

11-4900

To Be Argued By:
MICHAEL J. GUSTAFSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-4900

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANDREW ZAYAC,
Defendant-Appellant,

HERIBERTO GONZALEZ,
aka Eddie, aka Pablo,
Defendant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*Acting United States Attorney
District of Connecticut*

MICHAEL J. GUSTAFSON
SANDRA S. GLOVER (*of counsel*)
Assistant United States Attorneys

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 22, 2011. Appendix (“A__”) A46, 415. On November 23, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A47, 418. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

- I. Whether the defendant was entitled to a jury instruction on the affirmative defense of duress when he failed to establish that he had no reasonable opportunity to escape the coercive environment.

- II. Whether the district court abused its discretion in precluding evidence of the co-defendant's possession of an empty holster or hearsay testimony from the defendant's former attorney.

- III. Whether there was sufficient evidence to support the jury's verdict.

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ANDREW ZAYAC,
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ON APPEAL FROM THE UNITED STATES DISTRICT
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Preliminary Statement

Shortly after 11:30 p.m., on Sunday, February 8, 2009, Andrew Zayac and Heriberto Gonzalez pulled in front of the apartment building of Zayac's Bronx drug supplier, Edward Rivera. Rivera came out of his building and placed 68 pounds of marijuana—concealed in duffel bags, and valued at more than \$175,000—in the back of Zayac's Jeep Cherokee. Rivera then made the fatal mistake of getting into the back seat. At

some point after the Jeep drove off, Rivera was shot two times from close range. He died quickly.

The conspirators drove 60 miles north, to Padanaram Reservoir, a secluded area in Danbury, Connecticut. There, down a steep embankment, they dumped Rivera's 232-pound, lifeless body behind an outcropping of trees. He was not found until Tuesday.

Having disposed of Rivera's body, Zayac and Gonzalez hid the stolen marijuana at Zayac's girlfriend's home in New Rochelle, and then drove to an industrial area in the Bronx where they torched the Jeep a few minutes past 4:00 a.m. Both men were burned. Zayac later moved the stolen marijuana to his bedroom in his parents' home in Scarsdale, New York.

After investigators searched Zayac's bedroom and recovered the marijuana stolen from Rivera, Zayac made four separate statements to police. He lied in all of those statements.

After a six-day trial conducted in July 2011, a jury convicted Zayac of kidnap, robbery, possession of marijuana with the intent to distribute, use of a firearm to kidnap, rob, and murder Rivera, use of a firearm in furtherance of drug trafficking, and concealment and destruction of evidence, including Rivera's body and the Jeep. The jury acquitted Zayac of first degree murder.

On appeal, Zayac argues primarily that the trial judge erred by not instructing the jury on the affirmative defense of duress, but the trial judge properly concluded that Zayac had not established an evidentiary foundation for a duress defense. Zayac also contends that the trial judge abused her discretion in excluding from evidence (1) a holster and empty ammunition clip found in Gonzalez's house and (2) the testimony of Zayac's former attorney about why Zayac lied to the police. The trial judge's rulings on these issues were fully within her discretion, and any error was harmless in any event. Finally, Zayac claims that the government's evidence was insufficient to sustain his convictions on the kidnaping, robbery and firearms-related counts. As set forth below, however, the evidence was more than sufficient to sustain all of Zayac's convictions.

For all of these reasons, as set forth below, this Court should affirm Zayac's convictions.

Statement of the Case

On December 16, 2010, a Connecticut grand jury returned an eleven-count Second Superseding Indictment charging the defendants Zayac and Gonzalez with Kidnaping Resulting in Death, in violation of 18 U.S.C. § 1201(a)(1), Causing Death Through the Use of a Firearm—Premeditated Murder, in violation of 18 U.S.C.

§ 924(j)(1), Causing Death Through the Use of a Firearm—Felony Murder, in violation of 18 U.S.C. § 924(j)(1), Interference with Commerce by Robbery, in violation of 18 U.S.C. § 1951(a)(1), Use of a Firearm During and In Relation to a Narcotics Trafficking Offense, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), Possession with Intent to Distribute Marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D), Conspiracy to Use or Possess a Firearm in Furtherance of Crimes of Violence and a Narcotics Trafficking Offense, in violation of 18 U.S.C. § 924(o), Destruction or Concealment of Evidence in Federal Investigation (three counts), in violation of 18 U.S.C. § 1519, and Conspiracy to Destroy/Conceal Evidence in a Federal Investigation, in violation of 18 U.S.C. § 371. A25, 51-59.

Prior to trial, the district court granted the defendants' motions to sever. A16-18. In June 2011, a jury convicted Gonzalez on Counts Five and Eight through Eleven. A35.

Zayac went to trial in July 2011. On July 20, 2011, at the close of the government's case-in-chief, Zayac moved for a judgment of acquittal. The district court denied the defendant's motion. Government Appendix ("GA__") GA299.

On July 22, 2011, the jury convicted Zayac on Counts One (kidnaping), Three (felony murder), Four (Hobbs Act), Five (possession with intent to distribute marijuana), Seven (conspiracy to

use/possess firearm in furtherance of violent felony/drug trafficking crime), Eight (destruction/concealment of evidence), Nine (same), Ten (same) and Eleven (conspiracy to destroy/conceal evidence). A verdict of not guilty was returned on Count Two (first degree murder). No verdict was returned on Count Six (use or possession of a firearm in furtherance of a drug trafficking crime) because the district court instructed that if a guilty verdict was returned on Count Two or Count Three, the jury should not deliberate on Count Six. A39. See *United States v. Wallace*, 447 F.3d 184 (2d Cir. 2006).

The district court denied the defendant's motion for a new trial and for acquittal on November 1, 2011. SPA1. On November 22, 2011, the court sentenced Zayac principally to life imprisonment. SPA11-12.

I. Prelude to murder

A. Zayac and Gonzalez's long-standing, criminal relationship

Zayac and Gonzalez met in 2000, when they began working together. GA163, GA173. They were employed by Robert Schweit, a custodian in the Scarsdale school system who also ran a small, general maintenance business. GA163. Zayac and Gonzalez—Schweit's only two employees—worked together for approximately three years. GA164. They were co-workers and

friends, maintaining their relationship for nine years. GA164, GA173-174. Between January 31 and February 9, 2009, Zayac and Gonzalez contacted one another 30 times via telephone. GA217.

Schweit operated his maintenance company from his home in New Fairfield, Connecticut, which was approximately 4 miles from where Rivera's body was dumped. GA60, GA163, GA242. Schweit provided directions to his house to both Zayac and Gonzalez. The directions took them past Padanaram Reservoir. GA165, GA171.

In addition to doing maintenance work for Schweit, Zayac and Gonzalez burned a car for him as part of an insurance fraud in 2003. GA165-168. Schweit approached Gonzalez to burn the car because he knew that Gonzalez had burned a car for Zayac previously. GA171.

B. Zayac and Rivera's marijuana relationship

Rivera was a marijuana dealer who supplied marijuana to Zayac. GA64-65, GA245-247, GA268-271.

Rivera used two phones, one for family and friends, and a second phone ("the work phone"),

which was used primarily to arrange drug transactions. GA52, GA56-57.¹

Similarly, Zayac had two phones, one listed in his mother's name, which he used to call family and friends, and a second phone, subscribed to "Frank Hill," which Zayac used to communicate exclusively with Rivera ("the 3500 phone"). The 3500 phone was in contact with Rivera's work phone 228 times between December 2, 2008 and February 8, 2009. GA211, GA208, GA238.

In the days before his murder, Rivera told his close friend and marijuana-dealing associate, Muzafer Etemi, that he planned to do a drug deal. Specifically, Rivera received 68 pounds of marijuana from Canada approximately three or four days before his murder. He kept the marijuana in his apartment, where Etemi was staying at the time. The marijuana was packaged in one pound bags and contained in a few duffel bags. GA108-110, GA325.

Rivera told Etemi that he had a deal to sell the marijuana for \$2600/pound to two buyers from the Westchester area. Rivera mentioned that his customers did not want Rivera to "bring any Albanians"—a reference to Etemi and his associates. GA112. Etemi cautioned Rivera to be careful because the price the buyers were willing

¹ GA315 is a chart of all relevant phone numbers considered at trial.

to pay was too high. Rivera assured Etemi that he knew the customers and trusted them. GA111-112.

II. The events of February 8 and 9, 2009

A. Zayac brings Gonzalez to the drug deal

Zayac left his girlfriend's house on Sunday evening, February 8, 2009, telling her he was going to get marijuana. He was wearing sweat pants and did not appear to be carrying any money. He took the blue Jeep that was registered in his girlfriend's name. GA175-176.

At 10:40 p.m., Zayac used his personal phone to call Gonzalez. Cell site information shows that both Zayac's personal phone and Gonzalez's phone were near Gonzalez's residence, 1788 Lacombe Avenue, Bronx, New York. GA216, GA327. Zayac then turned his personal phone off.² A few minutes later, at 10:55 p.m., Zayac used the 3500 number to call Rivera's work

² Stephanie DiBuono's (Zayac's girlfriend's) phone records show that she made approximately 30 calls to Zayac's personal phone between midnight and 2:02 a.m. None of these calls registered on Zayac's phone records because his phone was powered off. GA176, GA216.

phone.³ GA219. Zayac's 3500 phone was still near Gonzalez's residence. GA213-214, GA219.

Less than an hour later, at 11:42 p.m., Zayac's 3500 phone was in contact with Rivera's work phone for the last time. As Rivera and Zayac spoke, Rivera walked from his building carrying the duffel bags of marijuana. Zayac and Gonzalez were in the Jeep parked in front of Rivera's building. Rivera placed the bags in the rear of Zayac's Jeep and got in the back seat. GA57-59, GA106, GA316.

Rivera was shot two times from close range. GA143-147. The bullets, which were not recovered, exited his body and left holes in the framework of the Jeep's backseat. GA41-43, GA318, GA319.

B. Rivera's body is dumped in Connecticut

Rivera weighed 232 pounds. GA142. His body was dumped behind an outcropping of trees near the Padanaram Reservoir in Danbury, Connecticut. The area was isolated, had no lighting and was pitch black at night. A guardrail separated the road from a steep embankment. Rivera's shirt and jacket rode high, one of his sneakers

³ Zayac's 3500 phone was in contact with Rivera's work phone 25 times on February 8, 2009. GA240-GA242, GA316.

was about nine feet from his body, consistent with being carried or dragged the spot. Rivera's blood stained baseball hat was found approximately 163 feet to the southeast. GA20, GA28, GA33, GA40-48, GA320-323.

