IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BAKARI SHAHID MCMILLAN, COREY ORENTHESES MILLER, DAMON TAQUAN JACKSON,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

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Nos. 18-4175 (L), 18-4182, 18-4462

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JURISDICTIONAL STATEMENT

This appeal is from a district court's final judgments in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered judgment as to Corey Miller and Bakari McMillan on March 9, 2018, and as to Damon Jackson on July 5, 2018. J.A. 1168-1179, 1259-1265.[1] All three defendants filed

[1] "J.A. __" refers to the page number of the Joint Appendix filed by defendants. "Br. __" refers to the page number of defendants' consolidated opening brief. The brief refers to defendants by their legal names but all three

(continued…)

timely notices of appeal after their convictions but before sentencing and judgment. J.A. 18, 36, 51; Fed. R. App. P. 4(b). McMillan and Jackson filed additional timely notices of appeal after judgment (on March 20, 2018, and July 9, 2018, respectively). J.A. 1187-1188, 1266-1267. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Defendant Corey Miller has failed to meet his burden of showing that the district court committed reversible, plain error by declining to enter judgment of acquittal in his favor.

2. Whether the defendants have failed to meet their burden of establishing that the district court committed reversible, plain error by not giving a multiple conspiracies instruction.

3. Whether the defendants have failed to meet their burden of establishing that the district court committed reversible, plain error by not giving a specific unanimity instruction.

4. Whether the defendants have failed to meet their burden of establishing that the district court committed reversible, plain error by admitting evidence regarding one victim's age.

(…continued)
defendants had nicknames that some witnesses used to refer to them. Jackson's nickname was "Deejay"; Miller's was "Clow"; and McMillan's was "Bizzle."

5. Whether the defendants have failed to meet their burden of establishing that a combination of eight other unpreserved purported errors regarding stray statements during a multi-day jury trial constitutes reversible, plain error.

STATEMENT OF THE CASE

1. Procedural History

The 29-count operative indictment charged ten defendants with various sex trafficking offenses under 18 U.S.C. 1591 and 1594. J.A. 55-75. The indictment charged a conspiracy to engage in sex trafficking in violation of Section 1594(c) in Count 1 and numerous substantive trafficking offenses under Section 1591 in the remaining counts. J.A. 55-75.

Seven defendants pleaded guilty, and three—Damon Jackson, Bakari McMillan, and Corey Miller (who are appellants here)—went to trial. The government presented evidence from three law enforcement officers, five of the defendants who pleaded guilty, two victims, and a trafficking expert. J.A. 166-675. After the government rested, defendants moved for judgment of acquittal on several counts. J.A. 675-693, 853-858. The government agreed to dismiss two Section 1591 counts against Jackson, and the district court granted Miller's motion as to one Section 1591 count; the court otherwise denied the motions. J.A. 675-693, 853-858. Jackson and Miller both presented evidence, and after the close of all the evidence, counsel for Jackson renewed his motion for judgment of acquittal,

stating, "Judge, for the record, we would renew our motions." J.A. 912. The district court denied the request for judgment of acquittal, stating, "[t]he easiest way to get the reverse is have the decision on both sides of the same question, so I may be wrong, but I'll be consistently wrong." J.A. 912.

Ten counts were submitted to the jury. The jury acquitted on two counts (one Section 1591 count for each Jackson and McMillan). J.A. 1081, 1084. The jury convicted on the other eight counts, which are the only charges relevant on appeal:

Count	**Defendant(s)**	**Victim**[2]	**Offense**[3]
1	Jackson, McMillan, Miller	--	Conspiracy to engage in sex trafficking of minors and by means of force, fraud, or coercion (18 U.S.C. 1594(c)).
2	Jackson	Deionna Brown	Sex trafficking by force, fraud, or coercion
3	Jackson	S.P.	Sex trafficking of a minor
4	Jackson	Lindsey Wentz	Sex trafficking by force, fraud, or coercion
5	Jackson	Briana Evans	Sex trafficking by force, fraud, or coercion
6	Jackson	Shelby Belton	Sex trafficking by force, fraud, or coercion
10	McMillan	S.P.	Sex trafficking by force, fraud, or coercion; sex trafficking of a minor

[2] The district court admitted testimony that used the full names of the victims in this case. Throughout this brief, the United States also uses the full names of adult victims and spells their names as reflected in the trial transcripts to maintain consistency with the district court record, joint appendix, and opening brief. The United States uses minor victims' initials in accord with Fourth Circuit Local Rule 25(c). The United States requests, however, that to protect victims' privacy, this Court identify all victims by their initials in any opinion the Court may issue. See *United States* v. *Cortes-Meza*, 685 F. App'x 731 (11th Cir. 2017) (using initials).

[3] The statute of conviction is 18 U.S.C. 1591, unless otherwise noted.

28	Miller	Briana Evans	Sex trafficking by force, fraud, or coercion

J.A. 1078-1086. The district court sentenced Jackson and McMillan to 480 months' imprisonment and Miller to 240 months' imprisonment. J.A. 1127, 1135, 1145, 1165, 1236, 1256.

2. Factual Background

a. Damon Jackson

Of the various defendants in this case, Jackson trafficked the most victims. J.A. 279, 348, 448. Jackson was violent with the victims, trafficked minors, and worked extensively with his co-defendants to engage in illegal trafficking.

i. Jackson trafficked Lindsey Wentz. For a period of time, Wentz was Jackson's "bottom bitch" or the victim that was at his side at all times. J.A. 236. Jackson posted advertisements for Wentz's services on Backpage—the website defendants used to advertise commercial sex—with his email account and phone number attached to these postings. J.A. 520-521. Jackson gave Wentz drugs so that she would continue performing commercial sex acts for his benefit throughout the night and into the morning. J.A. 387-388. In one instance, Jackson attempted to scare Wentz by telling her that he had transmitted AIDS to her. J.A. 283, 432-433. Jackson also grabbed, pushed, hit, and threw Wentz at various times. J.A. 235. Jackson eventually introduced Wentz to co-defendant Desmond Singletary, who then trafficked her and did so using violence. J.A. 271, 274.

Jackson also trafficked Briana Evans. Jackson recruited Evans after he saw an advertisement that co-defendant Corey Miller had posted for her. J.A. 230. Jackson promised Evans that he could provide her with drugs. J.A. 230. After Jackson picked Evans up from her hotel room, he ordered her to perform oral sex on the man who had driven them to a gas station and to a second hotel. J.A. 231-232. Jackson then posted advertisements for her on Backpage, and she began engaging in commercial sex acts for his benefit. J.A. 232-234. Jackson gave Evans rules, including that she was not permitted to look at or talk to any of his friends. J.A. 234. Jackson also insisted that Evans use baby wipes to slow down or stop the bleeding when she was menstruating so that she did not have to stop working. J.A. 242. Evans was scared and felt trapped. J.A. 233. Evans eventually escaped while she was on a job with Wentz by calling a friend while Jackson was away getting food. J.A. 239-240. Initially, Wentz tried to prevent Evans from leaving, but she was able to get out of the hotel room where they were working. J.A. 240. As Evans and her friend were leaving the hotel, Jackson pulled into the parking lot and chased them, but they were able to get away. J.A. 240. Evans eventually went to the hospital for drug treatment, and she has not engaged in commercial sex acts since escaping Jackson. J.A. 269.

Jackson also trafficked Deionna Brown. J.A. 306, 348, 389, 449-450, 466-467. Brown performed commercial sex acts and gave Jackson all of the proceeds.

J.A. 766. Brown eventually left Jackson and was trafficked by co-defendant Da-Shun Curry. J.A. 349. Brown taught Curry methods of trafficking that she had witnessed from being trafficked by Jackson. J.A. 358.

Jackson also trafficked Shelby Belton. J.A. 449, 532, 541. Belton left Jackson because he beat her numerous times, and she began working for co-defendant Kerry Taylor. J.A. 449, 457-458.

Jackson also trafficked a minor named S.P., who was 15 or 16 years' old and looked "[quite] young." J.A. 450-451, 472, 548-549.

ii. Jackson also trafficked several other women not named in the indictment. One of these women was Sierra Davis, who met Jackson through an online dating application when she was 17 years old and had a consensual sexual encounter with him in a hotel room. J.A. 295-296, 313, 320. After they had sex, Jackson told Davis that she was going to make him money, and a customer showed up to have sex with Davis. J.A. 296-297. Davis tried to call a friend, but the friend did not answer, and she thus felt she had no choice but to perform commercial sex acts for Jackson's benefit that day. J.A. 296-297. Jackson continued posting advertisements for her on Backpage, and Davis continued engaging in commercial sex for his benefit, even after she told Jackson that she was 17. J.A. 298-299, 320. Davis felt scared. J.A. 298. Eventually, after a falling out with Jackson, Davis broke a hotel room mirror and escaped while he was not present. J.A. 300-301.

Davis eventually returned to him because she felt bad about breaking the mirror but they got into an argument, and Jackson asked his friend and co-defendant Tremel Black to pick her up; he did so and began trafficking her. J.A. 301-302.

Jackson used force not only to traffic these women but also several others. For example, Jackson trafficked Diandrel Porter, whom he sexually assaulted. J.A. 280-282. And Jackson slapped a victim named Nessa, and, on a separate occasion, tried to get Nessa back after she had left by grabbing her from a hotel and putting her in a car. J.A. 383-386. Black and co-defendant Ryan Turner assisted Jackson in connection with this incident. J.A. 384-386.

Jackson used Facebook to recruit even more women to perform commercial sex acts for his benefit. See J.A. 524. At least two of these potential victims told Jackson they were underage, and he nevertheless continued to pursue them. J.A. 528, 531, 754-755.

iii. Jackson was friends with several of his co-defendants since middle school and was a member of the same gang as other co-defendants. J.A. 270, 302, 371, 442, 467-468, 710-711. One of his fellow gang members, Black, taught Jackson how to engage in commercial sex trafficking. J.A. 391. And Jackson "sold" a woman whom he had trafficked to Black for $40. J.A. 334, 562.

In addition, Jackson and his co-defendants often worked together and assisted each other with transportation. For example, after Turner and Jackson got

into a car accident while driving together, police found prepaid credit cards (which defendants used to pay for Backpage ads) and hotel room keys. J.A. 556-560. Black also provided rides to Jackson in exchange for cash when Jackson did not have a car (J.A. 382-383), as did Miller, who met Jackson through a stripper (J.A. 710, 775-776). In addition, Jackson and Bakari McMillan communicated with each other over Facebook when they were worried about potential investigations. J.A. 563. And they gave each other tips about how to maximize earnings from trafficking and congratulated each other on sex trafficking successes. J.A. 564-565.

Jackson had extensive contacts with his co-defendants and victims after he was arrested. Miller reached out to Jackson after Jackson's arrest, and Jackson asked Miller to visit him in jail. J.A. 568. This communication happened shortly after Evans had discussed both Miller and Jackson with investigators. J.A. 568-569. Miller got relevant information from Jackson over Facebook in an attempt to help Jackson get out of jail. J.A. 569. Miller was not the only co-defendant assisting Jackson during this time. Black also tried to help Jackson get out of jail. J.A. 404. And Nia Newkirk, who was one of McMillan's victims, deposited money in Jackson's prison account that she had received from S.P. J.A. 552. Finally, Jackson tried to ensure that witnesses, including Wentz, did not cooperate with investigators. J.A. 283, 313.

b. Bakari McMillan

McMillan trafficked 30 to 60 women from 2011 to 2015 and kept most of the proceeds of their commercial sexual activity. J.A. 631, 633; see also J.A. 338, 351. He made $700-$800 per day through sex trafficking. J.A. 632. The women McMillan trafficked included Ashley Williams, Nia Newkirk, S.P., D.C., Deionna Brown, and Carrie Mincey. J.A. 632-636. D.C. and S.P. were underage. J.A. 548-549, 634, 647.

McMillan had a bad temper and used violence against some of these women. J.A. 635. For example, he often punched and slapped women who worked for him. J.A. 636. He once assaulted S.P. when she would not let him use her father's car. J.A. 659. And S.P. had a chipped tooth when she escaped McMillan. J.A. 476, 546. McMillan slapped Newkirk (who was the mother of his child) and burned her arm with an iron for violating established rules for how to behave as a prostitute. J.A. 314, 316, 350, 394-396, 429-431. McMillan also used physical force against Brown. J.A. 392-393. For example, he once threw Brown out of a car and dragged her on the ground, causing her back piercing to come out. J.A. 316. McMillan also kept an AK-47. J.A. 478; see also J.A. 552.

McMillan had longstanding relationships with many of the co-conspirators. McMillan has been friends with Da-Shun Curry and Damon Jackson since middle school. J.A. 467-468, 710-711. Moreover, McMillan, Jackson, Tremel Black, and

Curry were members of the Crips. J.A. 371, 468. And, as discussed above, Jackson and McMillan communicated through Facebook about potential investigations and offered each other tips on where and how they could maximize their earnings from their sex trafficking operations. J.A. 563-565.

Co-conspirators also assisted McMillan with trafficking. For example, at McMillan's request, co-defendant Howard Parker transported a victim, who looked no older than 18, to a bus station to send her to Charleston to engage in commercial sex acts. J.A. 350-351, 359, 362. And co-defendant Robert Black allowed McMillan to use a hotel room to traffic two women until McMillan could get enough money for his own room. J.A. 608.

c. Corey Miller

Miller trafficked Briana Evans and worked with Damon Jackson to engage in trafficking activities.

i. Miller approached Evans and April Josie at a gas station in Charleston where he gave them his business card from Miami Modeling Agency. J.A. 218, 895. Miller offered to buy the women food, and they got in his car. J.A. 219. At that point, Miller took Evans's phone from her. J.A. 220. Evans dozed off, and when she woke up, Josie was no longer in the car. J.A. 219, 264. Miller took Evans to a gas station to get a sandwich and then took her to his house, which was in a remote area in Orangeburg, South Carolina. J.A. 220-221, 603.

Once at Miller's home, Miller pinned Evans down on the bed and raped her. J.A. 223. He told her that she "was going to be a real good ho and make him a lot of money." J.A. 223. Miller proceeded to lock Evans in a small room with bins, feminine products, towels, washcloths, small toiletries, and skimpy women's clothing. J.A. 223-224. Miller gave Evans a clipboard that had information and terminology that instructed her on how to work for him. J.A. 225-226.

Miller took Evans to a Red Roof Inn in Columbia, South Carolina, where she worked her first job. J.A. 227. Miller zip tied Evans, took pictures of her, and posted an online advertisement. J.A. 227, 241. Miller then communicated with potential clients or supervised Evans while she talked on the phone with them. J.A. 228. Evans was required to make $500 per day or else Miller would not permit her to eat or sleep. J.A. 229. Like Jackson, Miller expected Evans to use baby wipes to slow down or stop the bleeding when she was menstruating so that she did not have to stop working. J.A. 242. Evans's experience with Miller was "scary" and she felt "trapped." J.A. 233, 267.

ii. Miller met co-defendant Jackson through an exotic dancer. J.A. 710. They corresponded through social media periodically, and Miller gave Jackson rides when Jackson did not have a car. J.A. 710, 776. Jackson paid Miller for these rides in cash. J.A. 776, 801. After Jackson was arrested for his conduct in this case, the two exchanged messages on Facebook, in which Miller tried to find a

way to help Jackson get out of jail. J.A. 568-569. In these messages, Jackson asked Miller to visit him in jail and provided Miller with the necessary information to do so. J.A. 568.

SUMMARY OF THE ARGUMENT

Defendants raise five arguments, none of which was properly preserved before the district court. This Court thus reviews these arguments for plain error, a standard that defendants cannot satisfy.

1. Defendant Corey Miller challenges the sufficiency of the evidence as to both his substantive sex trafficking conviction (Count 28) and his conspiracy conviction (Count 1). There was sufficient evidence on both. As to the substantive offense, the jury heard sufficient evidence that Miller made Briana Evans engage in commercial sex acts by means of force, fraud, or coercion. Miller fraudulently told Evans that he was affiliated with a modeling agency; he then raped Evans, telling her she would make him a lot of money as a prostitute, and locked her in a room. He also restrained Evans and took the pictures that he used to advertise for commercial sex online. This evidence is more than sufficient to sustain a conviction under 18 U.S.C. 1591(a). Miller argues that the jury and district court should have credited his testimony over Evans's, but this Court does not reassess credibility on sufficiency review.

There was also sufficient evidence that Miller conspired with Damon Jackson to engage in illegal sex trafficking. Miller brought Evans to the location where she met Jackson and provided rides to Jackson when he did not have a car. Because transportation was critical to the conspirators' enterprise, providing rides to one another and to victims was a significant way in which conspirators assisted each other. In addition, Miller and Jackson corresponded after Jackson was arrested, and these communications suggested that Miller was trying to help Jackson get out of jail and prevent witnesses from cooperating with the investigation. A reasonable jury could infer from these circumstances that Jackson and Miller had a tacit understanding to assist each other with trafficking, which is sufficient to sustain the verdict.

2. All three defendants contend that the district court should have instructed the jury that it could find multiple conspiracies instead of a single overarching conspiracy on Count 1. But the court did not plainly err by not sua sponte giving such an instruction. Whether to give a multiple conspiracies instruction is a fact-bound question that depends on whether the record shows that there was significant evidence of multiple smaller conspiracies that outweighed evidence of a single overarching conspiracy. Here, there is significant evidence that there was a single overarching conspiracy to traffic young women because there were overlapping victims between the various defendants as well as overlapping

methods regarding how they trafficked these women. Indeed, the conspirators taught each other the methods and provided significant logistical assistance to each other. The record thus shows that the conspiracy was a loosely knit association of traffickers who worked together to accomplish illegal goals.

Even if defendants could show that a multiple conspiracies instruction would have been preferable, they have not demonstrated that any error was clear or obvious because they have cited no case involving similar circumstances where this Court or the Supreme Court has reversed a conspiracy conviction for failure to instruct on multiple conspiracies. They have also failed to establish that any plain error affected their substantial rights because the record does not suggest that a jury would have acquitted any of them had a multiple conspiracies instruction been given.

3. All three defendants contend that the district court erred by not instructing the jury that to convict on Count 1, they had to unanimously agree on the object of the conspiracy. That is, defendants contend that to convict on conspiracy, a jury must be unanimous on whether the goal of the conspiracy was to engage in sex trafficking of minors, on the one hand, or sex trafficking by means of force, fraud, or coercion, on the other. The district court did not err because defendants misread the statute. Generally, jurors must be unanimous on *elements* of the offense, but they need not be unanimous on the specific *means* of how each

element is satisfied. Here, Section 1594(c) criminalizes conspiracies to engage in illegal sex trafficking. The trafficking of minors, and trafficking by means of force, fraud, or coercion, are a means of the element of illegal sex trafficking, not separate elements themselves.

In any event, defendants admit that no court has interpreted Section 1594(c) as they contend; thus, even if there were error, it would not be plain. Further, defendants cannot show that any plain error affected their substantial rights because they were all convicted of the substantive offense of sex trafficking by means of force, fraud, or coercion. Thus, even if the jury were required to be unanimous on the object of the conspiracy, it is likely that the jury would have unanimously agreed that trafficking by force, fraud, or coercion was one of the objects of the conspiracy.

Defendant Bakari McMillan also contends that a specific unanimity instruction was necessary on Count 10. Specifically, McMillan contends that the jury needed to unanimously agree on whether he trafficked S.P. when she was a minor or by means of force, fraud, or coercion. Unlike Count 1, unanimity was required on whether the trafficking was of a minor or by force, fraud, or coercion for the Section 1591(a) offense. Nevertheless, the court did not err because the verdict form made clear that the jury had to unanimously agree whether McMillan violated the minor element or the force, fraud, or coercion element, and the jury

unanimously found both beyond a reasonable doubt. There was thus no error, let alone plain error, in failing to give a separate instruction on unanimity.

