No. 20-10084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MACKENZIE DAVIS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

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JURISDICTIONAL STATEMENT

This appeal is from the district court's final judgment in a criminal case. The court had jurisdiction under 18 U.S.C. 3231. The court entered its judgment and commitment against defendant-appellant Mackenzie Davis on February 26,

2020. ER.1006-1010.[1] Davis timely appealed on February 27, 2020. ER.1011. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in admitting under Federal Rules of Evidence 403 and 413 evidence that Davis committed other sexual assaults.

2. Whether there was sufficient evidence at trial for a reasonable juror to find that Davis violated 18 U.S.C. 1519 by altering, destroying, or concealing a photograph he took of the victim's bare breasts where Davis deleted the photograph off of his cell phone and the photograph was never recovered.

3.a. Whether the district court needed to find facts supporting application of a base offense level of 16 under Section 2A3.4(a)(2) of the United States Sentencing Guidelines by clear and convincing evidence rather than by a preponderance of the evidence.

b. Whether the district court clearly erred under the applicable evidentiary standard in finding that Davis engaged in sexual contact with the victim by placing her in fear, making application of a base offense level of 16 appropriate.

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[1] "ER.__" refers to the excerpts of record. "Br. __" refers to the page number in Davis's opening brief. "R.__, at __" refers to the docket entry number and page number of documents filed in the district court.

STATEMENT OF THE CASE

1. Procedural History

On January 2, 2019, a federal grand jury in the District of Arizona returned a three-count indictment against defendant-appellant Mackenzie Davis, an officer with the Hopi Rangers. ER.27-29. Count 1 charged Davis with deprivation of rights while acting under color of law, in violation of 18 U.S.C. 242. ER.28. Specifically, the indictment alleged that Davis willfully deprived Crystal Abloogalook of the right to be free from unreasonable seizure when he touched her breast, put his mouth on her breast, and photographed her bare breasts with his cell phone, all against Abloogalook's will and while she was handcuffed in the backseat of his patrol car. ER.28. Count 2 charged Davis with knowingly engaging in sexual contact with Abloogalook without her permission within the confines of Indian Country, in violation of 18 U.S.C. 1153 and 2244(b). ER.28. Count 3 charged Davis with destruction of evidence with the intent to impede, obstruct, and influence the Federal Bureau of Investigation's (FBI) investigation into his sexual misconduct, in violation of 18 U.S.C. 1519. ER.29. Specifically, the indictment alleged that Davis knowingly altered, destroyed, and concealed "a photograph[] from his cellular phone." ER.29.

After a four-day trial, the jury convicted Davis on all three counts. ER.869. The district court sentenced Davis to terms of imprisonment of 12 months on

Count 1, 24 months on Count 2, and 51 months on Count 3, all to run concurrently. ER.999-1000. The court also imposed a ten-year term of supervised release and a special assessment of $225. ER.1000. The court entered judgment on February 26, 2020. ER.1006-1010. Davis timely appealed. ER.1011.

2. Factual Background

a. On November 15, 2016, Davis, a uniformed officer with the Hopi Rangers, arrested Abloogalook for driving under the influence. ER.178-179, 279. Following the arrest, Davis drove Abloogalook to a mobile command center outside the Bureau of Indian Affairs (BIA) facility for Hopi Corrections to complete the intake process. ER.301-302. Typically, individuals arrested by Hopi Rangers remain at the BIA facility following intake. ER.300, 304. However, at the time of Abloogalook's arrest, the facility was condemned and could not house any arrestees. ER.314, 649. Consequently, Davis told Abloogalook that, after intake, he would drive her to the Navajo County Jail in Holbrook, Arizona. ER.180.

The route between the BIA facility and the Navajo County Jail spans 89 miles and takes approximately an hour-and-a-half to drive. ER.181, 316. The road between the facility and the jail is a two-lane highway adjacent to desert and has "barely anything on it." ER.181-182. During the drive to the jail, Davis asked Abloogalook if she wanted some Gatorade. ER.183. Abloogalook answered,

"yes." ER.183. Driving in the right lane of the highway, Davis crossed over the left lane and parked his patrol vehicle on the left shoulder of the road, facing oncoming traffic. ER.184. There were "hardly any vehicles" on the highway, and when looking out the left rear passenger door, Abloogalook saw only "bushes and desert." ER.184, 212. This stop occurred within the Navajo Reservation. ER.345-347.

Davis came around to the back of the car and opened the left rear passenger door where Abloogalook was sitting behind the driver's seat. ER.184-185. Because Abloogalook was handcuffed in front of her body, Davis put the Gatorade bottle to Abloogalook's mouth and she took a drink. ER.185-186. Davis put the bottle away, came back to Abloogalook, and told her she had something on her shirt. ER.186. He reached out and started "rubbing" her right breast, as if "trying to feel the shape of [it]." ER.186. This made Abloogalook "really, really scared." ER.186. While rubbing her breast, Davis told her, "damn, you got big boobs," which made Abloogalook feel "afraid" about "[what] was [happening] to [her]." ER.186-187. Then, using both of his hands, Davis started "grabbing" and "squeezing" Abloogalook's breasts over her shirt. ER.187. Abloogalook stayed quiet and said nothing. ER.187. Davis, who was "much bigger than [Abloogalook]," was in "[her] personal space" and blocked the entire rear doorframe. ER.187, 279. Abloogalook feared she "might get more hurt" and did

not believe there was any way to get out of the situation. ER.187, 280. In fact, Abloogalook felt like Davis had "total control over [her] in that moment." ER.280.

Davis next exposed both of Abloogalook's breasts. He lifted her shirt up towards her neck, pulled the bra cup over to the side, and took her left breast out of the bra. ER.188. Davis also exposed her right breast. ER.189. He then put his mouth on Abloogalook's left breast and started sucking on it. ER.189. Once he stopped, Davis said, "damn, I need to take a picture of this." ER.189. Leaving Abloogalook "still exposed," Davis went to the front seat of the patrol car, came back with a cell phone, and took a photograph of Abloogalook's bare breasts. ER.189-190. Abloogalook "couldn't believe this [was] happening" and worried about "the next thing [Davis] was going to do." ER.190-191.

After taking the photograph, Davis unbuckled Abloogalook's belt, unbuttoned her pants, and "attempted to put his fingers down under [her] panties." ER.191. Because Davis had "just [gone] too far," Abloogalook "pulled back" and said, "what are you doing?" ER.191. Davis quickly re-buttoned Abloogalook's pants, re-buckled her belt, pulled her bra back into position, and pulled down her shirt. ER.191.

Davis returned to the driver's seat and continued driving to the Navajo County Jail. ER.192. Along the way, he asked Abloogalook whether she would date a younger man and whether she would "do a threesome with another man and

him." ER.192. Davis also told Abloogalook that if she had "pulled over * * * right away" prior to her arrest, "[they] could have handled this differently" and "[she] could have sucked his dick." ER.193. Upon arriving at the jail, while waiting for the guards to open the gate to the sally port, Davis told Abloogalook, "this is going to be our secret, right?" ER.192, 195.

The next day, after Abloogalook was arraigned and released, she went to the office of the Hopi tribal leader—which she perceived as "the safest place to go not * * * within law enforcement"—and reported what Davis had done to her. ER.204-205.

b. The FBI initiated an investigation. ER.344. The FBI seized Davis's cell phone pursuant to a search warrant. ER.344-345. FBI Agent Dawn Martin analyzed the phone using a program called Cellebrite. ER.348. Cellebrite conducts a "logical or a file system extraction," which is one of "the most basic types of extractions." ER.542. Analyzing a phone via Cellebrite allows a user to view photographs contained on a phone; "sometimes," Cellebrite also will reveal photographs deleted from a phone. ER.349. Agent Martin analyzed Davis's phone using Cellebrite and looked specifically for photographs of Abloogalook's bare breasts. ER.356. She found no such photograph on his phone. ER.348.

A second FBI agent, Dennis Vollrath, later conducted a forensic examination of Davis's phone—specifically, "the memory chip on board the

phone." ER.544-545. To do so, Agent Vollrath had to "completely disassemble the phone down to the main circuit board, and under a microscope * * * microsolder hair-thin wires to various contacts" to "query all of the data off of that chip." ER.545. Agent Vollrath then processed the chip "through a Cellebrite tool known as Physical Analyzer." ER.546. This analysis revealed nine full-sized photographs taken on November 15, 2016, as well as thumbnail images corresponding to each of those full-sized photographs. ER.547-552; ER.1100-1115.

Agent Vollrath also found three thumbnail images that lacked a corresponding full-sized photograph. ER.552, 554.[2] These three thumbnail images showed Abloogalook's bare breasts. ER.220, 1105. Agent Vollrath looked through the phone but "was not able to find the actual image" that corresponded to the three thumbnail images. ER.554. Rather, he could only find in the phone's metadata "references" to a missing full-sized photograph that had been taken on November 15, 2016, and which had "previously existed on th[e] phone." ER.554. Specifically, the phone contained an "index entry" for a full-sized photograph corresponding to the three thumbnail images, but only "a zero bite file" remained

[2] Davis incorrectly characterizes the three thumbnail images Agent Vollrath found as "identical." Br. 13. The thumbnails differ in file size, and the second thumbnail image has a different aspect ratio than the other two and looks "squished * * * horizontally." ER.562, 1105.

where the photo should have been. ER.554. This meant that "the original image no longer existed." ER.554; see also ER.561 (stating that "it was like [there was] a file path," but "there was nothing there" where he "would expect to find that file"). Based on Agent Vollrath's training and experience, he concluded that the full-sized image "[had been] deleted" off of the phone. ER.556.

FBI agents also collected buccal swabs—sterile Q-tips rubbed on the inside of a person's cheek to obtain a DNA sample—from Davis and Abloogalook and sent them to a laboratory for analysis. ER.360, 364. A lab also analyzed the bra worn by Abloogalook when Davis sexually assaulted her. ER.362, 364. Swabs of the insides of the left and right cups of Abloogalook's bra identified DNA from three individuals. ER.418-419. One of those individuals was Abloogalook. ER.420-421. Examiners found "extremely strong support" for concluding that the DNA of one of the other individuals was Davis's. ER.419, 421-422.[3]

3. Pretrial And Trial Proceedings

a. On August 2, 2019, the government filed a notice of intent to offer evidence under Federal Rule of Evidence 413 (Similar Crimes in Sexual-Assault

[3] There was "very little evidence of DNA" from the third, unknown individual. ER.456.

Cases) that Davis had committed other acts of sexual assault. ER.30-46.[4] In light of statements Davis had made during an interview with the FBI, the government anticipated that his trial strategy would be to attack Abloogalook's credibility, argue she was "the aggressor," and suggest she had "attempt[ed] to bribe him" to avoid conviction for driving under the influence. ER.36, 41-42. The government thus asked the district court to admit testimony from Shantel Kaye, whom Davis had sexually assaulted approximately five years prior to his sexual assault of Abloogalook, while Kaye was in middle school and he was in high school. ER.34; see also ER.30-46. The government's position was that evidence of Davis's sexual assaults of Kaye was admissible to establish Davis's propensity to commit sexual assault, corroborate Abloogalook's anticipated testimony, and rebut any argument that Abloogalook had fabricated her allegations against Davis. ER.39-44.

Davis filed a motion in limine seeking to bar Kaye's testimony. ER.1027-1098. He argued that Kaye's testimony was inadmissible under Rule 413, lacked relevance, and should be excluded under Rule 403 because the danger of unfair prejudice substantially outweighed the testimony's potential probative value. ER.1035-1043. Davis also made clear his intent to challenge the credibility of both

[4] Where a defendant is accused of sexual assault in a criminal case, Rule 413 permits the admission of "evidence that the defendant committed any other sexual assault," which "may be considered on any matter to which it is relevant." Fed. R. Evid. 413(a).

women, suggesting that Abloogalook "had significant motivation to avoid another conviction" for driving under the influence and that Kaye's allegations "def[ied] common sense" because if she "had felt she was assaulted, she would not have continued to maintain contact with Mr. Davis." ER.1039, 1041.

The district court heard argument at the pretrial conference and orally denied Davis's motion. ER.98-112. The court pointed out that most of Davis's arguments pertained to "the credibility of the witness in the [Rule] 413 situation" and concluded that a jury could find that Davis sexually assaulted Kaye because "evidence of an ongoing relationship before and after does not mean that there was not a sexual assault that occurred during that relationship." ER.111-112. The court also reasoned that, although Kaye's testimony would be prejudicial to Davis, it would not be "unfairly prejudicial." ER.112. Later that day, the court affirmed by minute order its denial of Davis's motion. ER.1020 (R.85).

b. Trial began on October 9, 2019. ER.137. In his opening statement, defense counsel told the jury, among other things, that the case would "[come] down to * * * an issue of [Abloogalook's] credibility." ER.176. Defense counsel argued that Abloogalook lacked credibility because, on the day in question, she had been too drunk to recall accurately what had happened. ER.166, 176. He also contended that Abloogalook had a "history" of lying to law enforcement, her behavior after arriving at the Navajo County Jail (including not

reporting Davis's sexual assault to officers on duty at the jail) was inconsistent with what one would expect from a sexual-assault victim, and her story overall was incredible. ER.169, 171, 176-177.

When cross-examining Abloogalook, defense counsel emphasized many of these themes. He asked a series of questions about Abloogalook's level of inebriation and ability to recollect specific events preceding Davis's sexual assault. ER.235-243. Other questions were intended to cast doubt on Abloogalook's truthfulness when speaking with law enforcement and her reluctance to report Davis's sexual assault to Navajo County Jail guards or BIA officers following the incident. ER.226-227, 249-250, 253. Defense counsel also sought to highlight inconsistencies between Abloogalook's testimony and other evidence. For example, although Abloogalook recalled that her hands had been handcuffed behind her back during the sexual assault and Davis had pulled her shirt up to expose her breasts (ER.185, 188), defense counsel noted that the thumbnail images recovered from Davis's cell phone showed she had been handcuffed in front of her body and Davis had pulled her shirt down (ER.230-231).

c. Kaye testified at trial. At defense counsel's request (ER.480), the district court gave a limiting instruction prior to her testimony:

> You will now hear evidence that alleges that the defendant committed other acts of sexual assault. You may consider this evidence for any matter to which it is relevant or not at all.

> The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as substitute for proof that the defendant committed the charged crimes.

ER.513-514.

Kaye's testimony focused on sexual assaults by Davis that occurred five or six years before his sexual assault of Abloogalook, when Kaye was in "[s]eventh or eighth grade" and Davis was a "junior or a senior in high school." ER.515, 535. At that time, Kaye was "new in school" and Davis would sit next to her when they rode the bus. ER.515. At some point, Davis told Kaye that he liked her. ER.515. Kaye "didn't like [Davis] * * * like a boyfriend" but "[hung] out with him anyway" because she "thought [they] could just be friends." ER.516. The two would hang out in the morning before class in an area of the school that was "blocked off to the gym and auditorium" due to construction. ER.516.

In the beginning, Davis and Kaye "just talk[ed]." ER.517. But after they "[got] to know each other," Davis "would try making moves [on Kaye]." ER.517. He was "handsy," "rub[bing]" and "squeez[ing]" her breasts both over her clothes and under her bra. ER.517-518, 528. He also sucked on her nipples, "want[ed] to put his hand down [her] pants," and asked her to perform oral sex on him. ER.518-519, 530, 535.

Nearly all of this sexual contact was unwelcome. ER.517-519. Kaye would "tell [Davis] to stop" and that "somebody was going to come." ER.518.

"Sometimes," Davis would stop; other times, he would not. ER.518. For example, when Davis sucked on her nipples, Kaye would tell him that she "didn't want that," but Davis simply responded that "it would be okay" and "nobody was coming." ER.519. In those instances, Kaye "[j]ust ke[pt] quiet because [she] didn't know what to do." ER.519. Kaye also tried pushing Davis away, pressing her forearm against his chest, but because he was "two to three times bigger than [she] was," she was not able to push him away. ER.518-519.

d. During his case-in-chief, Davis called a number of witnesses intended to undermine Abloogalook's testimony. To imply Abloogalook had blacked out during the drive to the Navajo County Jail and possessed false memories of being sexually assaulted, Davis called a forensic toxicology expert to testify generally about the effects of alcohol consumption on memory. ER.588, 591-592, 599-613. To emphasize Abloogalook's inebriation and failure to report Davis's sexual assault to officers at the jail, Davis introduced testimony from officers who were on duty the night Abloogalook was brought to the facility. ER.670-672, 690-691, 707-708, 729. And to suggest Abloogalook had previously given a different account of the events, Davis called Sophia Pashano, a woman who had waited with Abloogalook for arraignment in the same courthouse holding cell. ER.767-768. Pashano testified that Abloogalook told her that an officer had touched her breast

when searching her at the time of arrest, not during her transport to the jail. ER.772-775, 778-779.

e. After Davis rested but prior to closing arguments, the district court again instructed the jury regarding Kaye's testimony:

> You have heard evidence that the defendant is alleged to have committed other acts of sexual assault not charged in the indictment. You may consider this evidence for its bearing on any matter to which it may be relevant.
>
> Remember that the defendant has not been charged with committing these acts. Do not return a guilty verdict unless the government proves the crimes charged in the indictment beyond a reasonable doubt.

ER.796-797.

With respect to the charge of destruction of evidence under 18 U.S.C. 1519 in Count 3, the district court instructed the jury that the first element the government needed to prove beyond a reasonable doubt was that Davis "knowingly altered, destroyed, or concealed a record, that is, a photograph from his cellular phone." ER.799. The court defined the term "conceal" to mean "to prevent disclosure or recognition of, avoid * * * revelation of, refrain from revealing recognition of, draw attention from, treat so as to be unnoticed, took place out of sight, withdraw from being observed, [or] shield from vision or notice." ER.799.

f. In her closing argument, defense counsel again argued that Abloogalook had accused Davis "of allegations that are simply not true." ER.828. She emphasized Abloogalook's intoxication and lack of recollection, suggested that she possessed false memories, insisted that she had not exhibited the "demeanor of a person who had been assaulted," and pointed to her reluctance to report Davis's sexual assault to officers at the Navajo County Jail and her allegedly inconsistent statement to Pashano. ER.829-835, 845-847. Regarding the destruction-of-evidence charge in Count 3, defense counsel admitted that Davis deleted the photograph he took of Abloogalook's bare breasts but argued that he had not "use[d] software to scrub out his phone," "throw[n] his phone in the river," or "smash[ed] it." ER.844.

After closing arguments, Davis moved for a directed verdict on all three counts. ER.863. As relevant here, Davis asked for a directed verdict on the destruction-of-evidence charge in Count 3, arguing that there was no evidence he "tried to scrub [his cell phone]" or permanently "get rid of" the photograph he took of Abloogalook. ER.864. Because the photo supposedly "stayed on the phone," Davis contended that it had not been "concealed or destroyed" for purposes of Section 1519. ER.864. The district court denied the motion. ER.864.[5]

[5] Davis twice moved for a judgment of acquittal on Count 2, arguing that his offense did not occur in Indian Country. ER.577-578, 864. The district court (continued…)

The next day, the jury returned guilty verdicts against Davis on all three counts. ER.869.

4. Sentencing

a. The United States Probation Office prepared a presentence investigation report (PSR) and calculated Davis's recommended range under the United States Sentencing Guidelines. R.127, at 1-20. The PSR began by grouping all three counts together under Sentencing Guidelines § 3D1.2(b) because they "involve[d] the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." R.127, at 8. The Guidelines determine the offense level of a group using the count with the highest base offense level. Sentencing Guidelines § 3D1.3(a). The PSR thus applied Section 2H1.1, the guideline applicable to Count 1, to the group because it resulted in the highest offense level among the three counts. R.127, at 8.

Under Sentencing Guidelines § 2H1.1(a), the base offense level is found in the offense guideline applicable to any underlying offense. Here, the guideline addressing the underlying offense of abusive sexual contact is Sentencing Guidelines § 2A3.4. R.127, at 9. Under that guideline, the base offense level is 16 or 20 if certain aggravating circumstances are present; if not, the base offense level

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(…continued)
denied the motion both times. ER.578-579, 864. Davis does not challenge these rulings on appeal.

is 12. Sentencing Guidelines § 2A.3.4(a)(1)-(3). As relevant here, Section 2A3.4(a)(2) provides for a base offense level of 16 if "the offense involved conduct described in 18 U.S.C. § 2242." Application Note 3 explains that "[f]or purposes of subsection (a)(2)," "conduct described in 18 U.S.C. § 2242" includes "engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping)." Sentencing Guidelines § 2A3.4, comment. (n.3(A)).

The PSR applied a base offense level of 12. R.127, at 9. It added four upward adjustments for commission of the offense under color of law, while Abloogalook was physically restrained, while she was in Davis's custody, and for obstruction of justice. R.127, at 9.[6] The PSR calculated Davis's total offense level as 24, which, with a criminal history of I, resulted in a recommended Guidelines range of 51 to 63 months' incarceration. R.127, at 9, 17. Because the maximum sentences for violating 18 U.S.C. 242 and 2244 are 12 months and 24 months, respectively, the PSR reduced Davis's recommended Guidelines sentences for Counts 1 and 2 to 12 months and 24 months and recommended a sentence of 51 months on Count 3, to run concurrently. R.127, at 13, 17.

[6] Davis does not challenge these adjustments on appeal.

b. The government objected to the PSR, arguing that a base offense level of 16 under Section 2A3.4(a)(2) should apply because Davis had engaged in sexual contact with Abloogalook by placing her in fear. ER.894-903. As support, the government pointed to the "sustained" fear recounted by Abloogalook in her trial testimony, including "fear of [Davis] based on his size and what else he might do to hurt her" and from Davis's "escalati[on] [of] the sexual assault itself." ER.900.

Davis disputed application of Section 2A3.4(a)(2). ER.904-949. He first argued that the district court would have to find facts supporting application of Section 2A3.4(a)(2) by clear and convincing evidence, rather than by a preponderance of the evidence, because of the guideline's "significant" impact on his recommended sentence. ER.911-913. He further contended that the trial record contained no clear and convincing evidence that he placed Abloogalook in fear and "used [that fear] to initiate [sexual] contact." ER.913-915. Rather, Davis suggested that Abloogalook became fearful only after he "touched her breast," and consequently, he did not "use[] fear * * * to initiate the [sexual] contact." ER.917. The Probation Office agreed, concluding that "[o]ther than the behavior that constitute[d] the instant offense, there is no reference to Davis acting in a way that would place the victim in fear." R.127, at 22.

Davis also filed a sentencing memorandum seeking a downward variance. R.128, at 1-15. In his memorandum, Davis asked the district court to sentence him to "no more than two years" of incarceration. R.128, at 1.

c. The district court held a sentencing hearing on February 24, 2020. ER.950. The court agreed with the government that the appropriate base offense level was 16 under Section 2A3.4(a)(2). ER.954. Without specifying which evidentiary standard it was using, the court stated that "there was behavior other than that necessary to constitute this offense that would place the victim in fear." ER.954. This included Davis's "photographing the victim, trapping her in the back of the car with his physical presence, commenting about the size of her breasts, [and] suggesting that he may have forced oral sex if he had had more time, as some of the other conduct." ER.954.

The district court overruled the remaining objections by the government and Davis. ER.954-955. It then calculated Davis's total offense level as 28. ER.955-956. With a criminal history of I, this resulted in a recommended Guidelines range for Count 3 of 78 to 97 months' incarceration. ER.956.

Given Davis's "lack of criminal history," his "family support," and "the need for [Davis] to continue [his] support of [his family]," the district court decided to "vary[] downward from the guidelines somewhat." ER.999. The court imposed the statutory maximum sentences on Counts 1 and 2 of 12 months and 24

months, respectively, and a 51-month sentence on Count 3, all to run concurrently. ER.999-1000. The court also imposed a ten-year term of supervised release and a special assessment of $225. ER.1000. The court entered judgment on February 26, 2020. ER.1006-1010.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in permitting Kaye to testify about earlier, similar instances of sexual assault by Davis. There is no dispute that Federal Rule of Evidence 413(a) permitted admission of this evidence. Davis contends only that the probative value of Kaye's testimony was substantially outweighed by a danger of unfair prejudice, requiring exclusion under Rule 403.

As the district court correctly concluded, exclusion under Rule 403 was unwarranted because Kaye's testimony was highly probative and any resulting prejudice was not unfair. Indeed, all of the factors this Court uses to assess this kind of prior-act evidence under Rule 403 *favor* admission. Davis's arguments to the contrary should be rejected, as they are unpersuasive, inconsistent with case law, or contradicted by the trial record. Moreover, even if the court abused its discretion in allowing Kaye to testify, that error was harmless in light of the court's two limiting instructions emphasizing the limited purpose of Kaye's testimony and other overwhelming evidence of Davis's guilt.

2. The jury had sufficient evidence to convict Davis on Count 2 for altering, destroying, or concealing evidence—specifically, the photograph he took of Abloogalook's bare breasts—in violation of 18 U.S.C. 1519. In challenging his conviction on this count, Davis contends that the government relied on a "'concealment' theory" under Section 1519 and that the evidence it proffered to prove concealment was insufficient.

This challenge fails for two reasons. First, contrary to Davis's suggestion, the government relied on three separate theories under Section 1519, arguing that he *altered, destroyed, or concealed* the photograph he took of Abloogalook. Because the jury had sufficient evidence on which to find that Davis altered or destroyed the photograph, any insufficient evidence regarding concealment would not merit reversal. Second, even if the government had relied solely on a concealment theory of liability, the evidence at trial was more than sufficient for a reasonable juror to find that Davis concealed the photo.

3. The district court correctly applied a base offense level of 16 under Sentencing Guidelines § 2A3.4(a)(2). Davis suggests that application of Section 2A3.4(a)(2) required clear and convincing evidence that he engaged in sexual contact with Abloogalook and that he did so by placing her in fear. Davis also contends that the government failed to make such a showing.

Davis is wrong on both points. A straightforward application of the factors this Court uses to determine whether the clear-and-convincing standard is required at sentencing shows that this case presents none of the exceptional circumstances that would necessitate use of that heightened evidentiary standard here. But even if the clear-and-convincing standard applied, Abloogalook's firsthand account of Davis's sexual assault provided clear and convincing evidence that he engaged in sexual contact with her by placing her in fear.

For these reasons, the Court should affirm Davis's convictions and sentence.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY BY SHANTEL KAYE UNDER RULES 403 AND 413

A. Standard Of Review

In a criminal case where a defendant is charged with committing a sexual assault, Federal Rule of Evidence 413(a) permits the admission of evidence that the defendant committed other sexual assaults, "[s]ubject to the limitations of Federal Rule of Evidence 403." *United States* v. *Redlightning*, 624 F.3d 1090, 1119 (9th Cir. 2010), cert. denied, 563 U.S. 1026 (2011). This Court reviews for abuse of discretion a district court's ruling under Rule 403 that the probative value of evidence is not substantially outweighed by a danger of unfair prejudice. *United*

States v. *LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001), cert. denied, 534 U.S. 1166 (2002). Rule 403 determinations are "subject to great deference, because the considerations arising under Rule 403 are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues." *United States* v. *Ubaldo*, 859 F.3d 690, 705 (9th Cir. 2017) (quoting *United States* v. *Lloyd*, 807 F.3d 1128, 1152 (9th Cir. 2015)), cert. denied, 138 S. Ct. 704 (2018).

B. No Unfair Prejudice Substantially Outweighed The Probative Value Of Kaye's Testimony

The district court did not abuse its discretion in admitting Kaye's testimony. Congress made evidence of other instances of sexual assault presumptively admissible under Rule 413, and all of the factors used by this Court to analyze such evidence under Rule 403 militate in favor of admission. None of Davis's arguments establishes any error—much less an abuse of discretion—by the district court. Even if the court did abuse its discretion in admitting Kaye's testimony, that error was harmless in light of the two limiting instructions given to the jury and the overwhelming evidence of Davis's guilt on Counts 1 and 2.

1. Rule 413 Permits Admission Of Evidence That A Defendant Committed Other Sexual Assaults

As noted above, in a criminal case where the defendant is accused of sexual assault, Rule 413 permits the admission of "evidence that the defendant committed

any other sexual assault," which "may be considered on any matter to which it is relevant." Fed. R. Evid. 413(a). Prior to 1994, the use of such "propensity evidence in sexual misconduct cases was severely restricted by Federal Rule of Evidence 404(b), which generally forbids the introduction of such evidence 'to prove the character of a person in order to show action in conformity therewith.'" *United States* v. *Sioux*, 362 F.3d 1241, 1244 (9th Cir. 2004). Congress enacted Rule 413 to "'supersede [] Rule 404(b)'s restriction'" and "establish[] a presumption * * * favoring the admission of propensity evidence at both civil and criminal trials involving charges of sexual misconduct." *Ibid.* (quoting *United States* v. *Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998)) (first alteration in original).

In passing Rule 413, Congress recognized the "assistance" this type of propensity evidence can offer "in assessing credibility." *United States* v. *Enjady*, 134 F.3d 1427, 1431 (10th Cir.), cert. denied, 525 U.S. 887 (1998). Because sexual assault "'generally [does not] occur in the presence of credible witnesses,'" "[p]rosecutors often have only the victim's testimony, with perhaps some physical evidence, linking a defendant" to the crime. *Id.* at 1431-1432 (quoting M. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 Am. Crim. L. Rev. 57, 69-70 (1995)). Prosecutions of sexual-assault crimes thus often come down to "the word of the defendant against the word of the victim." *LeMay*, 260 F.3d at

1033 (Paez, J., concurring in part and dissenting in part) (quoting 140 Cong. Rec. 15,210 (1994) (statement of Rep. Kyl)). Rule 413 reflects Congress's considered judgment that "evidence of other sexual assaults is highly relevant * * * and often justifies the risk of unfair prejudice" because it "'permits other victims to corroborate the complainant's account via testimony about the defendant's prior sexually assaultive behavior.'" *Enjady*, 134 F.3d at 1431-1432 (quoting Sheft, 33 Am. Crim. L. Rev. at 69-70); see also *United States* v. *Mandoka*, 869 F.3d 448, 456 (6th Cir. 2017) (noting that "Congress's decision to codify Rule 413 reflects its belief of the probative nature of such testimony") (quoting *United States* v. *LaVictor*, 848 F.3d 428, 450 (6th Cir.), cert. denied, 137 S. Ct. 2231 (2017)).

2. Kaye's Testimony Was Highly Probative And Resulted In No Unfair Prejudice

Davis does not dispute the admissibility of Kaye's testimony under Rule 413; rather, he insists that Kaye's testimony should have been excluded under Rule 403. Br. 26. Evidence admissible under Rule 413 must satisfy the requirements of Rule 403. See *Redlightning*, 624 F.3d at 1119. Under Rule 403, a district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of * * * unfair prejudice."

In *United States* v. *LeMay*, this Court set forth a nonexhaustive list of factors district courts should consider when determining whether evidence of a defendant's other acts of sexual misconduct admissible under Rule 413 nonetheless

must be excluded under Rule 403: (1) the "similarity of the prior acts to the acts charged," (2) the "closeness in time of the prior acts to the acts charged," (3) the "frequency of the prior acts," (4) the "presence or lack of intervening circumstances," and (5) the "necessity of the evidence beyond the testimonies already offered at trial." 260 F.3d at 1027-1028 (quoting *Doe ex rel. Rudy-Glanzer* v. *Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)). Davis contends that, under the *LeMay* factors, Kaye's testimony should have been excluded. Br. 26. He is wrong.[7]

Only in rare cases does Rule 403 warrant exclusion. The term "unfair prejudice" refers to the risk that relevant evidence will "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief* v. *United States*, 519 U.S. 172, 180 (1997). Under Rule 403, this risk "must not merely outweigh the probative value of the evidence, but *substantially* outweigh it." *United States* v. *Haischer*, 780 F.3d 1277, 1281-1282 (9th Cir. 2015) (quoting *United States* v. *Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995)). Exclusion under Rule 403 of otherwise admissible evidence thus is "an extraordinary remedy to be used sparingly." *Id.* at 1281 (quoting *Mende*, 43 F.3d at 1302); see also *United States* v. *Hankey*, 203 F.3d 1160, 1172 (9th Cir.) (emphasizing that

[7] Davis suggests that, in admitting Kaye's testimony, the district court "did not go through each of the factors set forth in *LeMay*." Br. 26. Davis does not, however, urge reversal on this ground. See Br. 22-23, 26.

"[a]pplication of Rule 403 must be cautious and sparing") (quoting *United States* v. *Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983), cert. denied, 467 U.S. 1243 (1984)), cert. denied, 530 U.S. 1268 (2000). This is especially true given "the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *United States* v. *LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997).

Given Davis's strategy at trial of attacking Abloogalook's credibility, questioning her truthfulness, and casting doubt on her recollection, Kaye's testimony under Rule 413 was exceedingly probative. Indeed, Kaye's description of instances when Davis sexually assaulted her corroborated Abloogalook's account of Davis's sexual assault and served to rebut his argument that Abloogalook had fabricated the entire incident. Moreover, analysis of the *LeMay* factors demonstrates that any prejudice resulting from Kaye's testimony neither was unfair nor substantially outweighed her testimony's considerable probative value.

a. Kaye's testimony had a high probative value because of the key similarities between Davis's sexual assaults of her and Abloogalook. Davis assaulted both women while he was in a relative position of power and authority over them. For example, Davis, a junior or senior in high school, was significantly older than Kaye, a seventh or eighth grade student, when he sexually assaulted her. ER.515, 517-519. Similarly, Davis sexually assaulted Abloogalook while she was

in his custody, sitting hand-cuffed in the backseat of his patrol car. ER.180, 184, 231. Davis also isolated both women in places where witnesses were unlikely—Kaye, in a "corner" of the school "blocked off" by construction where few people were around (ER.516), and Abloogalook, in a car parked on the left shoulder of a two-lane desert highway where "hardly any vehicles" were passing by (ER.184, 212). Kaye and Abloogalook also described extremely similar conduct by Davis, with him rubbing and squeezing their breasts over their clothes and sucking on their breasts—all without their consent. ER.186-187, 189, 517-518. Both women further testified that Davis wanted or attempted to put his hands down their pants and suggested that they could or should have engaged in oral sex. ER.191, 193, 530, 535.

Davis attempts to distinguish his sexual assaults of Kaye from his sexual assault of Abloogalook based on differences in his relationships with the two women and the settings of the assaults. Br. 26-27. Although Davis appears to acknowledge that he engaged in some sexual activity without Kaye's consent (Br. 26-27), he characterizes that conduct as occurring within a "high school relationship" and argues "Kaye was under no obligation to accompany [him]" to the "corner of [the] school gym" where the sexual assaults occurred (Br. 26). Davis contrasts this with his sexual assault of Abloogalook, which took place while

she was "handcuffed in the backseat of his vehicle, under arrest and in his custody." Br. 27.

These differences do not undermine the probative value of Kaye's testimony. To have "substantial probative value," prior sexual assaults "need not be identical" to the crime charged. *United States* v. *Erramilli*, 788 F.3d 723, 729 (7th Cir. 2015). Here, as in most crimes involving sexual assault, "[t]he relevance of the prior act evidence [is] in the details." *LeMay*, 260 F.3d at 1029. The details of the sexual assaults Kaye recounted are quite similar to Davis's sexual assault of Abloogalook in terms of how he took advantage of his relative authority over both women, the way he sequestered them, and the specific types of sexual contact in which he engaged.

Davis tries to downplay these similarities, suggesting his actions merely evinced "sexual interest in women's breasts." Br. 27. However, Kaye and Abloogalook's accounts contain relevant congruities in the way he groped and sucked on their breasts without their consent and sought to escalate things further by wanting to put his hand down their pants. Where, as here, evidence regarding other sexual assaults reveals key similarities with, and thus corroborates, testimony about the charged crime, that evidence is prejudicial "for the same reason [the evidence] is probative." *United States* v. *Keys*, 918 F.3d 982, 986 (8th Cir. 2019)

(quoting *United States* v. *Gabe*, 237 F.3d 954, 960 (8th Cir. 2001)). Accordingly, such prejudice "is not 'unfair.'" *Ibid.* (same).

b. Kaye's testimony also was probative because Davis's sexual assaults of her occurred only five or six years before his sexual assault of Abloogalook. ER.179, 514-515, 523. As Davis acknowledges, there is no "bright line rule" for precluding evidence that is remote in time. Br. 27; see also *United States* v. *Thornhill*, 940 F.3d 1114, 1120 (9th Cir. 2019). Here, admission of Kaye's testimony comports with appellate court decisions under Rule 413, which found no abuse of discretion when district courts admitted evidence of other sexual assaults predating the charged conduct by five or more years. See, *e.g.*, *United States* v. *Willis*, 826 F.3d 1265, 1274 (10th Cir.) (no abuse of discretion where sexual assaults occurred five years prior to the charged crime), cert. denied, 137 S. Ct. 405 (2016); *Erramilli*, 788 F.3d at 730 (same where sexual assaults occurred nine to eleven years prior); *United States* v. *Julian*, 427 F.3d 471, 485, 487 (7th Cir. 2005) (same where the sexual assault occurred 12 years prior), cert. denied, 546 U.S. 1220 (2006). This Court similarly has found no abuse of discretion where district courts admitted under Rule 414 evidence of other sexual misconduct involving children that predated the charged conduct by more than seven years. See, *e.g.*, *Thornhill*, 940 F.3d at 1116, 1120 (no abuse of discretion where sexual misconduct

occurred seven to ten years prior to the charged crime); *LeMay*, 260 F.3d at 1022-1023, 1030 (same where sexual misconduct occurred eight years prior).[8]

Davis does not argue that the five-year interval between his sexual assaults of the two women rendered Kaye's testimony per se more prejudicial than probative, and he concedes that neither party below identified any intervening circumstance that would affect the Rule 403 balance. Br. 27-28. Rather, Davis argues that the incidents with Kaye occurred when he "was a teenager," in contrast to his sexual assault of Abloogalook, which occurred when he was "an adult law enforcement officer." Br. 27-28. However, "the mere fact that [the defendant] was a minor at the time of his alleged sexual assaults against [other victims] does not render evidence of those events inadmissible." *Willis*, 826 F.3d at 1272, 1274 (dismissing the defendant's contention that prior sexual misconduct constituted "nothing more than a teenaged make-out session"); see also *United States* v. *O'Connor*, 650 F.3d 839, 853-854 (2d Cir. 2011) (finding no abuse of discretion in admitting passages from the defendant's autobiography describing his sexual attraction to children and sexual acts against "'[his] little sister' and her girlfriends while they were asleep," despite the defendant's argument that they simply

[8] Case law interpreting Rule 414 is relevant in considering Rule 413. See *Sioux*, 362 F.3d at 1244 n.4.

"described his thoughts and conduct as a teenager"), cert. denied, 565 U.S. 1148 (2012). Davis offers no reason for reaching a contrary conclusion here.

c. Kaye's testimony also is probative because it concerned multiple instances of sexual assault by Davis. Though Kaye did not explicitly state the number of times Davis rubbed and sucked on her breasts without her consent, the clear import of her testimony is that these sexual assaults occurred many times. See ER.518 (stating that when Davis rubbed and squeezed her breasts and she "[told] him to stop," "[s]ometimes" he would stop and "other times" he would not stop); ER.530 (noting that "sometimes" Davis also wanted to put his hand down her pants).

Davis does not dispute that multiple incidents took place in which he touched Kaye without her consent but suggests they "occurred within a limited period of time." Br. 28. This does not render Kaye's testimony any less probative. That "limited period of time" lasted almost half the school year, and Davis's sexual assaults of Kaye occurred frequently during that span. ER.523 (the sexual assaults took place between September and December); ER.528 (Davis was "worried about getting caught" "throughout" that period).

d. Finally, given the strategy Davis pursued at trial, Kaye's testimony was necessary to corroborate Abloogalook's account of the sexual assault he committed. "Prior acts evidence need not be *absolutely necessary* to the

prosecution's case in order to be introduced; it must simply be helpful or *practically necessary*." *LeMay*, 260 F.3d at 1029. Kaye's testimony satisfies that modest standard.

Throughout the trial, Davis disputed that any sexual assault had occurred by attempting to discredit Abloogalook's testimony and undermine her credibility. Defense counsel made this clear at the outset, telling the jury in his opening statement that the case would "[come] down to * * * an issue of credibility" regarding "Abloogalook's word." ER.176; see also pp. 11-12, *supra*. When cross-examining Abloogalook, Davis's counsel assailed her credibility by highlighting perceived inconsistencies between her testimony and other evidence, casting doubt on her veracity and memory, and questioning her motives for reporting the sexual assault. See p. 12, *supra*. To that end, Davis called witnesses in his case-in-chief to cast further doubt on Abloogalook's account. See pp. 14-15, *supra*. Defense counsel emphasized these themes again during closing arguments. See p. 16, *supra*.

This Court in *LeMay* made clear that where, as here, a defendant seeks to raise reasonable doubt by attacking a victim's truthfulness and recollection, testimony about other sexual assaults by the defendant is necessary "to bolster the credibility of the victim[]" and rebut insinuations she "could be fabricating [her] accusations." 260 F.3d at 1028; see also *United States* v. *Gaudet*, 933 F.3d 11, 18

(1st Cir.) (finding Rule 413 testimony probative where defense counsel's "strategy at trial involved discrediting [the victim's] credibility by highlighting inconsistencies in her testimony"), cert. denied, 140 S. Ct. 610 (2019); *Erramilli*, 788 F.3d at 729 (finding Rule 413 evidence "highly probative" where defense counsel argued that the victim's "account of what happened was incredible"). The district court thus admitted evidence of Davis's prior sexual assaults "in precisely the manner Congress contemplated," which "strongly indicates that its admission was not an abuse of discretion." *LeMay*, 260 F.3d at 1029.

Despite the corroborative nature of Kaye's testimony, Davis argues it was unnecessary given other evidence in the case. Specifically, Davis cites a map on which he circled the location of where he stopped with Abloogalook, photographic evidence recovered from his cell phone, and DNA evidence collected from the bra Abloogalook was wearing during the sexual assault. Br. 28-29.

None of this evidence rendered Kaye's testimony unnecessary. The map and photographic evidence, for example, pertained to unchallenged aspects of Abloogalook's account, as Davis never denied that he stopped along the side of the highway when transporting Abloogalook or that he took a photograph of her bare breasts. ER.173-174. In contrast, Kaye's testimony corroborated points in Abloogalook's narrative contested by Davis, including whether he groped her

breasts, sucked on her left breast, and attempted to put his fingers down her pants, as Abloogalook had testified. See pp. 11-12, 14-16, *supra*.

Moreover, though Davis currently suggests that Kaye did not need to testify given the strength of the government's photographic and DNA evidence, defense counsel hotly disputed the import and weight of that evidence at trial. For example, in closing argument, defense counsel pointed to the photographic evidence as a reason why Abloogalook should *not* be believed. See ER.844 (arguing the photographic evidence represented "the best evidence that Ms. Abloogalook's statements are incorrect" because it showed, contrary to prior statements, that she was handcuffed in front of her body during the sexual assault and not behind her back). As for the DNA evidence, defense counsel described the amount of DNA found as "minute" and suggested there were "a number of ways" Davis's DNA could have made its way onto Abloogalook's bra. ER.174-175. Kaye's testimony thus was "helpful or practically necessary" for corroborating Abloogalook's testimony, despite this other evidence. *LeMay*, 260 F.3d at 1029 (emphasis omitted).

e. Given the considerable probative value of Kaye's testimony, there was no danger that unfair prejudice would substantially outweigh it. Assessing unfair prejudice requires consideration of "the potential inflammatory nature of the proffered testimony" judged against what "the jury has already heard." *LeMay*,

260 F.3d at 1030. Here, the risk of prejudice—much less unfair prejudice—was low because Kaye's description of Davis's sexual assaults "was not more inflammatory than the conduct for which [he] was being tried." *United States* v. *Schaffer*, 851 F.3d 166, 183 (2d Cir.), cert. denied, 138 S. Ct. 469 (2017). Indeed, as the jury already had heard a more detailed and more egregious account of sexual assault by Davis through Abloogalook's testimony, nothing about Kaye's testimony created a substantial danger the jury would be "lure[d] * * * into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180.

Moreover, due to "the manner in which the evidence was presented[] and the jury instructions [given], a jury would have been unlikely to use the evidence for an improper purpose." *Erramilli*, 788 F.3d at 730. Defense counsel had "the opportunity to cross-examine" Kaye and highlight the differences between Davis's sexual assaults of the two women, as well as "to argue to the jury that the incidents were too dissimilar to be given any weight." *United States* v. *Arias*, 936 F.3d 793, 797 (8th Cir. 2019). Additionally, prior to Kaye's testimony, and then again prior to the commencement of deliberations, the district court provided "cautionary instructions to the jury" that explained the limited purpose of the evidence. *Schaffer*, 851 F.3d at 183; see ER.513-514, 796-797. These instructions "further reduced the risk of unfair prejudice." *Schaffer*, 851 F.3d at 183.

Davis's conclusory argument to the contrary is meritless. He contends that "Kaye's inflammatory testimony likely turned the jurors against [him] * * * and confused them with respect to the actual issues they were to decide." Br. 29. He does not, however, identify any "inflammatory" or "confus[ing]" aspects of Kaye's testimony, and he offers no explanation for why the jury would have convicted him on an impermissible basis despite the presumption that jurors follow limiting instructions. See *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000).

Accordingly, the district court did not abuse its discretion in admitting Kaye's testimony under Rules 403 and 413.

3. Any Error In Admitting Kaye's Testimony Was Harmless

Even if the district court abused its discretion, the error was harmless. An error is harmless if it is "more probable than not that the erroneous admission of the evidence did not affect the jury's verdict." *United States* v. *Ramirez-Robles*, 386 F.3d 1234, 1244 (9th Cir. 2004) (quoting *United States* v. *Vizcarra-Martinez*, 66 F.3d 1006, 1017 (9th Cir. 1995)), cert. denied, 544 U.S. 1035 (2005). In *United States* v. *Holler*, 411 F.3d 1061 (9th Cir.), cert. denied, 546 U.S. 996 (2005), overruled in part on other grounds, *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), cert. denied, 552 U.S. 1260 (2008), this Court held that any error admitting prior-act evidence under Rule 403 was harmless there because "the judge gave a limiting instruction" and "there was an abundance of substantial and

direct evidence" of the defendant's guilt. *Holler*, 411 F.3d at 1067; see also *United States* v. *Lague*, 971 F.3d 1032, 1041 (9th Cir. 2020) (noting that error in admitting evidence under Rule 403 is harmless where there is "overwhelming evidence of guilt").

Both circumstances are present here. First, as discussed above, the district court gave two limiting instructions. Second, the evidence of Davis's guilt on Counts 1 and 2—which included Abloogalook's firsthand description of Davis's sexual assault, evidence establishing that "[Davis's] DNA types were present in the bra" Abloogalook had been wearing, and evidence confirming that Davis had taken and deleted a picture of her bare breasts (ER.185-191, 423, 490, 556)—was overwhelming. Accordingly, any error by the district court was harmless.

II

THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DAVIS OF ALTERING, DESTROYING, OR CONCEALING EVIDENCE UNDER SECTION 1519

A. Standard Of Review

A challenge to the sufficiency of evidence supporting a criminal conviction is reviewed de novo. *United States* v. *Aldana*, 878 F.3d 877, 880 (9th Cir. 2017), cert. denied, 139 S. Ct. 157 (2018). Sufficient evidence exists to support a conviction if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Ibid.* (quoting *United States* v. *Roach*, 792 F.3d 1142, 1144 (9th Cir. 2015)).

B. Sufficient Evidence Supported Davis's Conviction Under Section 1519

Davis challenges the sufficiency of the evidence supporting his conviction under 18 U.S.C. 1519 for altering, destroying, or concealing evidence. Br. 36. He asserts that the government relied on a "'concealment' theory" under Section 1519 in charging him with destruction of evidence—specifically, by deleting the photograph he took of Abloogalook's bare breasts. Br. 30. Davis further contends that the government's evidence of concealment was insufficient, arguing that the government failed to prove that he took steps "to make [the photo] harder to find" beyond simply deleting it. Br. 34.

Davis is wrong on both points. The government relied on alteration, destruction, *and* concealment theories under Section 1519. And under any of these theories, there was ample evidence to support the jury's determination of guilt on this charge.

1. There Was Sufficient Evidence That Davis Altered Or Destroyed The Photograph He Took Of Abloogalook

Davis's challenge to his conviction under Section 1519 fails as a threshold matter because, in convicting him on this count, the jury was not required to find that he "concealed" the photograph he took of Abloogalook's bare breasts. Section 1519 criminalizes a wide range of conduct. As relevant here, any person who

"knowingly alters, destroys, * * * [or] conceals * * * any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States" violates the statute. 18 U.S.C. 1519.

The government relied on all three of these ways of violating Section 1519. The indictment charged Davis with "knowingly alter[ing], destroy[ing], and conceal[ing]" the photograph he took of Abloogalook. ER.29. Prior to closing arguments, the district court instructed the jury that the first element the government needed to prove was that Davis "knowingly *altered, destroyed, or concealed* a record, that is, a photograph from his cellular phone." ER.799 (emphasis added). Government counsel reiterated the point in her closing argument. ER.824 ("[T]here is no question that [Davis] knowingly altered, destroyed, or concealed the photo. He deleted it.").

The government therefore did not need to prove, and the jury was not required to find, that Davis concealed the photograph he took of Abloogalook. See *United States* v. *Lyons*, 472 F.3d 1055, 1069 (9th Cir.) ("[J]urors need not be unanimous as to a particular theory of liability so long as they are unanimous that the defendant has committed the underlying substantive offense."), cert. denied, 550 U.S. 937 (2007); see also *United States* v. *Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999) (where a statute set forth multiple, alternate means of committing the crime

of aiding and abetting, jurors did not need "to unanimously agree on a specific classification of [the defendant's] conduct"). Here, jurors were free to convict Davis for violating Section 1519 if they found beyond a reasonable doubt that he altered, destroyed, *or* concealed the photograph. Accordingly, if jurors had sufficient evidence to conclude that Davis altered or destroyed the photograph, any alleged insufficiency of evidence proving concealment would be irrelevant. See *Griffin* v. *United States*, 502 U.S. 46, 56 (1991) ("Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was * * * unsupported by sufficient evidence.").

Viewing the record in the light most favorable to the government, the jury had more than sufficient evidence on which to conclude that Davis deleted, and thus altered or destroyed, the photo he took of Abloogalook. The FBI's forensic analysis of Davis's phone showed that, although the phone had been used to take a full-sized photograph of Abloogalook's bare breasts, the image since had been deleted. ER.552-556. For his part, Davis never disputed that he deleted the photograph he took of Abloogalook. See ER.174, 844. Following his deletion, all that remained of the original full-sized photograph, apart from three thumbnail images created from the photograph, was "a zero bite file." ER.554.

Based on this evidence, a rational juror easily could have concluded that Davis altered or destroyed the photograph he took of Abloogalook's bare breasts.

See *United States* v. *Aleykina*, 827 F. App'x 708, 709-710 (9th Cir. 2020) (affirming the defendant's conviction under Section 1519 where she deleted and thus "succeeded in destroying" some of the files on her Internal Revenue Service laptop, and concluding alternatively that even if she "failed in her attempt to destroy all the files * * * she still altered evidence, which 18 U.S.C. § 1519 also prohibits, and which the government also charged"); see also *United States* v. *Boyd*, 312 F.3d 213, 217 (6th Cir. 2002) (defendant's deletion of child pornography to avoid detection by his probation officer constituted "[d]estruction of material evidence" for purposes of Sentencing Guidelines enhancement).

2. There Also Was Sufficient Evidence That Davis Concealed The Photograph He Took Of Abloogalook

Although the evidence that Davis altered or destroyed the full-sized photograph of Abloogalook was more than adequate, the jury also reasonably could have concluded that Davis concealed it. As Davis points out (Br. 32), this Court addressed "concealment" under Section 1519 in *United States* v. *Katakis*, 800 F.3d 1017 (9th Cir. 2015). The term "conceal," this Court noted, "means 'to prevent disclosure or recognition of'" or "'avoid revelation of.'" *Id.* at 1028-1029 (quoting Webster's Third New International Dictionary (1993)); see also ER.799 (district court's similar jury instruction defining the term "conceal"); see p. 15, *supra*. While declining to set forth a "comprehensive standard for what it means to 'conceal' a record under [Section] 1519," the Court held that it requires "some

likelihood that the item will not be found." *Katakis*, 800 F.3d at 1030. This standard sets a "low bar," simply requiring conduct that "do[es] more than merely inconvenience a reasonable investigator." *Ibid.*

Accordingly, where an investigator discovers a record in the course of conducting "a cursory examination (without using forensic tools)," the record has not been "concealed" for purposes of Section 1519. *Katakis*, 800 F.3d at 1030. *Katakis* thus held that where a defendant simply moves emails from his email inbox to the "deleted items" folder, that "degree of concealment is not sufficient" under Section 1519 where (1) the emails in the deleted items folder will remain there "unless a user [takes] further action" (for example, by emptying the folder); and (2) absent such further action, the emails will be discovered "within due course" because a "cursory examination" by "any competent investigator" would include a search of the deleted items folder for emails not in the inbox. *Katakis*, 800 F.3d at 1029-1030.

This case presents a different scenario. Unlike in *Katakis*, Davis did not simply move the photograph he took of Abloogalook to a different folder on his phone where it later was found through a cursory examination conducted in due course. Rather, the photo that "previously existed on th[e] phone" was deleted off the phone altogether and *was never recovered*. ER.554. Though the phone still contained three thumbnail images created from the deleted photo, the FBI

discovered those images only after disassembling the phone and conducting a forensic examination of its memory chip. ER.545. Accordingly, none of the circumstances in *Katakis* are present here: Davis *actually deleted* the photograph he took of Abloogalook, the FBI never found the photo, and discovery of the three thumbnail images created from the photo and found on the phone required use of forensic tools. Davis's actions clearly rise above the "low bar" adopted in *Katakis*. 800 F.3d at 1030.

Davis's two arguments to the contrary are unpersuasive. First, he relies on a lack of evidence that he took "any additional steps" beyond "delet[ing] the photograph" that "ma[de] [the photo] harder to find." Br. 34. But the government did not need to prove that *additional* steps were taken. The evidence in this case clearly established "some likelihood that the item [concealed] [would] not be found" because, here, the full-sized photo Davis took of Abloogalook's bare breasts *never* was found and it took special forensic tools to find the three thumbnail images created from the photo. *Katakis*, 800 F.3d at 1030.

Second, Davis challenges the government's reliance on its need to use forensic tools to find the three thumbnail images, contending that it "creates a situation in which [his] criminal liability [for concealment] * * * hinges on matters entirely out of his control." Br. 35. Davis's argument misses the mark because it ignores the fact that *his own actions* made the use of forensic tools

necessary. Under *Katakis*, the need for forensic tools is indicative of concealment because it demonstrates "some likelihood that the item will not be found." 800 F.3d at 1030. By definition, a defendant like Davis who takes actions that necessitate use of forensic tools to find a concealed item has done more than "inconvenience a reasonable investigator" because such evidence is not found "within due course." *Ibid.*

Therefore, sufficient evidence was presented that Davis altered, destroyed, or concealed the photograph he took of Abloogalook.

III

THE DISTRICT COURT CORRECTLY DETERMINED DAVIS'S BASE OFFENSE LEVEL UNDER THE SENTENCING GUIDELINES

A. Standard Of Review

This Court reviews a district court's application of the Sentencing Guidelines to the facts of a case for abuse of discretion and its factual findings for clear error. *United States* v. *Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir.) (en banc), cert. denied, 138 S. Ct. 229 (2017).

B. The District Court Correctly Applied A Base Offense Level Of 16

Davis challenges the district court's determination of his base offense level during sentencing. Davis contends that use of a base offense level of 16 under Sentencing Guidelines § 2A3.4(a)(2), instead of 12 under Section 2A3.4(a)(3), required the district court to find by clear and convincing evidence that he had

engaged in sexual contact with Abloogalook by placing her in fear. Br. 39. He further contends that the government failed to meet this standard because the evidence showed only that Abloogalook "became fearful of Mr. Davis as a result of the offense conduct," and not that he used fear "as the means to accomplish that conduct." Br. 42.

Both arguments lack merit. Under this Court's case law, the district court needed to find that Section 2A3.4(a)(2) applied based only on a preponderance of the evidence. But even if a heightened standard applied, the government proffered clear and convincing evidence that Davis accomplished his sexual assault of Abloogalook by placing her in fear.

1. A Base Offense Level Of 16 Applies Under Sentencing Guidelines § 2A3.4(a)(2) When A Defendant Engages In Sexual Contact With Another Person By Placing That Person In Fear

Sentencing Guidelines § 2A3.4(a) sets forth three base offense levels. Where, as relevant here, the offense involves "conduct described in 18 U.S.C. § 2242," Section 2A3.4(a)(2) applies a base offense level of 16. Where Section 2A3.4(a)(1) and (2) do not apply, Section 2A3.4(a)(3) applies a base offense level of 12.[9]

[9] Section 2A3.4(a)(1) provides for a base level offense of 20 "if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." That section is not at issue here.

The commentary to Section 2A3.4 explains the guideline. See *Stinson* v. *United States*, 508 U.S. 36, 47 (1993) (commentary in the Sentencing Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, is plainly erroneous, or is inconsistent with the text of the guideline). Application Note 3 states that "[f]or purposes of subsection (a)(2)," the phrase "conduct described in 18 U.S.C. § 2242" includes, *inter alia*, "engaging in * * * sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping)." Sentencing Guidelines § 2A3.4, comment. (n.3(A)). "Sexual contact" includes the intentional touching, either directly or through the clothing, of another person's breast with an intent to gratify one's sexual desire. 18 U.S.C. 2246(3).

2. The District Court Needed To Find Only By A Preponderance Of The Evidence That Davis's Conduct Qualified For A Base Offense Level Of 16

Davis contends that the district court was required to find facts supporting the application of a base offense level of 16 under Section 2A3.4(a)(2) by clear and convincing evidence because the guideline had an "extremely disproportionate effect on [his] sentence relative to the offense of conviction." Br. 39 (quoting *United States* v. *Jordan*, 256 F.3d 922, 930 (9th Cir. 2001)). Under this Court's

case law, however, the heightened clear-and-convincing standard does not apply here.

During sentencing in most cases, district courts may rely on facts established by a preponderance of the evidence. *United States* v. *Hymas*, 780 F.3d 1285, 1289 (9th Cir. 2015). In this circuit, a narrow exception applies where "a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." *Ibid.* (quoting *United States* v. *Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000)). Such a sentencing factor must be supported by clear and convincing evidence "to ensure that criminal defendants receive adequate due process." *United States* v. *Treadwell*, 593 F.3d 990, 1000 (9th Cir.), cert. denied, 562 U.S. 916, and 562 U.S. 973 (2010), overruled on other grounds, *United States* v. *Miller*, 953 F.3d 1095 (9th Cir. 2020). This heightened standard applies "only in *exceptional circumstances.*" *United States* v. *Felix*, 561 F.3d 1036, 1047 (9th Cir.), cert. denied, 558 U.S. 901 (2009).

This Court has distilled six factors for determining, based on the totality of the circumstances, whether the clear-and-convincing standard applies. Those factors include: (1) whether the enhanced sentence "falls within the maximum sentence for the crime alleged in the indictment"; (2) whether the enhanced sentence negates either the defendant's "presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment"; (3) whether

the facts supporting the sentencing factor "create new offenses requiring separate punishment"; (4) whether the increase in the sentencing range "is based on the extent of a conspiracy"; (5) whether the sentencing factor increases the defendant's offense level by more than four; and (6) whether the sentencing factor "more than doubles the length of the sentence authorized by the initial sentencing guideline range" in a case where the defendant would have otherwise received a "relatively short sentence." *United States* v. *Valle*, 940 F.3d 473, 479 (9th Cir. 2019) (quoting *Jordan*, 256 F.3d at 928). None of these factors is dispositive. *Hymas*, 780 F.3d at 1290.

Every factor except one weighs *against* applying the clear-and-convincing standard here, and the remaining factor is inapplicable. First, application of Section 2A3.4(a)(2) had no impact on whether Davis's recommended Guidelines range exceeded the statutory maximum terms of imprisonment, or fell below those maximums, permitted for Counts 1 through 3. Regardless of whether a base offense level of 12 or 16 applied, Davis's recommended Guidelines range exceeded the 12- and 24-month statutory maximums for Counts 1 and 2, and fell below the 240-month statutory maximum for Count 3. See 18 U.S.C. 242, 1519, 2244(b).

Davis acknowledges that application of Section 2A3.4(a)(2) had no effect on whether his recommended Guidelines range exceeded the statutory maximum

sentences. Br. 40 ("[T]he guidelines range with or without the enhanced base offense level exceeds the two-year statutory maximum."). He argues, however, that use of a base offense level of 16 created "even more of a disparity" between his Guidelines range and the statutory maximum. Br. 40. But because Davis's Guidelines range exceeded the statutory maximum for Count 2 and fell below the statutory maximum for Count 3 either way, application of Section 2A3.4(a)(2) instead of (a)(3) had no "extremely disproportionate effect" on his sentence. *Hymas*, 780 F.3d at 1289 (quoting *Mezas de Jesus*, 217 F.3d at 642).

Second, application of Section 2A3.4(a)(2) did not negate Davis's presumption of innocence or the government's burden of proof for the crimes charged. Section 2A3.4(a)(2) applies only after conviction, and it did not rely on any presumptions to increase Davis's sentence. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 87 (1986) (cited by *United States* v. *Restrepo*, 946 F.2d 654, 656 (9th Cir. 1991), cert. denied, 503 U.S. 961 (1992)). Third, Section 2A3.4(a)(2) created no new offenses requiring separate punishment, but rather, applied based on "conduct for which [Davis] was convicted." *Hymas*, 780 F.3d at 1290; cf. *Mezas de Jesus*, 217 F.3d at 643 (finding that the clear-and-convincing standard applied where the defendant's "sentence was enhanced nine-levels on the basis of an uncharged kidnaping") (emphasis omitted). This "alleviat[es] [any] due process concerns." *Hymas*, 780 F.3d at 1290.

Davis suggests these factors weigh in favor of the clear-and-convincing standard because, he claims, application of Section 2A3.4(a)(2) "results in a sentence commensurate with a conviction under 18 U.S.C. § 2242, which * * * the government did not charge and which the jury in this case did not consider." Br. 40. He is mistaken. Section 2242 addresses a more egregious offense involving a "sexual act," which requires contact with the victim's genitalia. 18 U.S.C. 2242, 2246(2). If Davis had received a sentence commensurate with conviction under Section 2242, he would have been sentenced under Section 2A3.1 of the Sentencing Guidelines, which imposes a minimum base offense level of 30. Sentencing Guidelines § 2A3.1(a); see also Sentencing Guidelines § 2A3.4(c)(1) (cross-referencing Section 2A3.1). Davis was not sentenced under Section 2A3.1. Accordingly, the district court's application of Section 2A3.4(a)(2) neither negated the government's burden of proof nor relied on any uncharged conduct.

The fifth and sixth factors also weigh against the clear-and-convincing standard.[10] Regarding the fifth factor, application of Section 2A3.4(a)(2) increased Davis's base offense level by only four levels. As this Court has noted, a "four-level increase in sentence is not an exceptional case that requires clear and convincing evidence." *United States* v. *Hopper*, 177 F.3d 824, 833 (9th Cir. 1999),

[10] The fourth factor, which pertains to conduct occurring in the context of a conspiracy, is inapplicable here, and Davis does not rely on it. Br. 40-41.

cert. denied, 528 U.S. 1163, and cert. dismissed, 529 U.S. 1063 (2000); see also *United States* v. *Pike*, 473 F.3d 1053, 1059 (9th Cir.) (five-level sentencing enhancement did not warrant use of clear-and-convincing standard), cert. denied, 552 U.S. 910 (2007).

As for the sixth factor, Davis would not have received "a relatively short sentence" absent application of Section 2A3.4(a)(2). *Valle*, 940 F.3d at 479. Rather, the Guidelines range of 51 to 63 months that would have applied absent the contested increase (R.127, at 13, 17), exceeds the relatively short sentences in other cases where this Court found the clear-and-convincing standard to apply. See, *e.g.*, *Valle*, 940 F.3d at 480 (clear-and-convincing standard applies where an 11-level increase changed a 1-to-7 month Guidelines range to a 37-to-46 month range); *Mezas de Jesus*, 217 F.3d at 643 (same where the defendant "went from a 'relatively short' sentence of less than two years to nearly five years"); *Hopper*, 177 F.3d at 833 (same where a 7-level increase changed the defendant's "relative[ly] short[]" 24-to-30 month Guidelines range to a 63-to-78 month range). Additionally, application of Section 2A3.4(a)(2) did not "more than double[]" Davis's recommended Guidelines range. *Valle*, 940 F.3d at 479. Instead, the recommended range increased from 51 to 63 months to 78 to 97 months. See R.127, at 13, 17; ER.956.

Recent cases in which this Court found the clear-and-convincing standard applicable at sentencing rely primarily on the fifth and sixth factors, neither of which supports Davis here. See *Valle*, 940 F.3d at 479; see also *United States* v. *Gonzalez*, 492 F.3d 1031, 1040 (9th Cir. 2007), cert. denied, 552 U.S. 1153 (2008). And, in any event, *none* of the six factors reveals any exceptional circumstances that merit application of a heightened evidentiary standard. Accordingly, the district court had to find only that a preponderance of the evidence supported application of a base offense level of 16 under Section 2A3.4(a)(2).

3. The District Court's Finding That Davis Engaged In Sexual Contact With Abloogalook By Placing Her In Fear Was Supported By Clear And Convincing Evidence

Even if the heightened standard urged by Davis applied, the district court still correctly calculated his base offense level under Section 2A3.4(a)(2). The court's factual finding that Davis engaged in sexual contact with Abloogalook by placing her in fear was fully supported by clear and convincing evidence. By extension, the finding also satisfied the applicable preponderance-of-the-evidence standard. There was no clear error.

a. The definition of "fear" in Section 2A3.4(a)(2) "is very broad." *United States* v. *Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998). As the commentary to the guideline states, Section 2A3.4(a)(2) includes all fear other than fear by the victim that she will be subjected to death, serious bodily injury, or kidnapping.

Sentencing Guidelines § 2A3.4, comment. (n.3(A)); see also *Cates* v. *United States*, 882 F.3d 731, 737 (7th Cir. 2018) (noting that Section 2242 "encompasses the use of any kind of threat or other fear-inducing coercion to overcome the victim's will"); *United States* v. *Gavin*, 959 F.2d 788, 791 (9th Cir. 1992) (concluding that "fear" in Section 2242 includes "all fears of harm to oneself or another other than death, serious bodily injury or kidnapping"), cert. denied, 506 U.S. 1067 (1993). Such fear "can be inferred from the circumstances, particularly a disparity in power between defendant and victim." *Lucas*, 157 F.3d at 1002. The setting of the sexual assault, including where the defendant drives the victim "to an isolated place," also can support a finding of fear. *United States* v. *Reynolds*, 720 F.3d 665, 674 (8th Cir. 2013).

b. The evidence at trial established that Davis engaged in sexual contact with Abloogalook by placing her in fear. This is evident from the context in which Davis's sexual assault of Abloogalook occurred, as well as Abloogalook's testimony about Davis's actions and the effect they had on her.

To begin, Abloogalook was in Davis's custody, sitting handcuffed in the backseat of a vehicle parked on the shoulder of a "pretty empty" desert highway. ER.184. Davis, a uniformed Hopi Ranger, told Abloogalook, "damn, you got big boobs," and began to "grab[]" and "squeez[e]" her breasts. ER.187, 279. He invaded "[Abloogalook's] personal space" and, being "much bigger" than her,

blocked "the whole area" of the doorframe with his body. ER.187, 279. Abloogalook was "totally scared," "in disbelief," "afraid [of what] was [happening] to [her]," and worried she "might get more hurt." ER.187, 279. She did not consider screaming "because [Davis] was so close," and she did not try to move backwards in her seat because she "was scared." ER.187, 279.[11] Abloogalook did not think there was any way she could get out of the situation or stop Davis; indeed, in the moment, she felt like he had "total control" over her. ER.280.

Under these circumstances, Davis proceeded to expose both of Abloogalook's breasts, suck on her left breast, and take a photograph of her with his cell phone. ER.189-190. All the while, Abloogalook "couldn't believe this [was] happening," "was really scared," and worried about "the next thing [Davis] was going to do." ER.190-191. As it turned out, the next thing he did was "und[o] [her] belt buckle" and the button on her pants and "attempt[] to put his fingers down under [her] panties." ER.191.

Having denied that a sexual assault took place at all, Davis proffered no evidence contradicting Abloogalook's account of the assault or the fear he instilled

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[11] This reaction is entirely consistent with "tonic immobility," which, as Davis's expert explained during cross-examination, occurs when "you get so scared that you just can't move." ER.620. When this happens, a person's "body literally causes them to freeze because they're so scared." ER.620.

in her before and during the assault. Accordingly, the trial record amply supports the district court's finding that Davis engaged in sexual contact with Abloogalook by placing her in fear, thus warranting a base offense level of 16.

c. Davis argues in response that the examples of fear cited by the district court—including fear created by him "trapping [Abloogalook] in the back of the car with his physical presence," "commenting about the size of her breasts," and "photographing [her]" (ER.954)—represented fear that "result[ed] as a consequence of [his] offense conduct" and not "fear used as the means to accomplish that conduct." Br. 42. He similarly contends that Abloogalook testified only that "she became fearful of [him] as a result of the offense conduct, not that [he] took actions to make her fearful so that he could accomplish the offense." Br. 42.

Davis's argument errs in ignoring the effect his actions had on Abloogalook and how they enabled him to commit and *continue* a sexual assault that progressed and escalated while Abloogalook was paralyzed with fear. By positioning his body in the doorframe of the vehicle, which eliminated any possibility of escape, Davis rendered Abloogalook fearful in the knowledge that she would not be able to stop him from sexually assaulting her. ER.187-188. By rubbing Abloogalook's breast and telling her, "damn, you got big boobs" (ER.186-187), Davis emphasized the

power disparity between himself, a male Hopi Ranger, and Abloogalook, a woman in his control and custody.

Davis took advantage of Abloogalook's fear and immobility by engaging in an escalating series of additional nonconsensual sexual contacts. He grabbed and squeezed her breasts "with both his hands." ER.187. He lifted her shirt up, exposed both of her breasts, and started sucking on her left breast. ER.188-189. Remarking, "damn, I need to take a picture of this," Davis then photographed Abloogalook's bare breasts with his cell phone (ER.189-190), which further accentuated the power imbalance at play.

The fear generated by Davis's actions as they occurred—in combination with the fear created by his prior actions—enabled him to engage in *subsequent* acts of unwanted sexual contact with Abloogalook over the course of the sexual assault. Cf. *United States* v. *Henzel*, 668 F.3d 972, 977 (7th Cir. 2012) (finding sufficient fear under Section 2242 where the victim feared the defendant "would react badly if she did not meet his demands"). Indeed, it is clear Davis depended on Abloogalook's initial silence and passivity because when he attempted to put his fingers down Abloogalook's underwear and she "pulled back and * * * said, what are you doing?" he ended the sexual assault, rebuttoning her pants and pulling her bra back into position. ER.191. Abloogalook's testimony thus clearly

demonstrates that Davis engaged in continuing, escalating nonconsensual sexual contact by placing her in fear.

Accordingly, the district court's application of a base offense level of 16 under Section 2A3.4(a)(2) was supported by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment and sentence.

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 13,185 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); 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 2019, in 14-point Times New Roman font.

s/ Jason Lee
JASON LEE
Attorney

Date: November 23, 2020