C. Zayac keeps the stolen marijuana

At 2:33 a.m., Gonzalez called his residence. At 2:34 a.m, Zayac used Gonzalez's phone to call his girlfriend, Stephanie DiBuono. During these phone calls, Gonzalez's phone used cell towers near DiBuono's New Rochelle residence. GA219. Zayac told DiBuono that he would be home soon. DiBuono then heard her Cadillac doors being unlocked. However, Zayac did not come into the house. DiBuono learned several hours later, when Zayac did return home, that Zayac had placed the marijuana in her car. GA177-178.

D. Zayac and Gonzalez torch the Jeep

Having dumped Rivera's body and secured the stolen marijuana, Zayac and Gonzalez drove to Gonzalez's home to get a second car. Zayac placed some personal effects, including his Carhartt jacket, in Gonzalez's car. GA123-124.

A security video from Pullman Sibling Fuel, 1108 Zerega Avenue, Bronx, New York, shows that at approximately 4:09 a.m., the Jeep was set on fire. GA63. Zayac and Gonzalez were bad-

ly burned while setting fire to the Jeep. GA66, GA177-178, GA180, GA324.

Phone records document that at 4:09 a.m. and 4:20 a.m, Gonzalez was in contact with his home phone. Zayac then used Gonzalez's phone to call DiBuono at 4:39 a.m., 5:21 a.m. and 5:45 a.m. During this final conversation, Zayac told DiBuono that he was with Gonzalez and coming home soon. These calls were all made near Gonzalez's residence. GA220, GA177, GA317.

Gonzalez treated Zayac for his burns, gave him a change of clothes and drove him home. GA274.

Zayac arrived at DiBuono's house at about 6:00 a.m. He was wearing new clothes—shorts, tee-shirt and sandals. His ear, face and legs were badly burned. Zayac told DiBuono that he had torched the Jeep because it was getting old and giving him problems. GA177-178.

III. The days following the murder

A. Zayac has DiBuono falsely report the Jeep was stolen

DiBuono is an elementary school teacher, and had to go to work Monday morning. Before going to work, however, she went to CVS and bought some pain medication and bandages for Zayac. She kept the marijuana in her car and drove to work. After work, she purchased several laundry

bags, and Zayac transferred the marijuana from the duffel bags to the laundry bags. GA176-178.

Zayac instructed DiBuono to report that the Jeep, which was titled in her name, had been stolen. DiBuono complied, filing a false report with the New Rochelle Police Department and making a false claim with her insurance company on February 10, 2009 that her Jeep was stolen on February 8, 2009. GA179, GA183. In making these false reports, DiBuono followed Zayac's instructions and falsely identified him as "Kevin Hill." GA180.

B. Zayac moves the marijuana

Zayac initially stored the marijuana in DiBuono's residence, but within a few days he moved it to his parents' house, where he had a bedroom in the attic. GA178. Zayac put Rivera's duffel bags in DiBuono's brother's car. GA183, GA125-127.

C. Gonzalez returns Zayac's belongings

Gonzalez came to Zayac's parents' house shortly after the murder. Zayac brought Gonzalez up to his room; DiBuono was present. Gonzalez also was suffering from bad burns, which he showed to DiBuono. She commented, in a friendly manner, that Zayac and Gonzalez were "crazy" for having burned the Jeep. Gonzalez and

Zayac responded casually, essentially saying, “yeah, we know.” GA180.

Gonzalez returned a bag containing some of Zayac’s property from the Jeep. Gonzalez did not threaten Zayac or raise his voice during the visit. DiBuono characterized the visit as awkward, as neither man said much. Zayac walked Gonzalez out of the house. Zayac did not issue any warnings to DiBuono or say anything about the visit. GA181.

D. The stolen marijuana is found hidden in Zayac’s bedroom

Minutes after midnight, on March 1, 2009, law enforcement authorities searched the bedroom Zayac maintained at his parents’ Scarsdale home. Zayac and DiBuono were present. GA125-127.

The investigators removed the paneling to the wall near Zayac’s bed and discovered three large bags that contained over 60 pounds of marijuana. GA125-127, GA325.

The investigators also seized burn treatment items and medical records documenting that Zayac consulted a plastic surgeon on February 12 and 19, 2009. GA127.

Zayac agreed to speak with investigators, who took him to the local police station. GA64.

IV. Zayac's four false statements

Zayac spoke to law enforcement on four separate occasions:

A. March 1, 2009

While searching Zayac's bedroom, investigators issued *Miranda* warnings to Zayac, and these warnings were repeated at the police department. GA64.

The investigators told Zayac that they had recovered the Jeep in the Bronx, which DiBuono had reported stolen. Zayac immediately said that DiBuono had nothing to do with reporting Jeep stolen; that she was just doing what he told her to do. GA64.

Zayac initially denied knowing Rivera. When the agents pressed, he acknowledged that he had known Rivera since the summer of 2008. Zayac said that he had bought marijuana from Rivera in the past, on one occasion buying 100 pounds from Rivera. GA65.

Zayac initially told investigators he had not seen Rivera for a while. The investigators told Zayac that a witness reported seeing Rivera getting into a blue Jeep on a recent Sunday night. Zayac responded that he had been negotiating a 70-pound marijuana transaction for several days and that he had gone to the Bronx to buy the marijuana from Rivera that night. He stated

that he drove to the building alone. He had \$100,000 in a book bag. He pulled in front of Rivera's apartment. Rivera came out with the marijuana, got in the driver's side rear seat of the Jeep and they drove off. Zayac said that because Rivera trusted him, there was no need to count the money. Zayac stated that he drove to the Bronx River Parkway, went one exit, completed the drug deal, and returned to Rivera's neighborhood, dropping him off about a block or so past his residence. GA65.

The investigators confronted Zayac with information that they had discovered a bullet hole in the rear seat of the Jeep. Zayac got very quiet, responding, "I don't know anything about that." GA65.

Zayac then discussed the burning of his Jeep. He said that after completing the \$100,000 drug transaction with Rivera, he decided to burn his Jeep because it gave him trouble. Zayac denied that he burned the vehicle for insurance purposes, explaining that it was worth only a few thousand dollars. GA66.

Because he would need a ride back to the Westchester area, as well as a means to transport the 70 pounds of marijuana he had just purchased, Zayac called his friend "Pablo"

(Gonzalez), who lived in the Bronx.⁴ Pablo agreed to help burn the Jeep. They met near Zerega Avenue and burned the Jeep. GA66.

The investigators also questioned Zayac about his phone records. Zayac denied any association with the 3500 phone, but he said that he turned off his personal cell phone that Sunday night. Zayac stated that after burning the Jeep, as he was getting a ride home, he used Pablo's phone to call DiBuono. The investigators confronted Zayac, telling him that Gonzalez's phone was used to call DiBuono at 2:30 a.m., nearly 90 minutes before the Jeep was burned. Zayac did not respond. GA66.

At the end of the interview, the investigators told Zayac that they had uncovered a large quantity of marijuana from behind the wall in his bedroom. Zayac denied that this was the marijuana he purchased from Rivera. He stated that he had already gotten rid of Rivera's marijuana. Zayac did not offer any further explanation. GA66.

Zayac, who still had burns on his face and arms, told the investigators that he and Pablo

⁴ Zayac told the investigators that Pablo lived in the Bronx and drove a black 1990 Mercedes with Florida plates. He explained that he and Pablo worked together in construction. The investigators understood that Pablo was Gonzalez's nickname. GA66.

burned themselves while torching the Jeep. GA66.

Zayac also told the investigators that he had spoken to Rivera late Monday (February 9, 2009), which, of course, was impossible because Rivera was already dead. GA67.

B. March 3, 2009

Zayac retained an attorney and met for a proffer session with investigators on March 3, 2009. GA245.

At this meeting, Zayac stated that he was introduced to Rivera approximately a year earlier by a mutual friend who knew that both Rivera and Zayac were in the marijuana distribution business. GA246.

Zayac stated that shortly after they met, Rivera said that he could supply up to 100 pounds of marijuana. Zayac stated that he and Rivera were interested in acting as middlemen, in essence brokering marijuana deals between dealers and buyers that they could find. Zayac felt they could make \$10,000 per deal. GA246.

Zayac stated that he had last seen Rivera a few weeks earlier. GA246. They were planning to consummate a 60-pound transaction. Zayac stated that he was acting as a middleman for Dana Lieberman, who would pay \$100,000 for the marijuana. On the night of the deal, which

Zayac thought was a Saturday, Lieberman delivered \$100,000 to Zayac at DiBuono's residence. GA247.

Zayac called Rivera to advise that he was coming to the Bronx with the money. As Zayac walked to his Jeep, a man came from behind and ordered him to get in the Jeep and drive to the Bronx. GA247-248. The unknown man got into the back seat directly behind Zayac. When Zayac was close to Rivera's apartment building, the unknown man instructed Zayac to pull over. The unknown man got into the front seat and Zayac saw that he had a small, nine millimeter hand gun. GA248.

The unknown man then commanded Zayac to drive to Rivera's building. When Zayac arrived at the building, Rivera came out with two large bags, which he placed in the back of the Jeep. Rivera got into the rear passenger seat and the unknown man told Zayac to drive north. GA248.

Zayac stated that when he began driving, the unknown man looked back at Rivera, who said "Trey?"⁵ Trey then told Zayac to give him his identification. As they drove north on the Bronx River Parkway, Trey told Zayac to pull over and get out of the Jeep. Zayac was left on the side of the parkway. GA248.

⁵ The transcript incorrectly records the name as "Tray."

Zayac then called his friend Pablo—who the investigators understood to be a reference to Gonzalez—to pick him up. Zayac and Gonzalez went to Gonzalez's house and smoked marijuana. Gonzalez then drove Zayac to DiBuono's house. GA248.

When they arrived at DiBuono's house, Zayac saw his Jeep parked in front of DiBuono's house. Zayac discovered that although Lieberman's \$100,000 was gone, the 60 pounds of marijuana was still in the back of the Jeep. He also saw blood in the back seat. Zayac assumed that somebody had been stabbed because there was not a lot of blood. Zayac stated that Gonzalez, who was once an EMT, looked into the Jeep. Gonzalez told Zayac to take the bags out of the Jeep. Zayac put the marijuana in DiBuono's Cadillac, which was parked nearby. GA248.

Zayac wanted to call the police, but Gonzalez suggested that they instead burn the Jeep. Zayac agreed to burn the Jeep, which they did on Zerega Avenue in the Bronx. GA248.

At this juncture the investigators concluded the interview and explained to Zayac and his attorney that they were going to finish an interview that they had been conducting with Gonzalez. GA248.

C. March 9, 2009

Zayac participated in a second proffer session on March 9, 2009. At the outset of the interview, Zayac apologized for previously lying to the investigators. He explained that he was afraid of Gonzalez. GA249.

Zayac confirmed that he had a prior marijuana relationship with Rivera. With respect to the February deal, Zayac now stated that the deal was for 60 pounds at a cost of \$140,000. Zayac said that he had saved the money from legitimate work and prior drug deals. He stated that he kept the cash in a shoebox in his parents' house. GA249.

During the interview, Zayac stated that his story about Trey was a lie. Zayac then stated that he arranged with Gonzalez to get a drink on Saturday, February 7, 2009. He explained that earlier in the day he met with Rivera and drove him downtown, where Rivera picked up duffel bags of marijuana. Although Rivera offered to let Zayac take the marijuana, Zayac declined because he did not bring his money. Instead, Zayac dropped Rivera at his apartment and returned to Westchester to retrieve his \$140,000. GA250.

Zayac called Gonzalez while returning to meet with Rivera. Gonzalez asked Zayac to pick him up early because Gonzalez had been in an argument with his girlfriend. Zayac told Gonza-

lez that he could not because he was going to complete a marijuana deal. When Gonzalez insisted that Zayac pick him up, Zayac relented. After picking up Gonzalez, Zayac went to Rivera's apartment to complete the \$140,000 transaction. GA250-251.

Rivera came out of his building and put two bags of marijuana in the back of Zayac's Jeep. Rivera was nonplussed by the presence of a second person in Zayac's Jeep. Shortly after Rivera got in the Jeep, Gonzalez pulled what looked to be a small nine millimeter handgun. Gonzalez then threw a bag of zip ties at Rivera and told him to put them on his hands and feet. Rivera complied. After Zayac drove for about two minutes, Gonzalez shot Rivera. Zayac was able to maintain control of the car. As Zayac drove, Gonzalez told him, "Be happy it is not you." GA251-252.

Gonzalez added, that he was "selling" the marijuana to Zayac—in other words, he would keep Zayac's \$140,000, but allow Zayac to keep the 60 pounds of marijuana. GA252.

Zayac drove to DiBuono's house. He told Gonzalez that he was not going to continue further. Zayac moved the marijuana to DiBuono's Cadillac and then sat in the Cadillac. Gonzalez drove away in the Jeep with Rivera's body. GA252.

Gonzalez returned to DiBuono's residence a few hours later. Zayac was still sitting in the Cadillac. Gonzalez told Zayac that they needed to burn the Jeep. Zayac then drove the Jeep to the Bronx, where Gonzalez burned it. GA253.

Zayac stated that he sat on a curb as Gonzalez doused the Jeep in gasoline and lit it on fire. Zayac explained that an explosion caused flames to shoot out the vehicle. Both men were burned. They drove back to Gonzalez's house, where Gonzalez provided medical treatment to Zayac. GA253.

The investigators pressed Zayac on whether he had been in Danbury the night of the murder. Zayac ultimately admitted that he had been lying, again out of fear of Gonzalez. Zayac stated that although he and Gonzalez had been in Danbury, Zayac did not assist in dumping the body. Rather, Zayac sat behind the steering wheel as Gonzalez singlehandedly moved the body down the embankment. GA253-254.

Specifically, Zayac explained that Gonzalez propped Rivera's body up in the back seat, pulled it from the Jeep, and dragged it over the guardrail and down the hill. Zayac stated that Gonzalez was down the hill with Rivera's body for a few minutes. Zayac stated that the gun was in Gonzalez's backpack, which was in the front seat next to Zayac. GA267-268.

At the conclusion of the interview, Zayac told the investigators that about one week after the murder Gonzalez came to his house and told him to keep his mouth shut. GA254.

D. December 16, 2010

Zayac spoke to the investigators a fourth and final time on December 16, 2010. He was accompanied by four attorneys and was provided his *Miranda* warnings. GA268.

In this version of the events surrounding Rivera's murder, Zayac stated that he had arranged with Rivera to purchase between 50 and 70 pounds of marijuana, which Zayac would in turn deliver to Dana Lieberman. GA268.

Zayac stated that at about 1:00 p.m. on Sunday, February 8, Rivera called him and asked for a ride to New York City to pick up the marijuana. Zayac stated that he went to the Bronx, picked up Rivera and drove him to lower Manhattan to retrieve the marijuana. GA268-270.

Because Zayac did not have Lieberman's money, he took Rivera back to Rivera's apartment and continued back to DiBuono's house. GA270.

At 10:30 p.m., Zayac left DiBuono's house and went to his parents' house to get \$120,000 that he had stashed in a book bag. Zayac stated that earlier in the week he and Gonzalez had been

discussing going to a deli in New York City. Zayac called Gonzalez and explained that he was on his way to pick up some marijuana, but that when he was done with the deal he would take Gonzalez to the deli. Gonzalez told Zayac that if Zayac was not going to come before the deal, he should not bother coming. GA270.

Zayac agreed to pick up Gonzalez first. Gonzalez got into the Jeep and put a book bag in the back seat. Gonzalez told Zayac he had a change of clothes in the bag. GA271.

Zayac intended to sell the marijuana to Dana Lieberman for between \$2,750 and \$2,800 a pound. GA271.

As Zayac and Gonzalez waited for Rivera to come out of his building, a mutual friend, Jesse Sanchez walked past Zayac and, recognizing him, waved. Rivera came out and put the marijuana in the back of Jeep. GA271.

Zayac planned to drive around the block, as he usually did, and return Rivera to his building. As Zayac was driving, Gonzalez brandished a small, black semi-automatic firearm. Gonzalez assured Zayac and Rivera that nobody would get hurt. When Rivera refused to bind himself with zip ties, Gonzalez shot him. The shooting startled and frightened Zayac, who screamed and cried. Gonzalez responded by telling Zayac he should be glad he too had not been shot. GA272.

Gonzalez told Zayac that if he drove to Scarsdale, Gonzalez would burn the Jeep and the dead body right in front of Zayac's parents' house. Gonzalez told Zayac to drive to Danbury because they would dump the body near Rob Schweit's house. GA272.

Zayac got lost. But Gonzalez directed him where to go, eventually instructing Zayac to pull over on a secluded road next to the Padanaram Reservoir. Gonzalez tried to pull Rivera's dead body out of the Jeep by himself. Zayac refused to help. When Gonzalez threatened to burn the car on the spot with the body in it, Zayac relented. Together, they got the body out of the car and dropped it over the guardrail. Zayac closed the Jeep's doors and got back into the driver's seat. Gonzalez rolled the body down the hill by himself. GA272.

Zayac sat alone in the Jeep with the gun and marijuana for a few minutes. GA267, 272.

When Gonzalez returned to the Jeep, Zayac drove to DiBuono's house. Zayac put the marijuana in a shed next to her house. GA273.

They then drove to Gonzalez's house in the Bronx. Zayac told the investigators that he continued to attempt to resist Gonzalez's directives. Specifically, Zayac told Gonzalez that he would not participate in the burning of the Jeep other than to drive Gonzalez to the location. Gonzalez

took the \$120,000 into his house. Zayac removed some personal effects from the Jeep and put them in Gonzalez's Mercedes Benz. GA273.

Zayac followed Gonzalez to a gas station. Zayac remained in his Jeep while Gonzalez parked his car and walked across a divided highway to purchase a container that he filled with gasoline before crossing the divided highway again. Zayac then followed Gonzalez to the area where Gonzalez burned the vehicle. GA274, 328.

Initially, Zayac sat in Gonzalez's car while Gonzalez prepared to burn the Jeep. But a moment before Gonzalez ignited the Jeep on fire, Zayac recalled he had spare set of keys in the Jeep. As Zayac reached into the Jeep to retrieve the spare keys, Gonzalez dropped the match that ignited a huge conflagration. Gonzalez ducked, and the flames rushed past him and burned Zayac. Gonzalez treated Zayac for his burns and gave him new clothes. GA274.

Zayac used Gonzalez's phone throughout the evening—at approximately 2:30 a.m. and then again at 4:39 a.m. and 5:21 a.m.—to call DiBuono. GA274, 316-317.

Summary of Argument

I. The district court properly declined to charge the jury on the affirmative defense of duress because Zayac failed to establish the requi-

site evidentiary foundation to warrant such an instruction. By his own admission, Zayac was alone in a running vehicle and in possession of a firearm and cellphone while his alleged coercer was on the other side of a guardrail, down a steep embankment, concealing a 232-pound lifeless body in an isolated area in the middle of the night. A few hours later, Zayac was again alone in a running vehicle, this time separated from his alleged coercer by several lanes of a divided road while his alleged coercer purchased gasoline. This Court's cases make clear that the opportunity to escape eviscerates the duress defense, and thus, the district court properly declined to instruct the jury on this affirmative defense.

II. The district court's evidentiary rulings did not deprive Zayac of a fair trial and did not amount to an abuse of discretion. *First*, the court did not abuse its discretion to exclude evidence of the codefendant's possession (nearly a month after the murder) of an empty holster designed for a .380 caliber firearm because neither the murder weapon nor the bullets were ever recovered. Given the uncertainty of the caliber of the murder weapon, there were too many speculative inferences for the jury to conclude that the codefendant's possession of a holster designed for a .380 caliber firearm tended to prove that he possessed and used the murder weapon. The

court's exclusion of this evidence, under these circumstances, was not an abuse of discretion. Moreover, to the extent the holster was relevant to show the codefendant possessed the murder weapon, that evidence actually corroborated the government's theory that the defendants acted in concert, and that Zayac aided and abetted in the murder by luring the victim to the back of his Jeep where he could be kidnaped, robbed and murdered.

Second, the court properly excluded the proposed testimony of Zayac's former lawyer that Zayac told him he lied to investigators because he feared the codefendant. This testimony was irrelevant, plain hearsay, and not admissible as a state-of-mind exception or as a statement supporting the defendant's credibility. Zayac's mental state in early March 2009, weeks after the crimes were completed, was irrelevant to the question of his state of mind on February 9, 2009—the night of the crimes. Because Zayac's statement to his attorney was simply an out of court statement offered to prove the truth of the matter, it was hearsay. The statement, moreover, did not qualify as a hearsay exception under Fed. R. Evid. 803(3) because the statement was clearly a statement of belief to prove the fact believed. Zayac's reliance on Fed. R. Evid. 806 is equally unavailing. That rule permits hearsay testimony to support a declarant's credibility

where the declarant's credibility has been attacked by the admission into evidence of a statement pursuant to Fed. R. Evid. 801(d)(2)(C),(D) or (E). Here, the government introduced Zayac's statements pursuant to Fed. R. Evid. 801(c) and 801(d)(2)(A). Finally, even if the district court abused its discretion in excluding the statement, it was harmless error given that the crux of the proposed testimony was already before the jury.

III. Sufficient evidence supported each of the counts of conviction. Viewed in the light most favorable to the government and drawing all reasonable inferences in favor of the government, the evidence established that Zayac planned with Gonzalez to set up, kidnap, rob and kill Edward Rivera and then dispose of his body in a remote area before setting fire to the Jeep that contained the forensic evidence of the crime. Phone records show that Zayac and Gonzalez were in continuous contact on the day and evening of the murder. Zayac used a separate phone to contact Rivera, setting him up by agreeing to pay an above-market price. Rivera was not surprised by Zayac bringing a second person to the deal. Zayac kept the stolen marijuana, worth more than \$100,000, and the defendants worked together throughout the evening and morning of Rivera's murder to complete the crimes and destroy evidence. Rather than report the crimes,

Zayac had his girlfriend falsely report the Jeep stolen. And Zayac repeatedly lied to authorities, often incredibly and always trying to fit his account to the facts that the investigators were uncovering.

Argument

I. The district court properly declined to instruct the jury on the affirmative defense of duress.

A. Relevant facts

On July 18, 2011, Judge Hall convened a charging conference at the conclusion of the third day of trial. For the first time, the defense raised the issue of duress, GA198, explaining “[t]his case comes down to the defendant’s testimony.” GA199. In support of the request, counsel stated:

Andrew Zayac will say well, I lied on day one but I lied because I believe Mr. Gonzalez was out. He had already killed somebody in my car. I was afraid for my girlfriend and family so I lied on day one. I lied on day two. I thought he was out until I realized when they transported me back to the facility that they finally arrested him. I contacted my lawyer and on [March 9] I told the truth as much as they were

willing to listen to. A year later I had another sit down. I told them all the truth.

GA199. Judge Hall explained that she would take the matter under advisement and wait to hear further testimony before ruling. GA199, GA261.

The government rested on July 20, 2011, and the defense elected not to put on a case. GA300-301. The court then convened another charging conference. GA302-310.

With respect to the appropriateness of a duress instruction, the court considered the burning of the Jeep first. The court declined to give the instruction because Zayac did not face an imminent threat and had an opportunity to escape when he sat in his Jeep while Gonzalez was purchasing gas across the street. GA304. The court then considered the applicability of a duress charge to the kidnaping charges and then the robbery charges. With respect to these charges as well, Judge Hall denied the requested instruction:

The pending issue is whether the defendant is entitled to a duress charge on Count One and Count Four. It is this Court's view that with respect to Count One, the kidnaping charge, that that crime occurred from and after the first threat. This is based on the defendant's

version. The first threat of Mr. Gonzalez towards Mr. Rivera including the ties and the pointing of the gun. It continued through the murder of Mr. Rivera and I believe the case law supports the conclusion it continues until the person or persons who kidnapped Mr. Rivera, in effect, lose custody or control over the body and based upon the evidence before me upon which the defendant is relying for his duress offense, that our [sic] occurred when Mr. Gonzalez left the body at the bottom of the hill. Therefore, the same opportunity to escape, the same lack of imminent harm undercuts the claim of duress by the defendant and therefore I do not believe there's any evidence from which a reasonable jury could conclude there was imminent harm while Mr. Zayac sat in the car at the top of the embankment.

With respect to the robbery, the case law indicates that when you rob an[d] attempt, the crime continues until you reach a safe haven or a place where the stolen item can be hidden or covered up or out of view. That's why people who drive getaway cars for bank robberies are liable as well. In this instance, the robbery of the marijuana continued at least until the return of [sic] Scarsdale and could be put in

the trunk of Ms. DiBuono's car. Could be said to be continued until the time it went behind the wall in Mr. Zayac's how [sic]. But certainly to the time it went to Ms. DiBuono's trunk. Therefore the robbery was continuing while Mr. Zayac sat in that car under his version of what happened with Mr. Gonzalez at the bottom of the steep embankment with the opportunity for Mr. Zayac to escape and the absence of any imminent threat of bodily or serious body injury as required by the offense. Therefore the court concludes there's not a factual basis upon which a jury could reasonably find that Mr. Zayac was under duress during the commission of the crimes in Counts One and Four and the Court will not charge on the duress defense as requested.

GA311.

B. Governing law and standard of review

This Court "review[s] the propriety of a jury instruction *de novo*." *United States v. Abelis*, 146 F.3d 73, 82 (2d Cir. 1998). In *United States v. Prawl*, 168 F.3d 622 (2d Cir. 1999), the Court held that a conviction will be vacated "on account of a missing requested instruction [only] if (1) the requested instruction was legally correct;

(2) it ‘represents a theory of defense with basis in the record that would lead to an acquittal’; and (3) ‘the theory is not effectively presented elsewhere in the charge.’” *Id.* at 626 (quoting *United States v. Vasquez*, 83 F.3d 574,577 (2d Cir. 1996)); accord *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000).

The affirmative defense of duress has three discrete elements:

(1) a threat of force directed at the time of the defendant’s conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity.

United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005); *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994).

Whether to allow a defense of duress to be presented is a question of law. *See, e.g., United States v. Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990). To be entitled to present evidence to the jury and then to obtain a jury instruction on the defense of duress, a defendant must present “some evidence on each of the elements of the defense.” *United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995); *United States v. Paul*, 110 F.3d 869, 871 (2d Cir. 1997) (“To be entitled to the ju-

ry charge, [the defendant] only had to raise a factual issue regarding each element of the defense.”); *Podlog*, 35 F.3d at 704 (defendant entitled to instruction on an affirmative defense only if the defense has “a foundation in the evidence.”) (internal quotation marks omitted); *United States v. Agard*, 605 F.2d 665, 667 (2d Cir. 1979) (defendant has the burden to “produce evidence which would support the defense of duress”).

With respect to the third element of the defense, the lack of opportunity to escape, this Court has emphasized that “[w]here there is reasonable opportunity to escape the threatened harm, the defendant must take reasonable steps to avail himself of that opportunity, whether by flight or by seeking the intervention of the appropriate authorities.” *United States v. Bakhtiari*, 913 F.2d 1053, 1058 (2d Cir. 1990) (quoting *United States v. Alicea*, 837 F.2d 103, 106 (2d Cir. 1988)); see also *Gonzalez*, 407 F.3d at 122; *United States v. Caban*, 173 F.3d 89, 94 (2d Cir. 1999) (defendant properly barred from asserting duress defense where “[h]e had several opportunities to end his involvement in the conspiracy and warn the police, but he did not do so”). A defendant is obligated to take any “reasonable opportunity to escape the threatened harm.” *Alicea*, 837 F.2d at 106.

The standard is an objective one; it does not excuse failures to act based on subjective distrust of the police or similar motivations. See *Gonzalez*, 407 F.3d at 122 (defendant’s subjective belief in futility of going to police was insufficient to demonstrate that no reasonable alternative to violating the law existed); *United States v. Jankowski*, 194 F.3d 878, 881, 883 (8th Cir. 1999) (defendant’s distrust of police, which arose from father’s imprisonment in Poland and criminal justice class at community college, did not satisfy the requirement that defendant make *prima facie* showing “that he had no reasonable, legal alternative to violating the law”); *United States v. Posada-Rios*, 158 F. 3d 832, 873 (5th Cir. 1998) (“A defendant’s subjective belief as to available legal alternatives is not determinative. As long as defendant’s crises permitted a selection from among several solutions . . . the necessity defense must fail.”) (citation and internal quotation marks omitted).

If a defendant fails to present “sufficient evidence to warrant a finding of duress, the trial court is not required to instruct the jury on [the] defense.” *United States v. Mitchell*, 725 F.2d 832, 837 (2d Cir. 1983); *United States v. Agard*, 605 F.2d 665, 667 (2d Cir. 1979); accord *Podlog*, 35 F.3d at 704. Accordingly, this Court encourages trial courts to decide the issue in advance of tri-

al. *Bakhtiari*, 913 F.2d at 1057; *see also Villegas*, 899 F.2d at 1344; *Paul*, 110 F.3d at 871.

The burden at such a hearing is on the defendant to present some evidence on each of the elements of the defense. *See, e.g., Jaswal*, 47 F.3d at 544. If the court finds that the defendant's evidence is insufficient as a matter of law to establish an element of the duress defense, the court may preclude the defendant from presenting evidence of that defense to the jury. *See United States v. Bailey*, 444 U.S. 394, 415-416 (1980); *Villegas*, 899 F.2d at 1343.

C. Discussion

The district court properly denied Zayac's request to instruct the jury on duress because Zayac did not lay a foundation that satisfied either the first or third elements of the duress defense. In particular, by his own, self-serving account, Zayac was not in imminent harm and had an opportunity to escape as he sat in the Jeep at the top of the embankment with a gun and cell phone. In short, because the record did not support a finding of duress, the district court properly declined to instruct the jury on the defense.