4. Defendants argue that the district court erred by admitting evidence from a co-defendant and two law enforcement officers that S.P. was a minor because those statements were hearsay. But the district court did not err, let alone plainly err. The challenged testimony did not rely on any out-of-court statements or documents regarding S.P.'s age. Defendants' argument that these witnesses relied on such statements is based on mere speculation because the witnesses were never asked how they learned or confirmed that S.P. was a minor.

In any event, any error is not clear or obvious because defendants have not cited any case law suggesting that a district court must assume a statement is hearsay without a basis for that assumption. Further, this testimony regarding S.P.'s age did not affect defendants' substantial rights because there was other testimony that S.P. looked young and that Jackson in particular corresponded and tried to recruit minor women to engage in commercial sex acts. In addition, in closing argument, the government emphasized a photograph of S.P. as evidence of her age. Even if the court erred in admitting testimony regarding S.P.'s age, defendants have thus failed to show that the verdict relied on these statements.

5. Defendants' final argument is that a hodgepodge of unpreserved errors requires reversal under the cumulative error doctrine. This argument fails because

they have failed to establish multiple plain errors that would warrant the unusual remedy of reversal on cumulative error grounds. Indeed, in some cases, defendants have waived their arguments by failing to develop them. Instead, defendants' arguments primarily involve pulling a few stray sentences out of a nearly 1,000-page trial transcript without citation to binding precedent that any statement was erroneously allowed. Because most of the challenged statements were proper, their failure to develop their arguments is unsurprising.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY REFUSING TO ENTER A JUDGMENT OF ACQUITTAL AS TO COREY MILLER

The jury convicted Corey Miller of conspiracy to engage in sex trafficking under 18 U.S.C. 1594(c) (Count 1) and sex trafficking by force, fraud, or coercion under 18 U.S.C. 1591 (Count 28). J.A. 1085-1086. He challenges the sufficiency of the evidence on both counts.

A. Standard Of Review

Miller moved for judgment of acquittal at the end of the government's case-in-chief. See J.A. 691-693. The district court denied this motion as to Counts 1 and 28, and Miller did not renew the motion after the close of all the evidence. J.A. 691, 693, 912. This Court thus reviews the denial of judgment of acquittal for

plain error. See *United States* v. *Gray-Sommerville*, 618 F. App'x 165, 167 (4th Cir. 2015).[4] To satisfy this standard, Miller must establish that there was (1) an error; (2) the error was plain; and (3) the error affected his substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Even if he establishes these elements, this Court only exercises its discretion to reverse where the "error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks, citation, and alteration omitted).

To show that the evidence was insufficient, Miller must establish that, viewing the evidence in the light most favorable to the government, no rational trier of fact could find the offense's elements beyond a reasonable doubt. See *United States* v. *Fuertes*, 805 F.3d 485, 502 (4th Cir. 2015). Miller, therefore, bears "a heavy burden." *United States* v. *Cornell*, 780 F.3d 616, 630 (4th Cir.

[4] At the close of the government's case-in-chief, each defense counsel separately moved for judgment of acquittal. J.A. 675-693. However, at the close of all the evidence, only Damon Jackson's counsel renewed his motions for judgment of acquittal, stating that, "Judge, for the record, we would renew our motions." J.A. 912. Jackson's renewal is insufficient to preserve Miller's challenge to the sufficiency of the evidence because one defendant's objections only suffice to preserve error for another defendant where both defendants have the same arguments. See *United States* v. *Pardo*, 636 F.2d 535, 541 (D.C. Cir. 1980) ("[A]ppellants may not latch onto [co-defendants'] motions and obtain a free ride."); cf. *United States* v. *Baker*, 458 F.3d 513, 518 (6th Cir. 2006) (no need to raise "redundant" objections). Here, Jackson and Miller have different arguments on sufficiency and thus were required to separately raise their arguments. In any event, regardless of the standard of review, Miller's sufficiency argument fails for the reasons discussed here.

2015) (citation omitted). This Court does "not reweigh the evidence or the credibility of witnesses," *United States* v. *Roe*, 606 F.3d 180, 186 (4th Cir. 2010), and reviews the evidence "in [a] cumulative context" instead of "in a piecemeal fashion," *United States* v. *Burgos*, 94 F.3d 849, 863 (4th Cir. 1996) (en banc).

B. Ample Evidence Supports The Jury's Verdict That Miller Used Force, Fraud, Or Coercion To Traffic Briana Evans (Count 28)

The jury convicted Corey Miller on Count 28, which alleged that he violated Section 1591 by using "force, threats of force, fraud, and coercion" to cause Briana Evans to engage in a commercial sex act. J.A. 74, 1086. Miller contends that there was insufficient evidence on the force, fraud, or coercion element of the offense. Br. 38-40. He is incorrect.

To sustain a conviction, there must be evidence that Miller "acted knowingly or in reckless disregard of the fact that means of force, threats of force, fraud, coercion, or any combination of such means would be used to cause [Evans] to engage in a commercial sex act." *United States* v. *Geddes*, 844 F.3d 983, 991-992 (8th Cir. 2017) (citation omitted). Here, Evans testified that Miller picked her up from a gas station near Charleston after suggesting that he was associated with a modeling agency that could employ her. J.A. 219; see also J.A. 510, 819, 895. Miller then took her cellphone away and drove her to his house in Orangeburg. J.A. 219-220. Evans testified that once there, Miller "proceeded to take me into his bedroom and sexually assaulted me. Pinned me down on the bed. It was hard

to breathe. Said that I was going to be a real good ho and make him a lot of money." J.A. 223. After the sexual assault, Miller locked Evans in a small room. J.A. 223-224. Miller then provided Evans with instructions on how to engage in commercial sex acts and took her to Columbia, where Evans worked her first job for Miller. J.A. 224-227. In Columbia, Miller tied Evans up and took photographs that he used in online advertisements for clients, and he refused to allow Evans to eat or sleep until she made $500 per day. J.A. 227-229, 241. This evidence is more than sufficient to establish that Miller used force (including, sexual assault and restraint), fraud (the promise of modeling work), and coercion (deprivation of food and sleep) to induce Evans to engage in commercial sex acts. See *United States* v. *Paul*, 885 F.3d 1099, 1103 (8th Cir. 2018) (sufficient evidence to find force, fraud, or coercion where defendant sexually assaulted victims).

Miller argues that the jury should have believed his version of the story rather than Evans's. Br. 38-40. But the jury did not, and this Court does not reassess a witness's credibility on sufficiency review. See *Roe*, 606 F.3d at 186. Moreover, the jury had plenty of reasons to disbelieve Miller's testimony because of his implausible and inconsistent explanations for his conduct with Evans. For example, when he was interviewed by law enforcement, Miller initially denied even knowing Evans. J.A. 639. He later admitted that he had sex with Evans but

then changed that story and said he knew Evans but did not have sex with her. J.A. 639. He then indicated that he and Evans had dated. J.A. 639, 833.

Miller's credibility issues extended past his relationship with Evans. For example, Miller told law enforcement that the reason he had instructions on how to engage in commercial sexual activity—or a pimp manual—was because he was working on a book, but he refused to provide any corroborating information (such as other research or manuscripts) that would support this story. J.A. 641-642. Miller also admitted that he posted more than 50 advertisements on Backpage, but he claimed that the ads were for escorting, rather than prostitution. J.A. 840-841. He claimed that "an escort gets paid for her time and her services," while a "prostitute gets paid for intercourse and sexual copulation," and that his ads and book project were only about the former. J.A. 840-841. Finally, Miller offered implausible testimony regarding a 2012 arrest, during which officers found 79 condoms, four cell phones, and a notebook with prices, names of clients, and dates in his car. He claimed he sold the condoms individually at clubs and other locations, that he sold cell phones at the flea market, and that the notebook was not his. J.A. 845-849.

At sentencing, the district court noted Miller's lack of credibility based on these inconsistencies and implausible statements. The court stated, "the explanation that Mr. Miller [gave] at trial in front of the jury, it's the first time in

28 years that I've ever seen a jury laugh at an explanation that a defendant had. It was utterly ridiculous. And so I can understand why they didn't believe you." J.A. 1134.

A reasonable jury could, and did, find based on Evans's testimony that Miller used force, fraud, and coercion to cause her to engage in commercial sex acts. The district court's refusal to enter a judgment of acquittal was thus not error, let alone plain error.

C. There Was Sufficient Evidence That Miller Conspired With Damon Jackson To Engage In Illegal Sex Trafficking (Count 1)

The jury also convicted Miller on Count 1, finding that he conspired with one or more of his co-defendants to engage in sex trafficking of minors or by force, fraud, or coercion. J.A. 1085-1086. Miller now contends that there was insufficient evidence that he and Damon Jackson had an agreement to engage in illegal trafficking activity. Br. 28-37. This Court should reject that argument because sufficient evidence showed that Jackson and Miller were engaged in sex trafficking and worked together to accomplish this illegal goal.

A conspiracy conviction requires the government to prove "that (1) two or more persons agreed to violate § 1591, (2) [Miller] knew of that conspiratorial goal, and (3) he voluntarily assisted in accomplishing that goal." *United States* v. *Mozie*, 752 F.3d 1271, 1287 (11th Cir. 2014). Miller contends that there was insufficient evidence on the first of these elements. To meet this element, there

need not be evidence of an express agreement; to the contrary, "[t]he existence of a tacit or mutual understanding between conspirators is sufficient evidence of a conspiratorial agreement." *United States* v. *Ellis*, 121 F.3d 908, 922 (4th Cir. 1997) (internal quotation marks and citation omitted). And, "a conspiracy may be proved wholly by circumstantial evidence," because "[b]y its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement." *Burgos*, 94 F.3d at 857-858; *United States* v. *Hackley*, 662 F.3d 671, 679 (4th Cir. 2011) ("Circumstantial evidence alone is sufficient to support a conviction for conspiracy."). As this Court has explained:

> Circumstantial evidence tending to prove a conspiracy may consist of a defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy. A conspiracy, therefore, may be inferred from a development and collocation of circumstances. Circumstantial evidence sufficient to support a conspiracy conviction need not exclude every reasonable hypothesis of innocence, provided the summation of the evidence permits a conclusion of guilt beyond a reasonable doubt.

Burgos, 94 F.3d at 858 (internal quotation marks, alterations, and citations omitted). On appeal, this Court reviews the circumstantial evidence in the cumulative context, instead of looking at each piece of evidence separately. *Burgos*, 94 F.3d at 863.

Considered cumulatively, there is sufficient circumstantial evidence that Jackson and Miller conspired. First, there is overwhelming evidence that Jackson and Miller both trafficked women through force, fraud, and coercion during the

same times and in the same location. The most specific testimony on this came from Briana Evans, who testified that Miller initially trafficked her and transported her to Columbia. J.A. 223-227. In Columbia, she met Jackson because he responded to an online advertisement that Miller posted (J.A. 230), and Jackson subsequently trafficked her using force, fraud, and coercion (J.A. 234-235). Evans, who had been in Charleston, would not have met Jackson but for Miller's transportation of her to Columbia. Both Miller and Jackson's conduct toward her created a climate of fear that made Evans perform commercial sex acts because she was scared of both of them. J.A. 267.

Second, that Miller and Jackson were engaged in trafficking at the same place and at the same time is no coincidence because the two men knew each other and provided assistance to each other. There was evidence that when Jackson did not have a car, Jackson paid Miller to drive him places. J.A. 710, 776, 801. Jackson and Miller met through an exotic dancer, who was with them at the time they shared a vehicle. J.A. 710, 830. This conduct is similar to that of other co-conspirators in this case. Specifically, other co-defendants who were working with Jackson to engage in illegal sex trafficking testified that they provided rides to Jackson and to each other. J.A. 382-383, 385.

Third, Miller and Jackson corresponded through social media about protecting their illegal sex trafficking activities from detection. J.A. 710. After

Jackson was arrested for his conduct in this case, he exchanged messages with Miller on Facebook and asked Miller to meet him in jail. J.A. 568-569. Miller responded positively, asking for Jackson's full name and address so that he could assist. J.A. 568-569. Importantly, Miller was not the only co-defendant who tried to assist Jackson. Tremel Black, another co-defendant who worked closely with Jackson to engage in illegal trafficking, also tried to get Jackson out of jail. J.A. 424. And while in jail, Jackson worked to ensure that witnesses did not cooperate with the investigation. J.A. 283, 313. In sum, a reasonable jury could find that Miller and Jackson conspired to engage in sex trafficking because they both engaged in the underlying offense, communicated through social media, provided assistance in a way that was common among the co-conspirators, and worked together after one of them was arrested for the underlying offense to get out of jail and to thwart the investigation.

Miller's shifting stories regarding his relationship with Jackson only further supports the jury's conclusion. He initially told investigators that he did not know Jackson at all. J.A. 642. Even when shown the Facebook messages he exchanged with Jackson, Miller continued denying that he knew Jackson. J.A. 644. But at trial, when pressed on cross-examination, Miller admitted that he was acquainted with Jackson and that he gave Jackson rides. J.A. 827-829. As noted above, the district court observed that the jury openly laughed at Miller's testimony. J.A.

1134. Based on the implausibility of Miller's stories regarding his relationship with Jackson (as well as his stories that he was working on a book about sex trafficking or was an entrepreneur who sold condoms), the jury could reasonably conclude that the relationship was more nefarious. See *Burgos*, 94 F.3d at 867 ("Relating implausible, conflicting tales to the jury can be rationally viewed as further circumstantial evidence indicating guilt.").

Finally, accepting Miller's argument would require the Court to draw inferences in his favor, contrary to the applicable legal standard. See *United States* v. *Penniegraft*, 641 F.3d 566, 571 (4th Cir. 2011). Miller asks this Court to infer that he and Jackson were not working together because (1) they had opposite views on whether to provide drugs to their victims, and (2) there was no evidence that Miller was a gang member while Jackson and other co-conspirators were gang members. Br. 31-32, 34-35. The jury heard these facts and arguments, and this Court's role is limited to determining whether any reasonable jury could find the elements of the offense beyond a reasonable doubt, not determining whether the defendant is "plausibly not guilty." *Burgos*, 94 F.3d at 871 (citation omitted). It is immaterial that the two co-conspirators differed in the nuance of how they treated their victims or that there were circumstances where one defendant engaged in trafficking activities independent of the other. See *United States* v. *Murphy*, 35

F.3d 143, 148 (4th Cir. 1994) ("[I]f the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe.").

In sum, there was sufficient evidence that Miller and Jackson conspired to engage in illegal sex trafficking and that Miller's explanations to the contrary were not plausible.

D. Miller Has Not Met His Burden Of Establishing Plain Error For The Remaining Purported Errors He Identifies Because He Fails To Cite Any Authority For These Arguments

At the end of his sufficiency argument, Miller points to a series of other purported errors that he contends prejudiced him. Br. 40-48. Specifically, Miller contends that he was prejudiced by: (1) the number of defendants; (2) the number of counts in the indictment; (3) the length of the trial and amount of evidence; (4) the "shocking and inflammatory" nature of the evidence; (5) portions of the prosecution's opening statement; (6) the prosecution's cross-examination of Miller; and (7) the district court's jury instructions. Br. 40-48.

Because Miller does not cite any authority for any of these arguments, they are waived. See *Hensley on behalf of N.C.* v. *Price*, 876 F.3d 573, 581 n.5 (4th Cir. 2017) (explaining that an argument is waived when a party fails to cite any authority for the argument). And because he also did not object to any of these errors in district court, his failure to cite any authority also means that he has not met his burden of establishing plain error. See *United States* v. *King*, 628 F.3d

693, 700 (4th Cir. 2011) (no plain error where defendant failed to identify "any binding precedent supporting his claim").[5]

II

THE ABSENCE OF A MULTIPLE CONSPIRACIES INSTRUCTION WAS NOT PLAIN ERROR BECAUSE NEITHER THE FACTS NOR BINDING PRECEDENT SUPPORTS SUCH AN INSTRUCTION

All three defendants contend that the district court should have instructed the jury that it could find that there were multiple conspiracies in this case. Br. 49-59. Defendants never requested such an instruction in the district court, and they cannot discharge their burden of showing reversible plain error.

A. Standard Of Review

Defendants admit that plain error review applies. Br. 49. They must thus "demonstrate [1] that an error occurred, [2] that the error was plain, and [3] that the

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[5] Miller suggests that the proof at trial created an impermissible variance from the indictment, but his actual argument is just a restatement of his sufficiency argument. Br. 26-28. That is, his contention is that the variance occurred through insufficient proof on the conspiracy. See Br. 37 ("The evidence at trial established facts materially different from those alleged in the indictment. The government did not produce substantial evidence that a reasonable fact finder could accept as adequate and sufficient to support a conclusion that Miller was guilty of conspiracy beyond a reasonable doubt."). The cases Miller cites (Br. 26-28) are inapposite. See *United States* v. *Ford*, 88 F.3d 1350, 1360 (4th Cir. 1996) (addressing how to review a conviction on a substantive count where a jury acquitted on a conspiracy count); *United States* v. *Losada*, 674 F.2d 167, 170 (2d Cir. 1982) (addressing what to do with a substantive count after a conspiracy count is dismissed); see also *United States* v. *Johansen*, 56 F.3d 347, 351 (2d Cir. 1995) (same). Unlike these cases, the jury here properly convicted on both the conspiracy and substantive counts.

error affected [their] substantial rights." *United States* v. *Stockton*, 349 F.3d 755, 761 (4th Cir. 2003) (citation omitted). "To be plain, an error must be clear or obvious." *United States* v. *Ellis*, 326 F.3d 593, 596 (4th Cir. 2003) (internal quotation marks omitted and citation omitted). Even if they establish "these requirements, correction of the error remains within the discretion of the appellate court, which the court should not exercise unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Stockton*, 349 F.3d at 761-762 (internal quotation marks, ellipsis, alterations, and citations omitted).

B. The District Court Did Not Plainly Err In Failing To Issue A Multiple Conspiracies Instruction Because Neither The Facts Nor The Law Required Such An Instruction

A multiple conspiracies instruction was not required because neither the facts of the case nor this Court's case law clearly requires such an instruction.

1. Generally, "[i]n cases where a defendant is charged with conspiracy, a district court must issue a 'multiple conspiracies' instruction where the evidence supports a finding that multiple conspiracies existed." *Stockton*, 349 F.3d at 762 (citation omitted). Such an instruction is not required, however, "unless the proof at trial demonstrates that the [defendant was] involved *only* in a separate conspiracy *unrelated* to the overall conspiracy charged in the indictment." *United States* v. *Nunez*, 432 F.3d 573, 578 (4th Cir. 2005) (alterations and citation omitted). Whether there is a single or multiple conspiracies depends on "the

overlap of key actors, methods, and goals." *United States* v. *Leavis*, 853 F.2d 215, 218 (4th Cir. 1988) (citations omitted). "[T]he failure to give a multiple conspiracies instruction is reversible error only where the defendant establishes substantial prejudice by showing that 'the evidence of multiple conspiracies [was] *so* strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction.'" *United States* v. *Wilford*, 689 F. App'x 727, 730 (4th Cir. 2017) (quoting *United States* v. *Bartko*, 728 F.3d 327, 344 (4th Cir. 2013)).

Here, there is sufficient overlap in defendants' methods and goals such that a multiple conspiracies instruction was not required. See *Bartko*, 728 F.3d at 344-345. The single goal of the conspiracy in this case was to traffic young women—some minors and some adults—and to make them engage in commercial sexual activity for the benefit of the conspirators by creating a climate of fear. Though at times the conspirators were competitive, they also worked together, as co-conspirator Tremel Black testified, and used several of the same methods to create the climate of fear that maintained their grip over their victims. J.A. 435.

The conspirators trafficked the same set of victims, and the fear instituted by one conspirator would carry forward, even after the victim left to another. J.A. 271, 388-389, 477. As Briana Evans testified, for example, she was generally scared of everyone, which began when Corey Miller raped and trapped her. J.A.

267. Moreover, the conspirators transferred victims between them, either by facilitating introductions or by selling women. For example, Evans would not have met Damon Jackson had Miller not transported her to the hotel where they met. J.A. 230. And Jackson sold a victim to Tremel Black and transferred Sierra Davis, another victim, to him. J.A. 304, 334, 562. Jackson acknowledged that many of the defendants trafficked the same victim. J.A. 470.

In addition, the conspirators taught each other the methods necessary to engage in trafficking. Black, for example, who had grown up in the sex trafficking business, explained and taught various methods to Jackson, and Da-Shun Curry taught the same methods to Howard Parker. J.A. 346, 391. Jackson and Bakari McMillan shared tips about how to make more money. J.A. 565. In other instances, conspirators' mutual victims would provide guidance based on how they had been treated by a prior conspirator. J.A. 358, 467 (victim who had worked for Jackson, McMillan, and Black taught Curry). These techniques included rules and structures about how victims were permitted to look at or communicate with potential clients and other traffickers, as well as methods of ensuring continuous commercial sex by minimizing bleeding during menstruation so that victims could keep working. J.A. 242, 374. It is not surprising that these techniques were passed among the various conspirators because several of them knew each other since

childhood and were part of the same gangs, demonstrating that they had opportunities to teach each other. J.A. 371, 468.

Finally, conspirators directly provided assistance to each other, as needed, to keep the enterprise going. For example, they gave each other rides, as Black and Miller provided to Jackson, or assisted each other by providing rides to victims, as Curry did for McMillan. J.A. 382, 710, 776. Kerry Taylor, another co-conspirator, confirmed that it was common for co-conspirators to travel together to traffic women. J.A. 445; see also J.A. 347. Black similarly testified that he and Ryan Turner helped Jackson force one of Jackson's victims to return to him. J.A. 385-386. Conspirators shared hotel rooms when they needed money and could not afford their own; for example, Robert Black allowed McMillan to use a hotel room to traffic two women until McMillan could use trafficking proceeds to get his own room. J.A. 608. And when conspirators were arrested, they communicated with each other to help post bonds or to communicate with potential victims to thwart the investigation. J.A. 424, 552, 563, 568-569.

None of the defendants can show, based on this factual record, that they were involved "*only* in a separate conspiracy *unrelated* to the overall conspiracy," *Nunez*, 432 F.3d at 578 (alterations and citation omitted), because there was significant overlap in the methods and goals of the conspiracy, *Leavis*, 853 F.2d at 218. Moreover, there is no evidence that defendants were "involved in a separate

conspiracy unrelated to" this overall conspiracy. See *Stockton*, 349 F.3d at 762. The evidence here suggests that defendants were engaged in a single conspiracy. See *United States* v. *Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993) (finding a single conspiracy where there was a "loosely-knit association of members linked only by their mutual interest in sustaining the overall enterprise of catering to the ultimate demands of a particular * * * market").

It is true, of course, that different conspirators had different levels of involvement and knowledge of the conspiracy's breadth, but that does not undermine the conclusion that there was a single conspiracy here. See *Banks*, 10 F.3d at 1054 ("[O]ne may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence."); *United States* v. *Johnson*, 54 F.3d 1150, 1154 (4th Cir. 1995) (finding a single conspiracy even where members of the conspiracy did not know each other or had only limited contact with each other). Nor does it matter, as defendants contend (Br. 53, 55), that some conspirators were competitive with each other at times. *United States* v. *Jeffers*, 570 F.3d 557, 568 (4th Cir. 2009) ("The fact that Jeffers may have competed with some of his coconspirators did not defeat the prosecution's theory that they were all members of a single conspiracy."). Defendants have thus failed to meet their burden of

establishing that the district court erred by not instructing the jury regarding multiple conspiracies.

2. In any event, any error is not clear or obvious. Defendants have cited no case law from this Court, or any other, where a verdict has been reversed due to the failure to issue a multiple conspiracies instruction.[6] Indeed, we have identified no case where this Court has reversed a judgment on that basis. The absence of any authority requiring vacatur on multiple-conspiracies grounds in cases like this one, along with the fact-bound nature of the inquiry, means that any error here was insufficiently clear or obvious to be plain. See *Ellis*, 326 F.3d at 596-597.

3. Even if there were error and that error were plain, defendants have not established that such plain error affected their substantial rights. See *United States* v. *Hastings*, 134 F.3d 235, 240, 243-244 (4th Cir. 1998) (on plain error review, appellant must show that "the error actually affected the outcome of the proceedings," that is, that the absence of his requested instruction "resulted in his conviction"). As defendants acknowledge, showing that they were prejudiced by the absence of a multiple conspiracies instruction, even if that error were preserved, is a heavy burden under this Court's case law. See Br. 52 n.2. This

[6] The only case defendants cite where a conspiracy conviction has been reversed is *United States* v. *Bell*, 954 F.2d 232 (4th Cir. 1992). But that case has been overruled. See *United States* v. *Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc). In any event, *Bell* concerned a sufficiency challenge, not an instructional challenge.

Court has held that to show prejudice, defendants must generally establish that "the evidence of multiple conspiracies was *so* strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count." *United States* v. *Tipton*, 90 F.3d 861, 883 (4th Cir. 1996). Here, defendants cannot make that showing because "[t]he evidence of the single conspiracy charged was not only strong enough to support the verdict reached, it was strong enough in relation to that of only multiple conspiracies." *Ibid.* The significant evidence of a single conspiracy with overlapping methods, defendants, victims, and goals outweighs any evidence that defendants were working independently in smaller groups toward separate goals.

III

THE DISTRICT COURT DID NOT PLAINLY ERR BY NOT GIVING A SPECIFIC UNANIMITY INSTRUCTION ON THE CONSPIRACY CHARGE OR THE SEX TRAFFICKING CHARGE

All three defendants contend that the district court should have instructed the jury that to convict on Count 1, it needed to be unanimous on what the object of the conspiracy was. Br. 60-75. McMillan also contends that the district court should have instructed the jury that it needed to be unanimous on whether he violated Section 1591 in Count 10 by trafficking a minor or trafficking through force, fraud, or coercion. Br. 75-79.

A. Standard Of Review

Defendants admit that they did not request a specific unanimity instruction. Br. 59. This Court's review of the absence of such an instruction is thus for plain error only. *United States* v. *Alvarado*, 816 F.3d 242, 248 (4th Cir. 2016). To reverse, this Court must find that there was (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). The burden of showing plain error is on defendants. *United States* v. *Strickland*, 245 F.3d 368, 379-380 (4th Cir. 2001).

B. The District Court Did Not Plainly Err Because No Binding Authority Requires Unanimity Regarding Object Of The Sex Trafficking Conspiracy (Count 1)

Defendants first contend that on Count 1, the district court should have instructed the jury that it must be unanimous on what exactly the goal of the conspiracy was—*i.e.*, whether the goal of the conspiracy was to traffic minors or to traffic by means of force, fraud, or coercion. Br. 60-75.

1. The failure to give a specific unanimity instruction is not error because the conspiracy statute at issue, Section 1594(c), prohibits conspiracies to engage in sex trafficking, regardless of how conspirators agreed to traffic their victims. The jury thus need not be unanimous on that question.

The Supreme Court has held that juries must be unanimous on the elements of the offense, but not on the specific means of satisfying a particular element. In *Schad* v. *Arizona*, the Court stated that "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." 501 U.S. 624, 631 (1991) (plurality opinion). Instead, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Id.* at 631-632 (citation omitted); see also *id.* at 649 (Scalia, J., concurring) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.").

The Supreme Court reaffirmed that principle in *Richardson* v. *United States*, stating that the jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element," *i.e.*, "which of several possible means the defendant used to commit an element of the crime." 526 U.S. 813, 817 (1999). Thus, where "an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously

concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force." *Ibid.*

Here, therefore, the question is whether the *type* of sex trafficking that defendants conspired to do is a means of an element of the conspiracy or is itself an element. Whether a "particular kind of fact" is an element of an offense is a question of statutory construction. *Richardson*, 526 U.S. at 817-818; see also *United States* v. *Nicolaou*, 180 F.3d 565, 571 (4th Cir. 1999). Defendants contend that the jury unanimously had to agree whether they conspired to engage in sex trafficking of a minor *or* by means of force, fraud, or coercion.

Defendants' reading is incorrect. The text of the statute requires that the jury only had to unanimously find that defendants conspired to engage in sex trafficking. The statute under which defendants were convicted, 18 U.S.C. 1594(c), states that "[w]hoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both." The offense is thus complete at the time a defendant agrees to violate Section 1591 in any way. See *Smith* v. *United States*, 568 U.S. 106, 110 (2013) ("The essence of conspiracy is the combination of minds in an unlawful purpose.") (internal quotation marks and citation omitted). As this Court has held, "[b]ecause of the nature of a conspiracy charge, when the jury agrees that the defendant agreed to commit a crime, all jurors do not have to agree about which offense the defendant

personally intended to commit." *United States* v. *Forbes*, 1 F. App'x 125, 127 (4th Cir. 2001); see also *United States* v. *Dillman*, 15 F.3d 384, 392 (5th Cir. 1994) ("[A]ll jurors need not agree on which particular offenses that defendant intended personally to commit as long as there is but one conspiracy that encompasses the particular offenses charged."). The particular ways in which Section 1591 can be violated (*i.e.*, trafficking a minor or by force, fraud, and coercion) is not an element of the Section 1594(c) offense, but rather are means of how a defendant can accomplish an element of that offense. Thus, "[a] general unanimity instruction is usually sufficient to support a conviction." *Forbes*, 1 F. App'x at 126; J.A. 1040-1041.

2. Even if there were error, defendants cannot establish that the error was plain because defendants admit that no court has interpreted Section 1594(c) as they contend. Br. 61-62 ("[U]ndersigned counsel has not located a sex trafficking case discussing the requirement of specific unanimity as to the object of a conspiracy pled pursuant to 18 USC Section 1594."); see also Br. 66 (noting the "dearth of federal jurisprudence regarding specific unanimity"). Defendants thus cannot carry their burden of demonstrating that the error was clear or obvious. This Court has emphasized that errors are plain only where there is either binding precedent from this Court or in the "exceedingly rare" situation where other circuits have "uniformly" taken a position on an issue. See *United States* v.

Carthorne, 726 F.3d 503, 517 n.14 (4th Cir. 2013) (citation omitted). Neither is the case here. *United States* v. *Marino*, 277 F.3d 11, 32 (1st Cir. 2002) (finding no plain error in a district court's refusal to give a specific unanimity instruction on which of several victims defendant conspired to kill because the law was unsettled).

Defendants cite a number of cases from other circuits, but none of those cases addresses Section 1594(c) or the issue presented here. For example, in *United States* v. *Sharpsteen*, 913 F.2d 59, 62 (1990), the Second Circuit rejected defendants' arguments that a jury must unanimously agree that defendants conspired to engage in *every* object of a multi-object conspiracy. In *United States* v. *Ross*, 131 F.3d 970, 990 (1997), the Eleventh Circuit addressed which object of the conspiracy would drive the Sentencing Guidelines range when a defendant had been convicted of a multi-object conspiracy.[7] And in *United States* v. *Pierce*, 479 F.3d 552, 553 (2007), the Eighth Circuit rejected defendants' contention that a special verdict form was required because the district court had given a specific

[7] *United States* v. *Margarita Garcia*, 906 F.3d 1255, 1279 (11th Cir. 2018), cites *Ross* and states in dicta that "the jury instructions should inform the jury that they must not only be unanimous as to the conspiracy charge, but also as to the objects of the conspiracy." But *Garcia* arises under the general federal conspiracy statute (18 U.S.C. 371), which incorporates multiple objects from all of federal criminal law; in contrast, Section 1594(c) incorporates a single object under a single statute (Section 1591). *Garcia* did not address the statutory text, and in any event, is in conflict with *Dillman*, 15 F.3d at 392, and thus cannot be the basis for a plain error argument. See *Carthorne*, 726 F.3d at 516.

unanimity instruction that would moot any need for such a verdict form. The court did not suggest that specific unanimity was necessary on the object of the conspiracy. Finally, in *United States* v. *Lapier*, 796 F.3d 1090, 1096-1098 (2015), the Ninth Circuit held that a specific unanimity instruction should have been given where both the district court and the government agreed that the evidence established two different drug conspiracies with two different co-conspirators.

3. Even if defendants could establish plain error, they cannot demonstrate that any such error affected their substantial rights. There is overwhelming evidence that all three defendants engaged in trafficking by force, fraud, or coercion. See, *e.g.*, J.A. 223-224 (Briana Evans's testimony that Corey Miller sexually assaulted her and locked her in a small room); J.A. 235 (testimony that Damon Jackson grabbed, pushed, hit, and threw one of his victims); J.A. 635 (Bakari McMillan's admission that he punched S.P. and was generally violent toward victims). Indeed, the jury found beyond a reasonable doubt that each of the defendants violated Section 1591 by engaging in sex trafficking by means of force, fraud, or coercion. J.A. 1078-1086. This creates a strong inference that the jury also would have unanimously concluded that defendants agreed to engage in trafficking by means of force, fraud, or coercion, if it had been required to make such a finding to convict under Section 1594(c). Defendants have thus failed to establish that the absence of a specific unanimity instruction affected their

substantial rights. See *United States* v. *Chen Chiang Liu*, 631 F.3d 993, 1001 (9th Cir. 2011) (absence of specific unanimity instruction did not affect substantial rights because of conviction on substantive offense); *United States* v. *Creech*, 408 F.3d 264, 269 (5th Cir. 2005) (appellant cannot show absence of specific unanimity affected substantial rights where he "fails to point to any evidence of confusion or disagreement within the jury").

Accordingly, this Court should reject defendants' contention that the district court plainly erred in failing to give a specific unanimity instruction on Count 1.

C. No Unanimity Instruction Was Necessary On The Substantive Sex Trafficking Count Because The Verdict Form Made Clear That Specific Unanimity Was Required (Count 10)

McMillan also contends that the district court plainly erred by not giving a specific unanimity instruction as to Count 10. Br. 75-79. Unlike Section 1594(c), Section 1591 contains two separate sets of elements: it criminalizes (1) sex trafficking by force, fraud, or coercion, and (2) sex trafficking of minors. 18 U.S.C. 1591(a). It also provides different sentencing consequences for each offense. 18 U.S.C. 1591(b). McMillan contends, correctly, that the jury needed to find unanimously whether he trafficked a minor or whether he trafficked using force, fraud, or coercion. But the district court did not plainly err by failing to

provide a specific unanimity instruction because the verdict form required that the jury make unanimous findings on the separate elements of each offense.[8]

As to Count 10, the verdict form asked the jury to "unanimously find" separately whether McMillan "[k]new or recklessly disregarded the fact that [S.P.] was under eighteen years of age" *and* whether McMillan "[k]new or recklessly disregarded the fact that force, fraud, and coercion would be used to cause [S.P.] to engage in a commercial sex act." J.A. 1083-1084. The jury checked "yes" to both the "under eighteen years of age" and "force, fraud, and coercion" questions and found McMillan "guilty" on Count 10. J.A. 1083. There was no need for a specific unanimity instruction because the verdict form made clear that the jury was unanimous as to each of the elements of McMillan's Section 1591 offense.[9]

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[8] McMillan is incorrect (Br. 68-70) that a jury must unanimously decide whether he "recruit[ed], entic[ed], harbor[ed], transport[ed], provid[ed], obtain[ed], advertise[ed], maintain[ed], patronize[ed], or solicit[ed]" a sex trafficking victim, 18 U.S.C. 1591(a)(1), *or* "benefit[ed], financially or by receiving anything of value, from participation in a venture which has engaged" in any of that activity, 18 U.S.C. 1591(a)(2). As the Second Circuit has held, these are all means of committing the same offense, rather than elements on which unanimity is required. See *United States* v. *Corley*, 679 F. App'x 1, 5 (2017). Defendants rely on *United States* v. *Flanders*, 752 F.3d 1317, 1338 (2014), where the Eleventh Circuit held that the two subsections contain different elements for purposes of double jeopardy. That case is distinguishable. At most, McMillan has identified a circuit split on the question, which is insufficient to establish plain error.

[9] Defense counsel expressly requested that the verdict form be separated in this way for sentencing purposes. See J.A. 885-886. The United States agreed, and the district court revised the form to separate the two questions. J.A. 885-886.

The Eighth Circuit recently rejected the precise argument that McMillan advances here. The court found that "the district court eliminated this risk of non-unanimity by * * * reflecting on the verdict form * * * that it must make separate findings whether [defendant] committed (i) 'the crime of sex trafficking of a minor,' and (ii) 'the crime of sex trafficking by use of force, fraud, or coercion.'" *United States* v. *Paul*, 885 F.3d 1099, 1105 (8th Cir. 2018). The court affirmed because the jury convicted on both. *Ibid.*[10]

Where, as here, the verdict form was clear that the jury unanimously found both that the victim was a minor and that force, fraud, or coercion were used, there is no need for a specific unanimity instruction. Accordingly, the district court did not err, let alone plainly err.

IV

THE DISTRICT COURT DID NOT PLAINLY ERR BY ADMITTING EVIDENCE REGARDING A VICTIM'S AGE BECAUSE NONE OF THE STATEMENTS WAS INADMISSIBLE HEARSAY

The jury convicted Damon Jackson and Bakari McMillan of trafficking S.P. when she was a minor. Defendants contend that the evidence regarding S.P.'s age was inadmissible under the hearsay rules and the Confrontation Clause. Br. 83-97.

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[10] Defendants cite *United States* v. *Mickey*, which is inapposite. 897 F.3d 1173 (9th Cir. 2018). There, the Ninth Circuit held that force, fraud, and coercion are all means of violating Section 1591, rather than elements. *Id.* at 1181-1182. Thus, a jury need not agree on which of these the defendant used to traffic the victim. *Ibid.*

Specifically, defendants challenge three statements. First, co-defendant Da-Shun Curry testified that S.P. was 15 or 16 years old and that he learned this because of his arrest for contributing to the delinquency of a minor. J.A. 472, 484-485. Second, Detective Charlie Benton testified that S.P. was 16, born in January 1999, and had been reported as a missing minor. J.A. 548-549. Third, Agent Shawn Caines testified that he and Benton independently confirmed that S.P. was 16 years old. J.A. 634.[11] The district court did not plainly err by admitting any of this evidence because none of these statements was inadmissible hearsay.

A. Standard Of Review

Defendants did not object to any of these statements on hearsay or Confrontation Clause grounds at trial, so review is for plain error only. *United States* v. *Hassan*, 742 F.3d 104, 137 (4th Cir. 2014). Accordingly, this Court reverses only if defendants can establish that: "(1) there is an error; (2) the error is plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Williamson*, 706 F.3d 405, 411 (4th Cir. 2013) (internal quotation marks, alterations, and citation omitted).

[11] Caines initially testified that McMillan admitted to him that S.P. was 16 (J.A. 634), but he later testified that McMillan said he did not know how old S.P. was (J.A. 652-653).

B. Defendants Have Not Established That Admission Of Statements Regarding S.P.'s Age Was Plain Error

Defendants cannot establish that admission of the statements regarding S.P.'s age meet any of the first three elements of plain error.

First, admission of these statements was not error because none of the statements is inadmissible hearsay or raises a Confrontation Clause issue. That is because none of these witnesses testified about an out-of-court statement. All three witnesses testified to S.P.'s age and how they learned it, but none of the witnesses cited any out-of-court statements. While Curry testified that he learned that S.P. was a minor after he was arrested for delinquency of a minor, he did not testify that he learned S.P.'s age from an out-of-court statement or document. J.A. 472, 484-485.[12] That is equally true of Benton and Caines, who testified that they confirmed S.P.'s age but did not say *how* they confirmed her age. J.A. 548-549, 634. Had any of these witnesses been asked how they learned S.P.'s age, it is possible that they would have cited out-of-court statements. It is equally possible that they would have responded by citing their own personal knowledge or other admissible

[12] In the opening brief, defendants repeatedly suggest that Curry testified that he learned S.P.'s age "from reading the arrest warrant charging" him with contributing to the delinquency of a minor. Br. 93, 95. But Curry never testified that he learned S.P.'s age from the arrest warrant, only that he learned her age after he had been arrested. See J.A. 472, 484-485.

evidence, such as public records.[13] But defendants did not ask the witnesses how they knew S.P.'s age; instead, they make the unfounded assumption that the witnesses relied on out-of-court statements or documents. Defendants have thus failed to establish that the challenged testimony contained hearsay.

Second, even if the court erred in admitting these statements, defendants have not established that the error is plain. The only Fourth Circuit case defendants cite has nothing to do with hearsay; instead, there, this Court summarily affirmed a district court's decision to admit a certified birth certificate. See *United States* v. *Austrew*, 317 F.2d 926 (1963) (affirming *United States* v. *Austrew*, 202 F. Supp. 816, 822 (D. Md. 1962)). And none of the cases from other circuits that defendants cite is analogous to this case. See *United States* v. *Vosburgh*, 602 F.3d 512, 538 (3d Cir. 2010) (noting that the government conceded that testimony regarding a minor's age was hearsay where witness expressly relied on out-of-court documents but affirming because there was other evidence of age); *United States* v. *Fahra*, 643 F. App'x 480, 481 (6th Cir. 2016) (not addressing any hearsay or Confrontation Clause issues); *United States* v. *Afyare*, 632 F. App'x 272, 293 (6th Cir. 2016) (holding that testimony from teachers or police officers regarding a

[13] The same is true in the Confrontation Clause context. Because defendants did not ask these witnesses how they learned S.P.'s age, the witnesses did not clearly rely on "testimonial" statements as opposed to nontestimonial statements. See *Michigan* v. *Bryant*, 562 U.S. 344, 354 (2011) (explaining the distinction).

minor's age would be lay opinions and not addressing any hearsay or Confrontation Clause issues). The absence of specific authority, binding or otherwise, means that any error is not plain. See *United States* v. *Carthorne*, 726 F.3d 503, 516 (4th Cir. 2013) ("An error is plain if the settled law of the Supreme Court or this circuit establishes that an error has occurred.") (internal quotation marks and citation omitted).

Third, even if defendants could establish plain error, they have not established that any such error affected their substantial rights. Here, the government adduced evidence—independent of the challenged statements—of S.P.'s age. For example, the government introduced a photograph from her Facebook page, which the United States emphasized in closing argument. See J.A. 572, 929 ("[T]ake a look [at the photo] and just judge for yourself."); Gov't Ex. 94. Kerry Taylor also testified that S.P. looked young at the time Jackson trafficked her. J.A. 451. And the jury heard evidence that Jackson corresponded on Facebook with girls who were minors and pursued them after they told him their ages. See J.A. 528, 531, 754-755. In light of this evidence, defendants cannot discharge their heavy burden of showing any that error in admitting the challenged testimony affected their substantial rights.[14]

[14] In challenging statements regarding S.P.'s age, defendants also suggest in passing that the district court erred by admitting Curry's statement regarding S.P.'s (continued…)

V

CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE APPELLANTS DID NOT PRESERVE ANY OF THE PURPORTED ERRORS AND CANNOT ESTABLISH ANY PLAIN ERROR

Defendants finally contend that eight unpreserved errors together constitute plain error. Br. 98-118.

A. Standard Of Review

This Court "may correct a forfeited error only if an error was made, the error is plain, and the error affects substantial rights." *United States* v. *Ramirez-Castillo*, 748 F.3d 205, 212 (4th Cir. 2014). Even if the "above three-part showing has been made, the decision to correct the error remains within [this Court's] discretion." *Ibid.*

(…continued)
physical injuries, but there was no plain error. Br. 94. Curry testified that when S.P. arrived to see him, "she had like a bruised eye and a chipped tooth. And I asked her like what happened, and she said [McMillan] had jumped on her." J.A. 473-474. These two sentences are not inadmissible hearsay. The first, that S.P. was physically injured, is not hearsay because Curry based this testimony on his perception of the injuries rather than any out-of-court statement. The second, regarding the source of the injuries, was admitted for its effect on the listener, *i.e.*, explaining why S.P. came to Curry. Regardless, any error regarding admission of the source of the injuries did not affect defendants' substantial rights because there was other evidence regarding McMillan's violence against S.P. Specifically, Caines testified that in an interview, McMillan admitted that he had punched S.P. J.A. 635. And Benton confirmed that S.P. had a chipped tooth. J.A. 546.

B. There Was No Cumulative Error Because None Of The Errors Defendants Identify Was Plain

On plain error review, defendants must show that there are multiple plain errors before they can seek reversal based on cumulative error. That is, the Court first determines whether there are multiple plain errors. If there are, the Court can then consider whether the aggregate effect of those plain errors affected defendants' substantial rights. *United States* v. *Martinez*, 277 F.3d 517, 531 (4th Cir. 2002).

Here, the Court need not reach the substantial rights prong because defendants have not established that there are multiple plain errors. To show that an error is plain, defendants must demonstrate that "the settled law of the Supreme Court or this circuit establishes that an error has occurred." *United States* v. *Ross*, 912 F.3d 740, 746 (4th Cir. 2019) (citation omitted). None of the eight purported errors defendants raise satisfies this standard. Indeed, much of defendants' argument on cumulative error is devoid of citation to binding Supreme Court or Fourth Circuit authority. As such, even if the Court concludes that there was error on any of these points, the error would not be clear, obvious, or plain.

1. Opening Statement

Defendants contend that several parts of the United States' opening statement were improper. Br. 99-105. Specifically, defendants contend that some

of the evidence varied from what prosecutors suggested and that some statements were inflammatory. Br. 99-105.

There was no error, let alone plain error. The opening statement as a whole contained "no more than an objective summary of evidence which the prosecutor reasonably expected to produce." *Frazier* v. *Cupp*, 394 U.S. 731, 736 (1969). Any differences between the evidence that the government expected at the time of opening statements and the presentation of evidence was minor. Indeed, the Supreme Court has recognized that "[m]any things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance." *Ibid.* And this Court has stated that any discrepancies between the opening statement and the evidence presented at trial are less troubling when "the court had instructed the jury that opening statements were not evidence, and defense counsel requested no additional instruction." *United States* v. *Sloan*, 36 F.3d 386, 399 (4th Cir. 1994). That was the case here. The district court instructed the jury on multiple occasions that counsel's opening statement was not evidence (J.A. 144, 1005), and the jury rendered its verdict after a four-day trial. Minor differences between what the government expects the evidence to show and what the evidence ultimately shows are thus not error. See Br. 100, 102 (taking issue with the prosecutor's statement that "several" victims would testify when

ultimately only two victims testified and that six of the seven co-defendants who pleaded guilty would testify when only five did).

Defendants ignore this case law entirely and cite no binding authority reversing a jury verdict in similar circumstances. Moreover, the out-of-circuit cases defendants cite are distinguishable. In *United States* v. *Labarbera*, 581 F.2d 107, 109 (1978), for example, the Fifth Circuit held that the government cannot suggest that prosecutors had extra-record evidence of defendant's guilt in closing argument. Here, the record supports the government's statement that some victims would not testify. See, *e.g.*, J.A. 631-633 (McMillan's admission that he trafficked between 30 and 60 women). In *United States* v. *Vaccaro*, 115 F.3d 1211, 1218 (1997), the Fifth Circuit held that the government could not disparage defense counsel by arguing that they "earn their living trying to muddle the issues." Here, the government stated only that defendants' *arguments*—that all of the prostitution in the case was consensual—were not credible and praised defense counsel as "nice people." Br. 103 (citing J.A. 153); J.A. 154. Finally, unlike in *United States* v. *Gonzalez*, 488 F.2d 833, 836 (2d Cir. 1973), prosecutors did not repeatedly attack defendants' credibility in derogatory terms. Rather, the government stated

that Bakari McMillan was largely credible and that Corey Miller's explanation that he was working on a book was not credible. J.A. 148-150.[15]

In sum, the government's opening statement laid out the facts that it expected to establish during trial, previewed potential defenses, and explained why those defenses were not credible. There was nothing unusual or inflammatory about the opening. Defendants have not established plain error.

2. Were-They-Lying Questions

Defendants contend that prosecutors asked a number of improper questions of McMillan and Jackson, the two defendants who testified, regarding whether other witnesses were lying. Br. 105-108. Neither this Court nor the Supreme Court has ever held that such questions are impermissible. Any error thus cannot be plain. See *United States* v. *Mitchell*, 584 F. App'x 44, 45-46 (4th Cir. 2014) (holding that these types of questions are not plain error due to an absence of binding precedent); see also *United States* v. *Faraz*, 626 F. App'x 395, 398 (4th

[15] *United States* v. *Velarde-Gomez*, 224 F.3d 1062 (9th Cir. 2000), which defendants also cite, was vacated because en banc review was granted. It is also inapposite because the Ninth Circuit concluded that while calling the defense "a sham" is inappropriate, prosecutors may permissibly "use less derogatory language to comment on the plausibility of a defendant's testimony," which is all the government did here. *Id.* at 1073 (citation omitted). *United States* v. *Wright*, No. 96-3010, 1997 WL 137207 (7th Cir. Mar. 18, 1997), is also inapposite. There, the court held that it was error (but not reversible) for the prosecutor to call the defendant a "bum," *id.* at *3; but here, defendants themselves admit that they were "pimps"—which is how the government characterized them. See, *e.g.*, J.A. 714 (Jackson stating that he was a pimp).

Cir. 2015) (same); *United States* v. *Schmitz*, 634 F.3d 1247, 1271 (11th Cir. 2011) (finding no plain error because "[t]he Supreme Court has never ruled on the propriety of [were-they-lying] questions and comments * * * and, until now, neither has the Eleventh Circuit"). Defendants thus cannot establish that any of the questions prosecutors asked Miller or Jackson were plain error.[16]

3. Closing Argument

Defendants contend that prosecutors misled the jury by arguing in closing that Miller and Jackson were working together after Jackson's arrest to get Jackson out of jail and to protect themselves by interfering with witnesses. Br. 108-111. But there was nothing improper about this closing because the argument was a natural inference from the evidence.

