2A Tr. 86.

Defendant blamed Ms. Stuhr for Ms. Tischer's departure from the house and his resulting loss of income from her prostitution. So in January 2013, he asked Ms. Stuhr to engage in commercial sex to make money. R.127/2A Tr. 83-84. Initially, Ms. Stuhr agreed because she liked defendant and wanted him to like her. R.127/2A Tr. 84. But over time, defendant's treatment of Ms. Stuhr changed from being "nice" to being "more violent, more controlling, territorial, like he owned her pretty much." R.132/2P Tr. 104. On various occasions, defendant shoved her, pulled her hair, and verbally abused her. R.132/2P Tr. 102.

As with Ms. Tischer, defendant arranged and controlled all aspects of Ms. Stuhr's prostitution transactions. He advertised Ms. Stuhr's commercial sex services on a website (R.127/2A Tr. 104-105; R.132/2P Tr. 83), and instructed her on how to handle her first prostitution transaction. R.127/2A Tr. 84-85. He also

determined the time, fee, and location of each transaction. R.127/2A Tr. 105-107; R.132/2P Tr. 4, 18, 20, 83. Defendant arranged several prostitution transactions a day, generally every day, in the basement of the Sparta house, in other private homes or motels in the area, or a private home in Winona, Minnesota. R.127/2A Tr. 85, 99, 102, 123; R.132/2P Tr. 3-4, 7-11, 57, 83-84; R.128/3P Tr. 37, 48-49. Defendant paid Ron Collins, Ms. Ryan (one of the other victims), and others with drugs and cash to drive Ms. Stuhr to the prostitution transactions that occurred outside of the Sparta house. R.128/3P Tr. 17-20; R.129/4 Tr. 32-33, 70-73. When the transactions occurred in the Sparta house basement, defendant hid in the upstairs bathroom with his gun. R.127/2A Tr. 90, 119; R.132/2P Tr. 95.

Defendant controlled Ms. Stuhr's access to heroin and money, and created and perpetuated her debts to him. Defendant determined how much money Ms. Stuhr could keep from each prostitution transaction, which started at 40% (generally $40) and dropped to zero. R.127/2A Tr. 86-87; R.132/2P Tr. 4, 91, 95. Ms. Stuhr used this money (her only source of income at that time) to buy heroin from defendant. R.127/2A Tr. 87; R.132/2P Tr. 4. Defendant, however, charged Ms. Stuhr $50 for each heroin purchase. R.127/2A Tr. 87. Ms. Stuhr explained she would pay defendant the remainder she owed him for a heroin purchase from the "next time," *i.e.*, from her next prostitution transaction. R.127/2A Tr. 87. Defendant also manufactured debt by imposing fines when Ms. Stuhr violated his

rules or he did not like her behavior. R.127/2A Tr. 87-88, 91-92. Although defendant sometimes gave Ms. Stuhr heroin as compensation for her prostitution, at other times he would arbitrarily deny her access to heroin. R.132/2P Tr. 100-101.

Defendant also controlled Ms. Stuhr through violence and threats of violence, including with his gun. Once, when Ms. Stuhr told defendant that she did not want to engage in sex with a client, defendant looked at his gun and threatened, "you always have a choice." R.127/2A Tr. 90-91; see also R.132/2P Tr. 44-45. She was "scared" by this threat and had sex with the customer. R.127/2A Tr. 91. Another time, after Ms. Stuhr lied to defendant about how much a customer had paid her for a prostitution transaction, defendant said she was a "dead duck." R.127/2A Tr. 93-94. For a couple of days, defendant forced Ms. Stuhr to sleep on the upstairs floor, withheld heroin and food (yet forced her to cook for him and gave the leftovers to dogs), and did not permit anyone in the house to speak to her. R.127/2A Tr. 113-117. During this time, Ms. Stuhr began going through heroin withdrawal, and was suicidal, "scared and alone," and did not believe she had anywhere else to go. R.127/2A Tr. 93-94, 113-116. After a couple of days, defendant stated, "are you ready to make some money?" (R.127/2A Tr. 117), which Ms. Stuhr understood to mean are you ready to do more prostitution transactions. R.127/2A Tr. 118. Ms. Stuhr also witnessed defendant harm and

threaten others and was scared by his conduct. See R.127/2A Tr. 72-73 (Ms. Stuhr heard defendant threaten Tony Koopman, another resident at the Sparta house, that he would withhold heroin and would shoot his dogs); R.127/2A Tr. 78 (Ms. Stuhr saw Ms. Tischer after defendant burned Ms. Tischer with a cigarette); R.127/2A Tr. 94-98 (Ms. Stuhr was scared when defendant assaulted and threatened Cody Nelson with his gun).

On another occasion, when Ms. Stuhr and Ms. Ryan had prostitution customers at the Sparta house at the same time, defendant told Ms. Stuhr that she could not wait to service her client until after Ms. Ryan was done. R.127/2A Tr. 118-119. As a result, Ms. Stuhr had sex with her customer on top of his bed.[5] When defendant learned that had happened, he "freaked out," punched her, threw her in the bathtub, and "stomped" on her. R.127/2A Tr. 118, 120. After this assault, Ms. Stuhr surreptitiously packed her belongings and left the Sparta house. R.127/2A Tr. 121-122. She hid her escape because she was "afraid" of how defendant would react if he knew she was trying to leave. R.127/2A Tr. 122. She stayed away for about a week, but she could not handle the pain of heroin withdrawal and called defendant to buy more heroin. R.127/2A Tr. 122-123.

[5] The basement had two beds; one for defendant and a second for the victims' prostitution transactions. R.127/2A Tr. 74, 118.

In late February 2013, Ms. Stuhr was arrested and briefly incarcerated. See R.126/1P Tr. 26, 33; R.132/2P Tr. 18, 39-40, 61-62. In mid-April 2013, she returned to defendant, engaged in commercial sex at defendant's direction, and gave him the proceeds. R.132/2P Tr. 19-23. Ms. Stuhr continued to engage in prostitution for defendant's benefit because she thought she and defendant were "going to get a place together," and she wanted to make him happy. R.132/2P Tr. 19; see also R.132/2P Tr. 21, 25.

C. Amanda Ryan

From January to March 2013, Ms. Ryan lived in the Sparta house basement and she was employed as a certified nursing assistant. R.128/3P Tr. 140, 143-146, 153; R.129/4 Tr. 25. Like Ms. Tischer and Ms. Stuhr, she was a heroin addict and purchased heroin from defendant. R.128/3P Tr. 141, 143-146; R.129/4 Tr. 25-26, 42. Her addiction was so strong that she needed heroin daily to perform her duties at work; without it, she would suffer from painful withdrawal. R.128/3P Tr. 146. During this time, when her nursing salary became insufficient to pay defendant for heroin, Ms. Ryan voluntarily turned to prostitution to earn money. R.128/3P Tr. 150-151. Defendant arranged some of these prostitution transactions. See, *e.g.*, R.132/2P Tr. 83-84; R.128/3P Tr. 151-152.

Ms. Ryan described defendant as "very greedy, manipulative, narcissistic, [and] controlling." R.128/3P Tr. 155. She explained, "he had the heroin, so it was

basically what he said goes." R.128/3P Tr. 155. As a result, she reluctantly performed various chores for defendant, including driving defendant or others, because she was afraid that if he became angry, he would deny her access to heroin and he was her sole provider. R.128/3P Tr. 155; see also R.132/2P Tr. 121. Also, Ms. Ryan did not believe she could obtain heroin from anyone else because she feared doing so would upset him. R.129/4 Tr. 29, 51.

When Ms. Ryan informed defendant that she had lost one of his debit cards, he told her she would have to immediately engage in a specific prostitution transaction to pay her debt. R.129/4 Tr. 30-31. Defendant also told Ms. Ryan he would not give her any heroin unless she engaged in that transaction. R.129/4 Tr. 31. Ms. Ryan complied because she believed she had no choice. R.129/4 Tr. 31.

SUMMARY OF ARGUMENT

A jury convicted defendant Monta Groce on eight of the nine counts charged in a Superseding Indictment in connection with his sex trafficking of three women, Lisa Tischer, Mirika Stuhr, and Amanda Ryan. On appeal, he challenges only his sex trafficking convictions (Counts 1-3), and his conviction for retaliation against a witness (Count 9).

1. Defendant's argument that the district court violated his Sixth Amendment rights by precluding him from cross-examining the victims about their alleged prior prostitution is without merit. He asserts that the victims' prior

prostitution was relevant to his state at mind, *i.e.*, that he believed their prostitution was voluntary and therefore he did not *know* that his actions would cause the women to engage in prostitution. This Court recently rejected this same argument in *United States* v. *Carson*, holding that a victim's prior sexual conduct is irrelevant to a defendant's defense that he did not have the *mens rea* to violate 18 U.S.C. 1591, the sex trafficking statute. 870 F.3d 584, 593-596 (7th Cir. 2017). Moreover, compelling evidence establishes that defendant *knew* – by his own deliberate acts of force, threats of force, coercion, and control over the victims' access to heroin – that he caused the three victims, all of whom were heroin addicts, to engage in commercial sex for his benefit. Accordingly, defendant cannot show any plain or obvious error that affected his substantial rights.

2. Also without merit is defendant's argument that the district court violated his Sixth Amendment rights by limiting his cross-examination of Ms. Stuhr concerning her prior prostitution, once Ms. Stuhr testified that her first prostitution transaction was at defendant's direction. Defendant was able to challenge Ms. Stuhr's credibility on this issue through the testimony of another witness (Ms. Brandy Eddy), who testified that Ms. Stuhr had engaged in prostitution before she met defendant. Moreover, defendant had ample opportunity to challenge Ms. Stuhr's credibility directly by addressing her past drug use, past convictions, and

flawed memory. And even if the district court had abused its discretion, any error here would be harmless because overwhelming evidence supports the verdict.

3. Defendant has waived his challenge to the jury instruction on the "reckless disregard" element of the sex trafficking charges, and therefore this Court should decline to review it. Even if this Court reviewed for plain error, and assumes the error was plain, defendant's substantial rights were not affected and therefore reversal of defendant's convictions on Counts 1-3 is not warranted. This Court considered the same instruction in *Carson*, and held that any error was harmless given overwhelming evidence of defendant's guilt. 870 F.3d at 602-603. The same conclusion applies here. Both because overwhelming evidence establishes that defendant acted knowingly, and this evidence establishes defendant's reckless disregard even under a correct instruction, the error did not affect defendant's substantial rights.

4. The district court properly admitted Ms. Melissa Copeland's testimony concerning her prostitution for defendant, and his subsequent violent assault to get some of the money from her, as direct evidence of defendant's participation in the conspiracy to transport individuals interstate for prostitution (Count 4). Although defendant asserts that this testimony unfairly prejudiced the jury's consideration of the sex trafficking charges against him (Counts 1-3), the testimony was direct evidence of his participation in the conspiracy. In any event, there is no basis to

conclude, through the lens of plain error, that this testimony resulted in unfair prejudice to defendant's sex trafficking charges; *i.e.*, defendant cannot show that, absent this testimony, there is a reasonable probability that the sex trafficking verdicts would be different.

5. The United States agrees with defendant that this Court should vacate his conviction on Count 9, retaliation under 18 U.S.C. 1513(b)(2), and remand for resentencing. The jury instruction failed to address an element of the offense. Section 1513(b)(2) prohibits knowingly engaging in conduct that causes bodily injury to another person with the intent to retaliate against the person for providing information to a "law enforcement officer" relating to the commission or possible commission of a crime. The statute defines "law enforcement officer" to be a *federal* law enforcement officer or an individual acting for, on behalf of, or advising the federal government. 18 U.S.C. 1515(a)(4). Because the jury instruction did not include this element of the offense, it was erroneous. Although defendant did not object to the jury instruction, under plain-error review the United States further agrees that defendant's substantial rights and the integrity of the proceedings were affected because there is insufficient evidence in the record to establish this element.

6. Defendant's cumulative error argument fails. He has not, and cannot, establish that two or more errors denied him a fundamentally fair trial. There was overwhelming evidence of guilt on the sex trafficking counts.

ARGUMENT

I

THE DISTRICT COURT DID NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION BY BARRING HIM FROM QUESTIONING THE VICTIMS ABOUT THEIR PURPORTED, PRIOR PROSTITUTION

A. Standard Of Review

Because the basis for defendant's challenge on appeal to the denial of his request for cross-examination is different from the grounds he asserted below, this issue is reviewed for plain error. *United States* v. *Carson*, 870 F.3d 584, 593 (7th Cir. 2017) (Because "[d]efendant's argument * * * was not one that he made in the district court * * * [this Court] review[s] it for plain error."). Under plain error, this Court will grant a new trial if there was (1) an error; (2) that was plain; (3) that affected the defendant's substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the proceedings. *United States* v. *Doyle*, 693 F.3d 769, 771 (7th Cir. 2012), cert. denied, 568 U.S. 1240 (2013). If this Court concludes that defendant sufficiently raised this issue below, this Court would review for an abuse of discretion. *Carson*, 870 F.3d at 593, 596-597 (This Court reviews *de novo* if the district court barred all opportunities for cross-

examination in violation of a defendant's Sixth Amendment right, and for an abuse of discretion if this Court determines sufficient opportunities to cross-examine the victims were afforded.).

B. Background

Before trial, defendant asserted that, pursuant to Federal Rule of Evidence 412 (Rule 412), he should be permitted to cross-examine the three named victims about their purported prostitution before meeting defendant.[6] He asserted that this evidence was relevant to the victims' bias and credibility, and to refute allegations that he coerced or caused them to engage in prostitution involuntarily. R.87, at 10-11; see also R.104, at 3 ("the women's prior prostitution was an independent business and * * * the women sought the defendant's assistance with their business"); A19-20, A23 ("under our defense theory * * * [t]his was a continuing course of conduct on their parts that was going on before they met [defendant]"). Defendant did not proffer any evidence of such prostitution, or that

[6] Rule 412(a) states that, subject to limited exceptions, in "a criminal proceeding involving alleged sexual conduct," evidence "offered to prove that a victim engaged in other sexual behavior" or "evidence offered to prove any alleged victim's sexual predisposition" is inadmissible. Rule 412 provides an exception when exclusion of a victim's sexual conduct would violate a defendant's constitutional rights. Fed. R. Evid. 412(b)(1)(C). A defendant has a Sixth Amendment right to a "meaningful opportunity to present a complete defense" but that right does not require "the admission of irrelevant evidence (or other types of evidence whose relevance is outweighed by other important considerations)." *Carson*, 870 F.3d at 593 (citation omitted).

he knew of such conduct. The United States moved to exclude any inquiry of the victims' prior sexual conduct. The United States agreed, however, that evidence of the victims' sexual conduct during their time with defendant was admissible. See R.85, at 8-11; R.102; A20, A22-23.

The district court ruled, consistent with Rule 412, that defendant could not ask the victims whether they engaged in prior prostitution, but could ask them about their sexual conduct during their time with defendant. SA33-35. Citing this Court's opinion in *United States* v. *Cephus*, 684 F.3d 703, 708 (7th Cir.), cert. denied, 568 U.S. 1004 (2012), the court concluded that the victims' prior sexual conduct was irrelevant and barring this questioning did not violate defendant's confrontation rights. SA33-35. The court also noted that defendant could effectively challenge a victim's bias by raising her immunity agreement. SA35. Finally, the court concluded that, under Federal Rule of Evidence 403, evidence of the victims' prior sexual conduct was more prejudicial than probative and could be confusing to the jury. SA36.

On appeal, defendant challenges the court's denial of cross-examination for a reason different from the one he asserted below. He now asserts (Br. 37-38) that the victims' prior prostitution was relevant to his state at mind, *i.e.*, that he believed their prostitution was voluntary and therefore he did not *know* that his actions would cause the women to engage in prostitution.

C. The District Court Did Not Violate Defendant's Sixth Amendment Right To Cross-Examination

1. Barring Evidence Of The Victims' Prior Sexual Conduct Did Not Violate Defendant's Sixth Amendment Right To Cross-Examination

This Court has squarely rejected the argument defendant makes here. In *Carson*, this Court held that, in a prosecution under Section 1591(a), a victim's prior prostitution is irrelevant to whether the defendant "knew or recklessly disregarded the fact that his own use of force, threats, and coercion caused the victims to engage in commercial sex." 870 F.3d at 595. In that case, the government moved to exclude testimony regarding the sex trafficking victims' sexual histories and prior prostitution under Rules 412 and 403. *Id.* at 592. The *Carson* defendant argued, as here, that this evidence was relevant to his defense that he subjectively believed that the women were not coerced into engaging in commercial sex acts, but did so willingly. *Ibid.* This Court rejected that argument, holding that "whether the victims had previously worked as prostitutes was irrelevant to the required *mens rea* for the crime." *Id*. at 593. The Court stated that the defendant proffered no evidence that the victims had voluntarily engaged in commercial sex transactions on other occasions and, even if he had, defendant "could not plausibly argue that his victims willingly worked for him or that he thought his victims were willingly working for him" given the "compelling evidence of coercion" presented at trial. *Id.* at 594. The Court concluded, *ibid.*:

> Whether they had worked as prostitutes previously would have no effect on whether [defendant] knew (or recklessly disregarded the fact) that force, threats of force or coercion would have caused his victims to engage in commercial sex acts under his 'employ.' This is particularly true because [defendant] was the one using force, threatening, and coercing them. Had [defendant] truly subjectively believed (whether correctly or not) that the victims were voluntarily working for him as prostitutes, he would have had no reason to rape, beat and threaten them, to take their telephones, clothing, shoes and control their access to drugs.[7]

The Court stated that its conclusion "follow[ed] directly" from its earlier decision in *Cephus*, 684 F.3d 703. *Carson*, 870 F.3d at 594. In *Cephus*, the defendant argued the district court violated his Sixth Amendment rights by precluding him from cross-examining one of his sex trafficking victims about her prior work as a prostitute to show that she was not coerced into working for him. 684 F.3d at 708. This Court rejected the argument, holding that such evidence was irrelevant. *Ibid.* The *Cephus* Court explained, *ibid.*, that the defendant

> wanted to suggest that having already been a prostitute [the victim] would not have been deceived by [him] and therefore her testimony that she was coerced into working for him * * * should be disbelieved. But the testimony sought to be elicited by the cross-examination would have been irrelevant. * * * [E]ven if she knew going in, from her prior [prostitution] experience, that [the defendant] probably would beat her, it was still a crime for him to do so. And

[7] See also, *e.g.*, *United States* v. *Todd*, 627 F.3d 329, 334 (9th Cir. 2010) (a defendant "know[s] that force, fraud, or coercion * * * will be used to cause [a] person to engage in a commercial sex act" when the defendant "is aware of [his own] modus operandi that will in the future cause a person to engage in prostitution").

> finally the fact that she'd been a prostitute before does not suggest that he didn't beat and threaten her – that was his *modus operandi* and there's no evidence that he would have made an exception for [the victim].

Although in *Cephus* the defendant argued the evidence was relevant to coercion, and here defendant is arguing that the evidence is relevant to his knowledge, this Court in *Carson* did not find this distinction meaningful. *Carson*, 870 F.3d at 594-595. The Court explained that *Cephus*, and its holding in *Carson*, are consistent with decisions of other circuits holding that "acts of prior prostitution are irrelevant to a charge under Section 1591(a) and thus barred." *Id.* at 595 (citing cases).

Accordingly, for the reasons set forth in *Carson* and *Cephus*, defendant's argument fails; the evidence he sought to elicit on cross-examination was irrelevant to the *mens rea* of the crime.[8] And in any event, given the evidence of his abusive conduct, defendant could not plausibly argue that he thought his victims were

[8] Defendant's reliance (Br. 38-39) on cases that hold a defendant's own prior conduct is admissible under Federal Rule of Evidence 404(b) to assess whether his charged conduct was voluntary or coerced is misplaced. See, *e.g.*, *United States* v. *Dunkin*, 438 F.3d 778, 780 (7th Cir. 2006) (defendant's prior bank robbery was relevant "to demonstrate the implausibility of a defense of coercion" for defendant's charged bank robbery). That a defendant's prior conduct is relevant to assess his own charged conduct is not comparable to his claim that a *victim's* prior conduct is relevant to assess *his* current knowledge. Further, defendant's citations do not consider the admissibility of comparably sensitive evidence that must be assessed in light of Rule 412's presumptive exclusion. See Fed. R. Evid. 412 Advisory Committee Notes, 1994 Amendments.

willingly working for him. The evidence shows that defendant deliberately used a combination of isolation, controlled access to heroin, physical force, threats (including with a gun), and controlled debt to cause three heroin addicts – Ms. Tischer, Ms. Stuhr, and Ms. Ryan – to engage in commercial sex. See, *e.g.*, R.127/2A Tr. 86-88, 90-91, 118-120; R.124/3A Tr. 75-77, 94; R.129/4 Tr. 30-31; cf. *Carson*, 870 F.3d at 594. Indeed, defendant would have no reason to isolate, physically abuse, threaten, and control Ms. Tischer's and Ms. Stuhr's access to heroin and money if these women repeatedly prostituted themselves willingly. Similarly, there would be no reason to threaten to withhold heroin from Ms. Ryan after she lost defendant's debit card if her commercial sex act was voluntary.[9]

2. Even If There Were Plain Error, Defendant's Substantial Rights Were Not Affected Because Overwhelming Evidence Establishes That Defendant Knew His Deliberate Conduct Caused The Victims To Engage In Commercial Sex

Defendant argues (Br. 42) that the limitation on cross-examination was not harmless because "[i]f the jury had learned of [his] actual knowledge of the alleged victims' history of prostitution, [the jury] may have concluded that [he] reasonably

[9] Defendant also argues (Br. 40-42) that the district court erred in excluding this evidence under Rule 412 because that rule has an exception permitting the admission of prior sex acts if its exclusion would violate a constitutional right. But as the Court concluded in *Carson*, because "the prohibited evidence was not relevant to [defendant's] *mens rea* * * * he suffered no harm, constitutional or otherwise, when it was excluded." 870 F.3d at 593 (also noting that the Constitution does not require the admission of irrelevant evidence).

believed the women were engaging in prostitution voluntarily." He further asserts (Br. 42) that "[t]his is particularly so in light of the minimal and tenuous evidence of force, threats of force, or coercion." This argument is baseless. And even if the district court erred in barring the cross-examination, overwhelming evidence supports his convictions on the sex trafficking counts, and therefore he cannot show that his substantial rights were affected. Cf. *Doyle*, 693 F.3d at 772 (given ample evidence, defendant failed to demonstrate that "but for the Confrontation-Clause error, the outcome of the trial probably would have been different") (citation omitted); *United States* v. *Thornton*, 642 F.3d 599, 605 (7th Cir. 2011) (on plain and harmless error review, defendant's challenge to restricted cross-examination of a witness about drug sales to the defendant failed given the "quite strong" evidence to support the conviction).

First, overwhelming evidence supports the conclusion that defendant knowingly caused Ms. Tischer and Ms. Stuhr to involuntarily engage in prostitution for his benefit. The evidence shows a pattern of physical abuse, threats of force, and coercion that included controlling the women's access to heroin and manufacturing and controlling their debt. See pp. 5-14, *supra*. For example, defendant created and manipulated their debt, which the victims could repay (or reduce) by engaging in prostitution. See pp. 8, 11-12, *supra*. Defendant set the price of heroin, which exceeded the share he gave the women for each prostitution

date, and controlled their earnings from their prostitution. See pp. 7, 11-12, *supra*. When defendant gave the women cash for their prostitution, they gave that cash back to defendant to pay for heroin. See pp. 8, 11, *supra*. Defendant would also manufacture and impose fines for punishment of his own rules that would be paid through prostitution. See pp. 7-8, 11-12, *supra*. Thus, defendant coerced Ms. Tischer and Ms. Stuhr to engage in commercial sex because of their financial dependence on him. Moreover, because Ms. Tischer and Ms. Stuhr were heroin addicts, and they feared and wanted to avoid the symptoms of heroin withdrawal, defendant's control of their access to heroin was an additional, powerful means of coercion to cause them to engage in prostitution. See pp. 7-8, 10-12, *supra*; see also *Carson*, 870 F.3d at 589-590, 594 (defendant's controlled provision of heroin, physical and sexual violence, and other forms of coercion caused women who were drug addicts to engage in commercial sex in violation of 18 U.S.C. 1591); *United States* v. *Mack*, 808 F.3d 1074, 1081-1082 (6th Cir. 2015) (defendant's pattern of force, threats of force, and controlled access to opiates to cause women who were drug addicts to engage in commercial sex established Section 1591 violation), cert. denied, 136 S. Ct. 1231 (2016); *United States* v. *Fields*, 625 F. App'x 949, 952 (11th Cir. 2015) (promoting victims' drug addiction and controlling access to drugs to cause them to engage in prostitution to avoid withdrawal sickness, and isolating victims from others, established Section 1591 violation). In view of this

evidence, defendant's assertion (Br. 43) that Ms. Tischer and Ms. Stuhr voluntarily engaged in prostitution to earn money to pay for heroin, and defendant provided heroin when the women could pay for it, is not persuasive.

Further, the evidence reflects that defendant controlled Ms. Tischer and Ms. Stuhr through force and threats of force. Defendant twice slapped Ms. Tischer across her face, physically barred her from leaving the Sparta house, and burned her face with a cigarette. R.124/3A Tr. 72, 74, 77, 79; see also R.127/2A Tr. 78. He also threatened Ms. Stuhr when she asked that she not engage in a specific prostitution transaction, assaulted her when he learned that she had sex with a client on his bed, and withheld food and heroin for two days as punishment, after which he asked, "are you ready to make some money?" See pp. 12-13, *supra*. That question, and Ms. Stuhr's *relief* by his question, after she felt suicidal and suffered from heroin withdrawal and no food, captures defendant's control over Ms. Stuhr's continued prostitution. R.127/2A Tr. 116-118. Accordingly, defendant's assertion (Br. 43) that there were only "a few incidents of physical violence" and defendant's acts of violence were not "used to compel prostitution" again mischaracterizes the evidence.

Similarly, Ms. Ryan was addicted to and needed heroin on a daily basis to avoid the pain of withdrawal and defendant was her sole heroin provider. She depended on defendant for that drug, she feared making him angry (which would

result in his withholding heroin), and he had threatened to withhold heroin for her noncompliance with his demands. R.132/2P Tr. 121; R.128/3P Tr. 145-146, 155; R.129/4 Tr. 25-26, 51. When she lost defendant's debit card, defendant demanded that she engage in commercial sex immediately and he threatened to cut off her heroin supply. R.129/4 Tr. 51. That Ms. Ryan had a job (unlike Ms. Tischer and Ms. Stuhr) did not preclude the jury from finding, as it did, that defendant's modus operandi of controlling her access to heroin coerced Ms. Ryan to engage in commercial sex on that specific occasion.

In sum, overwhelming evidence establishes that defendant knew his deliberate pattern of force, threats of force, and coercion caused Ms. Tischer, Ms. Stuhr, and Ms. Ryan to prostitute for his benefit. In light of this evidence, defendant cannot show that there is a reasonable probability that the sex trafficking verdicts would be different had he questioned the victims about their prior sexual conduct. Therefore, he cannot show that any conceivable error affected his substantial rights. Cf. *Doyle*, 693 F.3d at 772.

II

THE DISTRICT COURT'S LIMITATIONS ON DEFENDANT'S CROSS-EXAMINATION OF MS. STUHR, AFTER SHE TESTIFIED THAT SHE HAD NOT PREVIOUSLY ENGAGED IN PROSTITUTION, DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHTS

A. Standard Of Review

When a district court fully bars cross-examination on a witness's bias, motivation to testify, or motive to lie, this Court reviews the challenge *de novo*. *United States* v. *Carson*, 870 F.3d 584, 596-597 (7th Cir. 2017); *United States* v. *Recendiz*, 557 F.3d 511, 530 (7th Cir.), cert. denied, 558 U.S. 881 (2009). But when a court has afforded defendant some opportunity to cross-examine a witness in these areas, this Court reviews a trial court's limitations for an abuse of discretion. See *Carson*, 870 F.3d at 597; *Recendiz*, 557 F.3d at 530. Even if the Court finds error, an otherwise valid conviction is not set aside if the error is harmless. See *Carson*, 870 F.3d at 597; *United States* v. *Nelson*, 39 F.3d 705, 710 (7th Cir. 1994).

B. Background

Ms. Stuhr testified on direct about the first time defendant asked her to engage in prostitution for him and her agreement to do so. R.127/2A Tr. 83; A26-27. She testified that she did not know how to set up a date, what she was supposed to do, or how much money she was to charge. She also testified that defendant had to instruct her on how to begin the encounter, that she should not

ask the customer for money, and should tell the customer to place the money on a dresser. A26-27. Further, she testified that "I have never taken calls for * * * anybody else." A28.

At sidebar during cross-examination, defense counsel argued that while Ms. Stuhr suggested that she had not engaged in prostitution before defendant's request, defendant had a witness who would testify to the contrary. SA45. The district court agreed that Ms. Stuhr had testified to the effect that she had not previously engaged in prostitution, but stated that "we're going to have to discuss that at another time. We're not going to get into it with the witness now." SA45.

Defendant cross-examined Ms. Tischer on a range of topics that reflected on her credibility. Defendant addressed her prior arrests, past drug addiction, and prior incarceration. Defendant also elicited testimony that she cut off her GPS monitor upon release from jail before moving in with defendant, used drugs with defendant, and that her drug use affected her memory. See R.132/2P Tr. 27-31, 39, 59; see also R.127/2A Tr. 63-64. Defendant also questioned Ms. Stuhr about her meetings with the government to prepare for her testimony. R.132/2P Tr. 40-42.

The following day, after Ms. Stuhr had completed her testimony, the district court stated that because Ms. Stuhr had testified that she had not previously engaged in prostitution, defendant could present evidence about Ms. Stuhr's prior prostitution, but only to impeach Ms. Stuhr's credibility. SA47. Defendant

addressed this topic with Ms. Brandy Eddy, a government witness. The district court advised counsel to first ask Ms. Eddy whether she saw Ms. Stuhr engage in prostitution before meeting defendant and, if the answer was yes, counsel could ask her the "who, what, where, when, [and] how." SA51-52.

Ms. Eddy testified that she had seen Ms. Stuhr engage in prostitution before Ms. Stuhr had met the defendant. SA53. But twice she could not identify a specific instance. SA54. When asked a third time, Ms. Eddy testified that she and Ms. Stuhr engaged in prostitution with a client before Ms. Stuhr met defendant. SA54. Ms. Eddy also testified that Ms. Stuhr had engaged in prostitution for "years," suggesting that it was a means for Ms. Stuhr to pay for drugs. R.128/3P Tr. 128.[10]

The district court explained to the jury that although Ms. Stuhr "indicated her first experience with prostitution was with the defendant," whether that statement was true did not bear on what the jury must decide. SA53. The court instructed that Ms. Eddy's testimony can be considered "as impeachment; in other

[10] Defendant, in his Statement of the Case (Br. 13-14), suggests that the district court improperly limited counsel's questions to Ms. Eddy and restricted counsel's closing argument when she referred to Ms. Eddy's testimony. Defendant does not address these issues in the Argument section of his brief, and therefore they are waived. *United States* v. *Parkhurst*, 865 F.3d 509, 524 (7th Cir. 2017). In any event, they lack merit.

words, as going to the credibility of Ms. Stuhr. That's the only reason to consider it. And you'll have to weigh the credibility of the witnesses and decide who you believe." SA53.

C. The District Court Did Not Violate Defendant's Sixth Amendment Right To Cross-Examination

1. The District Court Did Not Abuse Its Discretion In Limiting Cross-Examination Of Ms. Stuhr Regarding Her Prior Sexual Conduct

Defendant argues (Br. 44-48) that the district court violated his Sixth Amendment right to impeach Ms. Stuhr's credibility by limiting his cross-examination of her regarding her prior sexual conduct. Not so. A defendant's Sixth Amendment right to confrontation requires a meaningful opportunity for cross-examination; it does not require an opportunity to question a witness "to whatever extent the defense might wish." *Carson*, 870 F.3d at 596 (quoting *Recendiz*, 557 F.3d at 530). Here, defendant had ample opportunity to challenge Ms. Stuhr's credibility directly and did so. Defendant also was permitted to question Ms. Eddy and have her testify that Ms. Stuhr had engaged in prior prostitution.

In analogous circumstances, this Court has found that a district court did not abuse its discretion in limiting cross-examination to preclude "the opportunity to add extra detail" about a witness's motive, bias, or credibility where the defendant otherwise addressed these matters. *Nelson*, 39 F.3d at 708. In *Carson*, this Court

held that the district court did not abuse its discretion limiting defendant's cross-examination of a government witness who testified that defendant knew that one of the sex trafficking victims was only 17 years old. 870 F.3d at 596-598. The defendant in *Carson* was able to attack the credibility of the witness by raising his grant of immunity, and by showing that he had participated in aspects of the charged crime, was a convicted felon, and was a "habitual drug user." *Id.* at 596; see also *id.* at 597. The Court stated that a district court "has broad discretion to impose reasonable limits on the extent and scope of cross-examination" and, although constrained by the Sixth Amendment, "there is no guarantee of cross-examination to whatever extent the defense might wish." *Id.* at 596 (quoting *Recendiz*, 557 F.3d at 530). The Court explained that a defendant cannot be denied the ability to establish that a witness had a motive to lie, "but once that motivation has been established, the defendant has no constitutional right to pile on." *Id.* at 597. The Court concluded that because the district court did not prevent the defendant from establishing the witness's motivation for lying during his testimony, the district court's limitation on the cross-examination did not run afoul of the Sixth Amendment and was not an abuse of discretion. *Id.* at 597-598.

Moreover, a defendant's Sixth Amendment rights are not violated when a witness's testimony is barred on a particular topic but, as here, the defendant is able to address that topic through other witnesses. In *Malinowski* v. *Smith*, 509

F.3d 328 (7th Cir. 2007), for example, the defendant sought to question a school counselor about his conversations with a sexual assault victim in order to address the victim's honesty, but was barred from doing so based on privilege under state law. *Id.* at 331. Defendant, however, cross-examined the victim generally and presented a different witness who addressed the victim's honesty (the barred topic). *Id.* at 338. This Court held that the state court's ruling was not contrary to Sixth Amendment precedent (the standard for habeas relief) because he had sufficient opportunity to address the barred topic through other witnesses. *Id.* at 335, 338-339; cf. *United States ex rel. Brent* v. *Jones*, No. 06-C-3817, 2008 WL 4876963, at *5 (N.D. Ill. Aug. 4, 2008) (a district court's bar on cross-examining a witness based on his earlier, inconsistent statement to police was not contrary to clear Sixth Amendment precedent when the court admitted a stipulation that the police officer would have testified to the inconsistent statement).

Defendant's challenge to the narrow limitation on his cross-examination of Ms. Stuhr concerning her possible prior prostitution fails because he was able to challenge her credibility both directly and through Ms. Eddy's testimony. See *Malinowski*, 509 F.3d at 337-339; *Nelson*, 39 F.3d at 708-710. As noted above, defendant elicited testimony from Ms. Stuhr concerning her prior arrests, past drug addiction, and prior incarceration. He also elicited that she cut off her GPS monitor upon release from jail before moving in with defendant, used drugs while

with defendant, and that her drug use affected her memory. See, *e.g.*, R.127/2A Tr. 63-64; R.132/2P Tr. 27-31, 39, 43; see also R.132/2P Tr. 59. Moreover, because the jury had Ms. Eddy's testimony to compare to Ms. Stuhr's, it could decide whether Ms. Stuhr was credible in light of Ms. Eddy's testimony that she previously engaged in prostitution.[11] In sum, the district court's approach neither violated defendant's Sixth Amendment rights nor was an abuse of discretion.[12]

---

[11] Defendant relies upon (Br. 46-47) *Davis* v. *Alaska*, 415 U.S. 308 (1974), which held that the trial court's limitation on cross-examination violated the Sixth Amendment, but that case does not help him. As this Court explained in *Malinowski*, 509 F.3d at 337-338, *Davis* is inapposite where, as here, the defendant has an alternative witness to address the barred topic of cross-examination. Defendant also cites (Br. 45-46) *United States* v. *Valenzuela*, No. CR 07-00011(A)-MMM, 2008 WL 2824958, at *3 (C.D. Cal. July 21, 2008), but in that case the district court simply stated that *if* the government introduced evidence that put the victims' sexual histories at issue, it was *possible* that the defendant could present evidence rebutting those claims after compliance with Rule 412(c).

[12] Defendant suggests (Br. 45) that a limiting instruction may have avoided any constitutional error, but he never requested one. Moreover, contrary to defendant's suggestion, this Court in *Sandoval* v. *Acevedo*, 996 F.2d 145, 148-149 (7th Cir.), cert. denied, 510 U.S. 916 (1993), did not hold that a limiting instruction is required in these circumstances. In that case, this Court did *not* decide whether a defendant's Sixth Amendment rights were violated when defendant was barred from cross-examining a sexual assault victim about her past sexual conduct after she addressed that topic. *Id.* at 148-149. This Court held that any error was harmless because the district court's limiting instruction, which addressed the victim's "denial" of a certain type of sexual conduct with men other than defendant, was phrased such that "the natural inference for the jury to draw * * * is just the inference that the defendant would have wanted it to draw." *Id.* at 149.

2. Even If The District Court Abused Its Discretion, Any Error Was Harmless

Even if the district court abused its discretion, defendant's extensive impeachment of Ms. Stuhr's credibility (directly and indirectly), and the compelling evidence to support this conviction, renders any error harmless. An error is harmless when, "assuming that the damaging potential of the cross-examination were fully realized," a reviewing court will conclude that the jury would have reached the same verdict. *Nelson*, 39 F.3d at 710 (citation omitted). Here, the jury had ample grounds to consider and assess Ms. Stuhr's credibility, including Ms. Eddy's testimony, and therefore the narrow limitation "did not reduce the damaging potential of cross-examination." *Ibid.* (internal quotation marks omitted). The jury simply chose to believe Ms. Stuhr. Moreover, given the overwhelming evidence of defendant's knowing use of force, threats with his gun, and coercion (including controlling Ms. Stuhr's access to heroin) to cause Ms. Stuhr to engage in commercial sex (see pp. 9-14, 26-28, *supra*), there is no reasonable probability that defendant's conviction on this count would have been different even if Ms. Stuhr had admitted to engaging in prior prostitution. See *Nelson*, 39 F.3d at 710 ("the jury chose to believe the witnesses" and "adding detail to the cross-examination would not have changed that verdict").

III

DEFENDANT WAIVED HIS CHALLENGE TO THE SEX TRAFFICKING JURY INSTRUCTION; EVEN IF CONSIDERED, AN ERROR IN THE ELEMENT OF "RECKLESS DISREGARD" IN 18 U.S.C. 1591(a)(1) DID NOT AFFECT DEFENDANT'S SUBSTANTIAL RIGHTS AND THEREFORE WOULD NOT WARRANT REVERSAL

A. Standard Of Review

Defendant asserts (Br. 48-53) that the Court should review this challenge to the jury instructions for plain error. Defendant, however, waived his challenge because counsel (1) stated that she had no objection to the court's proposed jury instructions (R.88, at 1); (2) proposed additional text on a different and unrelated aspect of the sex trafficking instruction (unanimity) (R.88, at 1-2); and (3) told the court that she had no other objection to this instruction. See R.167, at 30 (July 7 pretrial hearing); R.129/4 Tr. 19, 103; see also, *e.g.*, *United States* v. *Sawyer*, 733 F.3d 228, 229 (7th Cir. 2013) (counsel's response of "no" when asked if he objected to interstate commerce instruction on 18 U.S.C. 1591 waived subsequent appellate challenge); *United States* v. *O'Connor*, 656 F.3d 630, 644 (7th Cir. 2011) (counsel waives an appellate challenge to a jury instruction when he informed the district court that he had no objection to the instruction), cert. denied, 132 S. Ct. 2373 (2012); *United States* v. *Drake*, 456 F.3d 771, 776 (7th Cir. 2006) (counsel's acceptance of a jury instruction and request for one change unrelated to the issue on appeal "could constitute waiver"). If this Court were to excuse defendant's

waiver and choose to review this issue, the plain error standard would apply. See, *e.g.*, *ibid.*

B. Although The Jury Instruction On An Element Of 18 U.S.C. 1591(a)(1) Was Incorrect, The Error Did Not Affect Defendant's Substantial Rights And Therefore Would Not Warrant Reversal, Even If Defendant Had Not Waived The Issue

Defendant asserts (Br. 48-53) that the instruction on "reckless disregard" was incorrect, and that this error affected his substantial rights and warrants a new trial on Counts 1-3. Although the United States agrees that the instruction was incorrect, defendant cannot establish that this error affected his substantial rights, and therefore he would not be entitled to a new trial, even if he had not waived his challenge to the instruction. See *United States* v. *Carson*, 870 F.3d 584, 601-603 (7th Cir. 2017).

1. As relevant here, 18 U.S.C. 1591(a) makes it unlawful to harbor a person "knowing," or in "reckless disregard of the fact," that force, threat of force, or coercion will be used to cause the person to engage in a commercial sex act. The court instructed the jury, consistent with this Circuit's pattern instructions for 18 U.S.C. 1591, that a person "recklessly disregards" a fact "when he is aware of, *but consciously or carelessly ignores*, facts and circumstances that would reveal the fact." A77 (emphasis added); see also Pattern Criminal Jury Instructions Of The Seventh Circuit, at 467 (2012 ed.) (Circuit Pattern Instructions). Defendant, relying on the definition of reckless disregard adopted in *Farmer* v. *Brennan*, 511

U.S. 825, 838 (1994), argues (Br. 48-51) that this jury instruction is incorrect because the use of "or" in the phrase "consciously or carelessly ignore" permitted the jury to find that the defendant acted with reckless disregard, even if he merely acted negligently.

The Committee Notes accompanying the Circuit Pattern Instructions on Section 1591 and addressing "reckless disregard" cite *United States* v. *Pina-Suarez*, 280 F. App'x 813 (11th Cir.), cert. denied, 555 U.S. 1007 (2008), and *United States* v. *Wilson*, No. 10-60102-CR, 2010 WL 2991561 (S.D. Fla. July 27, 2010), report and recommendation adopted, 2010 WL 3239211 (S.D. Fla. Aug. 16, 2010). See Circuit Pattern Instructions at 467. Both *Pina-Suarez*, 280 F. App'x at 817-818, which addressed charges for alien smuggling, and *Wilson*, 2010 WL 2991561, at *6, which addressed charges under Section 1591, defined "reckless disregard" to require a defendant to "consciously *and* carelessly ignore" certain facts, and did not use the joinder "or." The United States agrees that the correct joinder should be "and."

2. Assuming the jury instruction error is plain, defendant cannot obtain a new trial because he cannot show that the error affected his substantial rights. See *Carson*, 870 F.3d at 602; see also *United States* v. *Cardena*, 842 F.3d 959, 998 (7th Cir. 2016), cert. denied, No. 17-5321, 2017 WL 3184728 (S. Ct. Oct. 2, 2017). To do so, he must show that "there is a reasonable probability that but for the error the

outcome of the trial would have been different." *Carson*, 870 F.3d at 602 (quoting *Cardena*, 842 F.3d at 998). In *Carson*, this Court considered the same jury instruction and found that any error was harmless based on overwhelming evidence of the defendant's guilt. *Id.* at 602-603. Here, too, defendant cannot show that there is a reasonable probability of a different verdict absent the claimed error, and therefore he cannot establish that his substantial rights were affected. Overwhelming evidence supports the conclusion that defendant *knew* that force, threats of force, or coercion would be used to cause the victim to engage in prostitution. In addition, based on the same evidence, if the jury had been correctly instructed that to act with reckless disregard the defendant must have acted "consciously *and* carelessly," defendant cannot show that there is a reasonable probability that the verdict would be different.

First, if a jury instruction permits the jury to find a defendant guilty on one of two different theories (here, defendant "knew" or "recklessly disregarded" the fact that force, threats, or coercion would cause the victims to engage in commercial sex), and one of them is legally incorrect, the guilty verdict may nevertheless be affirmed if defendant cannot show a "reasonable probability that the outcome would have been different had the jury been instructed" only on the correct theory of conviction. See *Cardena*, 842 F.3d at 997-999; *Sorich* v. *United States*, 709 F.3d 670, 672-673 (7th Cir. 2013), cert. denied, 134 S. Ct. 952 (2014);

United States v. *Black*, 625 F.3d 386, 388, 393 (7th Cir. 2010), cert. denied, 563 U.S. 1028 (2011). Here, as set forth above (pp. 26-29, *supra*), ample evidence supports the conclusion, beyond a reasonable doubt, that defendant *knew*, by engaging in a deliberate pattern of physical abuse, threats of harm, and controlled access to heroin and money, that his conduct would cause the victims to engage in prostitution. Indeed, that was the whole point of his conduct. Defendant's repeated characterization of this evidence as "minimal and attenuated" (Br. 52) is belied by the record. Moreover, as in *Carson*, it is hard to imagine how defendant could have merely "carelessly disregard[ed] the circumstances of the force or coercion," without having actual knowledge of it, "when *he was the actor* [doing the] forcing and coercing" through his assaults, threats, and coercion. 870 F.3d at 602 (emphasis added).

Second, if a jury instruction misstates the law, a defendant's substantial rights are affected only if he can show that there is a reasonable probability that he would not have been convicted under the *correct* instruction. See, *e.g.*, *United States* v. *Lawson*, 810 F.3d 1032, 1040 (7th Cir. 2016). Defendant cannot meet this standard. Leaving aside the portion of the instruction based on defendant's "knowledge," if the jury had been correctly instructed that reckless disregard requires proof that defendant acted consciously *and* carelessly, the same evidence (noted above) that establishes that defendant acted knowingly also establishes that

he acted consciously and carelessly. See *id.* at 1041-1042 (ample evidence established defendant would have been convicted under 18 U.S.C. 924(c) absent the error in the instruction); see also *United States* v. *Gray-Sommerville*, 618 F. App'x 165, 168 (4th Cir.) (a victim's testimony that she told defendant she was 16 years old was sufficient to establish that defendant "knew or acted in reckless disregard" of the fact that the victim was under 18 years old), cert. denied, 136 S. Ct. 226 (2015).

Finally, defendant's assertion (Br. 52-53) that the erroneous jury instruction likely affected the outcome is undermined by the fact that the Superseding Indictment (R.49), the evidence (see pp. 5-15, 26-29, *supra*), and the government's closing argument (R.175, at 2-18) reflected the single theory that defendant knowingly and deliberately engaged in a pattern of conduct including force, threats, and coercion to cause the victims to engage in commercial sex. See, *e.g.*, *Carson*, 870 F.3d at 603 (an incorrect jury instruction on reckless disregard was harmless given the government's theory of the case and closing argument that focused only on defendant's knowledge). Further, because there was no error here or in the district court's exclusion of the victim's prior sexual conduct (see Argument I.C., *supra*), defendant's assertion (Br. 53) that these two errors "reinforced and compounded each other" to create an incorrect standard of guilt is incorrect.

3. Defendant also asserts (Br. 49) that use of the phrase "would reveal" in the jury instructions – *i.e.*, that "a person recklessly disregards a fact when he is aware of, but consciously or carelessly ignores, facts and circumstances that *would reveal* the fact" – was incorrect. A77 (emphasis added). He asserts that this phrase permitted the jury to find defendant acted in reckless disregard even if defendant did not *actually* draw the inference of a risk rather than the fact that force, threats of force, or coercion would be used to cause the victims to engage in prostitution. This Court rejected this argument in *Carson*, explaining that "'reckless disregard' * * * requires only an awareness of facts and circumstances that give rise to a risk of a Section 1591 violation, not an awareness of the risk itself." 870 F.3d at 603. Moreover, the version of Section 1591(a) in effect at the time of defendant's conduct is written in the future tense: a defendant violates this provision when he acts "knowing or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion * * * , or any combination of such means *will be used* to cause the person to engage in a commercial sex act." 18 U.S.C. 1591(a) (2015). (A subsequent amendment does not alter the statute's use of the future tense.) The phrase "would reveal" in the jury instructions is consistent with that future tense. See *United States* v. *Wearing*, 865 F.3d 553, 555-556 (7th Cir. 2017) (noting Section 1591's use of the future tense).

IV

THE DISTRICT COURT DID NOT PLAINLY ERR IN ADMITTING MS. COPELAND'S TESTIMONY CONCERNING THE CHARGED CONSPIRACY

A. Standard Of Review

Defendant argued below that Ms. Copeland's testimony should be excluded because it was irrelevant. A37-38. Defendant now argues (Br. 54-58) that this testimony should have been barred under Federal Rule of Evidence 403 (Rule 403). Because defendant's argument "was not one that he made in the district court," this Court reviews it for plain error. *United States* v. *Carson*, 870 F.3d 584, 593 (7th Cir. 2017).

B. Ms. Copeland's Testimony

Count 4 of the Indictment alleged that defendant "knowingly conspired and agreed with C.N., R.C., B.T. *and others*" to violate 18 U.S.C. 2421 by transporting women, *including* the three named victims, in interstate commerce "with intent that the [women] engage in prostitution and in any sexual activity for which a person can be charged with a criminal offense." R.49, at 2-3 (emphasis added). Ms. Melissa Copeland, a childhood friend of defendant, was one of the persons who, at defendant's direction, crossed state lines to engage in sexual activity, and she testified for the government on that issue. See A40-42.

At the beginning of Ms. Copeland's testimony, defendant objected on the basis of relevance given his belief that her testimony would address a fight she had with defendant over money she received from a prostitution customer. A37-38. The United States explained that Ms. Copeland was an "other" person who was identified in the conspiracy count and summarized the assault. A37-38. The district court allowed the testimony. A39.

Ms. Copeland testified that when she was with defendant and others in Bangor, Wisconsin, defendant asked her if she wanted to earn $150 without saying how, and she said yes. A40-41. She then drove a few hours away to a man's house in Minnesota to get the $150. She did not know until she was in the man's house that she needed to provide sexual favors to receive the $150. A42. She did so and received the money. A42. Afterwards, defendant wanted a share of Ms. Copeland's proceeds but she refused. A43-44. Defendant then threw Ms. Copeland to the ground, forced her head to the pavement, reached into her brassiere, and took a portion of her money. A44.

During direct examination, the United States asked Ms. Copeland if she had ever previously engaged in prostitution, and she said no. A44. On cross-examination, the following exchange occurred (SA59):

> Counsel: Okay. Now, you said that you never did anything like that before.
> Ms. Copeland: No, I always have a job.

> Counsel: Okay. So you don't remember prostituting in Milwaukee when you got back from Arizona?
> Ms. Copeland: I'm not a prostitute.
> Counsel: Never done that before?
> Ms. Copeland: I don't even have it on my record.
> Counsel: Okay. Well, if somebody came in here and said yeah, I remember going on a date with her --
> Ms. Copeland: Bring him in.

At this point, the United States objected. SA59. Defendant's counsel asserted that defendant told her he knew of Ms. Copeland's prior acts of prostitution. SA59. The district court advised, "If you're not going to be able to impeach her, I think we're going to move on." SA60. The court gave the jury an advisory instruction that Ms. Copeland's sexual history is "not a part of this case." SA60. The United States did not mention Ms. Copeland's testimony in its closing argument.

C. The District Court Did Not Plainly Err In Permitting Ms. Copeland's Testimony

Defendant asserts (Br. 54-58) that the district court abused its discretion in admitting Ms. Copeland's testimony because it created a substantial risk of prejudice to his sex trafficking charges (Counts 1-3).[13] Although defendant acknowledges (Br. 54) that the government can elicit evidence of other acts that are direct evidence of a charged conspiracy, he asserts that here admission of this

[13] As noted above, Count 4 charged defendant with conspiracy to engage in the interstate transportation of women for prostitution, and the government called Ms. Copeland as a witness to support that count. Defendant was convicted on Count 4, but he is not challenging that conviction.

testimony violated Rule 403 because it had no probative value and it was highly prejudicial. He asserts (Br. 55) that the effect of her testimony – that someone would deceive a childhood friend into engaging in prostitution that she otherwise would never have done – was highly prejudicial because a central issue in the sex trafficking charges was whether that prostitution was voluntary or compelled. He also asserts (Br. 56) that it was cumulative of other evidence of the conspiracy, and therefore lacked probative value. Defendant's arguments are without merit.

Rule 403 requires a district court to exclude evidence when its "probative value is substantially outweighed by a danger of * * * unfair prejudice[.]" Because all adverse evidence is prejudicial, the key is whether the prejudice is "unfair." *United States* v. *McKibbins*, 656 F.3d 707, 712 (7th Cir. 2011). The standard for reversal on a Rule 403 challenge on plain error is "steep"; the defendant must show a reasonable probability that the verdict would be different absent the error. See *United States* v. *Klemis*, 859 F.3d 436, 440, 445 (7th Cir. 2015) (testimony was not "obviously and egregiously prejudicial" because, given the overwhelming evidence of guilt, there was no reasonable probability that he would have been acquitted but for this challenged evidence); *United States* v. *Cooper*, 591 F.3d 582, 585, 589-590 (7th Cir.) (the erroneous admission of evidence was harmless given the overwhelming evidence to support convictions), cert. denied, 561 U.S. 1036 (2010).

First, the district court correctly admitted Ms. Copeland's testimony as *direct* evidence of the conspiracy charged in Count 4, and "direct evidence of a crime is almost always admissible" and subject to Rule 403. *United States* v. *Gorman*, 613 F.3d 711, 717 (7th Cir. 2010). As noted above, Ms. Copeland testified that at defendant's direction, she travelled from Wisconsin to Minnesota, engaged in a sexual act, and received money. See A40-42. Further, she testified that defendant violently took from her some of the money, which reflected his exercise of control over that transaction and therefore was relevant to establish his role in the conspiracy. Accordingly, defendant's assertion (Br. 56-57) that defendant's use of force against Ms. Copeland is only relevant to the sex trafficking charges, and not the conspiracy charge, is not correct and is certainly not plain or obvious error. See *United States* v. *Molina*, 484 F. App'x 49, 54-55 (7th Cir. 2012) (recorded call by defendant discussing his debt to drug dealer, including defendant's statements he would use violence if necessary to collect money from his own customers, was direct evidence of his possession with intent to distribute drugs even though violence is not an element of the crime).

In any event, there is no basis to conclude, through the lens of plain error, that this testimony resulted in unfair prejudice to defendant's sex trafficking charges; *i.e.*, defendant cannot show a reasonable probability that the sex trafficking verdicts would be different absent her testimony. As recounted above

(pp. 26-29, *supra*), overwhelming evidence establishes that defendant knew his deliberate pattern of force, threats of force, and coercion caused Ms. Tischer, Ms. Stuhr, and Ms. Ryan to prostitute for his benefit. In light of this evidence, defendant cannot show that there is a reasonable probability that the sex trafficking verdicts would be different had Ms. Copeland not been permitted to testify about her interstate prostitution and defendant's subsequent use of force to take some of the money that she was paid.[14] See *Molina*, 484 F. App'x at 55-56 (the violent character of defendant's statements did not outweigh its relevance to prove defendant's drug trafficking; even if prejudicial, it was harmless in light of the other overwhelming evidence); *Cooper*, 591 F.3d at 589-590 (admission of evidence of several victims' fatal heroin overdoses from heroin purchased from defendant, which was not necessary to prove an element of the charged offense and was highly prejudicial, was harmless in the face of compelling evidence of defendant's guilt).

---

[14] Defendant also complains (Br. 57 n.11) that the court's limiting instruction (see A61) on the jury's consideration of "other acts" in determining whether defendant committed the acts charged in the indictment increased the risk that the jury would rely on Ms. Copeland's testimony in considering the sex trafficking charges. But that generalized jury instruction was not tethered to any specific counts, and Ms. Copeland's testimony was direct evidence of the conspiracy charged in Count 4. Moreover, defendant never sought a specific jury instruction concerning the testimony of Ms. Copeland that he challenges here.

V

THIS COURT SHOULD VACATE DEFENDANT'S CONVICTION ON COUNT 9, RETALIATION IN VIOLATION OF 18 U.S.C. 1513(b)(2), BECAUSE THE JURY INSTRUCTION FAILED TO IDENTIFY AN ELEMENT OF THE OFFENSE

A. Standard Of Review

Because defendant did not object to the jury instruction on retaliation, this Court reviews for plain error. See *United States* v. *Griffin*, 84 F.3d 912, 924-925 (7th Cir.), cert. denied, *Rux* v. *United States*, 519 U.S. 999 (1996), and *Scurlock* v. *United States*, 519 U.S. 1020 (1996); see also page 19, *supra*.

B. Background

Ms. Tischer testified that she spoke to "law enforcement" about defendant's unlawful activities at the Sparta house after she left the Sparta house and before she reunited with defendant in April 2014. R.124/3A Tr. 112. She further testified that, in April 2014, after she had been out of contact with defendant for more than a year, and after he learned that she had spoken to law enforcement about his actions, defendant threatened to rape and kill members of her family. R.124/3A Tr. 78. In addition, she testified that, during this time, when defendant, Ms. Tischer, and others were at the home of a friend, Ron Collins, the defendant stated that there was a "snake in the house and that that snake was going to die that night." A31. Defendant then brutally assaulted Ms. Tischer. R.124/3A Tr. 113-116; see also R.128/3P Tr. 23-27. Ms. Tischer believed defendant's "snake"

comment was referring to her as a "snitch, that [she] talked to the police on him," and that defendant was going to kill her. A31. After the assault, defendant posted on Facebook that Ms. Tischer and Mr. Collins were "snitches." R.124/3A Tr. 116; see A33-34.

Count 9 charged defendant with violating 18 U.S.C. 1513(b)(2). Section 1513(b)(2) provides that it is unlawful for a person to knowingly engage in conduct that causes bodily injury, damages property of another person, or threatens to do so, "with intent to retaliate against any person" for "any information relating to the commission or possible commission of a Federal offense * * * given by a person to a law enforcement officer." A "law enforcement officer" is defined to be an officer employed by the federal government or an individual acting for, on behalf of, or advising the federal government. 18 U.S.C. 1515(a)(4). Accordingly, to establish a violation of Section 1513(b)(2), the United States must prove, among other things, that the retaliation occurred because information regarding the commission or possible commission of a federal offense was communicated to a *federal* law enforcement officer or to an officer acting for, on behalf of, or advising the *federal* government.

Count 9 of the Superseding Indictment charged that:

> [i]n or about April 2014, * * * defendant Monta Groce knowingly engaged in conduct and thereby caused bodily injury to another person, specifically, defendant struck and assaulted [Lisa Tischer] and, in so doing, the defendant acted with intent to retaliate against

> [Ms. Tischer] because [Ms. Tischer] had provided information to law enforcement officers relating to the commission and possible commission of a federal offense.

R.49, at 6. The evidence at trial did not indicate that Ms. Tischer gave information to a federal law enforcement officer or an officer acting for, on behalf of, or advising the federal government.

Consistent with the Superseding Indictment, the jury instructions (A76) identified two elements of the offense:

> To sustain the charge against the defendant in Count 9, the government must prove these elements:
> (1) The defendant, Monta Groce, knowingly engaged in conduct that caused bodily injury to Lisa Tischer; and
> (2) The defendant engaged in this conduct with intent to retaliate against Lisa Tischer because Lisa Tischer had provided information to law enforcement officers relating to the commission or possible commission of a federal offense.

Defendant did not object to this instruction on the basis that it did not require the government to prove that the law enforcement officer was a *federal* official.

C. The Jury Instruction On Count 9 Failed To Identify An Element Of The Offense And The Trial Evidence Does Not Prove That Element

The United States agrees with defendant (Br. 28-35) that the jury instruction on Count 9 failed to identify an essential element of the offense, *i.e.*, that Ms. Tischer gave the information to a federal officer. Sections 1513(b)(2) and 1515(a)(4), read together, plainly require that the underlying communication

must be to a federal law enforcement officer (or someone acting on behalf of, or with a connection to, the United States). Case law also supports this conclusion. See, *e.g.*, *United States* v. *Draper*, 553 F.3d 174, 180 (2d Cir. 2009) (a law enforcement officer's federal status is a third element of Section 1513(b)(2)); *United States* v. *Maggitt*, 784 F.2d 590, 598-599 (5th Cir. 1986) (a conviction under 18 U.S.C. 1513 requires proof of the federal status of the law enforcement officer who received information regarding a federal crime); see also *United States* v. *Snyder*, 865 F.3d 490, 496 (7th Cir. 2017) (addressing the "required federal nexus" for the "reasonable likelihood" of a victim's communication with a federal officer or judge under 18 U.S.C. 1512(a)(1)(C)).

The United States also agrees that there is no evidence in the record that establishes this element of the offense, and therefore the failure to instruct the jury on this element is plain error that affected defendant's substantial rights and the fairness and integrity of these proceedings. See *Draper*, 553 F.3d at 181-183.[15] Accordingly, this Court should vacate defendant's conviction on Count 9 and remand for resentencing on defendant's remaining convictions.

---

[15] Because the United States concedes that the jury instructions were erroneous, this Court need not address defendant's other challenges to his conviction on Count 9, *i.e.*, the sufficiency of the evidence (Br. 35-37) or his assertion (Br. 34 n.6) that 18 U.S.C. 1513(b)(2) requires proof that defendant knew of the involvement of a federal law enforcement officer.

VI

DEFENDANT CANNOT ESTABLISH CUMULATIVE ERROR

A. Standard Of Review

When an appellant asserts cumulative error, this Court will consider only plain errors and errors preserved for appellate review. *United States* v. *Christian*, 673 F.3d 702, 708 (7th Cir. 2012). Reversal is appropriate only if "the errors, considered together, could not have been harmless." *United States* v. *Adams*, 628 F.3d 407, 419 (7th Cir. 2010), cert. denied, 565 U.S. 861 (2011) (citation omitted).

B. Defendant Cannot Establish Cumulative Error

Defendant argues (Br. 58-59) that numerous alleged errors "reinforced and compounded the others" and therefore, cumulatively, these errors are not harmless. Defendant offers no further explanation as to why this might be so. To establish cumulative error, defendant must identify at least two errors that collectively denied him "a fundamentally fair trial," not a perfect trial. *Adams*, 628 F.3d at 419. This Court considers "the entire record," including "the nature and number of errors committed, the interrelationship and combined effect of the errors, how the trial court handled the errors, and the strength of the prosecution's case." *Ibid.*

We have acknowledged two errors in the jury instructions, one of which requires vacating defendant's conviction on Count 9 (and resentencing) (Argument V), and one of which is harmless (Argument III). But no combination of these

errors, and any other alleged errors, deprived defendant of a fair trial.[16] Moreover, the government's case could hardly be considered weak. There was overwhelming evidence of guilt on the sex trafficking counts, including defendant's assaults, threats of violence, controlled access to heroin, manipulated debt, and isolation of the victims from friends and family. Accordingly, defendant's cumulative error argument fails. See *United States* v. *Courtright*, 632 F.3d 363, 370-371 (7th Cir. 2011) (even assuming two interrelated errors, there was no cumulative error given "the abundant evidence" of defendant's guilt); *Adams*, 628 F.3d at 419-420 (errors were collectively harmless given the "overwhelming" evidence of guilt).

[16] Defendant lists eight individual errors. Two of these alleged errors – that the district court erred by permitting the United States to ask Ms. Copeland and Ms. Stuhr about their prior sexual history (error (ii)), and the district court interfered with defendant's closing argument (error (iv)) – are not addressed in the defendant's brief, and therefore they are waived. See *United States* v. *Parkhurst*, 865 F.3d 509, 524 (7th Cir. 2017).

CONCLUSION

This Court should affirm defendant's sex trafficking convictions. This Court should vacate defendant's retaliation conviction and remand for resentencing.

Respectfully submitted,

JEFFREY M. ANDERSON
Acting United States Attorney

s/ Alice H. Green
ALICE H. GREEN
JULIE S. PFLUGER
Assistant United States Attorneys
United States Attorney's Office
Western District of Wisconsin
222 West Washington Avenue
Suite 700
Madison, WI 53703
(608) 264-5158

JOHN M. GORE
Acting Assistant Attorney General

s/ Jennifer Levin Eichhorn
THOMAS E. CHANDLER
JENNIFER LEVIN EICHHORN
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Brief Of The United States As Appellee:

(1) complies with Circuit Rule 32(c) because it contains 13,420 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32(b), Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: October 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, by filing the foregoing Brief Of The United States As Appellee with the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, I caused to be served a true and correct copy of the foregoing brief. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney