No. 25-1795

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

AARON THOMAS MITCHELL,

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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STATEMENT OF JURISDICTION

The United States agrees with defendant-appellant Mitchell's jurisdictional statement.

STATEMENT OF THE ISSUES

After a nine-day trial, a jury convicted defendant-appellant Aaron Thomas Mitchell, a former officer with the United States Customs and Border Protection, of kidnapping the 15-year-old female victim, L.O., and depriving her of her constitutional right to bodily integrity under color of law—specifically, by repeated sexual assaults. On appeal, Mitchell seeks reversal of these convictions and raises six issues:

1. Whether the district court abused its discretion when it denied Mitchell's motions for mistrial when the United States (a) elicited testimony about DNA evidence that the district court subsequently excluded from evidence and addressed via a joint stipulation and curative instruction, and (b) attempted to present a demonstrative badge to overcome L.O.'s apparent language barrier, but was prevented from doing so after the district court sustained Mitchell's objection.

2. Whether Mitchell is entitled to reversal based on allegations of prosecutorial misconduct, many raised for the first time on appeal.

3. Whether the district court abused its discretion when it denied Mitchell's motion to continue trial after previously granting ten of Mitchell's continuance requests.

4. Whether the district court abused its discretion when it admitted evidence of Mitchell's cellphone internet searches.

5. Whether the district court properly denied Mitchell's motion to dismiss the kidnapping charge after finding that vehicles—as a class—are instrumentalities of interstate commerce.

6. Whether Mitchell has waived review of his claims based on the cumulative error doctrine.

STATEMENT OF THE CASE

A. The Offense Conduct[1]

On the morning of August 25, 2022, L.O. walked from her home in Mexico to her Arizona middle school, crossing the United States-Mexico border along the way. 3-ER-290-292, 297, 304, 309.[2] Though she lived

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[1] The facts recounted here are described in the light most favorable to the verdict. *See United States v. Nevils*, 598 F.3d 1158, 1163-1664 (9th Cir. 2010) (en banc).

[2] Citations to "ER" refer to Mitchell's Excerpts of Record, preceded by the volume number and followed by the page number. "SER" refers to

in Mexico, she attended school in Arizona as a United States citizen. 3-ER-290, 302. After L.O. crossed the border, she sat on a bench near her school and waited for classes to start. 3-ER-309-311.

While L.O. was waiting, a red car pulled up next to her. 3-ER-312. The driver, later identified as Mitchell, rolled down the windows and asked her what she was doing there. 3-ER-312; 4-ER-524. He also asked her if she was a United States citizen and demanded she show him her documents. 3-ER-312-313.

Mitchell told L.O. that he was a police officer. 3-ER-315.[3] L.O. saw that Mitchell was wearing a vest labeled "police" with white letters. 3-ER-312. He ordered her to "Get in" and said, "I'm going to take you to the police station." 3-ER-316. Mitchell told L.O. to pass him her backpack and all her belongings, including her cellphone. 3-ER-316-317. L.O. asked Mitchell if he was really a policeman. 3-ER-317. He said,

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the United States' Supplemental Excerpts of Record, and "Br." refers to Mitchell's Opening Brief, each followed by the pertinent page number. "Ex." refer to exhibits admitted at trial.

[3] At the time, Mitchell was a Customs and Border Protection officer. 5-ER-908.

"Yes," and showed her a yellow badge bearing the word "police." 3-ER-317.

L.O. got into Mitchell's car. 3-ER-317. He turned her cellphone off and placed it in her backpack. 3-ER-327. He drove her to a residential area where he stopped to handcuff her ankles and wrists behind her back. 3-ER-317-318. Then he drove her to his apartment. 3-ER-327. During the drive, Mitchell asked L.O. several questions, including how old she was. 3-ER-328. L.O. told Mitchell that she was 15 years old. 3-ER-328.

When they arrived at Mitchell's apartment complex, he covered her with a sweater and left her in the car while he went upstairs. 3-ER-332-333. He told her not to make any noise. 3-ER-332-333. When he came back downstairs, he uncuffed her feet so she could walk and then brought her out of the car and took her to his apartment. 3-ER-334. She noticed that Mitchell carried a pistol on his side. 3-ER-342. Surveillance video from Mitchell's apartment showed him walking behind her, holding onto her shoulder or arm as the two walked upstairs toward his apartment. 3-ER-334-340. Mitchell walked her to his bedroom. 3-ER-345-346. He told her to change into his shorts and sit on the toilet in a bathroom next to the room. 3-ER-346-347. He told her he would take her to the police

station soon, but she did not believe him. 3-ER-347. Mitchell also changed into shorts and a T-shirt in front of her and threw his vest and gun into the corner of the room. 3-ER-355.

Mitchell then grabbed bottles of Fireball and Hennessy, offering some to L.O. 3-ER-347-348. He also drank from the bottles. 3-ER-347-348. She told him that she did not want to drink the alcohol, but he insisted. 3-ER-348. She drank from one of the bottles. 3-ER-349. Then, he placed a shirt over her mouth and tied it back. 3-ER-347, 351-352. He later took the shirt off L.O.'s mouth and tried to kiss her. 3-ER-347-348. L.O. pushed him as he tried to kiss her. 3-ER-348. He told her that he did not want to hurt her and to do everything that he told her to. 3-ER-348.

Mitchell directed L.O. to the bed and took off her handcuffs so she could lay down. 3-ER-352-353. He asked her if she knew what "cuddling" was. 3-ER-353. When L.O. said that she did not, he said he would show her. 3-ER-353. He laid down with her, placing her leg over his and began touching her stomach under her clothes. 3-ER-353-354. He then positioned his leg and arm over her and fell asleep face down on the bed. 3-ER-354.

When Mitchell woke up, he pulled off both of their shorts and started rubbing his penis on her vagina. 3-ER-362-363. She was still wearing her underwear, but he pulled her underwear to the side. 3-ER-363. She felt disgusted as he touched her. 3-ER-363. She told him not to hurt her. 3-ER-363. Then, he forced his penis into her vagina, causing her such pain that she let out a noise. 3-ER-363-364. After raping her vaginally, he told her to position herself facedown where he forced his penis into her anus, which also caused her pain. 3-ER-364. She told Mitchell to stop, but he did not. 3-ER-364. She was crying and felt emotionally "[v]ery sad and upset." 3-ER-365. Mitchell told her to lay face up again where he again forced his penis into her vagina, again causing pain. 3-ER-365. She again told him to stop, but he did not. 3-ER-365.

Then, Mitchell moved to stand by the side of the bed and placed her hands on his penis to "masturbate" him until he ejaculated. 3-ER-365-366. He ejaculated on the bed and inside her vagina. 3-ER-366. Mitchell told L.O. to put her pants on and to wash her hands in the bathroom. 3-ER-367. Mitchell also cleaned the sperm from his sheets using a towel

and water. 3-ER-367. L.O. used the restroom to urinate, but Mitchell would not let her close the door. 3-ER-368.

Mitchell later sat on the bed and made L.O. kneel on the ground to masturbate him a second time. 3-ER-369. He ordered her to get on her knees. 3-ER-369-370. He tied a T-shirt over her eyes so she could not see. 3-ER-369. While L.O. was masturbating Mitchell, he placed his hands around her neck and tightened his grip. 3-ER-370-371. She thought she was going to die. 3-ER-371. Mitchell did not let go of L.O.'s neck until he ejaculated into her hands. 3-ER-371. He removed the T-shirt from her eyes and told her to again wash her hands in the bathroom. 3-ER-371. Then he placed handcuffs on her. 3-ER-375-376.

Throughout the episode, Mitchell told her not to make any noise. 3-ER-377. He also directed her not to say anything to anyone else. 3-ER-377. L.O. told him that she would not say anything. 3-ER-377. She asked if he would return her personal belongings, including her computer and cellphone. 3-ER-377-378. Mitchell told her he would not because he did not want her to have his fingerprints. 3-ER-377-378. He directed her to tell others that her items were stolen. 3-ER-377. Then Mitchell drove her back to where he had picked her up and let her go. 3-ER-379-380.

B. L.O.'s Prompt Report of Mitchell's Crimes and the Police Investigation

After L.O. exited Mitchell's car, she ran to a store where she would go after school sometimes. 3-ER-381-382. There, she ran into her brother and friends where she told them "a little bit" of what happened. 3-ER-383. She used another person's cellphone to call her mother. 3-ER-382-383.

That night, L.O. went with her mother and aunt to the police station to report the rape. 3-ER-384-385. She felt pain in her vagina and in her buttocks that continued after that day. 3-ER-386. A pelvic exam showed L.O. suffered a vaginal laceration and hymenal bruising. 6-ER-1103-1105. She later showed bruises on her wrists and ankles. 3-ER-395.

Forensic analysis of L.O.'s underwear found DNA on the outside of the underwear matching Mitchell by 21 of 23 Y-STR loci. 5-ER-879-880. Per the DNA expert, that match would not be expected in more than one in 5471 United States males. 5-ER-880. Analysts also found blood on the inside of her underwear. 6-ER-1146-1147. Finally, her underwear tested positive for sperm. 6-ER-1147.

L.O. identified Mitchell as her rapist after seeing his photograph in a photographic lineup. 4-ER-524. When she saw Mitchell's photograph, she "knew immediately that it was him" because she "remembered his eyes." 4-ER-524.

In a recorded interview, detectives questioned Mitchell about the assaults. Ex. 81; SER-47-179.[4] In the interview, which was recorded, Mitchell admitted that he picked up L.O. before school and drove her in his car to his apartment more than an hour away. Ex. 81 at 01:45-2:50, 5:30-6:50; SER-83-85, 92-93. He also admitted that he gave her alcohol and spent hours in his bedroom with her. Ex. 81 at 14:30-15:10, 16:10-16:17; SER-85-88, 123-125. However, he denied having sexual contact with L.O. Ex. 81 at 07:15-07:20; SER-127. During the interview, detectives noticed that Mitchell had a tattoo under his right arm of the word, "DOUBT." 6-ER-1020-1021. This tattoo was consistent with the

[4] Along with the recording of the interview (Ex. 81), the government provided the jury with a transcript thereof as an aid for their review of the recording. *See* Ex. 81-D; SER-47-206; *see also* 6-ER-1021-1025 (discussion of Exhibit 81 and the government's transcript). A copy of the recording (Ex. 81) will be transmitted to the Court per Circuit Rule 27-14.

one L.O. identified on her rapist—a tattoo on his arm of a word that started with a "D." 3-ER-356.

Detectives also completed a forensic analysis of Mitchell's cellphone, where they found several searches on the phone's web browser timestamped in the days surrounding the assaults. 7-ER-1264. The searches were: (1) "Can a 16-year-old girl get drunk fast?"; (2) "Can one shot get you drunk?"; (3) "What to put over mouth to stop a scream?"; (4) "Why do rapes go unreported?"; and (5) "I was raped but I peed afterwards." 7-ER-1264-1265. Detectives also found a search timestamped on the morning of the sexual assaults: "How long does it take to smother someone?" 7-ER-1265.

C. Procedural History

1. On July 13, 2022, a federal grand jury in the District of Arizona indicted Mitchell of a single count of kidnapping a minor, in violation of 18 U.S.C. 1201(a)(1) and (g). SER-3-4. On November 30, 2022, the grand jury returned a superseding indictment charging Mitchell with deprivation of rights under color of law, in violation of 18 U.S.C. 242 (Count 1); kidnapping a minor, in violation of 18 U.S.C. 1201(a)(1) and (g) (Count 2); and obstruction by false report, in violation

of 18 U.S.C. 1512(b)(3) (Count 3). 1-ER-60-62. The government later moved to dismiss the obstruction charge. 1-ER-2. More than two years after Mitchell was indicted, trial commenced on August 19, 2024. 8-ER-1511.

2. Mitchell filed or orally lodged 13 motions to continue trial in docket numbers 23, 39, 48, 50, 54, 121, 151, 159, 169, 189, 225, 268, and 299. 8-ER-1489, 1491-1492, 1495, 1498-1499, 1502, 1506, 1509, 1511. Five of the motions to continue trial were filed or lodged after trial counsel, Stephanie Bond, was appointed to represent Mitchell on March 19, 2024. 8-ER-1499. On May 16, 2024, the district court granted Mitchell's tenth motion to continue trial to August 19, 2024. 8-ER-1502. The continuance gave Mitchell's counsel an additional three months to prepare for the trial. Thereafter, the district court denied Mitchell's motions to continue the trial beyond the August 19, 2024, date. 8-ER-1509, 1511.

3. Prior to trial, Mitchell filed a motion to dismiss the kidnapping charge because, he argued, his alleged use of a vehicle to carry out the kidnapping did not provide a sufficient nexus to interstate commerce. SER-5-10. The government filed an opposition, arguing that

the indicted charge had a sufficient nexus to interstate commerce because vehicles are instrumentalities of interstate commerce. SER-11-17. The district court denied the motion to dismiss, finding that vehicles as a class are instrumentalities of interstate commerce. 1-ER-13-17.

4. In a written motion in limine, Mitchell sought to exclude, among other evidence, "[a]ny testimony regarding inconclusive, uninformative DNA results." SER-39. Mitchell later argued under Federal Rule of Evidence 403 that the probative value of the testimony linking him to DNA profiles found in two vulvar vestibule swabs and two vaginal swabs of L.O. did not outweigh the significant prejudice the testimony caused him. SER-44. The government filed no written opposition to the defense motion. At a pretrial motions hearing, the government generally agreed it would not present "inconclusive" DNA evidence, but expressed the understanding that this would still permit the government to elicit expert testimony about two "scientifically significant [DNA] results." 2-ER-201; *see also* 2-ER-201 (stating that "the Government [would be] fine with" excluding inconclusive DNA results, "depending on what th[at] mean[t]"). Based on the parties' apparent agreement, the district court granted Mitchell's motion, but warned

about the potential that the defense could open the door to the "other inconclusive evidence coming in." 2-ER-203.

During trial, the government's DNA expert testified that "[t]he Y-STR DNA profile from the vaginal swabs matched Aaron Mitchell at five Y-STR loci, and the remaining 18 loci were inconclusive." 5-ER-859. Mitchell objected and moved for a mistrial. 5-ER-860-861. The district court denied the motion for a mistrial, but ordered the testimony stricken and specifically directed the jury to disregard it. 5-ER-874. The court also instructed the jury on the following stipulation: "The parties have stipulated that the DNA test of the vaginal swabs taken from L.O. were inconclusive and could not be matched with the DNA of Aaron Mitchell. And that it is stipulated testimony which needs to be taken as having been proven." 1-ER-10.

5. During re-direct of L.O., the government attempted to show L.O. a detective's badge as a demonstrative to establish the size of the identification Mitchell showed her when he first approached her. 4-ER-530. The defense objected without stating a basis for the objection. 4-ER-530. The district court sustained the objection. 4-ER-530. Mitchell later moved for a mistrial based, in part, on the government's attempt to

use the demonstrative badge. 4-ER-560. The court denied the motion for mistrial. 4-ER-561.

6. The jury convicted Mitchell of Counts 1 and 2 as charged. 1-ER-2. The district court sentenced Mitchell to 27 years' imprisonment. 1-ER-2.

SUMMARY OF ARGUMENT

1. The district court acted within its discretion to deny Mitchell's motions for mistrial because he failed to show any error, let alone any prejudicial error. First, the government did not engage in misconduct when it elicited the challenged DNA result, because it believed that the district court's exclusion of "inconclusive" DNA results did not bar the use of scientifically significant results. Further, the district court's remedy not only mitigated any prejudice to Mitchell but provided him with an undeserved evidentiary advantage. Second, the government did not engage in misconduct when it attempted to use a demonstrative badge during examination of L.O. Further, Mitchell suffered no prejudice because the district court prevented the government from using the demonstrative.

2. Mitchell is not entitled to relief based on alleged prosecutorial misconduct. As to the three allegations of prosecutorial misconduct that were raised before the district court, the challenged actions do not constitute misconduct at all, and Mitchell cannot establish resulting prejudice that materially undermined the outcome of the trial. As to the other eight allegations of prosecutorial misconduct, which Mitchell raises for the first time on appeal, he fails to show that any of the challenged conduct amounts to plain error which entitles him to relief. Mitchell has also waived review of numerous other misconduct allegations by failing to provide adequate briefing for the claims in his opening brief.

3. The district court acted properly within its discretion when it denied Mitchell's motions to continue trial. The factors this Court considers when analyzing motions to continue weighed heavily in favor of denying Mitchell's continuance requests considering the inconvenience further delay would have caused to the parties, the large number of previously granted continuances, Mitchell's fault in needing and seeking further delay, the failure of Mitchell to establish legitimate reasons for further delay, and the failure of Mitchell to establish that he was prejudiced by the court's denial of another continuance.

4. The district court acted properly within its discretion when it admitted evidence of Mitchell's cellphone-based web searches based on proper authentication, balancing of the probative value versus undue prejudice, and application of character evidence rules.

5. The district court properly declined to dismiss the kidnapping charge because a vehicle is an instrument of interstate commerce.

6. Mitchell waived review of his cumulative error claims by failing to provide adequate briefing of the issues. Regardless, Mitchell is not entitled to relief as he has failed to show any prejudicial error.

ARGUMENT

I. The District Court Acted Within its Discretion to Deny Mitchell's Motions for Mistrial

A. Standard of Review

When a defendant moves for a mistrial based on alleged prosecutorial misconduct, this Court reviews the district court's denial of a mistrial for abuse of discretion. *United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1029 (9th Cir. 2009). A district court acts within its discretion to deny a mistrial where the prosecutor's alleged misconduct was not prejudicial. *Id.* at 1030.

B. The Government Did Not Engage in Prosecutorial Misconduct

Mitchell alleges two instances of prosecutorial misconduct for which he requested but was denied a mistrial: (1) the presentation of allegedly improper DNA evidence, and (2) the use of a demonstrative badge during the redirect examination of L.O. However, in neither of these instances did the government's actions amount to misconduct, nor has Mitchell established prejudice. As such, the district court acted properly within its discretion when it denied Mitchell's mistrial motions.

1. The Attempted Presentation of the Challenged DNA Result was Not Improper or Prejudicial

The government did not engage in misconduct when it attempted to present evidence of a scientifically significant DNA result upon a good faith belief that the district court had permitted its admission. The record reflects that there was confusion amongst the parties about the scope of the court's pretrial ruling on whether to exclude certain DNA evidence. While the government had agreed not to present testimony about "inconclusive" DNA results, the transcript reflects that the government understood the court's ruling as permitting the presentation of two scientifically significant DNA results, including the challenged

DNA result. As such, the prosecution's attempt to elicit testimony about the DNA result did not amount to misconduct.

Even if it did, Mitchell suffered no prejudice from the elicitation of that testimony. To the contrary, his defense *benefited* from the remedy the court adopted in response to that testimony. And regardless, even if the court somehow abused its discretion when addressing the contested testimony, the error was nonetheless harmless given the abundant trial evidence demonstrating that Mitchell had in fact raped L.O.

a. In a written motion in limine, Mitchell sought to exclude, among other evidence, "[a]ny testimony regarding inconclusive, uninformative DNA results." SER-39. Mitchell argued that the probative value of the testimony linking him to DNA profiles found in two vulvar vestibule swabs and two vaginal swabs of L.O. did not outweigh the significant prejudice the testimony caused him. SER-44. The government filed no written opposition to the defense motion.

At a pretrial motions hearing, the district court raised the issue by asking the attorneys about "any testimony regarding inconclusive information or DNA results." 2-ER-201. The government agreed it would not present "inconclusive" DNA evidence, "depending on what this

means." 2-ER-201. The government indicated that there were two results it expected to ask the DNA analyst about that were "scientifically significant results based on the number of loci match." 2-ER-201-202. In contrast, the government said it would not present results with only a one-locus or two-loci match, which reflects a weaker association between the two DNA samples. 2-ER-201-202; 5-ER-870. Based on the parties' apparent agreement, the district court granted Mitchell's motion, but warned about the potential that the defense could open the door to the "other inconclusive evidence coming in." 2-ER-203.

During trial, the government presented testimony from Dr. Stefanie Percy-Fine about her DNA analysis of samples collected in the case. 5-ER-833, 842. During a sidebar discussion about the preliminary DNA testimony, the government's counsel told the court that, "[M]y understanding of Your Honor's ruling was [the expert] isn't going to talk about the results in terms of, like, there is one-loci, two-loci." 5-ER-857-858. The court reiterated that it had excluded "anything that was inconclusive" and directed the government to "move on to . . . where the evidentiary value was found *in the other two*." 5-ER-858-859

(emphasis added). The government then had the following exchange with the DNA expert:

> Q. I want to focus on the vaginal swabs that were tested in this case. What was the result of the testing and analysis done on the vaginal swabs in this case?
>
> A. I'm going to refer to my report.
>
> Q. Sure.
>
> A. The Y-STR DNA profile from the vaginal swabs matched Aaron Mitchell at five Y-STR loci, and the remaining 18 loci were inconclusive.
>
> Q. And when you say matched to Aaron Mitchell, just to be clear--

5-ER-859. Mitchell objected without providing a basis. 5-ER-859. The district court sustained without providing an explanation. 5-ER-859. The government continued its examination:

> Q. Per Y-STR testing, when you associate a loci number, is it accurate to associate it also with the male line of that particular person?
>
> A. Yes.
>
> Q. And what is the frequency statistic associated at that swab location?
>
> A. It is not expected to occur more frequently than one in 415 United States males.

5-ER-860.

The court called a recess. 5-ER-860. Mitchell's counsel moved for a mistrial, arguing that "the exterior part of the underwear [was] the only thing that's admissible, and that was violated." 5-ER-860-861. The government's counsel again responded that she understood the court's ruling as excluding only the "inconsequential or insignificant results," such as the one-locus or two-loci results. 5-ER-861. She explained that the five-loci result was one of the two samples that the government's expert had identified as having evidentiary significance. 5-ER-861. Government counsel denied that she deliberately violated the court's order. 5-ER-863. She also indicated for the record that her DNA expert, if permitted, would "testify that the five-loci [result] is neither inconclusive nor insufficient." 5-ER-865.

b. The government's attempt to elicit testimony about the five-loci DNA result was not misconduct. Just before the government attempted to elicit testimony about the result, the district court specifically directed government's counsel to "move on to . . . where the evidentiary value was found in the other two." 5-ER-858-859. From this, the government reasonably believed that the court had permitted testimony about the two samples the parties and the court had discussed

at the pretrial hearing. Further, the government reasonably believed that the district court had admitted the DNA result linking Mitchell to L.O.'s vaginal swab because it was a scientifically significant result.

This Court has held that a DNA expert's testimony that a six-loci match could not exclude the defendant as a contributor was probative of the defendant's guilt. *See United States v. Mitchell*, 502 F.3d 931, 970 (9th Cir. 2007) ("[T]he expert's testimony indicates that a 'cannot exclude' finding can tell a lot, and can increase the probability that the person's DNA is present, depending on the number of loci at which the person cannot be excluded.") Consequently, the government's attempt to elicit testimony about the DNA result from L.O.'s vaginal swab did not amount to misconduct. Indeed, it appears to be nothing more than a good faith, and legally well-founded, misunderstanding of the court's prior ruling.

c. Further, Mitchell cannot show that he was prejudiced by the testimony regarding that DNA result. The district court's remedy negated any adverse impact the testimony of the DNA result could have had. The court ordered the testimony stricken and specifically directed the jury that they "will disregard that testimony and not consider it as part of [its] deliberations." 5-ER-874. Further, the district court later

instructed the jury on the following stipulation: "The parties have stipulated that the DNA test of the vaginal swabs taken from L.O. were inconclusive and could not be matched with the DNA of Aaron Mitchell. And that it is stipulated testimony which needs to be taken as having been proven." 1-ER-10. The court's remedy sufficiently mitigated any prejudice "as juries are assumed to follow the court's instructions." *See Cardenas-Mendoza*, 579 F.3d at 1029.

If anything, the district court's remedy arguably strengthened Mitchell's defense through its instruction to the jury about the meaning of the challenged DNA result. Based on the stipulation (1-ER-10), the jury was instructed to "take as proven" that the DNA profile from L.O.'s vaginal swab did not match Mitchell, when other evidence showed otherwise. Specifically, the government's DNA expert testified that "[t]he Y-STR DNA profile from the vaginal swabs *matched* Aaron Mitchell at five Y-STR loci." 5-ER-859 (emphasis added). Per the expert, such a match is not expected to occur more frequently than one in 415 males in the United States. 5-ER-860. Though Mitchell claims he was prejudiced by not being able to call his own expert, he fails to explain how his expert would have provided more favorable testimony than what was

presented in the stipulation. Indeed, while the jury would have been entitled to determine for itself the weight to be afforded to any expert that Mitchell could have called, it had no such option with the parties' stipulation under the court's instruction. Br. 22. As such, the district court's remedy amounted to an unwarranted windfall that eliminated any potential prejudice to Mitchell.

d. Finally, any prejudice caused by the DNA testimony was harmless given the strength of the other evidence connecting Mitchell to the rape. The erroneous admission of expert testimony is harmless where the government can show that it is "more probable than not that the jury would have reached the same verdict even if the expert testimony had not been admitted" or that the "testimony was relevant and reliable . . . based on the record established by the district court." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019) (alteration, internal quotation marks, and citations omitted).

Here, Mitchell admitted to investigators that he brought L.O. to his apartment, gave her alcohol, and spent hours with her in his bedroom. Ex. 81 at 00:45–2:50, 5:30–6:50, 14:30–15:10, and 16:10–16:17; *see also* SER-85-88, 94-95, 123-125. Further, L.O. identified Mitchell as her

rapist, noting that when she saw his photograph in the lineup, she "knew immediately that it was him" because she "remembered his eyes." 4-ER-524. Mitchell also had a tattoo matching one observed by L.O. 3-ER-356; 6-ER-1020-1021. Moreover, uncontested DNA analysis matched Mitchell to DNA found on the outside of L.O.'s underwear (5-ER-879-880), which corroborated L.O.'s testimony and undercut Mitchell's denials. Given the strength of the evidence identifying Mitchell as L.O.'s rapist, it is "more probable than not that the jury would have reached the same verdict even if" it had not heard the stricken testimony regarding the challenged DNA result. *Ruvalcaba-Garcia*, 923 F.3d at 1190 (citation omitted).

2. The Attempted Use of a Demonstrative Badge was Not Improper or Prejudicial

The government also did not engage in prosecutorial misconduct when it attempted to use a detective's badge as a demonstrative during its redirect examination of L.O.

a. On direct examination through a Spanish-language translator, L.O. testified that Mitchell showed her a yellow badge bearing the word "police" on it. 3-ER-317. During cross-examination, still with the Spanish-language translator, Mitchell's counsel questioned L.O.

about Mitchell showing her his badge. 3-ER-438. They had the following exchange:

> Q: Now, you also said yesterday that, when he pulled up in the red hatchback vehicle, that he showed you his badge. Do you remember saying that?
>
> A: Yeah, he showed me--yes, he showed me identification.
>
> Q: Okay. Well, yesterday you specifically called it a badge. Was it a badge or an identification?
>
> A: I don't remember, but it said that he was a police officer.
>
> Q: Okay. So, you don't remember if it was some type of identification that said "police" on it or if it was a badge?
>
> A: I don't remember.

3-ER-438.

Mitchell's counsel returned to this topic again later in his cross-examination, asking L.O., "Yesterday you specifically said it was a badge?" 3-ER-462. L.O. responded, "Yes, because that was the only way I knew how to express it." 3-ER-462. She later explained, "[w]ell, for me a badge is also like an identification." 3-ER-463.

On redirect examination, the government asked L.O. about the item Mitchell showed her when he first contacted her. 4-ER-529-530. L.O. said, "So I don't know. It said 'police' and--I don't remember. It was gold,

and I do recall it was, like, this big." 4-ER-530. When the government asked L.O. to give an estimate of the size in inches or centimeters, L.O. responded through the translator, "I wouldn't know how to say it." 4-ER-530.

The government asked for a moment, then attempted to show L.O. a detective's badge as a demonstrative to overcome the apparent language barrier. 4-ER-530. The defense objected without providing a basis for the objection. 4-ER-530. The district court sustained the objection. 4-ER-530. The government continued with its redirect examination about other issues. 4-ER-530. Mitchell did not raise the issue of the badge again until after another witness was called, examined, and allowed to step down. 4-ER-559-560. At that time, Mitchell moved for a mistrial based on alleged witness coaching and the "stunt" involving the demonstrative badge. 4-ER-560. The government's counsel explained that she grabbed the detective's badge as a demonstrative because her "intention was to ask whether it was smaller, bigger, the same as that item." 4-ER-561. The court denied the motion for mistrial. 4-ER-561.

b. Mitchell cannot show that the government's attempted use of the detective's badge as a demonstrative was misconduct. Indeed, Mitchell's opening brief cites to no legal authority that supports his argument on that point, and the omission is hardly surprising. This Court has affirmed the use of demonstratives during the examination of a witness. *See Unites States v. Yazzie*, 59 F.3d 807, 811 (9th Cir. 1995). Here, the demonstrative could have helped elicit clarifying testimony from L.O. about the size and shape of the "badge" that Mitchell had shown her when he first contacted her and forced her into his vehicle. This evidence would have borne directly on how Mitchell perpetuated his sexual assault of the young victim under the color of law—for example, by showing her an item (an actual police badge, or at the very least, something roughly the same size and shape as a police badge) in order to pressure her into his car. As such, the government's attempt to use a demonstrative badge was not misconduct.

c. Further, Mitchell cannot show that he was prejudiced by this attempted line of questioning because the witness was not permitted to answer. Government counsel tried to use the demonstrative in her questioning of L.O., but defense counsel objected and the court sustained

the objection. 4-ER-560-561. As a result, the jury never heard any testimony from L.O. in response to the government's attempted use of the demonstrative, and there is no reasonable likelihood that such an *absence* of testimony caused Mitchell any prejudice. Indeed, this Court has found no prejudice from the *actual* use of a demonstrative. *See Yazzie*, 59 F.3d at 811. Thus, Mitchell cannot show he suffered any prejudice from the government's attempted use of the demonstrative.

II. Mitchell is Not Entitled to Relief Based on Any of the Additional Alleged Claims of Prosecutorial Misconduct

Mitchell argues that he is entitled to reversal of his convictions based on a litany of other forms of alleged prosecutorial misconduct. Mitchell raised some of these allegations before the district court, while others are raised for the first time on appeal. Finally, Mitchell has waived several of the misconduct allegations by failing to provide adequate briefing of the issues in his opening brief.

A. Standard of Review

Where a criminal defendant objects to prosecutorial misconduct in the district court, this Court reviews the claim de novo, and where the Court determines misconduct occurred, it reviews the misconduct for harmlessness. *United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir.

2015). However, where a criminal defendant fails to preserve such claims by making a timely objection before the district court, this Court reviews for plain error. *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013). This Court can reverse for plain error only if: "(1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Dominguez-Caicedo*, 40 F.4th 938, 948 (9th Cir. 2022) (citation omitted).

Under either standard, a defendant seeking relief for alleged misconduct must establish both misconduct and prejudice. *United States v. Wright*, 625 F.3d 583, 609-610 (9th Cir. 2010).

B. Mitchell Cannot Show Misconduct or Resulting Prejudice Warranting Reversal for Any of the Actions to Which He Objected Below

Mitchell raises the following allegations of prosecutorial misconduct for which he objected at the district court: (1) opening statements about Mitchell's internet searches, (2) attempted use of the demonstrative badge, and (3) attempted admission of precluded DNA evidence from L.O.'s vaginal swab. However, Mitchell is not entitled to

relief based on these allegations as they neither constituted misconduct, nor caused Mitchell any prejudice.

First, Mitchell cannot show that the government's opening statement about the cellphone searches was misconduct. Br. 48-55. Here, during its opening statement, the government told the jury that they would learn about searches on Mitchell's cellphone, including a search for "How long does it take to smother someone?" 3-ER-266. The defense objected, claiming that the district court had excluded that search before the trial. 3-ER-266-267. That claim was wrong; the district court specifically denied the defense motion to exclude evidence of that search. 2-ER-122. Moreover, when the defense renewed its motion to exclude the specific search regarding smothering, the court invited the defense to object to evidence of that search before it was introduced, "*if there is no evidence as to the smothering*." 2-ER-193 (emphasis added). However, the government clearly signaled its intention to present evidence that Mitchell obstructed L.O.'s breathing during the assault. In its opening statement, the government told the jury that it expected the evidence to show that when Mitchell demanded L.O. rub his penis a second time:

> This time the defendant put his hands on her neck, and [L.O.] will describe how he began squishing her neck, how she thought at that moment maybe he was going to squeeze it hard, how she thought at that moment maybe she wasn't going to make it home.

3-ER-261-262. Mitchell does not contest that L.O.'s testimony about how he squeezed her neck and covered her mouth with a shirt during the sexual assault was properly admitted at trial. With this evidence of smothering-related conduct in the record, Mitchell's internet searches about smothering preceding his assault of L.O. were also relevant and admissible, as the district court had suggested. *See* 2-ER-193 (suggesting that defense counsel object "if there is *no* evidence as to the smothering" (emphasis added)). Knowing that L.O. would likely testify about the smothering, and recognizing that Mitchell's internet searches would consequently be relevant and admissible under the court's prior statements, it was not misconduct for the prosecutor to mention the searches during her opening statement. Further, Mitchell cannot identify any prejudice resulting from the statement because the jury was ultimately presented evidence that Mitchell made the following web-based search on his cellphone: "How long does it take to smother someone?" 7-ER-1265. This issue is without merit.

As discussed above, the prosecution's attempted use of the demonstrative badge was neither misconduct nor prejudicial to Mitchell. Also discussed above, the prosecution's attempt to elicit testimony about a scientifically significant DNA result matching Mitchell to DNA found in L.O.'s vaginal swab was neither misconduct nor was it prejudicial. As such, Mitchell is not entitled to relief on any of the prosecutorial misconduct claims for which he objected at the district court.

C. Mitchell's Meritless and Unpreserved Claims of Prosecutorial Misconduct Do Not Constitute Plain Error Warranting Reversal

Mitchell raises numerous charges of prosecutorial misconduct for the first time on appeal: (1) a speaking objection during cross-examination of L.O.'s mother; (2) vouching for a witness during cross-examination of L.O.'s friend, Y.B.; (3) testifying about facts not in evidence during cross examination of L.O.; (4) objecting to the foundation of a defense video exhibit; (5) a purportedly "misleading" cross-examination of L.O.; (6) vouching for law enforcement witnesses during rebuttal; (7) "making noises" during court rulings; and (8) attempting to admit precluded sperm evidence. Br. 30-42 (citation omitted). However, Mitchell cannot show that any of these actions warrant plain error relief.

First, the government did not engage in misconduct when it made a speaking objection during cross-examination of L.O.'s mother. Br. 32. At trial, Mitchell's counsel asked L.O.'s mother if L.O. never skipped school. 5-ER-815. L.O.'s mother responded, through a Spanish-language translator, "Yes. That is the truth. She never skipped from school." 5-ER-815. Mitchell's counsel asked, "So you were not aware that she had 14 unexcused absences that semester?" 5-ER-815. The government objected, noting that "[t]here's a difference between absences and skipping school." 5-ER-815. The government appeared to be arguing that the question assumed facts not in evidence.

Mitchell argues that the prosecutor's objection "pervaded the trial with prejudice so as to constitute an unfair trial" because the objection "told the jury how to interpret [L.O.'s] unexcused absences" and amounted to "testif[ying] to facts not in evidence." Br. 32. Not so. The government was merely stating the specific ground for its objection, as the rules allow. *See* Fed. R. Evid. 103(a)(1)(B). Further, the district court specifically instructed the jury that the attorneys' statements, objections, and arguments are not evidence. 7-ER-1405. Jurors are presumed to follow the court's instructions. *United States v. McChristian*, 47 F.3d

1499, 1508 (9th Cir. 1995). On this record, Mitchell cannot show that there was any error, let alone that a plain error occurred and affected his substantial rights or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Dominguez-Caicedo*, 40 F.4th at 948 (citation omitted).

Second, the government did not improperly vouch for the victim's friend, Y.B., during cross examination. Br. 33-34. "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). Here, during cross-examination of Y.B., Mitchell's counsel asked her if she "told the police officer something that wasn't true when [she was] being interviewed in June of 2022?" 5-ER-819. The government objected. 5-ER-819. When the district court asked for the basis of the government's objection, the prosecutor said, "I don't think . . . this witness has been inconsistent." 5-ER-819.

Far from vouching, the government was simply arguing that defense counsel's attempted impeachment of the witness was not based

on any identified inconsistency. The government made no personal assurances of the witness's veracity. Nor did the government suggest that evidence outside the record supported the witness's testimony.

Later during the same cross-examination, Mitchell's counsel began to impeach Y.B. with a transcript of her statement to police when the government objected because "this is not an inconsistency." 5-ER-827. Again, the government was merely stating the specific ground for its objection. The government made no personal assurances of Y.B.'s veracity and did not suggest that other evidence supported Y.B.'s testimony. As such, the government engaged in no vouching or misconduct. Further, as discussed above, the jury was instructed not to consider the attorneys' statements as evidence. 7-ER-1405. Thus, Mitchell's claim is without merit. *McChristian*, 47 F.3d at 1508.

Third, the prosecution did not commit misconduct by allegedly testifying about facts not in evidence or by implying that defense counsel acted in bad faith during the cross-examination of L.O. Br. 34-35. Here, the government objected to a defense question about whether L.O.'s police interview transcript included her statement to police that Mitchell had sex with her. 3-ER-486. When the district court asked for the

prosecutor to explain the objection, the prosecutor noted that "the recording of the interview cut off, and so the complete interview is not transcribed." 3-ER-483. During a sidebar, the government explained that it objected because the defense question would mislead the jury unless it was clear that part of the interview was not recorded. 3-ER-483. The district court overruled the objection, noting that the government could address the incomplete transcript issue "with the appropriate witness." 3-ER-484. Here, the government did not engage in misconduct when it merely stated the basis for its objection. As noted above, Rule 103(a)(1)(B) generally requires attorneys to state the basis for their objections. Moreover, the government made no disparaging remarks of defense counsel in front of the jury. Finally, the jury was instructed not to consider the attorneys' statements as evidence. 7-ER-1405; *see McChristian*, 47 F.3d at 1508. This issue is without merit.

Fourth, the prosecution did not engage in misconduct when it objected to the foundation of a defense video based on apparent editing. Br. 35-36. Here, the government objected and asked for a sidebar. 6-ER-1214-1215. The district court refused to take a sidebar and instead directed defense counsel to continue, without ruling on the objection. 6-

ER-1214. The government again objected, this time explaining the ground for its objection as lack of foundation, noting that the video "has been enhanced." 6-ER-1214-1215. Mitchell's counsel denied that it was enhanced. 6-ER-1215. When the district court later clarified if the government's objection was as to foundation, the government's counsel responded, "This has been lightened. We have the same video that's already been admitted as our Exhibit 104. And the exhibit on their list says 'enhanced,' and it is clearly lightened." 6-ER-1215. Again, there is nothing inherently wrong about attorneys stating the basis for their objections, as it is generally required. *See* Fed. R. Evid. 103(a)(1)(B). Moreover, the government made no disparaging remarks of defense counsel in front of the jury. The government attempted to discuss the objection at sidebar, but the district court refused. 6-ER-1214. This does not amount to misconduct. Indeed, Mitchell makes no attempt to cite any legal authority to support his claim, and he identifies no prejudice suffered from this exchange. The jury was also instructed not to consider the attorneys' statements as evidence. 7-ER-1405; *see McChristian*, 47 F.3d at 1508. Accordingly, this claim of error is also without merit.

Fifth, the government did not engage in misconduct when, in explaining the basis for an objection, it advised the court that "[i]t would be misleading" for the defense to question L.O. about her observations regarding her backpack without clarifying a point in time. Br. 36-37. The district court apparently agreed and directed Mitchell's counsel to ask L.O. at what point in time she was talking about. 3-ER-455. Again, pursuant to Rule 103(a)(1)(B), attorneys are generally required to state the basis for their objections, and the government made no disparaging remarks of defense counsel in front of the jury. This does not amount to misconduct.

Sixth, the government did not engage in misconduct when it argued against the defense's theory that the incriminating internet searches found on Mitchell's cellphone were planted. Br. 37-39. During the defense's closing argument, Mitchell's counsel accused the police of planting the cellphone searches on Mitchell's phone, arguing: "[W]hat else would they do? Type in a few searches? I wouldn't put it past them." 7-ER-1465. In rebuttal, the government addressed this allegation, arguing that it did not make sense for the local police department to plant the phone searches for the FBI to find months later. 7-ER-1477. The

government explained that the defense accusation would mean "the FBI [was] in on the conspiracy to plant these phone searches, to risk their careers and their families, all to further implicate the defendant by way of this elaborate technological scheme." 7-ER-1477.

This was not vouching. Again, "[v]ouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *Necoechea*, 986 F.2d at 1276. If the prosecutor had argued that the jury should give the officers' testimony more credence because they would not "jeopardize their careers" to lie, that could constitute improper vouching. *See United States v. Combs*, 379 F.3d 564, 574-575 (9th Cir. 2004). In *Combs*, this Court found impermissible the argument to the jury that the jury could only acquit if they believed the agent risked losing his job by lying on the stand. *Ibid.* However, unlike the prosecution in *Combs*, the government here was responding to specific allegations that the investigating officers had engaged in serious misconduct by planting evidence on Mitchell's cellphone. Arguing that the officers would not "jeopardize their careers" to plant evidence is different than invoking

their careers to bolster their credibility. When considering that the defense counsel's closing argument was a clear attack on the integrity of the government's investigators, the government's response—to question the plausibility of defense counsel's theory—was fair. Importantly, "courts should examine rebuttal arguments in the context of the arguments that they rebut." *United States v. Wilkes*, 662 F.3d 524, 539 (9th Cir. 2011). Further, even if this Court held that the statement here was improper, Mitchell cannot show that this was a plain error affecting his substantial rights or that it "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Dominguez-Caicedo*, 40 F.4th at 948 (citation omitted). He is, thus, not entitled to relief.

Seventh, Mitchell cannot show plain error resulting from the prosecution's "noises" during the district court's rulings on objections. Br. 40. Here, during a sidebar, the district court directed a prosecutor to warn her co-counsel that the court could hear her "making noises" during the court's rulings on objections. 4-ER-516. The record contains no other information about the noises: how loud they were, how often they occurred, or what message, if any, they conveyed. Mitchell cannot show that these noises affected his substantial rights or "seriously affected the

fairness, integrity, or public reputation of judicial proceedings." *Dominguez-Caicedo*, 40 F.4th at 948 (citation omitted).

Eighth, the government did not engage in misconduct when it elicited relevant evidence that serology testing of L.O.'s underwear was positive for sperm. Br. 41-42. In a discussion outside the presence of the jury, Mitchell's counsel objected to the admission of the serologist's testimony regarding sperm, arguing that "that goes into the DNA testing that you've already precluded." 6-ER-1144. The government responded that the serologist "will testify that those results for the semen and sperm were not sent off for DNA testing, so it's not the subject of the DNA testing that was at issue yesterday." 6-ER-1144. Mitchell's counsel responded, "Okay. I just wanted to make sure." 6-ER-1145. The court made no ruling about the serology evidence before the prosecutor continued its direct examination of the serologist.

The serologist testified that she "positively identif[ied] sperm on the underwear." 6-ER-1147. Mitchell's counsel did not object. 6-ER-1147. Mitchell's counsel did not object until after the government asked two more questions. 6-ER-1147. And when Mitchell's counsel objected, she failed to give a basis for the objection. 6-ER-1147. The court sustained

the objection without explanation and directed the government to move on. 6-ER-1147. The government then asked about other serology testing and results. 6-ER-1147-1148. The government later clarified that the serology relating to semen was negative but was positive for sperm. 6-ER-1149. Mitchell's counsel objected again without explaining the basis for the objection, and the court sustained it. 6-ER-1149.

On this record, the government did not engage in misconduct when it elicited testimony about the positive sperm serology on L.O.'s underwear because the evidence was specifically discussed just before the prosecutor elicited the evidence and the court did not exclude it. Further, Mitchell cannot show that this was a plain error that affected his substantial rights or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Dominguez-Caicedo*, 40 F.4th at 948 (citation omitted). Because Mitchell cannot show plain error resulting from any of the allegations of prosecutorial misconduct, he is not entitled to relief.

D. Mitchell Has Waived Review of His Remaining Claims of Prosecutorial Misconduct

Finally, Mitchell has waived review of the remaining claims of prosecutorial misconduct by failing to provide adequate briefing.

Mitchell alleges prosecutorial misconduct based on numerous sustained defense objections, many of which he fails to individually identify. Br. 30-31. To the extent Mitchell seeks relief on the unidentified sustained objections, Mitchell has waived review. *See United States v. Panaro*, 266 F.3d 939, 951-952 (9th Cir. 2001) (declining to reach the merits of an argument where the "assertion is too general" and where the appellant provided "no specific reference" to the particular facts underlying the claim). Even if these claims were preserved, Mitchell cannot show error. The objections were sustained, and jurors are presumed to follow the court's instructions. *McChristian*, 47 F.3d at 1508.

Likewise, Mitchell attempts to shoehorn in claims of a *Brady* violation and violations of his Sixth and Fifth Amendment rights—all with virtually no supporting argument. Br. 42. Mitchell fails to include any discussion of what the alleged suppressed evidence was, whether it was favorable or material, or how he was prejudiced by its nondisclosure. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) (to show a *Brady* violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and

prejudice must have ensued"). Because Mitchell makes only a "general" assertion of *Brady* misconduct, he has likewise abandoned this claim on appeal. *Panaro*, 266 F.3d at 951-952; *see also* Fed. R. App. P. 28(a)(8)(A); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1077 n.8 (9th Cir. 2003).

III. The District Court Did Not Abuse Its Discretion When It Denied Mitchell's Final Motion to Continue Trial

A. Standard of Review

"A district court's decision to deny a motion for a continuance is reviewed for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017).

B. The District Court Provided Mitchell a Reasonable Amount of Time to Put on a Constitutionally Sufficient Defense

As the Supreme Court has emphasized, "broad discretion must be granted [to] trial courts on matters of continuances." *Walter-Eze*, 869 F.3d at 907 (quoting *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). This Court considers five factors when determining whether a district court abused its discretion in denying a continuance. The factors are: (1) "whether the parties, the court, or counsel would be inconvenienced" by the continuance; (2) "whether previous continuances ha[d] been granted"; (3) whether there existed "legitimate reasons for the delay"; (4) "whether

the delay [was] the defendant's fault"; and (5) "whether the denial would prejudice the defendant." *Williams v. Stewart*, 441 F.3d 1030, 1056 (9th Cir.), *amended by* 2006 WL 997605 (9th Cir. Apr. 18, 2006). The last factor, prejudice, is the "most critical," *United States v. Mejia*, 69 F.3d 309, 316 (9th Cir. 1995), and "must be established," *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011).

None of these factors suggests any abuse of discretion by the district court in denying Mitchell the last of his many requested continuances. First, granting yet another continuance of the trial would have inconvenienced the government and its witnesses, several of whom were subpoenaed for the August 19, 2024 trial and would have to be rescheduled. *See* SER-32. Another continuance would have inconvenienced the minor victim and her family, who had already waited more than two years for the case to be resolved. During those two years, the young victim experienced the stress and hardship associated with the looming trial date and her anticipated court testimony, knowing she would have to recount very intimate, traumatic events in front of strangers. Moreover, in reliance on the district court's order setting August 19, 2024, as a firm trial date agreed upon by all parties, the

prosecutors, one of whom lived out of state, rearranged their personal lives and professional obligations to be ready for trial. *See* SER-33. Given the inconvenience another continuance would have caused the parties, this factor supports the district court's denial.

Second, the district court had previously granted ten motions to continue trial requested by Mitchell. 8-ER-1489-1492, 1495, 1498-1499, 1502, 1506, 1509, 1511. The final continuance granted by the district court provided Mitchell's counsel with more than three months to prepare for the trial date that he previously had requested. 8-ER-1502. Because the district court had granted many prior requests for a continuance, this factor weighs heavily in favor of the district court's denial.

Third, Mitchell fails to identify any legitimate reasons for further delay. Mitchell argues that "[n]either defense counsel felt they had sufficient time to review the extensive disclosures in this complex case." Br. 47. Yet, of the 77,000 pages of discovery provided by the government, 71,000 consisted of a single cell-phone extraction report of Mitchell's cellphone which was already reviewed and reported on by a defense expert. *See* SER-22. Mitchell argues that his trial counsel were unprepared to provide witness proffers or timely disclosure of expert

motions but fails to identify which witnesses were affected. Br. 48. Mitchell also argues that his counsel "lacked sufficient time to meet with [him] to prepare him to testify." Br. 48. Yet, he fails to explain why more than three months was required to facilitate such a meeting, especially given the numerous additional extensions he had already been granted. Because Mitchell failed to identify any legitimate reason for further delay, this factor weighs in favor of the district court's denial of the continuance.

Fourth, the cause for further delay was the preparedness of Mitchell's counsel. Br. 47. Mitchell does not attempt to allege that the delay was caused by the prosecution team or the court. Br. 47. Thus, this factor weighs in favor of the district court's denial of the continuance.

Fifth, Mitchell failed to establish prejudice from the district court's denial of another continuance. Mitchell makes only conclusory arguments that his trial counsel were not prepared or did not have enough time. *See* Br. 43-48. Yet, he fails to explain how the verdict would have been different had his counsel been provided with more time. *See Wilkes*, 662 F.3d at 543. Because Mitchell has failed to establish any prejudice resulting from the district court's denial of a final continuance,

this "most critical" factor weighs in favor of the court's denial. *See Mejia*, 69 F.3d at 316.

Because the applicable factors support the district court's denial of a continuance, Mitchell has failed to demonstrate that the district court abused its discretion.

IV. The District Court Did Not Abuse Its Discretion When It Admitted Evidence of the Internet Searches Found on Mitchell's Cellphone

Mitchell challenges the admission of web searches found on his cellphone, arguing that the evidence lacked sufficient foundation of authenticity, was improper character evidence, and the danger of prejudice substantially outweighed its probative value. However, all of these claims lack merit.

A. Standard of Review

This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Komisaruk*, 885 F.2d 490, 492 (9th Cir. 1989). This Court will not reverse based on a district court's evidentiary rulings unless the appealing party can establish that it is more probable than not that the improper evidence materially affected the verdict. *United States v. Dorsey*, 677 F.3d 944, 951, 954 (9th Cir. 2012).

B. The Government Laid a Proper Foundation for Admission of the Internet Searches Found on Mitchell's Cellphone

The authenticity requirement is satisfied so long as the proponent provides "evidence sufficient to support a finding" that the item is what the proponent claims it is. Fed. R. Evid. 901(a); *see also United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004). Mitchell challenges the authenticity of the internet-search evidence (1) based on alleged "tampering" by the case agent and (2) because the expert could not testify about the specific time of all but one of the searches. Br. 54-55. However, because the government presented evidence sufficient to sustain a finding that the searches were web-based searches on Mitchell's cellphone, the district court did not abuse its discretion in admitting the evidence.

First, the district court acted within its discretion when it found that there was no evidence of tampering or alteration of the searches admitted at trial. 2-ER-119. Here, Douglas Police officers seized Mitchell's property on August 26, 2022, and placed the property in a secure evidence locker. 2-ER-115-116. On August 28, 2022, the officers inventoried the property and found Mitchell's cellphone in the pocket of

a vest. 2-ER-115-116. At that time, the officers placed the phone in airplane mode and completed a cursory search of the phone. 2-ER-116. On August 29, 2022, after obtaining a search warrant, the case agent conducted a Cellebrite download, which included a manual review. 2-ER-116. When the officer accessed the web browser, he found the following already typed in to the search bar, "girl kidnapped/raped in Douglas, Arizona." 2-ER-122. This surprised the agent, who grabbed his own phone and recorded a video capturing what he saw on Mitchell's web browser. 2-ER-117. While the case agent accessed the browser, he accidentally created a KTX file for the web search, which acts as a timestamp, probably from a downward swipe. 2-ER-117-119. The KTX file for the web search recorded the timestamp as August 29, 2022. 2-ER-117.

The district court admitted the other searches, finding that there was "no dispute" that the other searches were not changed by officers. 2-ER-119-120. However, the court excluded the "girl kidnapped/raped in Douglas, Arizona" search given that it was not known when the search was typed in and because it was a "very damning statement." 2-ER-120, 122. Mitchell does not attempt to argue that the searches admitted at

trial were tampered with. Rather, he asks this Court to reverse the district court's ruling, in part, because the "web searches lacked reliability." Br. 54. However, because the admitted searches were found on Mitchell's cellphone with no indication that law enforcement officers had changed or altered them, they were reliable and relevant evidence of the crimes.

Second, the government provided evidence sufficient to support a finding that Mitchell conducted the searches. The searches were found on Mitchell's cellphone. 7-ER-1264. Per the forensic analysis of the phone, all but one of the admitted searches were created between August 14, 2022, and August 29, 2022, when the Cellebrite download was completed. 7-ER-1264. One search had a timestamp of the morning of the rape. 7-ER-1265. There was no evidence that police had altered or changed any of the searches that were presented to the jury. As such, there was sufficient evidence of authenticity such that a reasonable juror could find that the searches were web-based searches found on Mitchell's phone.

C. The Probative Value of the Cellphone's Web Searches was Not Substantially Outweighed by the Danger of Undue Prejudice

Next, Mitchell argues that the searches lacked relevance and caused him prejudice. Br. 52-55. Under Federal Rule of Evidence 403, relevant evidence is inadmissible if the court finds that its probative value is substantially outweighed by a danger of unfair prejudice. Here, the web-based searches were highly probative of Mitchell's identity, intent, and knowledge of L.O.'s age. The searches provided another critical link tying Mitchell to the crime given the timing and subject matter linking his phone to the rapes. The searches corroborated L.O.'s story about how the rapes occurred, including that Mitchell used alcohol to try to get her "drunk," that he tied a shirt "over [her] mouth" during the attacks, and that he squeezed her neck or "smother[ed]" her during one of the assaults. 7-ER-1264-1265. The searches established Mitchell's intent to rape L.O., given that two of the searches sought information specific to "rapes" or being "raped." 7-ER-1264-1265. The searches established Mitchell's knowledge that L.O. was a minor when he searched, "Can a 16-year-old [girl] get drunk fast?" 7-ER-1264-1265.

Finally, one of the searches was specifically timestamped on the morning of the rape, further tying Mitchell to the crimes. 7-ER-1265.

Moreover, the only prejudice identified by Mitchell—that he was limited in his cross-examination of officers regarding the alleged tampering—relates to a different ruling by the district court that he does not challenge on appeal. Br. 55. As explained above, Mitchell cannot point to any evidence of tampering. Further, Mitchell cannot show that undue prejudice substantially outweighed the probative value of the evidence. As such, he is not entitled to relief on this basis.

D. The Cellphone-based Web Searches were Not Improper Character Evidence

Next, Mitchell claims that the evidence of the web searches was improper character evidence that did not prove identity, intent, knowledge, etc. Br. 54. Evidence of any other crime, wrong, or bad act is generally not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. Fed. R. Evid. 404(b). Here, the searches are not properly considered character evidence at all because they were not evidence of another crime, wrong, or bad act to prove Mitchell's character for rape. Rather, the evidence of Mitchell's web-based searches was inextricably

intertwined in the charged offense conduct and helped establish Mitchell's intent, identity, and knowledge regarding the charged offenses. *See* Fed. R. Evid. 404(b)(2); *United States v. Porter*, 121 F.4th 747, 752 (9th Cir. 2024).

As discussed above, the evidence was highly probative of Mitchell's identity, intent to rape, and knowledge of L.O.'s age. And the danger of undue prejudice did not substantially outweigh the probative value of the evidence. As such, the district court did not abuse its discretion when it admitted evidence of the cellphone searches.

V. The District Court Properly Declined to Dismiss the Kidnapping Charge Because a Vehicle is an Instrument of Interstate Commerce

Mitchell challenges his kidnapping conviction because, he argues, an automobile is not an instrumentality of interstate commerce. Br. 55-58. Here, Mitchell was convicted of kidnapping a minor in violation of the federal kidnapping statute, 18 U.S.C. 1201(a)(1) and (g). The evidence showed that Mitchell used his car to drive L.O. away from her school community to his apartment nearly an hour away for the purpose of sexually assaulting her. 3-ER-312, 327; Ex. 81. Because an automobile

is a long-recognized instrumentality of interstate commerce, Mitchell is not entitled to relief.

A. Standard of Review

This Court reviews an as-applied constitutional challenge to a statute de novo. *United States v. Stackhouse*, 105 F.4th 1193, 1198 (9th Cir.), *cert. denied*, 145 S. Ct. 558 (2024).

B. Automobiles are Instrumentalities of Interstate Commerce

This Court has expressly identified automobiles as instrumentalities of interstate commerce. *See Fejes v. FAA*, 98 F.4th 1156, 1160 (9th Cir. 2024) ("We have held that cars are instrumentalities of interstate commerce."); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) (holding that cars are instrumentalities of commerce).

Numerous circuits have likewise held that automobiles are instrumentalities of interstate commerce. *See, e.g.*, *United States v. Bishop*, 66 F.3d 569, 588-590 (3d Cir. 1995) (holding that motor vehicles are "the quintessential instrumentalities of modern interstate commerce"); *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (concluding that instrumentalities of commerce "are the people and things themselves moving in commerce, including automobiles,

airplanes, boats, and shipments of goods"); *United States v. McHenry*, 97 F.3d 125, 127 (6th Cir. 1996) (rejecting challenge to carjacking statute based on *United States v. Lopez*, 514 U.S. 549, 551 (1995)); *United States v. Small*, 988 F.3d 241, 251-252 (6th Cir. 2021) (holding that a reasonable jury could conclude that the frequent use of the rental car was not "casual and incidental" to the kidnapping, but an important tool for the conspirators to effectuate their activities in the commission of the crime). Similarly, other circuits have held that automobiles are instrumentalities of interstate commerce in the context of other federal statutes. *See United States v. Mandel*, 647 F.3d 710, 722 (7th Cir. 2011) (denying Commerce Clause challenge to federal murder-for-hire statute under plain error standard and noting that automobiles "play a crucial role in interstate commerce"); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (holding that automobiles are instrumentalities of interstate commerce); *Bishop*, 66 F.3d at 588 (motor cars are "the quintessential instrumentalities of modern interstate commerce").

Mitchell argues that the district court "misapplied *Stackhouse*" when it found that a vehicle was an instrumentality of interstate commerce as applied to a federal kidnapping statute charge. Br. 56-57.

But he fails to explain how. Mitchell notes that *Stackhouse* involved the defendant's use of a cellphone, not a car, to perpetuate the kidnapping in that matter. Br. 57. Yet, the district court here expressly acknowledged this difference. 1-ER-15.

As in *Stackhouse*, this Court must analyze whether the proffered instrumentality of interstate commerce gave federal authorities jurisdiction under the Commerce Clause to regulate intrastate kidnappings. There, this Court held that "the application of the federal kidnapping statute to an intrastate kidnapping is constitutional where the defendant uses a cellphone—an instrumentality of interstate commerce—in furtherance of the offense." *Stackhouse*, 105 F.4th at 1196. Because an automobile has similarly been long recognized as an instrumentality of interstate commerce, the application of the federal kidnapping statute to the intrastate kidnapping here is likewise constitutional.

The Seventh Circuit recently applied reasoning similar to that employed by this Court in *Stackhouse* when it held that automobiles, as a class, are instrumentalities of interstate commerce under Section 1201(a)(1). *See United States v. Protho*, 41 F.4th 812, 828 (7th

Cir. 2022). Likewise, the Sixth Circuit in *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022), held that an automobile was an instrumentality of interstate commerce as applied to the federal kidnapping statute, given that the Commerce Clause "contemplates congressional efforts to keep the channels of interstate commerce free from immoral and injurious uses." *Id.* at 1011 (internal quotation marks and citation omitted).

Mitchell asks this Court to reverse his conviction based the Tenth Circuit's recent decision in *United States v. Chavarria*, 140 F.4th 1257 (10th Cir. 2025). Br. 57-58. *Chavarria* affirmed the dismissal of an indictment alleging violation of the federal kidnapping statute because it charged that the defendant "used a motor vehicle" in committing the offense, and the court reasoned that not "*every* motor vehicle is a 'means, facility, and instrumentality of interstate commerce" for purposes of Congress's authority under the Commerce Clause. *Id.* at 1259 (citation omitted; emphasis in original); *see also id.* at 1265 ("The question we must answer is whether "motor vehicles" are always presumed to be instrumentalities of interstate commerce. We hold they are not.").

Even if *Chavarria* could be read as broadly as Mitchell suggests, it is not precedential in *this* circuit, which has squarely held that "cars are themselves instrumentalities of commerce, which Congress may protect." *Oliver*, 60 F.3d at 550; *see also Fejes*, 98 F.4th at 1160. Mitchell's argument that would also require this Court to ignore its reasoning in *Stackhouse*. *See* pp. 58-59, *supra*. Further, it would require this Court to part ways with the majority of circuits that have affirmed the use of an automobile as an instrumentality of interstate commerce in the context of a federal kidnapping statute. *See United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits."). For these reasons, the district court here properly declined to dismiss the kidnapping charge. Mitchell is, thus, not entitled to relief.

VI. Mitchell has Waived Review of His Cumulative Error Claims Based on Inadequate Briefing

Mitchell also seeks relief based on the cumulative error doctrine. Br. 42, 58.[5] However, Mitchell has waived his cumulative-error claims by failing to provide adequate briefing for them. *See Bear Lake Watch,*

[5] Mitchell raises these claims in two separate sections. *See* Br. 42, 58. For clarity, the government addresses both as a single issue.

Inc. v. FERC, 324 F.3d 1071, 1077 n.8 (9th Cir. 2003). Federal Rule of Appellate Procedure 28 requires the argument section of an appellant's brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A); *see also United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) ("Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief."). Both of Mitchell's cumulative-error claims, labeled as sections C and G, are addressed in single-sentence arguments. Br. 42, 58. The briefing for these claims falls well short of this Court's briefing mandate. Each is a conclusory assertion bereft of *any* record citations and supported by a single legal citation without analysis. Thus, these claims are waived as inadequately briefed. *See United States v. Panaro*, 266 F.3d 939, 951-952 (9th Cir. 2001) (declining to reach the merits of an argument where the "assertion is too general" and where the appellant provided "no specific reference" to the particular facts underlying the claim).

Even if this Court finds that the claims are not waived, Mitchell has failed to show any prejudicial error, let alone cumulative errors resulting

in prejudice. *See United States v. Wilkes*, 662 F.3d 524, 542 (9th Cir. 2011). As such, these claims, if not waived, are without merit.

CONCLUSION

For the foregoing reasons, this Court should affirm Mitchell's convictions.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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