The district court admitted evidence that Miller and Jackson exchanged messages on Facebook after Jackson was arrested in this case. J.A. 568-569. Defendants did not and do not challenge admission of this evidence. Throughout trial, Jackson argued that these messages could not have been from him, even

[16] Several of the questions defendants cite (Br. 106-107) are permissible even under out-of-circuit authority. These cases only prohibit prosecutors from asking "whether other witnesses were lying." *Schmitz*, 634 F.3d at 1268. Several of the questions defendants highlight ask whether *Miller or Jackson themselves* were lying. Br. 106-107 (citing J.A. 720, where a prosecutor asked Miller "[b]ut you lied; you said you didn't even know Damon Jackson, right?"). And other questions were asking whether other witnesses had any motivation to testify as they did, not whether they were lying. Br. 106 (citing J.A. 718, where a prosecutor asked Miller about Briana Evans, "what's her motivation?").

though they were sent from his account, because he did not have access to Facebook while jailed. J.A. 782-783. But Jackson could provide no alternative explanation as to how these messages were sent from his account. J.A. 783. In addition, there was testimony from other co-conspirators that they were working to help Jackson get out of jail. J.A. 423-424. And, there was evidence that before Jackson's arrest, Jackson and Miller both trafficked the same victim, Briana Evans. J.A. 231. Finally, there was evidence that Jackson was contacting witnesses after he had been arrested to try to get them not to cooperate. J.A. 283, 313.

At closing, the government summarized this evidence, contending that it showed that Miller and Jackson were working together after the arrest to help Jackson get out of jail and to attempt to thwart the investigation. J.A. 933-934. This was a reasonable inference from the messages, in which Jackson was specifically asking Miller to visit him in jail. J.A. 568-569.

Accordingly, there was no error, let alone plain error. Counsel has "wide latitude * * * in making closing arguments." *Oken* v. *Corcoran*, 220 F.3d 259, 269 (4th Cir. 2000) (internal quotation marks and citation omitted). "Closing argument, in particular, is a time for energy and spontaneity, not merely a time for recitation of uncontroverted facts." *United States* v. *Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (internal quotation marks and citation omitted). Defendants advocate parsing the closing argument, which this Court has repeatedly rejected,

particularly where, as here, the jury has been instructed that attorneys' statements are not evidence. J.A. 1005. "[T]o parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner." *Johnson*, 587 F.3d at 633. Defendants therefore have not established plain error.

4. Hearsay

Defendants contend that the United States elicited hearsay statements from witnesses, but they make no legal argument that the statements were inadmissible. See Br. 111-112. Defendants merely string together a series of quotations to the transcript with no citations to authority; they have thus waived the issue. See *Grayson O Co.* v. *Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument * * * by failing to develop its argument—even if its brief takes a passing shot at the issue.") (internal quotation marks, citation, and alterations omitted); see also *Hensley on behalf of N. Carolina* v. *Price*, 876 F.3d 573, 581 n.5 (4th Cir. 2017) (explaining that an argument is waived when a party fails to cite any authority for the argument).[17]

[17] Defendants' failure to explain why these statements are hearsay is unsurprising because upon closer examination, the statements were admissible. See, *e.g.*, J.A. 474 (Da-Shun Curry's statement that victim told him Bakari McMillan was violent was admissible under Federal Rule of Evidence 801(c)(2) because it was not offered for the truth but rather to explain why victim came to see him); J.A. 313 (Sierra Davis testified to what Tremel Black told her, which is

(continued…)

5. Vouching

Defendants contend that the government vouched for the credibility of its witnesses. Br. 112-113. The United States agrees with defendants that "[i]t is impermissible for a prosecutor to indicate her personal belief in the credibility of Government witnesses or to elicit one witness' opinion that another witness has told the truth." Br. 112. To show improper vouching, "two criteria must be met: (1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." *United States* v. *Strickland*, 702 F. App'x 154, 155 (4th Cir. 2017).

None of the statements that defendants identify constitutes vouching. For example, defendants challenge questions that the government asked investigators regarding whether victims' statements had been consistent throughout the investigation and trial. Br. 112. These questions are not vouching; rather, they elicit "facts relevant to the jury's assessment of the witness's credibility." *United States* v. *Jones*, 471 F.3d 535, 544 (4th Cir. 2006). Defendants also point to investigators' statements regarding why certain victims were not called as witnesses. Again, these statements are not vouching, because "[t]he Government

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(…continued)
admissible under Federal Rule of Evidence 801(d)(2)(E) as statements of a co-conspirator).

has a right to explain its procedures and the relationship between the Government and its witnesses." *United States* v. *Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993).

Defendants also challenge the government's summary in closing argument of why Briana Evans was credible. Br. 112. The government summarized the reasons why Evans had no reason to lie. That was not impermissible vouching but instead reliance "on the trial evidence to suggest, rather than assure, that the * * * witness was credible." *Strickland*, 702 F. App'x at 156. It is true, however, that after summarizing the reasons the jury should find Evans credible, the government said, "I believe Briana." J.A. 995. That statement is not vouching because the context in which it was made makes clear that statement was based on the record evidence and not on the prosecutor's personal knowledge or extra-record evidence. See *Strickland*, 702 F. App'x at 155.

In any event, even when preserved, this Court finds vouching troubling only where the government's statements are pervasive rather than isolated. See *United States* v. *Collins*, 415 F.3d 304, 309 (4th Cir. 2005); see also *United States* v. *Craddock*, 364 F. App'x 842, 844 (4th Cir. 2010) (plain error). That is not the case here. Accordingly, defendants fail to establish that any alleged vouching constituted plain error.

6. Attacking Defense Counsel

Defendants assert that "[a]ny comment by the prosecution that disparages a defendant's decision to exercise his Sixth Amendment right to counsel is * * * improper" and that a "prosecutor's disparaging comments about defense counsel may impermissibly strike at this fundamental right." Br. 113-114 (citation omitted). But defendants do not specify where in the record the government disparaged any of their decisions to exercise their rights to counsel or disparaged defense counsel. To the contrary, prosecutors in opening expressly told the jury that "all five defense attorneys to a man or a woman are nice people, we all respect each other and we all get along." J.A. 154. The statements that defendants cite (Br. 113) demonstrate only that prosecutors attacked the credibility of defendants' explanations for their conduct, which were implausible, as the district court recognized at sentencing. J.A. 1135-1134. In any event, defendants have cited no case from the Supreme Court or this Court finding that statements akin to those cited in their brief were inappropriate. They have thus failed to establish that there is any error, let alone plain error.

7. Golden Rule

Defendants contend that counsel for the United States improperly argued the Golden Rule. Br. 114-115. As with hearsay, defendants have waived this argument because they have cited no authority and made no legal argument. See

Price, 876 F.3d at 581 n.5. This is not surprising because the government's questioning and argument were permissible. An improper Golden Rule argument is that "the jurors should put themselves in the shoes of [one of the parties] and do unto him as they would have him do unto them under similar circumstances." *United States* v. *Susi*, 378 F. App'x 277, 283 n.5 (4th Cir. 2010) (citation omitted). Defendants challenge the government's questions on cross-examination regarding whether various defendants would have wanted their family members to engage in the activities of the victims in this case. But these questions did not ask jurors to put themselves in victims' shoes; rather, they were designed to challenge defendants' testimony that they had not forced the victims into sex trafficking. With regard to closing argument, defendants misrepresent the record by suggesting that the government "asked the jury to look at it through the girls' world." Br. 115. In fact, the government did the opposite, telling the jury that contrary to the defense's closing, the United States was *not* asking them to look at the case through the eyes of the victims: "We're not asking you to go into anybody else's world, we're asking you to look at the facts as we've put them up here for you. Look at the evidence and judge it with your own common sense." J.A. 988. Defendants have thus failed to meet their burden of establishing that there was error, let alone plain error.

8. Gang Membership

The district court admitted evidence that several defendants were members of gangs, including the Crips, Folk Nation, and Jack Boys. The evidence of gang membership underscored the relationship between the co-defendants: some were members of the same gang, and others were friends from childhood. "[A]dmission of gang-related evidence is appropriate to demonstrate the existence of a joint venture or conspiracy and a relationship among its members." *United States* v. *Teran*, 496 F. App'x 287, 292-293 (4th Cir. 2012) (internal quotation marks and citation omitted). Defendants have cited no case from this Court or the Supreme Court that membership of gang evidence is inadmissible in this context. See Br. 115. They thus have failed to satisfy their burden of establishing plain error.

* * *

Defendants have failed to satisfy their burden of establishing that there were any plain errors with regard to this hodgepodge of unpreserved arguments. The Court thus need not decide whether there was cumulative error. If the Court does reach that issue, however, there was no cumulative error because any error did not so "fatally infect * * * the trial's fundamental fairness" as to warrant the "unusual remedy" of reversal on cumulative error. *United States* v. *Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (internal quotation marks and citations omitted). Indeed, any argument that the trial was so fatally flawed runs up against the jury's

careful decision to acquit on two counts, while convicting on eight others. See *United States* v. *Runyon*, 707 F.3d 475, 520 (4th Cir. 2013) (jury's partial decision in favor of defendant undermines cumulative error argument).

CONCLUSION

For these reasons, this Court should affirm the district court's judgments.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that this case can be resolved on the briefs, particularly given that the issues raised by defendants are all subject to plain error review. The United States will appear for oral argument if this Court believes that argument would be helpful.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) contains 15,191 words in accordance with this Court's order granting the United States' unopposed motion for permission to file an oversized brief; and

(2) complies with the typeface requirements of 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/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Dated: March 29, 2019

CERTIFICATE OF SERVICE

I certify that on March 29, 2019, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that one paper copy of the foregoing brief was sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by FedEx on March 29, 2019.

s/ Vikram Swaruup
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