Because Zayac did not testify at trial, the record to support his duress defense rested on the four pre-trial statements he made to law enforcement, as introduced by the government

through the testimony of Detective Trompetta and Agent George. Zayac's four internally inconsistent statements were a poor attempt to provide an account of events that absolved him of all culpability and, as time passed, to fit the facts the police were uncovering. Nevertheless, the court construed Zayac's statements in a light most favorable to the defendant. GA304. As such, Zayac's duress claim for the kidnaping and robbery charges was built on this foundation:

- Zayac drove to the Bronx with \$120,000 to buy marijuana from Rivera. GA270.
- After the deal, Zayac planned to take his friend Gonzalez to a deli in New York City. GA270.
- Gonzalez prevailed upon Zayac to pick him up first. GA251, 270.
- Gonzalez did not pull on gun on Zayac and rob him of the \$120,000.
- Zayac brought Gonzalez to the drug deal. GA271.
- Gonzalez shocked Zayac by murdering Rivera in the Jeep. GA251, 272.
- Gonzalez threatened Zayac, saying "be happy it is not you." Gonzalez also told Zayac that he was "selling" the marijuana to Zayac. GA252.

- Gonzalez directed Zayac to the spot next to Padanaram Reservoir in Danbury, Connecticut. GA272.
- Zayac refused to help Gonzalez dispose of the 232-pound body. GA272.
- Gonzalez threatened Zayac that he would burn the Jeep right there, on the road next to the reservoir. GA272.
- Zayac relented, and helped pull the body from the Jeep. GA272.
- Gonzalez got the body down the embankment and placed it behind the outcropping of trees. This took several minutes. GA267, 272, 323.
- While Gonzalez was down the embankment for those several minutes, Zayac sat alone in the Jeep. He had his cell phone and Gonzalez's gun. GA267-268, 272.

On this record, Zayac could not show that he had “no reasonable opportunity to escape other than by engaging in the otherwise unlawful activity.” *Mitchell*, 725 F.2d at 837; *Agard*, 605 F.2d at 667. As in *Mitchell*, Zayac “was not in company with his alleged coercer,” 725 F.2d at 837, at all times during the crime. The evidence instead establishes that Zayac had an indisputable opportunity to escape while the crimes were ongoing. Most significantly, according to Zayac’s

own statements, he sat alone in the Jeep at the top of the embankment—with his cell phone and Gonzalez’s gun—while Gonzalez dumped Rivera’s body. During those moments, as the district court fully recognized, Zayac was not in imminent danger and had an opportunity to escape and avoid further unlawful activity.

This Court has held that “where there is a reasonable opportunity to escape the threatened harm, the defendant must take reasonable steps to avail himself of that opportunity, whether by flight or by seeking the intervention of the appropriate authorities.” *Bakhtiari*, 913 F.2d at 1058 (internal citation omitted). Critically, “even a small window of opportunity to escape is sufficient to preclude the duress defense as a matter of law.” *United States v. Pestana*, 865 F. Supp. 2d 357, 368 (S.D.N.Y. 2011), *aff’d*, *United States v. Ortiz*, 520 Fed. Appx 41 (2d Cir. 2013) (unpublished decision). Here, Zayac had even more than “a small window of opportunity to escape”; he had several minutes alone in a Jeep with a cell phone.

United States v. Alicea, 837 F.2d 103 (2d Cir. 1988), illustrates how short Zayac falls in making the required showing under these standards. In *Alicea*, the defendants sought a duress instruction based on their testimony that they had been raped and forced to carry drugs onto a plane under the eye of a “watcher.” *Id.* at 104-05.

The defendants also testified that their coercers threatened to harm their families if they failed to cooperate. *Id.*

The *Alicea* Court affirmed the denial of a duress charge, however, because it could identify several instances where the defendants failed to take sufficient action to extricate themselves from harm's way. First, the defendants had "twenty minutes" in the airport during which they might have escaped their watcher. *Id.* at 105. Once on the plane, the court reasoned, each defendant had opportunities to "separate herself from her companion" and "complain to the cabin attendants or the officers on the plane." *Id.* at 105-06. Finally, at a stopover in Miami, the *Alicea* Court determined that the defendants could have "elude[d] the 'watcher' and alert[ed] the authorities." *Id.* On these facts, this Court held that "the appellants . . . clearly took no steps, reasonable or otherwise, to extricate themselves" and were thus not entitled to a duress instruction. *Id.* at 106.

Here, Zayac offered no evidence to explain why he did not drive off with the murder weapon and cell phone, leaving the killer 60 miles from home and literally in the dark with a dead body. Accordingly, just as in *Alicea*, because Zayac had an opportunity separate himself from the alleged "threat" (Gonzalez) and did not do so, he was not entitled to a duress instruction.

Whether Zayac subjectively believed that he could not escape is irrelevant because the availability of a reasonable opportunity to escape “is measured by an objective standard.” *Pestana*, 865 F. Supp. 2d at 368 (citing *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998)); *Gonzalez*, 407 F.3d at 122 (defendant’s “subjective belief that going to the police would have been futile [wa]s insufficient to demonstrate that she had no reasonable alternative but to violate the law.”).

The same analysis pertains to the applicability of the duress charge to the obstruction counts. Taking Zayac’s evolving statements in the light most favorable to him, the following facts constituted Zayac’s foundation:

- After Gonzalez dumped Rivera’s body behind the trees in Danbury, Zayac drove him back to New York. GA273.
- Gonzalez allowed Zayac to call his girlfriend at approximately 2:30 a.m. to advise her he would be home soon. GA274, 316.
- Gonzalez gave the stolen marijuana, worth at least \$120,000, to Zayac.
- Zayac stashed the stolen marijuana at DiBuono’s residence and then drove Gonzalez back to his Bronx residence. GA177-178, 273.

- Gonzalez forced Zayac to participate in the burning of the Jeep, which contained evidence of the murder. GA273.
- Zayac followed Gonzalez to a remote area in the Bronx. Along the way, Gonzalez stopped at a gas station to purchase gas. Zayac waited in his Jeep across the street. GA274, 328.
- Zayac declined to participate actively in the torching of the Jeep. Instead, he sat in Gonzalez's car. GA274.
- But as Gonzalez was about to light the Jeep on fire, Zayac went into the Jeep to retrieve a spare set of keys. GA274.
- Both Gonzalez and Zayac suffered bad burns. GA66, 177-178, 180.
- Gonzalez, a former EMT, treated Zayac's burns, gave him new clothing to replace the burned clothing, and drove him back to DiBuono's residence. GA274.

Again, as a matter of law, Zayac was not entitled to a duress instruction on these facts. He failed to show that he was in imminent danger or that any circumstance precluded him from attempting an escape when he was alone in his Jeep across the street from a gas station. The district court properly refused to give a duress

instruction when the evidence showed plainly that Zayac could simply have driven away.

Zayac cites multiple Second Circuit holdings for the proposition that a defendant is entitled to a duress instruction whenever there is a “foundation in the evidence.” *E.g.*, *Paul*, 110 F.3d 860; *Podlog*, 35 F.3d at 704); *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). He recognizes, however, that he must establish a “foundation in the evidence” for each element of the defense—including that he had no reasonable opportunity to escape. *See* Br. at 20-21. Having recognized this critical requirement, Zayac then ignores it, arguing instead that “[t]here was ample evidence of duress, Gonzalez’s unexpected brandishing and use of a gun to murder Rivera, threats to Zayac, and Zayac’s fear that he could not safely disentangle himself from Gonzalez.” *Id.* at 23. With respect to the seminal moments when Zayac was alone in his Jeep—at the top of the hill and across the street from the gas station—the defense erroneously asserts that the district “court was not entitled to parse the record and find an instance where Zayac’s escape may have been reasonably or theoretically possible.” *Id.*

But that is not the law. This Court has never endorsed such a strait-jacketed approach to the analysis of when a duress instruction is appropriate. The law clearly requires that defendants

take advantage of any reasonable opportunity to escape during the course of the offense, and this Court has had little difficulty in determining so in many prior instances. *See Gonzalez*, 407 F.3d at 122; *Caban*, 173 F.3d at 94; *Bakhtiari*, 913 F.2d at 1057-58; *Villegas*, 899 F.2d at 1343-44; *Alicea*, 837 F.2d at 106; *Mitchell*, 725 F.2d at 836-37; *see also United States v. Nwoye*, 663 F.3d 460, 463 (D.C. Cir. 2011) (noting that the Second Circuit, in *Alicea*, “imposed a . . . high bar” for establishing duress claims where opportunity to escape exists); *Pestana*, 865 F.Supp.2d at 360-368.

Zayac’s reliance on *United States v. Paul*, 110 F.3d 869 (2d Cir. 1997), moreover, is misplaced. In *Paul*, this Court held that it was a question for the jury to determine whether the defendant had the chance to escape at some point *after* being confronted with the choice of imminent danger or unlawful action. *Id.* Paul was entitled to a duress instruction because he *made an evidentiary showing* that, after being confronted with a weapon, he had no opportunity to escape. *Id.* The Court in *Paul* explained that its ruling “turn[ed] on *the point in time* as to which the defendant faced imminent danger and lacked an opportunity to avoid the danger.” *Id.* at 871 (emphasis added).

Here, by contrast, Zayac can point to no evidence that he lacked an opportunity to escape

after being faced with the choice of imminent danger or continuing unlawful activity. Although the fatal shots had already been fired, the crime was ongoing as a matter of law when Zayac's opportunity to escape arose. GA310; *see, e.g., United States v. Seals*, 130 F.3d 451, 462 (D.C. Cir. 1997) (“[T]he crime of kidnapping continues while the victim remains held.”); *United States v. Grubczak*, 793 F.3d 458, 464 (2d Cir. 1986) (holding that a robbery continues throughout the “escape phase”).

Simply put, Zayac put forth no evidence to show that he was precluded from taking advantage of the two opportunities to escape. Therefore, there is no question for the jury to decide. Even under *Paul*, Zayac was not entitled to a duress instruction as a matter of law. *Id.* (“If . . . the court finds that the defendant's evidence is insufficient as a matter of law to establish the defense, the court is under no duty to give the requested charge.”).

Zayac's attempts to distinguish *Mitchell* and *United States v. Bailey*, 444 U.S. 394 (1980), are unavailing. In *Mitchell*, the Court found that because the defendant had not been in his alleged coercer's constant presence in the days leading up to the crime, he was not entitled to a duress instruction. *Mitchell*, 725 F.2d at 837. While the opportunities to alert the authorities in *Mitchell* arose over multiple days, *Mitchell* nonetheless

establishes that if the defendant is outside the presence of his alleged coercer, he must attempt to escape or alert the authorities if he is to get a duress instruction at trial.

Bailey involved prison escapees who claimed that terrible prison conditions forced them to escape. *Bailey*, 444 U.S. at 412-15. The *Bailey* Court held that the defendants were not entitled to a duress instruction because they failed to surrender to the authorities while the crime (escaping prison) was ongoing even though the opportunity presented itself. *Id.* *Bailey* required a “bona fide effort” by the escapees to “surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.” *Id.* That is, *Bailey* required affirmative action to avoid an ongoing violation of the law “as soon as” the opportunity to arose. Here, the crime was ongoing at the moment Zayac could have attempted to escape and alert the authorities. But Zayac failed to take any steps to do so. Zayac made no “bona fide effort.” *Id.* Thus, while *Bailey* does deal with very different factual circumstances, it further supports the district court’s decision not to grant a duress instruction.

Finally, Zayac posits that the government must disprove some element of the duress defense beyond a reasonable doubt. Br. at 28. But as Zayac himself recognizes, the government only has the burden of disproving an element of

duress once defendant has made the necessary initial showing. *Mitchell*, 725 F.2d at 836. Here, Zayac did not make a sufficient showing to give rise to any burden on the government.

In conclusion, because Zayac failed to establish a complete evidentiary foundation for a duress defense, the district court properly declined to instruct the jury on that defense.

II. The district court did not abuse its discretion in precluding evidence of either an empty holster found in Gonzalez's home or the hearsay testimony of the Zayac's former attorney.

A. Relevant facts

1. Empty holster

On March 3, 2009, Gonzalez consented to a search of his residence. Investigators found in the top drawer of his bureau a leather holster that had a side pouch to hold a cartridge for ammunition. The holster was empty. The investigators did not find a gun or any ammunition in Gonzalez's apartment. GA1-2.

The district court excluded evidence of the empty holster and magazine from Zayac's trial.⁶ The court ultimately determined that the empty

⁶ The court also excluded this evidence from the Gonzalez trial. A24.

holster, while relevant, “is not very probative of the issues in this case.” GA135. The court reasoned that the probative value of the evidence was significantly diluted by the many inferences the jury would have to make to connect the recovery of the holster to Gonzalez’s possession and use of a firearm during the murder of Rivera. In particular, the jury would have to infer from Gonzalez’s possession of an empty holster on March 3 that he possessed that holster on the night of the murder. The jury would also have to infer that because he possessed a holster, he possessed a gun on the night of the murder, and further that that gun was one of the four types of guns that could have caused Rivera’s death. GA135. In short, the holster was not “very probative of the issues in this case.” GA135. The district court then conducted the balancing test proscribed by Fed. R. Evid. 403. In balancing the probative value of the holster with the danger of unfair prejudice, the court concluded that because of the multiple speculative inferences required, there was “too high a risk that the jury will form its conclusion based upon the speculative inferences as opposed to the evidence that’s introduced.” GA135.

The Chief Medical Examiner, Dr. Wayne Carver, testified in the government’s case-in-chief about the two gunshot wounds that killed Rivera. On cross-examination, Dr. Carver was

asked if he could “say with any degree of medical certainty what size the bullet might have been that caused Mr. Rivera’s injuries?” GA157. Doctor Carver responded that the gun was likely an “intermediate” sized gun, although he could not be more specific on the actual size: “I could rattle off a whole bunch of numbers and still miss by a mile.” GA157. Dr. Carver agreed that Rivera’s gunshot wounds “could have” been caused by a 9 mm firearm or a .380 caliber firearm. GA157. Dr. Carver also testified, however, that other size guns could have killed Rivera, including a .38 revolver, a “40” or “.45.” GA158.

2. Hearsay testimony from Zayac’s former lawyer

On July 18, 2011, during the first charging conference, the defense advised the court that it intended to call Attorney Geoffrey Orlando as a witness in its case-in-chief. Attorney Orlando represented Zayac at the March 3 and 9, 2009 proffer sessions. GA200. The defense explained that Orlando would testify that Zayac told him on March 4 that he had lied to investigators on March 1 and 3 because he feared Gonzalez, who had threatened him. GA198-200.

The court conducted a hearing out of the jury’s presence the next day, July 19, 2011. GA255-259. Orlando testified that:

Q. What did Mr. Zayac say to you regard to the March 3 proffer?

A. Well, he apologized to me for lying to me and to the agents about a number of factors of the events of the night of this incident.

Q. Did he explain to you why he lied on March 3?

A. Yes. He said that the co-defendant Mr. Gonzalez threatened to kill him and threatened to kill his family and his girlfriend if Andrew brought him into the picture that Mr. Gonzalez was the shooter that night and he threatened him.

Q. Was Andrew concerned at this point March 4 if Mr. Gonzalez was in fact in custody?

A. Yes, he was. It was of great concern to him.

Q. Did he tell you that concern was foremost in his mind on March 3 when he did the proffer?

A. Yes absolutely.

GA256.

At the conclusion of the hearing, Judge Hall precluded Orlando's testimony, explaining: (1) Zayac's state of mind in early March was irrele-

vant to the issue of duress and (2) to the extent the proffered testimony was offered to rebut the government's claims that Zayac had made false statements, the testimony was a premature attempt to invoke Fed. R. Evid. 801(d)(1)(B). GA259-260.

B. Governing law and standard of review

Rule 403 of the Federal Rules of Evidence provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]”

“Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence’s probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational.” *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *see also United States v. Desposito*, 704 F.3d 221, 234 (2d Cir.), *cert. denied*, 133 S. Ct. 2402 (2013); *see also United States v. Pipola*, 83 F.3d 556, 565 (2d Cir. 1996) (trial court’s ruling after a conscientious balancing of probative value versus unfair prejudice will not be reversed on appeal absent a clear showing of abuse of discretion); *United States v. Ramirez*, 894 F.2d 565 (2d Cir. 1990) (same).

A district court’s evidentiary rulings are reviewed for abuse of discretion. *United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009). “To find abuse, the appellate court must find that the trial court acted arbitrarily or irrationally.” *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (citations omitted). Even if a court abuses its discretion by excluding a particular piece of evidence, the conviction may be vacated only if there has been a violation of a “substantial right,” such that the error was not harmless. See *United States v. Ebbers*, 458 F.3d 110, 122 (2d Cir. 2006).

C. Discussion

1. Empty holster

The district court exercised sound discretion in excluding the holster found at Gonzalez’s home. As Dr. Carver’s testimony made clear, it was not possible to say with certainty what type and size firearm was used to kill Rivera. While acknowledging that a 9 mm caliber firearm *could* have been used—thus supporting Zayac’s statement that Gonzalez used what appeared to be a 9 mm to shoot Rivera—the record also supported the conclusion that there were other sizes and types of firearms that could have also been used, including: .380 caliber, .40 caliber, 10 mm, and .45 caliber. As Dr. Carver explained, he could “rattle off a whole bunch of numbers and

still miss by a mile.” GA157. The uncertainty of the caliber of the murder weapon supported the court’s ruling that there were too many “speculative inferences” for the jury to conclude that Gonzalez’s possession of a holster designed for a .380 caliber firearm tended to prove that he possessed and used the weapon that killed Rivera. Given the range of different firearms that could have been used to murder Rivera, the court’s exclusion of this evidence was neither “irrational” nor an abuse of discretion.

In any event, even if the court erred in excluding the holster, any error was harmless because there was substantial evidence in the record to support Zayac’s convictions under an aider and abettor theory. While the admission of the holster may have tended to implicate Gonzalez as possessing a firearm and possibly the firearm that killed Rivera, such evidence also *corroborated* the government’s theory that Gonzalez and Zayac perpetrated these crimes together and that one of them brought the firearm and one (or both) used the firearm to shoot Rivera. For purposes of the defendant’s criminal liability, however, it did not matter who owned, possessed, or used the firearm, so long as the evidence proved that each defendant aided and abetted the other in the commission of the crimes. In this regard, even if the jury were to have reasonably concluded that the empty holster tended to prove

Gonzalez possessed the murder weapon, there is little doubt that the defendant fully, intentionally and voluntarily participated in the kidnaping, robbery and murder of Rivera.

2. Hearsay testimony

The district court properly excluded the proffered hearsay testimony from Zayac's former lawyer. Zayac wanted to present the testimony of Attorney Orlando, his former lawyer, that he (Zayac) apologized to him for lying to the investigators on March 3 and that Zayac said he lied because he feared Gonzalez. As the district court recognized, this proffered evidence of Zayac's state of mind in early March was irrelevant to Zayac's state of mind on the night of the murder and thus irrelevant to the validity of a duress defense. Moreover, to the extent that Zayac offered this testimony to bolster his own credibility, the court properly found that this effort was premature because Zayac had not yet testified. GA259-260.

On appeal, Zayac argues that his lawyer's proffered testimony should have been admitted under the "state-of-mind" exception to the hearsay rule (Rule 803(3)) or as a statement supporting Zayac's credibility under Fed. R. Evid. 806. These arguments are untenable. Orlando's testimony did not fall under the Rule 803(3) hearsay exception; it was not relevant; and it was not

admissible as a statement supporting (or attacking) Zayac's credibility. The district court therefore did not err in excluding Orlando's testimony. But even if the court did err, any error was harmless because the substance of Orlando's proffered testimony was already before the jury.

First, the proffered statement did not qualify under Rule 803(3)'s "state-of-mind" exception to the hearsay rule. Under that exception, a statement is not excluded by the hearsay rule if it is:

[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed[.]

Fed. R. Evid. 803(3). The Federal Rules of Evidence, therefore, contemplate an exception to the exception: a statement that would otherwise be admissible under the state-of-mind exception is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed.

The Advisory Committee Notes explain that the "exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from

allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.”

A witness may testify to a declarant saying “I am scared,” but not “I am scared *because* the defendant threatened me.” The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase “because the defendant threatened me” is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid.

Turning to the case at hand, Rule 803(3) arguably would have permitted Orlando to relate any out-of-court statements Zayac made to him to the effect that Zayac was scared, or in any other state reflecting his then-existing mental or emotional condition (assuming the statement was relevant). But that is as far as Rule 803(3) would go. The state-of-mind exception would not permit Orlando to relate Zayac’s statements as to *why* he was scared or held any particular state of mind or what he might have *believed* that would have induced the state of mind.

The Fifth Circuit’s decision in *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980) illustrates this point well. In that case, the defendant

was convicted of impersonating a federal officer and making false statements. The defendant testified that he committed the crimes and lied because he feared a co-conspirator who had threatened him. The trial court permitted defense witnesses to relate any direct statements the defendant had made concerning his state of mind (that Cohen said he was scared), but prevented the witnesses from testifying as to the defendant's statements of belief, *i.e.*, that Cohen was scared because the co-defendant was threatening him. *Id.* at 1225. The Fifth Circuit affirmed, explaining that “[i]f the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—“I’m scared”—and not belief—“I’m scared because [the co-defendant] threatened me.” *Id.*

The *Cohen* Court’s analysis of Rule 803(3) is directly on point. While Rule 803(3) would permit Orlando to testify that Zayac said he was scared on March 3, 2009, the Rule would not permit Orlando to go further and testify for the defendant as to the basis for his belief.

The court properly excluded the proffered testimony for a *second*, equally persuasive reason: it was irrelevant. By its terms, Rule 803(3) allows hearsay statements concerning a declarant’s “*then-existing*” state of mind. Thus, Orlando’s description of Zayac’s fear could have cap-

tured only Zayac's state of mind on March 4—nearly a month after the crime was committed. Zayac's state of mind at the time of the *proffer*, however, was not probative in any way of his state of mind at the time of the *crime*. It had no bearing on either his *mens rea* or his potential duress defense. Accordingly, the district court properly exercised its considerable discretion in excluding the statement as irrelevant under Rule 401.

The government introduced Zayac's four pre-trial statements not as admissions, but instead as false exculpatory accounts. In *United States v. Marin*, 669 F.2d 73 (2d Cir. 1982), this Court succinctly identified the two theories under which the government typically introduces a defendant's statements:

When the government offers in evidence the post-arrest statement of a defendant it commonly does so for either of two reasons. It may wish to use the statement to establish the truth of the matter stated. In these circumstances, under Rule 801(d)(2)(A), the statement is not hearsay, because it is simply a statement of the opposing party. On the other hand, the government may wish to offer the statement to show that the defendant made false representations to the authorities, from which the jury could infer a consciousness of

guilt, and hence guilt. In these circumstances the statement obviously is not offered for the truth of the matter asserted, and therefore is non-hearsay under Rule 801(c), as well as non-hearsay under Rule 801(d)(2)(A) as the statement of an opposing party. Regardless of which purpose the government had in offering the defendant's statement, the statement as thus offered is not hearsay.

Id. at 84.

The *Marin* Court aptly noted that the rule does not work both ways: “when the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible. When the defendant offers his own statement simply to show that it was made, rather than to establish the truth of the matter asserted, the fact that the statement was made must be relevant to the issues in the lawsuit.” *Id.*

Here, Zayac's prior statement to Orlando that Gonzalez threatened him was hearsay if offered to prove that fact, and was irrelevant if offered simply to prove that Zayac made such an allegation. Accordingly, it was not admissible.

Finally, Orlando's testimony was not admissible under Fed. R. Evid. 806,⁷ which provides that a declarant's credibility may be attacked or supported in the same way that a witness's may be. Rule 806 provides in pertinent part:

⁷ Zayac submits that Judge Hall "suggested that she might revisit her ruling if Zayac elected to testify because his statements to Orlando might then be admissible as prior statements under Rule 806. A295 [sic]" Br. at 45. The government respectfully submits that the district court was contemplating the applicability of Rule 801(d)(1)(B), not Rule 806. "THE COURT: Right. Mr. Zayac could testify to [Gonzalez's threats and Zayac's attendant fear] because he's subject to cross-examination if he testifies. [The government] could on cross open the door, I suppose by suggesting he's making this up or it is a *recent fabrication*[,] It would seem to me at this point [Orlando's testimony] might be relevant or offered by the defense as a prior consistent statement." GA257. The court's statements are most naturally read as invoking Fed. R. Evid. 801(d)(1), which provides in relevant part that a prior consistent statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." This rule has no applicability in this case because Zayac did not testify.

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D) or (E)—has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

In this case, Zayac’s statements were not offered for the truth of the matter asserted, but rather as non-hearsay pursuant to Rule 801(c). Alternatively, his statements were admissible pursuant to *Rule 801(d)(2)(A)* as statements of an opposing party. *See Marin, supra*. Rule 806, by its very terms, does not apply to Rule 801(c) or Rule 801(d)(2)(A).

Zayac’s reliance on *United States v. Trzaska*, 111 F.3d 1019 (2d Cir. 1997), is equally unfounded because it has nothing to do with the issue on appeal. In *Trzaska*, the defendant was convicted of being a felon in possession of firearms. At trial, Trzaska did not testify. But his son testified that Trzaska said he “didn’t want nothing to do with [the guns] anymore,” which supported the defense that Trzaska did not intentionally possess several firearms. The gov-

ernment, relying on Rule 806, then sought to impeach the declarant's (Trzaska's) credibility by introducing a subsequent inconsistent statement that Trzaska had made to his probation officer that he was like "a drug addict with this"—an apparent reference to gun possession. This Court held that the district court erred when it concluded that the two statements were inconsistent. *Id.* at 1025. Here, the question is not, as it was in *Trzaska*, whether two statements are inconsistent such that they would fall within the ambit of Rule 806, but rather whether Rule 806 even applies at all.

In short, on this record, the district court was well within its discretion to exclude Orlando's proffered testimony. Moreover, even if the district court abused its discretion in excluding the evidence, it was clearly harmless error given that the gist of Orlando's testimony—that Zayac was afraid of Gonzalez—was already before the jury. Special Agent George testified twice that in Zayac's proffer of March 9, 2009, "he stated he had not been truthful on March 3 He stated he was afraid of Heriberto Gonzalez." GA249, GA253. See *United States v. Al Kassar*, 660 F.3d 108, 123 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 2374 (2012). In sum, the district court properly excluded the evidence, but even if there was error, it was harmless.

III. The trial evidence against Zayac was sufficient to establish his guilt.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts *supra*, and are supplemented where necessary below in the Discussion portion.

B. Governing law and standard of review

Because Zayac preserved the issue of evidentiary sufficiency at trial, this Court reviews the record *de novo* under the well-settled standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010).

The Supreme Court has never departed from the *Jackson* standard, which preserves the jury's role as fact-finder and weigher of the evidence. Accordingly, this Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. *Sabhnani*, 599 F.3d at 241.

The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on ap-

peal. *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

“[T]he task of choosing among competing inferences is for the jury, not a reviewing court.” *United States v. Salmonese*, 352 F.3d 608, 618 (2d Cir. 2003) (citations omitted); *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002). “The ultimate question is not whether *we believe* the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*.” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

The jury’s verdict will be upheld even when it is based entirely on inferences from circumstantial evidence. *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002); *see also United States v. D’Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994).

C. Discussion

Zayac argues “the government’s evidence of kidnaping, robbery, and related firearms charges⁸ was insufficient.” Br. at 3. According to Za-

⁸ Zayac’s argument addresses his convictions on Counts One, Three, Four and Seven. Zayac apparently concedes that the evidence was sufficient to

zac, because there was no direct evidence of what happened in the car, the government's case against him rested solely on the inferences from his false statements to the police. Br. at 3; 29-41. This argument rests on a simplistic and incomplete view of the evidence, and further rests on the failure to draw all inferences from the evidence in favor of the jury's verdict.

The government presented an ample body of circumstantial evidence at trial to prove that Zayac was not "merely present" at a crime, but rather was a fully involved criminal participant. The Court should reject Zayac's myopic view of the evidence.

Viewed in the light most favorable to the government and drawing all reasonable inferences in favor of the government, the evidence established the following: (1) Zayac set Rivera up, using the 3500 phone and agreeing to pay an above-market price; (2) Zayac needed Gonzalez's help to commit the crimes, and thus his presence in the Jeep was intentional and planned, as shown in part by Rivera's lack of surprise at finding Gonzalez at the scene of a drug deal; (3) Zayac was not surprised by the murder; (4) Za-

sustain his convictions for possessing marijuana with intent to distribute (Count Five) and the destruction and concealment of evidence (Counts Seven—Eleven).

yac and Gonzalez worked together throughout the night to complete the crimes and destroy evidence; (5) Zayac kept the stolen marijuana, worth more than \$100,000; (6) rather than report the crimes, Zayac had his girlfriend report the Jeep stolen; and (7) Zayac repeatedly lied about his involvement in the crimes.

- **Zayac set Rivera up**

Zayac used the 3500 phone to communicate exclusively with Rivera for approximately three months. He did not deal with any other drug connections—sources or customers—on this phone. He listed the number under a false name and discarded it after the robbery and murder. By February 2009, Zayac had progressed in his relationship with Rivera to the point where they were going to consummate a 70-pound drug deal worth between \$120,000 and \$175,000.

Zayac intended to set up and rob Rivera. The jury could also rationally conclude that to entice Rivera into the trap, Zayac agreed to pay above-market rates. Indeed, Rivera’s drug trafficking associate, Muzaffer Etemi, cautioned Rivera that the \$2,600/pound price seemed too good to be true. Rivera declined Etemi’s offer to help, however, because he trusted his Westchester customers who did not want Rivera to “bring any Albanians.”

In short, based on the evidence before it and the reasonable inferences from that evidence, the jury could reasonably conclude that Zayac intended to set up and rob Rivera, and that he enticed him into a trap with the promise of a big payout on a drug deal.

- **Zayac brought help, and Rivera was not troubled by the second person**

The jury could reasonably conclude that Zayac needed help to accomplish his plan for Rivera, so he brought Gonzalez into the scheme. Zayac brought Gonzalez to the drug deal. This did not happen as a matter of happenstance, as Zayac falsely claims. Gonzalez was meant to be there. The jury was free to reject the claim by Zayac that Gonzalez insisted that he get picked up before Zayac completed the major drug deal.

The jury was similarly free to reject Zayac's claim that his calls with Gonzalez on the day and hours before the murder were merely social chat about going to a deli in New York City, particularly given the perpetrators' actions in the wake of the murder when they jointly destroyed evidence of the crimes. Furthermore, common drug dealing etiquette strongly disapproves of strangers showing up for major deals. *See United States v. Chavez*, 947 F.2d 742, 745 (5th Cir. 1991) ("The jury . . . was entitled to consider the unlikelihood that the owner of such a large

quantity of narcotics would allow anyone unas- sociated with the conspiracy to be present during the unloading.”). In other words, Gonzalez was not in the Jeep by accident. He was there be- cause Zayac needed him.

That Gonzalez was not in the Jeep by acci- dent is further confirmed by Rivera’s reaction to his presence in the Jeep. When the co- defendants picked-up Rivera outside his apart- ment, Rivera loaded the marijuana into Zayac’s Jeep and got in the back seat without hesitation. The jury could reasonably infer that Rivera un- derstood Zayac would not be alone. Rivera had described his customers to Etemi as the Westchester guys. Just as Zayac would have balked at Gonzalez’s last minute presence if he was not part of the plan, so too would Rivera have protested if Gonzalez was an unexpected development.

Jurors are neither required to divorce them- selves from their common sense nor to abandon the dictates of mature experience which reason- ably may include their recognition that “crimi- nals rarely welcome innocent persons as wit- nesses to serious crimes *United States v. Her- nandez*, 995 F.2d 307, 314 (1st Cir. 1993).

- **Zayac was not surprised by the shooting**

Rivera was shot twice while seated in the back seat of the Jeep, where he died. The jury could reasonably infer that Zayac was not surprised by the shooting, and in fact, that the shooting was planned.

First, the jury could reasonably infer that the Jeep was parked when the shooting occurred or, if in motion, that Zayac (the driver) was prepared for Rivera to be shot. If Gonzalez shot Rivera unexpectedly while Zayac was driving, the gun would have been so close to Zayac's head that he likely would have been momentarily blinded and deafened. GA251-252, GA294. Zayac did not make this claim in any of his four false statements to the police. Nor did he claim that he almost crashed the Jeep at the unexpected shots. In addition, common sense dictates that it would be highly unusual to shoot someone in a moving vehicle, in traffic, where witnesses might be present.

Moreover, the jury was entitled to infer that the shooting, far from being a surprise to Zayac, was planned as part of the robbery. Given Rivera's connection to "the Albanians," the jury could infer that there was no way Zayac and Gonzalez were going to rob Rivera and leave him alive to seek retribution, especially when it was clear

that Rivera knew Zayac. In other words, Zayac had significant incentives to see Rivera killed.

- **Zayac and Gonzalez worked together to complete the crimes and destroy evidence**

The jury could reasonably infer that Zayac and Gonzalez planned the robbery and murder based on their coordinated actions on the night of the murder. Zayac and Gonzalez drove for approximately an hour to the Padanaram Reservoir in Danbury. They selected a remote spot in an area both where familiar with from their association with Robert Schweit, a former employer for whom they burned a vehicle.

After arriving at the Reservoir, they removed Rivera's 232-pound, lifeless body from the back seat. The jury could reasonably infer that Zayac and Gonzalez did this together. It would have been virtually impossible for one person to literally lift the dead weight over the guardrail and get the body to its ultimate resting place. And while it is possible the body was rolled down the embankment, it would have had to have been dragged or carried around the trees that were in front of the rocks. GA322, GA323. In short, the jury could reasonably infer that that the disposal of Rivera's body was a two-person job.

Zayac and Gonzalez continued to collaborate on their way from the Reservoir to Dibuono's

home; along the way they used Gonzalez's phone to call their respective homes, thus suggesting a high level of collaboration and cooperation.

Their collaboration continued when Zayac and Gonzalez returned to the Bronx to destroy the evidence of the crime, *i.e.*, the Jeep. They both clearly participated in the burning the Jeep as the explosive blast of fire burned both defendants. Gonzalez drove Zayac to Gonzalez's apartment to change clothing and treat Zayac's burns. Gonzalez drove Zayac to DiBuono's residence in New Rochelle.

- **Zayac kept the drugs**

Zayac—not Gonzalez—took possession of the stolen marijuana, worth more than \$100,000. Based on this fact, the jury could rationally conclude that Zayac was a knowing and willing participant in the crimes and in control of the operation.

Moreover, the jury could reasonably reject Zayac's illogical explanation for how he ended up with the stolen property. Zayac told the police that Gonzalez robbed him of his \$120,000, but—in an unexplained fit of beneficence—let him keep the stolen property worth over \$100,000. If Gonzalez's goal was to rob Zayac of the cash, he could have accomplished this goal more easily while alone with Zayac in the Jeep (*i.e.*, before they picked up Rivera). In this way, Gonzalez

could have avoided killing a drug dealer for marijuana that he did not want, and further, avoided committing murder in front of a witness (Zayac) that he allowed to use his phone and go home at the end of the night. The jury, in using its collective experience and common sense, was well within its province to reject Zayac's account and to rationally conclude that the two defendants were in the car together for the common purpose of robbing and killing their victim.

Clearly this is a case where a jury could reasonably infer a defendant's guilty knowledge as to his involvement in a crime from his false exculpatory statements. *See e.g. United States v. Aleskerova*, 300 F.3d 286 (2d Cir. 2002).

- **Zayac directed DiBuono to file a false police report**

The next day, Zayac had a few options. One of them was to report the prior evening's events to the police. Zayac instead had his girlfriend call the police (and insurance company) and report that the Jeep he and Gonzalez had murdered Rivera in had been stolen on Sunday.

- **Zayac's repeated lies revealed consciousness of guilt**

In addition to the evidence described above, the jury was also entitled to consider Zayac's false exculpatory statements to the police, which

revealed a tremendous consciousness of guilt. Zayac lied immediately and repeatedly to law enforcement about his knowledge of and participation in Rivera's murder. His false statements were internally inconsistent, and in a few instances, profoundly unbelievable. A rational jury could readily conclude that because Zayac could not keep track of his lies and attempts to re-fit his story to the facts that were emerging in the course of the investigation, he had a significant consciousness of guilt. *See United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993) ("circumstantial evidence may include acts that exhibit a consciousness of guilt, such as false exculpatory statements").

Zayac's ever-changing stories to law enforcement following the seizure of marijuana from his bedroom and his arrest contradicted his claimed lack of involvement.

The drug deal: Zayac first claimed that he and Rivera had consummated a marijuana transaction without incident.

Zayac then told investigators that as he went to meet with Rivera, he was kidnaped by an unknown man named Trey. Zayac said that he was let out on the side of the road after Trey took his identification. Zayac called Gonzalez to pick him up; they smoked marijuana and went back to DiBuono's house. There, Zayac saw his Jeep and discovered it contained marijuana—not the ma-

rijuana that was seized from his bedroom. In this version, Gonzalez prevailed upon Zayac to burn the Jeep.

Zayac's next version of the story was that he planned to meet Rivera to consummate a marijuana deal and then take Gonzalez to a deli in New York City. Gonzalez insisted that he be picked up before the drug deal; otherwise, he would not go out to the deli. Zayac relented. Rivera was not worried about the last minute addition of a third party and unwittingly entered the Jeep, where he was ultimately shot by Gonzalez.

The dumping of the body: Zayac initially told police he had spoken to Rivera at a point in time when Rivera was dead. In his second account, where Trey kidnaped him, Zayac made no mention of knowing anything about Rivera's murder.

In his third account, Zayac stated that after Gonzalez surprised him by murdering Rivera as Zayac was driving away from Rivera's building, Zayac drove to DiBuono's house, where Gonzalez let him stay. Gonzalez took the Jeep and returned a few hours later, having disposed of Rivera's body.

Zayac subsequently changed this account. He later stated that Gonzalez forced him to drive to the area near Padanaram Reservoir. Zayac ultimately said that Gonzalez forced him to help pull the victim's body out of the Jeep. Zayac

stated, however, that he did not help put the victim behind the trees at the bottom of the hill.

The burning of the Jeep: Zayac first stated that after completing an uneventful marijuana transaction with Rivera, he burned his Jeep. He called Gonzalez to help him.

In his second version, Zayac said that he burned the Jeep at Gonzalez's suggestion after Trey had parked it back in front of DiBuono's house with a load of marijuana in the back.

Zayac's final explanation was that Gonzalez burned the Jeep in order to cover for the murder. In this account, Zayac claimed that he sustained burns because he reached into the Jeep to retrieve a spare set of keys just as Gonzalez set the Jeep ablaze.

The fear of Gonzalez: Zayac's claim that he lied because he feared Gonzalez was entirely unbelievable. In his very first words to law enforcement, Zayac told them of the existence of Gonzalez when he told them that he helped him burn the Jeep. Zayac then alerted the police to Gonzalez's involvement in the crime when he reported that it was Gonzalez who suggested burning the Jeep after Trey had parked it in front of DiBuono's house.

The jury was entitled to view this complicated webs of inconsistencies, admitted falsehoods, self-serving assertions and unbelievable tales for

what it truly was: a serious consciousness of guilt on Zayac's part.

Coupled with the other circumstantial evidence adduced at trial, there plainly was sufficient evidence to justify the jury's verdicts. The trial evidence showed that Zayac orchestrated the kidnaping, robbery and murder of Rivera. Zayac set Rivera up, and was the last person to communicate by telephone with Rivera. Rivera was last seen getting into Zayac's vehicle. Zayac brought along Gonzalez to help with the crime, and then they undertook extraordinary efforts to conceal and destroy evidence of the crime, including Zayac's own vehicle where the murder occurred. Zayac kept the proceeds of the robbery. Against this backdrop, there can be no credible claim that Zayac was wrongly convicted.

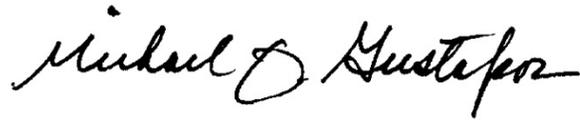
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 4, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Michael J. Gustafson". The signature is written in a cursive style with a large, prominent initial "M".

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that on November 22, 2013, the government filed an unopposed motion seeking permission to file an oversized brief of no more than 20,000 words, pursuant to Local Rule 27.1. On November 25, 2013, the Court granted that motion in part, permitting the government to file a brief containing no more than 16,000 words. This brief contains 15,971 words, in that the brief is calculated by the word processing program to contain approximately words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "Michael J. Gustafson". The signature is written in a cursive style with a prominent loop at the end of the last name.

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY