No. 17-2132

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SARAH M. NIXON,
Defendant–Appellant.

On Appeal from the United States District Court for the
Central District of Illinois, No. 2:15-CR-20057
(Hon. Colin S. Bruce)

RESPONSE BRIEF FOR THE UNITED STATES

JOHN E. CHILDRESS
United States Attorney
Central District of Illinois

ELLY M. PEIRSON
LAUREN S. KUPERSMITH
Trial Attorneys
Child Exploitation and Obscenity Section

JOHN P. CRONAN
Acting Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

WILLIAM A. GLASER
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 532-4495
William.Glaser@usdoj.gov

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STATEMENT OF JURISDICTION

Defendant-Appellant Sarah Nixon's jurisdictional statement is complete and correct.

ISSUES PRESENTED

I. Whether the international parental kidnapping statute's affirmative defense for "fleeing an incidence or pattern of domestic violence" includes emotional, psychological, and financial abuse.

II. Whether the district court reversibly erred by failing to require jury unanimity on whether the defendant "removed" her daughter from the United States or "retained" her outside the United States.

III. Whether the district court reversibly erred by concluding as a matter of law that the defendant's ex-husband had parental rights at the time the defendant removed her daughter from the United States.

IV. Whether the district court abused its discretion by excluding (a) testimony regarding the defendant's post-traumatic stress disorder (PTSD) and (b) hearsay statements from the defendant's daughter about alleged abuse.

V. Whether cumulative error occurred.

STATEMENT OF THE CASE

A. Procedural History

In October 2015, a grand jury in the Central District of Illinois indicted Defendant-Appellant Sarah Nixon for removing a child from the United States and retaining a child outside of the United States with the intent to obstruct the lawful exercise of another person's parental rights, in violation of 18 U.S.C. § 1204. Doc. 7. After a six-day trial, a jury convicted Nixon. *See* A.79; 12/20/16 Tr. 104. The district court sentenced Nixon to 26 months of imprisonment and one year of supervised release. A.81-82.

B. Relevant Facts

Sarah Nixon took her six-year-old daughter into Canada hours before a state-court judge in Illinois awarded custody to Nixon's ex-husband. Even after she learned of the custody order, she continued to take her daughter farther into Canada.

1. After a contentious separation, Nixon accused her ex-husband of abusing their daughter, S.G.

Nixon was born in Canada and married G.G. in 1997. 12/16/16 Tr. 8-9. In 2006, both accepted jobs at the University of Illinois at Urbana-Champaign—G.G. as a tenure-track professor and Nixon as a visiting lecturer. *Id.* at 10-11. In 2008, they had a daughter, S.G. *Id.* at 11. Because of marriage difficulties, Nixon and G.G. decided to separate in October 2010, and Nixon

moved to Montreal, Quebec, with S.G. 12/14/16 Tr. 182-83. G.G. continued to maintain contact with S.G. by driving to Montreal for visits. *Id.* at 183-84.

Nixon and G.G. divorced in May 2012. 12/14/16 Tr. 182, 187. After Nixon filed a child-custody suit in Canada, she and G.G. reached an agreement regarding visitation rights. *Id.* at 188-89. But the Canadian court never finalized custody, and Nixon dismissed her suit in 2014. *Id.* at 192-93.

While G.G. was visiting Montreal in January 2014, Nixon accused him of touching S.G.'s vagina while he and S.G. were swimming at a hotel pool. 12/14/16 Tr. 244-45; 12/16/16 Tr. 25. Nixon texted G.G., "S[.G.] says you touched her vagina." 12/16/16 Tr. 31. He responded by asking Nixon if she was drunk and saying that he was going to file harassment charges against her. *Id.* G.G. did, in fact, go to the police about the matter. 12/14/16 Tr. 246.

In August 2014, Nixon moved back to Illinois and worked out a visitation schedule with G.G. in which he had S.G. on one weeknight and alternate weekends. 12/14/16 Tr. 193-96; 12/16/16 Tr. 44. Nixon was "[h]ostile and worse" toward G.G., and she interrupted his visits with S.G. with "constant text messages." 12/14/16 Tr. 194, 196. For example, Nixon would ask to speak with S.G. during these visits and then text again within minutes if G.G. failed to respond. *See id.* at 198 (three texts saying "I would like to speak with S[.]" within 11 minutes); 201 (repeating "I'd like to talk with

S[.]" within one minute of G.G. responding, "Okay. Just give us two minutes to find place. We're in the mall."). She also accused him of "terrorizing" S.G. *Id.* at 210. For example, she texted him, "S[.G.] said you are telling her that 'whenever someone cuts food with a knife, they are putting poison in it.' What the hell is wrong with you?" *Id.* at 209. On another occasion, she texted, "S[.G.] told me that you tell her 'cars eat children.' . . . . Stop terrorizing S[.G.] . . . . Grow the hell up already. If you think cars eat children and knives poison food, you need psychiatric help more than ever." *Id.* at 210-11.

By this time, G.G. had been in a relationship with A.L. since 2011 and had another daughter, born in 2012. 12/14/16 Tr. 176-77. When it came time for S.G. to return to Nixon after a visit with G.G.'s family, S.G. was "terrified of leaving." *Id.* at 214. When told it was time to "go back to her Mommy," S.G. would have "an extreme meltdown," that might include screaming, slamming doors, and "cowering in the corner." 12/19/16 Tr. 154. She was "inconsolable," *id.*, and had to be "cajole[d] and convince[d] that she should leave because Mom is waiting." 12/14/16 Tr. 214. After G.G. dropped S.G. off with Nixon in the Urbana City Building's parking lot, Nixon would sometimes stay there in her car with S.G. for an hour or two after the drop-off, until as late as 10:00 p.m. *Id.* at 215-16.

In September 2014, Nixon again accused G.G. of touching S.G.'s vagina. 12/14/16 Tr. 242. According to G.G., he helped S.G. "wipe her butt" in the bathroom at her request. *Id.* at 243. Nixon contacted the police and played them a recording that she had made of S.G. discussing the alleged touching. 12/16/16 Tr. 52. While the recording was playing, Nixon mouthed along with S.G.'s words for about a minute, "like it[had] been rehearsed several times." 12/19/16 Tr. 131. The Urbana Police and the Illinois Department of Child and Family Services (DCFS) both conducted an investigation into the matter, but the DCFS concluded Nixon's allegations were unfounded. *Id.* at 9-10, 132-33.

According to Nixon, G.G. abused S.G. in other ways in late 2014. For example, S.G. allegedly told Nixon that G.G. "hit [her] on [her] booster shot" after a vaccination at school. 12/16/16 Tr. 59. At another point, Nixon noticed an injury on S.G.'s palm, and S.G. allegedly told her that G.G. had pushed a sharp rock into her hand, saying, "[T]his is because you told Mommy." *Id.* at 61. After Nixon picked S.G. up from G.G.'s family the day after Christmas, Nixon allegedly noticed that S.G. had a "big scratch down her face," "bruising in her ears," and earwax on her hair and neck. *Id.* at 64-65. S.G. said she did not know what had happened, so Nixon took her to the hospital, but she was discharged that same night. *Id.* at 68-69, 71.

In January 2015, Nixon again alleged that G.G. had touched S.G.'s vagina. 12/16/16 Tr. 73-74. According to Nixon, S.G. told her that G.G. had placed her in a chair in his office at the University of Illinois, rubbed her vagina, and made her touch his penis. *Id.*

The University of Illinois Police investigated these allegations in conjunction with DCFS. 12/19/16 Tr. 179-80, 183. Investigators observed that G.G.'s office, where the alleged touching took place, had windows along one side facing the atrium so that "from the floor above, you could look down into the office." 12/15/16 Tr. 35; 12/19/16 Tr. 182.

In an interview with a police detective, Nixon spent more time talking about "the history of her and [G.G.] and their relationship" than "about the allegations" of abuse. 12/19/16 Tr. 188. And Nixon did not express any fear for S.G.'s safety and "still wanted S[.] to have a relationship with her dad." *Id.* Nixon claimed that as early as 2012, she had discussed with her attorney the possibility of G.G. molesting S.G. *Id.* at 189. Yet, contradictorily, she also said that she "had absolutely no fear of sexual molestation from [G.G.] at that time, and that her actual fear of that did not come about until January of 2014." *Id.*

Nixon also told the detective she thought G.G. was abusing S.G. in an attempt to get custody of her. 12/19/16 Tr. 189-90. Nixon said there were

"two main things that Family Court judges despise, one of which is false allegations; the other parental alienation." *Id.* at 190. She said that, as "part of his big manipulative plan," G.G. "intentionally touched S[.]'s vagina so that it would be reported and that [Nixon] would appear to look bad" when she reported it. *Id.* at 189-90.

A few days after this interview, Nixon called the detective and asked her to interview S.G. about a "balloon popping" that had happened about four months previously. 12/19/16 Tr. 191. Nixon said she had found a picture that S.G. had drawn of the incident. *Id.* The detective instructed Nixon in two separate phone calls not to talk to S.G. about the incident or show her the picture. *Id.* at 191-92. At the interview, Nixon admitted that she had talked to S.G. about the incident, but claimed she had not shown her the picture. *Id.* at 193. When S.G. told the detective she had seen the picture the day before, Nixon admitted that she had not only shown S.G. the picture but also asked S.G. to draw a knife on the picture. *Id.* at 197-99. S.G. herself told the detective that the balloon "probably popped on the ceiling." *Id.* at 195. At the conclusion of the investigation, the police did not recommend charges against G.G., but presented the case to prosecutors to consider charges against Nixon for filing a false police report. 12/19/16 Tr. 205.

In part because of Nixon's "ongoing harassment," G.G. had sought full custody of S.G. around November 2014. 12/14/16 Tr. 211-12. After the alleged abuse in January, Nixon filed a petition to require G.G.'s visits with S.G. to be supervised. 12/16/16 Tr. 77. At a hearing on January 26, 2015, the family-law judge, Judge Arnold Blockman, issued an agreed-upon order stating that G.G. should not have contact with S.G. pending the custody trial, except for supervised visits in the company of Dr. Helen Appleton. A.77; 12/15/16 Tr. 9-10; 12/16/16 Tr. 77-78.

In advance of the custody trial, Dr. Appleton prepared an evaluation in which she recommended that G.G. be awarded custody of S.G. because Nixon was a danger to S.G.'s mental health. 12/16/16 Tr. 85, 89-90, 176-77. In early July 2015, the family-court judge conducted a six-day custody trial and took the case under advisement until July 13, a Monday. 12/14/16 Tr. 218-19; 12/16/16 Tr. 169.

2. Nixon fled to Canada on the day she expected to lose custody of S.G. and was apprehended a few days later.

Nixon thought it would be "very unlikely" that Judge Blockman would grant her custody. 12/16/16 Tr. 103. The judge had "made it very clear that he felt [Nixon] was . . . coaching S[.G.]" *Id.* So on Sunday, July 12, Nixon decided to take S.G. to Canada, despite the fact that there was a retention order in place prohibiting her from leaving Illinois with S.G. *Id.* at 106-07.

Her goal was to "cross that border into Canada before Judge Blockman was to render his decision." *Id.* at 108. She left around midnight and crossed the Ambassador Bridge into Canada at about 10:45 a.m. on July 13. *Id.* at 109, 113, 115-16; 12/14/16 Tr. 13-14. Later that afternoon, Judge Blockman awarded G.G. custody of S.G. 12/14/16 Tr. 219, 224.

Nixon and S.G. spent the night of July 13 with a relative near Toronto and proceeded toward Montreal the next day. 12/16/16 Tr. 119-22. Nixon decided to spend the night of July 14 with friends, Gregory Rock and Sine McKenna, in a rural area near Maxville and Moose Creek, Ontario. 12/16/16 Tr. 124-25; 12/14/16 Tr. 44. When her sister asked via Facebook message where she was, Nixon said, "[P]lease don't talk about us to anyone. We are safe, but it is not safe for me to talk about where we are at this time." 12/14/16 Tr. 146.

Nixon did not want her car to be seen at the Rock-McKenna residence, so she decided to park it at a neighbor's house, leaving a note from McKenna on the windshield that said, "My friend, Sarah, is involved in a serious custody battle and would like to leave her car here." 12/16/16 Tr. 129, 131; 12/14/16 Tr. 61. Nixon parked in the wrong driveway, however, and the property owner called the police the next morning to report a suspicious vehicle. 12/14/16 Tr. 17-18, 30. When the police ran the license plate, they learned

that the vehicle belonged to Nixon and that she was wanted in Illinois for child abduction. *Id.* at 20-21.

When police initially canvassed the houses near where Nixon's car was found, Rock and McKenna denied any knowledge of her. 12/14/16 Tr. 32. But after officers found McKenna's note on Nixon's car, Rock admitted that Nixon was there. *Id.* at 62, 83. Nixon agreed to accompany officers to the police station. *Id.* at 84-88. S.G. was placed in a foster home overnight. *Id.* at 111. G.G. picked her up the next day and took her back to Illinois. *Id.* at 229-32.

The Canadian authorities released Nixon, and she remained in Canada for the next few months. 12/16/16 Tr. 139-41. In July 2015, a federal magistrate judge in the Central District of Illinois issued a warrant for Nixon's arrest based on a sealed complaint for international parental kidnapping. *See* Doc. 1. Federal authorities arrested her in September 2015 when she attempted to cross the border into New York. 12/15/16 Tr. 103; 12/16/16 Tr. 143.

At trial, S.G. (then eight years old) took the stand. 12/19/16 Tr. 163-75. She testified that she remembered "telling some people that Daddy touched [her] private areas," but that he had not really done so. *Id.* at 170. She also remembered telling someone that "Daddy punched [her] or hurt [her] head,"

even though he had not. *Id.* She testified that "Mom" had told her to say these things and that saying untrue things about her daddy made her feel "[b]ad" and [s]ad." *Id.* at 170-71, 175.

C. Rulings Under Review

The rulings under review are addressed in the relevant argument sections below.

SUMMARY OF ARGUMENT

1. The district court correctly concluded that § 1204(c)(2)'s affirmative defense for "fleeing an incidence or pattern of domestic violence" does not include emotional, psychological, or financial abuse. It correctly limited Nixon's defense to evidence of physical and sexual abuse. The statutory background and the legislative history indicate that, at the time it enacted § 1204, Congress understood "domestic violence" to require physical force. And although the Supreme Court has said "domestic violence" does not necessarily require "violence" in the ordinary sense, the Court has never suggested that the term includes mere emotional or psychological abuse.

In any event, any error in excluding such evidence was harmless because Nixon introduced ample evidence of G.G.'s alleged physical and sexual abuse of S.G. Any evidence regarding G.G.'s alleged emotional abuse of Nixon

would have risked confusing the issues and would not have tipped the scales in Nixon's favor.

2. The district court correctly concluded that the jury did not need to unanimously agree on whether Nixon "removed" S.G. from the United States or "retained" her in Canada. Retaining and removing are simply alternate means of satisfying § 1204's jurisdictional requirement, and nothing indicates that each constitutes a separate crime. Moreover, any error in failing to give a unanimity instruction was harmless because the evidence overwhelmingly established (and Nixon did not seriously contest) that she both removed *and* retained S.G. outside of the United States.

3. The district court correctly concluded as a matter of law that G.G. had "parental rights" at the time Nixon took S.G. into Canada. The state court's January 2015 order temporarily limiting G.G.'s contact with S.G. to supervised visits did not terminate his parental rights. Thus, the district court correctly denied Nixon's motion for judgment of acquittal, and it correctly instructed the jury that G.G. had parental rights at the relevant time. Even if the court erred, the error was harmless because Nixon retained S.G. outside the United States after she knew G.G. had been awarded full custody.

4. The district court did not abuse its discretion by excluding evidence of Nixon's PTSD and of S.G.'s hearsay statements.

a. Nixon's PTSD was primarily relevant, if at all, to her subjective belief that S.G. was being abused, not to the reasonableness of that belief. Although some courts have found PTSD relevant to a defendant's reasonable belief that she needs to use force in self-defense, those cases do not apply here because Nixon's past experiences of physical and emotional abuse would hardly inform the reasonableness of her belief that S.G. was being sexually abused. The district court correctly concluded that Dr. Marti Loring's clinical diagnosis of Nixon was not subject to the same rigors as a forensic examination and was therefore not appropriate for use at trial. And it correctly held in the alternative that the evidence was inadmissible under Rule 403 since it was based in part on decades-old abuse by Nixon's family members and teachers.

For the same reasons, the court properly excluded Dr. Virginia Chow's testimony. Additionally, Nixon failed to provide notice of Chow's testimony, as required by Federal Rule of Criminal Procedure 16, which would alone justify exclusion. As to Terri McKean's lay testimony about Nixon's demeanor, the district court allowed McKean to testify exactly as Nixon wished her to.

In any event, any error in excluding the PTSD evidence was harmless. Contrary to the district court's ruling at trial, § 1204(c)(2)'s defense requires *actual* domestic violence, not merely a reasonable belief that abuse occurred,

and Nixon's PTSD was not relevant to show actual abuse. Moreover, the PTSD evidence was, at most, only marginally helpful to show that Nixon reasonably believed G.G. had sexually abused S.G. And it was seriously undermined by S.G.'s testimony that Nixon coached her to make the allegations.

b. Nor did the district court abuse its discretion by preventing three witnesses from testifying to S.G.'s hearsay statements that G.G. abused her. The court *did* allow Nixon to testify to these statements in order to show their effect on Nixon. But the additional witnesses' testimony would have been hearsay that was not admissible under any exception to the hearsay rule. The court properly held in the alternative that the evidence should be excluded under Rule 403 because it was cumulative and misleading. And any evidentiary error was harmless because these witnesses would have done little to show that Nixon reasonably believed S.G. had been abused.

5. Because the district court committed no errors, Nixon cannot show cumulative error. And even if the district court had committed multiple evidentiary errors, Nixon was not deprived of the right to a fair trial.

ARGUMENT

I. The District Court Did Not Err by Excluding Evidence of Alleged Emotional, Psychological, and Financial Abuse.

The international parental kidnapping statute prohibits removing or attempting to remove a child from the United States or retaining a child outside the United States "with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a). It contains an affirmative defense that applies if "the defendant was fleeing an incidence or pattern of domestic violence."[1] 18 U.S.C. § 1204(c)(2). Nixon argues that the district court "erroneously defined 'domestic violence' to exclude emotional, psychological, and financial abuse." Br. 16.

A. Standard of review

Because the district court's decision to limit Nixon's affirmative defense rested upon its interpretation of a statute, this Court's review is *de novo*. *See United States v. Simmons*, 215 F.3d 737, 741 (7th Cir. 2000) (reviewing *de novo* the decision to disallow "a proffered defense"); *United States v. Nagelvoort*, 856 F.3d 1117, 1129 (7th Cir. 2017) ("We review issues of statutory interpretation *de novo*.").

[1] The government does not dispute that domestic violence can include violence committed by a parent against a child.

Nixon preserved this claim by filing a motion *in limine*, Doc. 22, which the district court rejected in a definitive ruling, Doc. 25 at 9. *See United States v. Schalk*, 515 F.3d 768, 776 (7th Cir. 2008) ("A definitive, unconditional ruling *in limine* preserves an issue for appellate review, without the need for later objection.").

Nixon has not challenged the district court's jury instruction regarding the affirmative defense, so any challenge to the instruction is waived. *See United States v. Burns*, 843 F.3d 679, 695 n.4 (7th Cir. 2016). But, for the reasons explained below, such a challenge would also fail on the merits.

B. The court correctly concluded that "domestic violence" in § 1204(c)(2) does not include purely emotional, psychological, or financial abuse.

Section 1204 does not define "domestic violence," but the relevant tools of statutory interpretation all indicate that the term does not include mere emotional, psychological, or financial abuse.

1. Plain meaning

When interpreting a statute, a court must "look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation and quotations omitted). When Congress adopted § 1204 in 1993, the term "domestic violence" was not commonly included in dictionaries. *See* Black's Law Dictionary 484 (6th ed. 1990);

American Heritage Dictionary 550 (3d ed. 1992). When dictionaries did begin to include the term, they did not define it broadly enough to include emotional or psychological abuse. *See* Black's Law Dictionary 1564 (7th ed. 1999) ("[v]iolence between members of a household, usu[ally] spouses; an assault or other violent act committed by one member of a household against another"); American Heritage Dictionary 550 (4th ed. 2000) ("[v]iolence toward or physical abuse of one's spouse or domestic partner"). This indicates that Congress likely had in mind a definition that was limited to physical violence.

2. Statutory background

The statutory background also supports this narrower definition. At the time that Congress adopted § 1204, only one other statute defined "domestic violence." 42 U.S.C. § 10701(8). And it defined the term to include "(i) attempting to cause or intentionally, knowingly, or recklessly causing bodily injury or physical illness; (ii) rape, sexual assault, or causing involuntary deviate sexual intercourse; (iii) placing by physical menace another in fear of imminent serious bodily injury; or (iv) the infliction of false imprisonment," as well as "physically or sexually abusing [a] minor child." *Id.* Although § 1204 does not reference this definition, § 10701 provides a helpful indication of how Congress understood the term in 1993.

Congress subsequently defined "domestic violence" (or some variant of the term) in other statutes. With one exception, those statutes require physical force, often by incorporating 18 U.S.C. § 16's definition of a "crime of violence."[2] *See* 18 U.S.C. § 921(a)(33)(A) (defining "misdemeanor crime of domestic violence" to mean an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"); 18 U.S.C. § 2261(a)(1) (requiring, as an element of the crime of "interstate domestic violence," that the defendant "commit[ ] or attempt[ ] to commit a crime of violence" against a spouse or intimate partner); 18 U.S.C. § 3561(b) (defining "domestic violence crime" to mean "a crime of violence . . . in which the victim or intended victim" is a current or former spouse, intimate partner, child, or relative); 8 U.S.C. § 1227(a)(2)(E)(i) (defining "crime of domestic violence" by reference to 18 U.S.C. § 16); 34 U.S.C. § 12291(a)(8) (saying that "[t]he term 'domestic violence' includes felony or misdemeanor crimes of violence committed by" certain family members).

The lone exception is a provision relating to the Federal Deposit Insurance Corporation (FDIC), 12 U.S.C. § 1831x(e)(3). That statute defines

[2] Section 16 requires that the offense either (a) have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "by its nature, involve[ ] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.

"domestic violence" to include causing or attempting to cause "physical harm, severe emotional distress, psychological trauma, rape, or sexual assault" or "damage to property so as to intimidate or attempt to control the behavior of another person." *Id.* This definition applies only to a prohibition on discrimination by insurers. *See* 12 U.S.C. § 1831x(e)(1). In the criminal context, however, Congress has consistently used the term to mean *physical* violence. *See, e.g.,* 18 U.S.C. §§ 921(a)(33)(A), 2261(a)(1), 3561(b). This indicates that Congress did not intend § 1204 to include merely emotional or psychological abuse.

3. Legislative background

Section 1204's legislative history also indicates that Congress had physical violence in mind. An earlier version of the statute (without a defense for fleeing domestic violence) was first introduced in the Omnibus Crime Control Act of 1991. *See* H.R. Rep. 102-242(I) at 35. Another provision of that Act defined domestic violence (for purposes of a domestic-violence intervention program) to mean "any act or threatened act of violence, including any forceful detention of an individual, which . . . results or threatens to result in physical injury." *Id.* at 55.

A later version of the international parental kidnapping statute—this time with a defense for "fleeing an incidence or pattern of domestic

violence"—was included in a conference report on the Violent Crime Control and Law Enforcement Act of 1991. *See* H.R. Rep. 102-405, § 2802. Another section of that Act defined "domestic violence" (for purposes of a proposed background-check system) to include "a felony or misdemeanor involving the use or threatened use of force." H.R. Rep. 102-405, § 913(8). This Act passed the House, but did not pass the Senate before the end of the 102d Congress. *See* H.R. Rep. 103-390 at 4. When the 103d Congress finally passed § 1204, it did so as part of a stand-alone bill that did not define domestic violence. *See* International Parental Kidnapping Crime Act of 1993, Pub. L. 103-173, 107 Stat. 1998 (1993). But the legislative history indicates that when Congress considered earlier versions of § 1204, including when it first inserted the domestic-violence defense, it understood domestic violence to mean physical violence, not simply emotional, psychological, or financial abuse.

4. Interpretation of similar statutes

The Supreme Court has also consistently used the term "domestic violence" in connection with physical violence. In *United States v. Bryant*, 136 S. Ct. 1954, 1958 (2016), the court described 18 U.S.C. § 117(a), which prohibits "domestic assault . . . within Indian country," as being aimed at preventing "domestic violence." And the Court treated the term "domestic

violence" as synonymous with "physical violence by an intimate partner." *Bryant*, 136 S. Ct. at 1959.

Nixon attempts to rely on *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014), which noted that the term "domestic violence" is "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Castleman* actually undermines Nixon's argument. *Castleman* considered the definition of "misdemeanor crime of domestic violence" that applies to § 922(g)'s prohibition on firearm possession. The term "misdemeanor crime of domestic violence" is defined to include an offense that "has, as an element, the use . . . of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Relying on *Johnson v. United States*, 559 U.S. 133 (2010), which interpreted the term "violent felony" in the Armed Career Criminal Act, the court of appeals in *Castleman* held that "physical force" in § 921(a)(33)(A) required "violent force." *Castleman*, 134 S. Ct. at 1409-10.

The Supreme Court reversed, concluding that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching" into the domestic-violence definition. *Castleman*, 134 S. Ct. at 1410. It observed that "whereas the word 'violent' or 'violence' standing alone connotes a substantial degree of force, that is not true of 'domestic violence.'" *Id.* at 1411 (citation, footnote, and quotations omitted). "'Domestic violence' is not merely a type

of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* Thus, although a "'squeeze of the arm [that] causes a bruise'" might not be "'violence' in the generic sense," it could be considered *domestic* violence "when the accumulation of such acts over time can subject one intimate partner to the other's control." *Id.* at 1412 (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)).

Castleman did not suggest that domestic violence includes merely emotional or psychological abuse. Indeed, *Castleman* was interpreting a statute that defined domestic violence to require *physical* force. *See Castleman*, 134 S. Ct. at 1412 ("[T]he operative phrase we are construing is not 'domestic violence'; it is 'physical force.'"). It merely observed that the term "domestic violence" did not connote the same degree of force as the term "violent felony." *Id.*

But *Castleman* did point out that "perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws.'" *Castleman*, 134 S. Ct. at 1411 (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009)). And it observed that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* *See Hayes*, 555 U.S. at 418 (holding

that "misdemeanor crime of domestic violence" includes "a misdemeanor battery whenever the battered victim was in fact the offender's spouse" even if the predicate offense does not "identify as an element of the crime a domestic relationship between aggressor and victim."). This indicates that the term domestic violence ordinarily refers to *physical* violence such as assault or battery.

C. Nixon's contrary interpretation is unpersuasive.

Nixon's contrary reading would strip nearly all meaning from the word "violence." *Castleman* recognized that "domestic violence" does not necessarily require "'violence' in the generic sense." 134 S. Ct. at 1412. But the fact remains that Congress used the word "violence" rather than a more inclusive term such as "abuse." Although "domestic violence" can be committed using slight amounts of physical force, *Castleman* did not suggest that it includes mere emotional or psychological abuse.

Nixon relies on broad definitions of domestic violence in non-legal literature, such as the definition adopted by the DOJ's Office on Violence Against Women, which says that "[d]omestic violence can be physical, sexual, emotional, economic, or psychological action or threats of action that influence another person." Br. 24 (quotations omitted). *Castleman* quoted parts of that office's definition, but only those related to *physical* violence. *See*

Castleman, 134 S. Ct. at 1411. The Office on Violence Against Women is a non-litigating component of the DOJ that was not created until after Congress enacted § 1204. And the definition of "domestic violence" that the Office uses to further its goal of preventing violence against women does not reflect the term's accepted meaning in the criminal context. For example, the Office defines "domestic violence" to include behaviors that "humiliate" or "blame" someone, as well as "constant criticism, diminishing one's abilities, name-calling, or damaging one's relationship with his or her children." https://www.justice.gov/ovw/domestic-violence. Congress cannot have meant § 1204(c)(2)'s defense to absolve parental kidnappers of criminal liability based simply on cutting remarks or unkind words unaccompanied by some form of physical violence.

Nixon asserts that § 1204's "purpose and structure" support "a narrow reading of the criminal offense and a broad application of its affirmative defenses." Br. 17. Yet her arguments do not support this assertion. First, she argues that "Congress envisioned the victims as not only the child, but also abused parents." Br. 18. This is true, but the legislative history that she cites referred to the "left-behind" parent as the victim, *not* the kidnapping parent. *See Int'l Parental Child Abduction Act of 1989: Hearing Before the Subcomm. On Criminal Justice of the Comm. on the Judiciary on H.R. 3579*, 101st Cong. 5 (1990)

(statement of Sen. Dixon). The same statement refers to international parental kidnapping as "a terrible crime." *Id.* This hardly supports Nixon's claim that § 1204(c)(2)'s affirmative defense should be interpreted broadly.

Second, Nixon points out that the International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001-9011, which implements the Hague Convention on the Civil Aspects of International Parental Child Abduction, is the "remedy of first resort when a child is removed from the United States." Br. 18. She is correct that Congress intended ICARA's procedures to "be the option of first choice for a parent who seeks the return of a child." Pub. L. 103-173, § 2, 107 Stat. 1998 (1993). But simply because a parent should use ICARA's civil remedy to seek *return* of the child does not mean that § 1204—a criminal provision designed to punish and deter abduction—should be given a "narrow reading." Br. 17.

Nixon also points out (Br. 20) that Article 13(b) of the Hague Convention on the Civil Aspects of International Parental Child Abduction allows courts to decline to return a child where "[t]here is a grave risk that his or her return would expose the child to physical or psychological harm." 1343 U.N.T.S. 89. She argues that "it is sensible to construe § 1204(c)(2) as contemplating" a similar defense for psychological harm. Br. 20. In fact, the opposite is true. Congress was clearly aware of the Hague Convention's

"psychological harm" standard when it adopted § 1204 because it referenced the Convention in § 1204(d). Yet Congress did *not* provide an affirmative defense based on "psychological harm." This indicates a clear purpose to make § 1204(c)(2)'s affirmative defense narrower than the Hague Convention's exception.[3] *See United States v. Amer*, 110 F.3d 873, 880-81 (2d Cir. 1997) (noting that, as a "matter of statutory construction," § 1204's "explicit listing of three, and only three, affirmative defenses is a strong indication that the defenses arguably inferred from the Hague Convention are not available").

Nixon also relies on the interstate stalking statute, which prohibits stalking that "causes . . . substantial emotional distress." 18 U.S.C. § 2261A(1)(B). Nixon suggests (Br. 21) that, because this statute falls within a chapter of the U.S. Code entitled "Domestic Violence and Stalking," it indicates that "domestic violence" can include emotional abuse. In fact, the opposite is true. The interstate stalking statute makes no reference to domestic violence. But the immediately preceding section—entitled "Interstate domestic violence"—requires the use or risk of *physical* force. 18 U.S.C. § 2261(a)(2) (requiring as an element a "crime of violence," which is defined in

[3] And, even under the Hague Convention, "the risk of harm must truly be grave" because "any more lenient standard would create a situation where the exception would swallow the rule." *Norinder v. Fuentes*, 657 F.3d 526, 535 (7th Cir. 2011).

18 U.S.C. § 16 to require physical force). Thus, these provisions undermine Nixon's argument because they show that Congress specifically chose to include emotional harm in the stalking statute, but *not* in the domestic violence statute.

Nixon points out that § 1204(b) defines both "child" and "parental rights" narrowly. Br. 19. She argues that Congress's failure to provide a (narrow) definition of "domestic violence" in the statute indicates Congress's "deliberate intent to construe 'domestic violence' broadly." Br. 20. But Congress's failure to define domestic violence means it should be given its ordinary meaning, not an unnaturally broad one.

Finally, Nixon invokes the rule of lenity. Br. 25-26. That rule applies if, "at the end of the process of construing what Congress has expressed, there is a grievous ambiguity or uncertainty in the statute." *Shaw v. United States*, 137 S. Ct. 462, 469 (2016) (quotations and citation omitted). In this case, there is no ambiguity. The statute's text and history indicate that "domestic violence" does not include non-physical abuse. The district court correctly interpreted § 1204(c)(2) to exclude mere emotional or psychological abuse.

D. Any error was harmless.

Even if the district court erred in excluding evidence of non-physical abuse, the resulting error was harmless. Nixon was allowed to introduce

allegations that G.G. sexually abused S.G., hit her on a sore spot caused by a vaccination, pushed a "pointed rock" into her hand, and "took the back of her head and smashed it down repeatedly on [a] table." 12/16/16 Tr. 48, 59, 61, 73-74, 229. Nixon also elicited evidence of G.G.'s alleged emotional abuse of S.G., such as his popping S.G.'s balloon with a knife and telling S.G. that cars eat children and knives poison food. 12/14/16 Tr. 209-11; 12/19/16 Tr. 191-92. In light of this evidence, additional evidence of G.G.'s alleged emotional and psychological abuse of Nixon herself would have done little to support her affirmative defense and would not have affected the trial's outcome.[4]

II. The District Court Did Not Reversibly Err by Failing to Provide a Unanimity Instruction.

Nixon next argues (Br. 27-30) that the district court erred by failing to require jury unanimity regarding whether Nixon "removed" S.G. from the United States or "retained" her in Canada.

A. Standard of review

This Court reviews "*de novo* whether jury instructions accurately summarize the law, but give[s] the district court substantial discretion to formulate the instructions provided the instructions represent a complete and

[4] Nixon alleges (Br. 3) that she suffered "years of physical . . . abuse" by G.G., but she made no attempt to prove it, even though the district court's ruling allowed evidence of physical abuse. A.9.

correct statement of the law." *United States v. Daniel*, 749 F.3d 608, 613 (7th Cir. 2014) (quoting *United States v. Dickerson*, 705 F.3d 683, 688 (7th Cir. 2013)). Failing to give a required unanimity instruction is harmless error if it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (quotations omitted).

B. Background

In her proposed jury instructions, Nixon treated "remov[ing]" and "retain[ing]" S.G. as alternative means of satisfying a single element. Doc. 86 at 2. At the jury-instruction conference, however, her counsel asserted that they were "probably elements—and so we may need an instruction on unanimity." 12/19/16 Tr. 244. The government argued that removing and retaining were simply "two different means of accomplishing the jurisdictional aspect" of the statute. *Id.* at 249.

The district court agreed with the government. 12/19/2016 Tr. 250. It instructed the jury that the first "element[ ]" of the offense was that Nixon "either (a) knowingly removed the child, S.G., from the United States; or (b) knowingly retained the child, S.G., who had been in the United States, outside the United States." 12/20/16 Tr. 15. It said the jury was not

"required to unanimously agree which of several possible ways the defendant committed an element of the crime." *Id.* at 20.

C. The jury did not need to be unanimous regarding whether Nixon "removed" her daughter from the United States or "retained" her in Canada.

"[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element" of the offense. *Richardson v. United States*, 526 U.S. 813, 817 (1999). But the jury "need not always decide unanimously which . . . of several possible means the defendant used to commit an element of the crime." *Id.* The question of jury unanimity is ultimately a question of statutory interpretation. *Id.* at 818.

Section 1204's text and history indicate that "remov[ing]" and "retain[ing]" are simply alternative means of satisfying a single element. Section 1204 applies to anyone who "removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a). The remove-or-retain requirement is a jurisdictional element similar to the federal kidnapping statute's requirement that the victim be "transported in interstate or foreign commerce." 18 U.S.C. § 1201(a)(1). Removing and retaining are simply two means of satisfying that jurisdictional hook, and each interferes equally with the other parent's rights.

Nixon argues that because the phrase "or attempts to do so" applies only to removing a child, removing and retaining must be "separate offenses." Br. 29. She is incorrect. Congress added attempt liability to § 1204 in 2003. *See* PROTECT Act of 2003, § 107, Pub. L. 108-21, 117 Stat. 650. As explained in the legislative history, this change was needed to "facilitate effective intervention and prevention of parental kidnappings of children before they are removed from the United States." H.R. Conf. Rep. 108-66 at 52. Where the "abducting parent [wa]s on the way out of the country" but still in the United States, the FBI previously "ha[d] very limited ability to become involved and prevent the abduction from becoming an international occurrence." *Id.*

Congress's imposition of attempt liability only upon the "remov[ing]" prong does not suggest that § 1204 creates two separate offenses. There would be little reason to punish attempting to retain a child outside the United States. If the parent had not *actually* kept the child out of the United States, then the child (by definition) would be back within the United States. And the crime (attempted retention) would have occurred entirely outside the United States. As the legislative history makes clear, the goal was to prevent international abductions before they occur, not to prevent unsuccessful attempts to keep a child from reentering the United States.

In light of that goal, it makes little difference whether Nixon satisfied § 1204's jurisdictional element by removing S.G. from the United States or retaining her outside the United States. *See United States v. Renteria*, 557 F.3d 1003, 1008 (9th Cir. 2009) (unanimity not required regarding whether a building was used "in interstate or foreign commerce" or "in any activity affecting interstate or foreign commerce"); *United States v. Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005) (jury need not be unanimous regarding "the government's four alternative theories on how interstate commerce was affected by the [charged] extortion"). The district court did not err in instructing the jury.

D. Any error was harmless.

Even if the failure to give a unanimity instruction was error, the error was harmless. The evidence established beyond a reasonable doubt that Nixon both removed S.G. from the United States *and* retained her in Canada with the intent to obstruct G.G.'s parental rights. Nixon did not dispute "that she removed S.G. from the United States." Doc. 40 at 3. Indeed, she testified at trial that she took S.G. to Canada on the very day that she expected G.G. to be awarded custody. 12/16/16 Tr. 106-08.

Nor did Nixon seriously dispute that she retained S.G. in Canada. Her counsel admitting in closing argument that she was "trying to get to court [in

Montreal] so she could file something to protect [S.G.]." 12/20/16 Tr. 44. *See id.* at 67 ("[W]hen she was in Canada, her goal was to get to Montreal. We know that. There's . . . really no contradiction about that."). And the evidence showed that she continued to drive farther into Canada on July 14, even after she learned that Judge Blockman had awarded custody to G.G. 12/16/16 Tr. 201-05. When at her friends' house that night, Nixon hid her car. 12/16/16 Tr. 129-31. And she told her sister that it was "not safe for me to talk about where we are." 12/14/16 Tr. 146. The evidence overwhelmingly established that Nixon "retained" S.G. outside of the United States. Any error in denying a unanimity instruction regarding "remov[ing]" or "retain[ing]" was harmless.

III. The District Court Did Not Err by Denying Nixon's Motion for Judgment of Acquittal or by Instructing the Jury That G.G. Had Parental Rights As a Matter of Law.

Nixon next claims that the district court erred by (a) rejecting her argument in her motion for judgment of acquittal that G.G. had no parental rights as a matter of law when Nixon took S.G. into Canada, and (b) instructing the jury that G.G. *did* have parental rights at that time. Br. 30-33.

A. Standard of review

This Court reviews *de novo* "the district court's denial of [a] motion for judgment of acquittal." *United States v. Thomas*, 845 F.3d 824, 830 (7th Cir.

2017). And it reviews "*de novo* whether jury instructions accurately summarize the law, but give[s] the district court substantial discretion to formulate the instructions." *Dickerson*, 705 F.3d at 688 (quotations omitted). If the instructions accurately summarize the law, the Court "examines the district court's particular phrasing of the instruction for abuse of discretion." *Id.*

B. Background

In her motion for judgment of acquittal, Nixon argued that G.G. did not have parental rights when she and S.G. crossed into Canada on the morning of July 13, 2015, because the state court's temporary order barring contact between G.G. and S.G. was still in place. Doc. 98 at 5. Thus, she did not "remove[ ] a child from the United States . . . with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a).

The district court denied Nixon's motion, concluding that the January 2015 order did "not terminate or impact G.G.'s parental rights" and, in fact, gave him visitation rights under Dr. Appleton's supervision. A.77. And, in any event, the evidence showed Nixon "illegally *retain*[*ed*] S.G. outside the U.S." after G.G. was awarded full custody. *Id.*

The district court also concluded that the existence of G.G.'s parental rights was "not a question for the jury" but "a question of law." 12/19/16 Tr. 218. Therefore, the court instructed the jury that "On July 12 and 13, 2015, as

a matter of law, G.G. had parental rights with respect to the child, S.G." 12/20/16 Tr. 16. And it instructed that "[t]he government is not required to prove that a court custody order was in place prior to the removal of the child from, or the retention of the child outside, the United States." *Id.*

C. G.G. had parental rights at the time Nixon removed S.G. from the United States.

The district court correctly concluded that G.G. had parental rights when Nixon removed S.G. from the United States. Section 1204 defines "parental rights" as "the right to physical custody of the child . . . whether joint or sole (and includes visiting rights)" and "whether arising by operation of law, court order, or legally binding agreement of the parties." 18 U.S.C. § 1204(b)(2).

G.G. is S.G.'s father, and he petitioned for her sole custody in November 2014. 12/15/16 Tr. 30. As the district court explained, the state court's January 2015 order was "very limited in nature, concerning only an agreement to limit G.G.'s contact with S.G. in a certain way."[5] A.77. Specifically, the order allowed G.G. "visitation with S.G. in the presence of

[5] The state-court judge was willing to testify that the January 2015 order did not terminate or restrict G.G.'s rights, 12/14/16 Tr. 164, but the district court did not find such testimony necessary, *id.* at 165, 171-72.

Dr. Appleton." *Id.* And in May 2015, Dr. Appleton issued a report recommending that G.G. have sole custody of S.G. 12/15/16 Tr. 56-58.

The January 2015 order cannot reasonably be construed as terminating G.G.'s "parental rights" under § 1204. For one thing, the order allowed "visiting rights," which are included in § 1204(b)(2)'s definition of parental rights. *See United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010) (noting that a father had "parental rights" based on a court order that "granted [him] at least six supervised visits"). For another, Nixon knew that the purpose of the July 2015 trial was to determine whether G.G. should be awarded sole custody. Nixon's view that G.G. had *no* parental rights until he was given *sole* custody, Br. 31, is untenable.

Nixon's contrary arguments lack merit. She emphasizes that § 1204 refers to "*physical* custody." Br. 31. But that is not the end of the definition. The term includes "joint or sole" physical custody, as well as "visiting rights." § 1204(b)(2)(A). Thus, a parent can have "parental rights" even when the child is temporarily out of his or her physical custody. Otherwise, a parent with weekend custody could take a child out of the country with impunity as long as she did so on a weekend. Although G.G.'s parental rights had been temporarily limited to supervised visitation, they had not been terminated.

Nixon also contends that the district court gave "absolute priority" to parental rights arising "by operation of law" as opposed to those defined by "court order." Br. 31-32. She is incorrect. The district court did not conclude that rights arising by operation of law always trump those arising from a court order. Instead, it found that *this specific* court order did not terminate G.G.'s parental rights.[6]

Nixon does not directly assert that the existence of G.G.'s parental rights was a jury question, rather than a legal question for the court to resolve. But she hints at such an argument, saying the court relieved the government of its burden to "prove every element of the crime beyond a reasonable doubt." Br. 30 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 698-99 (1975)). This Court has "repeatedly and consistently held that 'perfunctory and undeveloped arguments . . . are waived.'" *United States v. Cisneros*, 846 F.3d 972, 978 (7th Cir. 2017) (quoting *United States v. Berkowitz*, 927 F.3d 1376, 1384 (7th Cir. 1991)). But even if Nixon adequately raised such an argument, she has not pointed to any authority suggesting that the existence of parental rights is a

[6] Nixon also asserts that she lacked intent to obstruct parental rights because she "did not believe Illinois was the proper jurisdictional forum for the custody case." Br. 32 n.7. But her belief was based on advice from a friend who attended law school but had not passed the bar. 12/19/16 Tr. 38-41. And the state court ruled against her on this point before she fled to Canada. 12/16/16 Tr. 175.

jury question. Nor could she show that any error in failing to submit this question to the jury prejudiced her. The evidence overwhelmingly established that G.G. had parental rights when Nixon removed S.G. from the United States. If the jury had been properly instructed on the meaning of "parental rights," it would have concluded that G.G. had them.

D. In any event, G.G. had parental rights when Nixon retained S.G. in Canada.

At the very least, G.G. clearly had parental rights—indeed the right to sole custody—by the afternoon of July 13, 2015. 12/14/16 Tr. 219. Nixon learned of the state-court's custody order at least by 11:00 a.m. on July 14, 12/16/16 Tr. 201-04, yet continued to head farther into Canada for another nine hours before stopping, *id.* at 125-26. And she intended to proceed to Montreal the next day. *Id.* at 129-30. This was more than enough evidence to show that Nixon "retained" S.G. outside the United States with intent to obstruct G.G.'s parental rights. Thus, the district court did not err in denying her motion for judgment of acquittal, and any error in instructing the jury that G.G. had parental rights on July 12 and 13 was harmless.

IV. The District Court Did Not Abuse Its Discretion by Excluding Evidence of Nixon's PTSD and S.G.'s Hearsay Statements.

Nixon challenges the district court's exclusion of or limitations on the testimony of six proposed defense witnesses.[7] Br. 33-50. She asserts that all of these witnesses would have testified regarding "a key issue: whether Nixon reasonably believed she was fleeing an incidence or pattern of domestic violence." *Id.* at 33.

A. Standard of review

This Court reviews evidentiary rulings, including the exclusion of defense witnesses, for abuse of discretion. *United States v. Kielar*, 791 F.3d 733, 744 (7th Cir. 2015). Nixon suggests (Br. 34) that *de novo* review should apply because the district court's evidentiary rulings "depriv[ed] her of her right to present her defense and her right to a fair trial," Br. 33 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973)). She is correct that this Court "review[s] de novo whether an evidentiary ruling violated [the defendant's] constitutional rights." *United States v. Beavers*, 756 F.3d 1044, 1049 (7th Cir. 2014). But where a "litigant has simply dressed an evidentiary ruling in

[7] Nixon asserts that the district court "completely excluded" the testimony of five witnesses and "severely limited" the testimony of three more. Br. 33. But her brief only identifies six witnesses whose testimony was excluded or limited.

constitutional clothing," this Court "continue[s] to use the abuse-of-discretion standard." *United States v. Caira*, 737 F.3d 455, 460 (7th Cir. 2013).

Nixon "cannot transform the exclusion of this evidence into constitutional error by arguing that she was deprived of her right to present a defense." *United States v. Waters*, 627 F.3d 345, 354 (9th Cir. 2010) (brackets and quotations omitted). As *Chambers* recognized, a defendant exercising her right "to present witnesses in [her] own defense" must still "comply with established rules of procedure and evidence." *Chambers*, 410 U.S. at 302.

The cases Nixon cites (Br. 34) are not to the contrary. *United States v. Gentile*, 816 F.2d 1157, 1161 (7th Cir. 1987), involved the Double Jeopardy Clause's collateral estoppel component, not an ordinary evidentiary ruling. And in *United States v. Saunders*, 973 F.2d 1354, 1358-59 (7th Cir. 1992), the Court concluded that the district court had "made a straightforward evidentiary ruling that we review for abuse of discretion." Because this case involves "straightforward evidentiary ruling[s]," *id.* at 1359, this Court should review for abuse of discretion.

"District judges have wide discretion over decisions to admit or exclude evidence," and this Court will "reverse only if no reasonable person could take the judge's view of the matter." *United States v. Brown*, 871 F.3d 532, 536 (7th Cir. 2017). And evidentiary errors are subject to harmless error analysis,

meaning reversal is warranted "only when the error had a substantial and injurious effect or influence on the jury's verdict." *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008) (quotations omitted).

B. Background

Nixon argues that the district court erroneously excluded two categories of evidence: (1) testimony that she suffered from PTSD and (2) hearsay statements that S.G. made to health and counseling professionals about G.G.'s alleged abuse.

1. Evidence of PTSD

Nixon sought to introduce testimony from three witnesses regarding her PTSD or other nervous behavior. The primary witness was Dr. Marti Loring, for whom Nixon gave expert notice as required by Federal Rule of Criminal Procedure 16(b)(1)(C). *See* Doc. 34. The government moved *in limine* to exclude Dr. Loring's testimony, Doc. 39, and Nixon argued in response that evidence of her PTSD "ma[de] it more probable that her intent was not to obstruct lawful parental rights, but instead to protect her daughter from perceived (if not real) domestic violence." Doc. 40 at 4.

After conducting a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *see* 10/31/16 Tr., the district court concluded that Dr. Loring was qualified as an expert in the field of

traumatology and had reliably applied a reliable methodology in diagnosing Nixon. A.58-61. But the court excluded her testimony as unhelpful to the trier of fact and likely to confuse the jury. A.61-67.

The district court reasoned that Nixon was, in effect, attempting to advance a diminished capacity defense. A.62-63. "Dr. Loring would testify that [Nixon] was so mentally impacted by her PTSD that she felt she 'had no choice' but to flee with S.G. to Canada . . . ." A.62. Nixon had not followed Federal Rule of Criminal Procedure 12.2's requirements for asserting a diminished capacity defense. And, even if she had, Dr. Loring's testimony would "not aid the trier of fact" because her diagnosis was focused on providing treatment, not on determining Nixon's diminished capacity for legal purposes. A.63. The court found "persuasive" the government's forensic psychology expert, who testified at the *Daubert* hearing that a clinical diagnosis, such as Dr. Loring's, is very different from a forensic psychological evaluation appropriate for use at trial. A.63-65. Although Dr. Loring's clinical diagnosis might "help the jury decide if [Nixon] was suffering from PTSD," it "would not help the jury determine the fact at issue, which is whether [Nixon] was suffering from PTSD . . . such that she could not appreciate the nature of her actions and form the intent to obstruct the lawful exercise of G.G.'s parental rights." A.65.

The district court also concluded that Dr. Loring's testimony would confuse the jury because (1) her evaluation was focused on treatment and therapy, not the forensic setting of the criminal trial, (2) her testimony would open her up to cross-examination regarding "testimony and evidence that has already been barred by the court," (3) her testimony would create the "danger of irrelevant, prejudicial information in the form of allegations of abuse that are years, even decades, old," and (4) her testimony would "mudd[y] the waters" because she proposed to testify that Nixon's "PTSD made her act in a state of panic and irrationality, *i.e.* without a reasonable belief." A.65-67.

Nixon apparently intended to call Dr. Virginia Chow, a Canadian psychologist who treated Nixon for a few months in 2013 and 2014 and diagnosed her with PTSD. A.68. But Nixon conceded that Dr. Chow's testimony was inadmissible based on the district court's ruling with respect to Dr. Loring, and the district court agreed. A.68-69.

Nixon also indicated her intent to call Teri McKean, a licensed clinical social worker, to testify about her "observations as a lay person as to [Nixon's] stress and anxiety" in order to show that Nixon was "upset and deeply concerned over the abuse allegations." A.69; Doc. 74 at 5. The district court concluded that McKean could not "present any expert testimony" such as a "diagnosis of [Nixon] related to PTSD." A.70. But it found McKean's

testimony otherwise admissible, subject to a limiting instruction that the jury should "consider McKean's testimony only as a lay person who observed and interacted with Defendant." A.70. McKean testified at trial subject to this limitation. *See* 12/15/16 Tr. 154-82.

2. Hearsay statements regarding alleged abuse

Nixon also sought to introduce testimony from three witnesses regarding G.G.'s alleged sexual abuse of S.G. Dr. Kathleen Buetow was a pediatrician who met with S.G. and concluded that S.G. was the victim of sexual assault by G.G. A.18-19, 45-46. Debra Poblano was a counselor at S.G.'s kindergarten who spoke to S.G. about several instances of G.G.'s alleged physical abuse. A.18, 37-38. And Meghan Murphy was a counselor who concluded that S.G. had been a victim of sexual abuse. A.19-20, 39-40.

Nixon sought to introduce S.G.'s statements to these witnesses as either fact testimony (from all three witnesses) or expert testimony (from Buetow and Murphy). A.34. The district court excluded their testimony as inadmissible hearsay, rejecting Nixon's reliance on various exceptions to the hearsay rule. A.36-50. First, S.G.'s statements to Poblano and Murphy were not admissible under Rule 803(3)'s exception for then-existing mental, emotional, or physical condition because the statements were made a month or more after the alleged events, would constitute double hearsay, and would be inadmissible under

Rule 403 because they would "needlessly confuse the issues and mislead the jury." A.38, 41-42. But the court concluded that S.G.'s statements "directly to [Nixon] . . . will be admissible under this exception, should [Nixon] choose to testify to them." A.42.

Second, the court concluded that Rule 803(4)'s exception for statements made for medical diagnosis or treatment did not apply to Buetow's testimony. A.42. It was "questionable" whether S.G.'s statements were pertinent to any treatment provided by Dr. Buetow. A.46. The district court also shared the state-court judge's concerns about the reliability of Buetow's testimony, including that Buetow did not fully consider whether S.G. had been coached. A.47. Additionally, the district court concluded in the alternative that "the prejudice from admitting such evidence would outweigh its probative value under Rule 403." A.47.

Third, the district court rejected Nixon's argument that S.G.'s statements were admissible under Rule 807's residual exception, concluding that they lacked the required "circumstantial guarantees of trustworthiness." A.49-50.

The district court also held that Buetow and Murphy could not give their expert opinion that G.G. abused S.G. because the only basis for their conclusions was S.G.'s hearsay statements, and their testimony would circumvent the hearsay rule. A.51.

C. The court did not abuse its discretion by excluding evidence of Nixon's PTSD.

The district court did not abuse its discretion when it excluded evidence of Nixon's PTSD. The district court ruled prior to trial that § 1204(c)(2)'s affirmative defense did not require Nixon "to prove the abuse actually occurred," but only that she reasonably believed S.G. was subject to domestic violence.[8] Doc. 91 at 4 (emphasis omitted). Nixon argues that the PTSD evidence was relevant to her affirmative defense because it showed that she reasonably believed S.G. was being subjected to domestic violence. Br. 34-35. She sought to introduce this evidence through Dr. Loring, Dr. Chow, and Terri McKean. Br. 34. As explained below, these witnesses' testimony was inadmissible.

1. Dr. Marti Loring

The exclusion of Dr. Loring's testimony was not an abuse of discretion for several reasons. First, the district court correctly concluded that Dr. Loring's testimony was not helpful to the trier of fact. A.62. Nixon argues that the district court "mistakenly characterized" her defense as a diminished

[8] The government argued that actual abuse, rather than merely a "reasonable belief," was required. Doc. 89 at 4-6. But the district court applied the "reasonable belief" standard at least in part because the government "took the position" in an earlier filing "that the reasonable belief standard was applicable." Doc. 91 at 4 (citing Doc. 52 at 30).

capacity defense. Br. 35. The district court's characterization is not surprising, given that defendants not infrequently seek to use their PTSD to show diminished capacity either as a defense at trial or in mitigation at sentencing. *See, e.g., United States v. Stinefast*, 724 F.3d 925, 929 (7th Cir. 2013) (sentencing); *United States v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998) (trial). But even if Nixon was not actually advancing a diminished capacity defense, the district court correctly concluded the evidence was unhelpful to the jury. Although evidence of Nixon's PTSD might tend to show that she *subjectively* believed her daughter was being sexually abused, it does little to establish that her belief was "reasonable."

Nixon cites a number of state-court decisions that admitted evidence of PTSD or battered-woman syndrome to establish a defendant's reasonable belief that she needed to act in self-defense. Br. 35, 36 n.8. Some state cases have focused primarily on the syndrome's relevance to the defendant's *subjective* belief that danger is imminent. *See Commonwealth v. Pitts*, 740 A.2d 726, 733-34 (Pa. Super. Ct. 1999) (concluding PTSD was relevant to prove the defendant's "subjective belief of danger or death"); *People v. Hadnot*, 2010 WL 2053365, at *25 (Cal. Ct. App. 2010) (unpublished) (although "arguably relevant" to the defendant's "reasonable and actual belief," PTSD was particularly relevant to the imperfect self-defense theory that she "acted in the

actual, but unreasonable, belief that she needed to defend herself"). Others have concluded that PTSD or battered-woman syndrome is also relevant to the reasonableness of the defendant's belief that self-defense is necessary. *See, e.g., Perryman v. State*, 990 P.2d 900, 904 (Okla. Crim. App. 1999) (PTSD was relevant "to explain the reasonableness of the accused's belief in the imminence of danger of great bodily harm"); *State v. Hines*, 696 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1997) (PTSD evidence was "relevant to the issues of the honesty and reasonableness of defendant's purported belief that she had to resort to deadly force"); *People v. Humphrey*, 921 P.2d 1, 10 (Cal. 1996) (concluding that "evidence of battered woman's syndrome is generally *relevant* to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend"); *State v. Janes*, 850 P.2d 495, 503 (Wash. 1993) (testimony regarding PSTD and battered-child syndrome "helps the jury to understand the reasonableness of the defendant's perceptions").

These cases do not indicate that the district court abused its discretion. The theory of PTSD's relevance in self-defense cases is that the defendant subjectively and reasonably feared imminent harm based on the defendant's past interactions with the victim. *See Humphrey*, 921 P.2d at 8-9; *Perryman*, 990 P.2d at 904. That is, the abusive conduct that required the use of force in self-defense was the same conduct that gave rise to the PTSD or battered-woman

syndrome. In this case, however, Dr. Loring's PTSD diagnosis was apparently based in part on abuse that occurred more than 20 years prior, dating back to when Nixon was a child, by people other than G.G. 10/31/16 Tr. 69-74, 87. PTSD resulting from these disparate past experiences had little relevance to whether Nixon reasonably believed G.G. was sexually abusing S.G.

Second, even if Nixon's PTSD were relevant, Dr. Loring's PTSD diagnosis would not have helped the trier of fact because it was a clinical diagnosis, not a forensic one. Dr. Loring held a Ph.D. in sociology, was a board-certified expert in traumatic stress, and had been trained in forensic traumatology. A.58-59; 10/31/16 Tr. 57. But she was not a psychologist. And the government's forensic psychology expert testified at the *Daubert* hearing that Dr. Loring's diagnosis was "more appropriate for use in a clinical or treatment setting," rather than the forensic setting. A.63. The expert noted that "in the clinical setting the focus is generally on treatment or to assist the patient," whereas in the forensic setting "the individual may have much to gain by . . . a certain diagnosis." A.64. *See Diestel v. Hines*, 506 F.3d 1249, 1260-61 (10th Cir. 2007) (psychiatrist testified regarding differences between forensic psychiatrist and treating psychiatrist); *Galowski v. Berge*, 78 F.3d 1176, 1179, 1182 (7th Cir. 1996) (psychiatrist who opined that the defendant was incompetent was "not a forensic psychiatrist"). The district court did not

abuse its discretion by concluding that Dr. Loring's treatment-related PTSD diagnosis—which was not subject to the rigors of a forensic examination—would not help the jury decide what Nixon reasonably believed at the time she took S.G. to Canada.

Finally, even if Dr. Loring's testimony would have been helpful to the jury, the district court properly excluded it under Federal Rule of Evidence 403. As the district court pointed out, PTSD evidence would have opened the door to "allegations of abuse that are years, even decades, old." A.66. For example, Dr. Loring's PTSD diagnosis relied in part on (1) G.G.'s having called Nixon names, (2) Nixon's childhood ballet teacher having insulted her weight, and (3) physical abuse by her family members when she was a child. 10/31/16 Tr. 69-74, 87. This would have needlessly lengthened the trial and confused the jury.

The district court also noted the confusing nature of Dr. Loring's testimony. Although Nixon was trying to establish that she had a "reasonable belief" that G.G. was abusing S.G., Dr. Loring "appeared to state that [Nixon's] PTSD made her act in a state of panic and irrationality." A.67. This apparent contradiction "would only serve to confuse the jury." A.67. The district court—which heard Dr. Loring's testimony in the *Daubert* hearing and

was in the best position to conduct the Rule 403 analysis—did not abuse its discretion.

2. Dr. Virginia Chow

Dr. Chow's testimony was inadmissible for the same reasons as Dr. Loring's. It was also inadmissible because Nixon never gave notice of her intent to call Dr. Chow as an expert, as required by Rule 16(b)(1)(C). Where a party fails to comply with Rule 16's disclosure requirements, the district court may "prohibit that party from introducing the undisclosed evidence." Fed. R. Crim. P. 16(d)(2)(C). *See United States v. Causey*, 748 F.3d 310, 319 (7th Cir. 2014). Nixon cannot show that the exclusion of Dr. Chow's testimony was an abuse of discretion.

3. Terri McKean

Finally, the district court acted well within its discretion in limiting Terri McKean's testimony. Although Nixon suggests that McKean was an "expert witness[ ]," Br. 34, she never noticed McKean as an expert. And in the district court, she sought to have McKean testify only "to her observations as a *lay person* as to [Nixon's] stress and anxiety." A.69 (emphasis added). *See* Doc. 74 at 5 (arguing that "McKean can testify to her observations as a lay witness"). Indeed, Nixon never argued below that McKean should be able to testify regarding Nixon's PTSD; she only asserted that McKean could testify about

Nixon's "severe anxiety, distress, and need for counseling during the months preceding the custody trial." Doc. 74 at 6. So Nixon has not preserved her claims that McKean should have been allowed to testify (a) as an expert and (b) about Nixon's PTSD.

More importantly, the district court ruled that McKean could testify as a lay witness about her "observations of [Nixon's] demeanor and behavior," which is exactly what Nixon requested. A.70. During McKean's testimony at trial, the district court twice prevented her from straying into expert opinion, 12/15/16 Tr. 161, 163, but Nixon never objected to the district court's limitations. *See* 12/15/16 Tr. 154-65, 175-79, 181. In short, Nixon was able to elicit from McKean exactly the evidence that she asked for. Consequently, her argument (Br. 34) that the district court erred by "severely limiting" McKean's testimony is unavailing.

D. Any error in failing to admit PTSD evidence was harmless.

Even if the district court abused its discretion by excluding evidence of Nixon's PTSD, the error was harmless for several reasons. First, Nixon's PTSD was potentially relevant only because the district court applied the "reasonable belief" standard to § 1204(c)(2)'s affirmative defense. But that was not the correct standard. Section 1204 applies if the defendant was fleeing "an incidence or pattern of domestic violence," 18 U.S.C. § 1204(c)(2), not "*conduct*

that the defendant reasonably believed was an incidence or pattern of domestic violence." Moreover, the requirement of an "incidence" or "pattern" suggests that the domestic violence must have actually occurred. If the jury had been properly instructed that it needed to find an actual "pattern" or "incidence" of domestic violence, Nixon's PTSD would not have been even arguably relevant. *Cf. Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction"); *Neder*, 527 U.S. at 15-19 (omission of an element from the jury instructions was harmless where properly-instructed jury would have convicted).

Second, even if the "reasonable belief" standard were correct, the PTSD evidence was, at best, only marginally helpful to Nixon's defense. As Nixon admitted below, this evidence was "not case-dispositive" because "a person can commit this offense and have PTSD." Doc. 40 at 5. Although some state courts have held that PTSD is relevant to a person's reasonable belief that force is necessary for self-defense, that relevance is far from obvious. PTSD is primarily relevant to a person's *subjective* belief, showing that, because of her past, she perceives a threat where an ordinary person would not. And, as the district court observed, the proffered evidence here indicated that Nixon's

"PTSD made her act in a state of panic and irrationality, *i.e.* without a reasonable belief." A.66-67. Such evidence would not have helped Nixon.

Third, the other evidence in this case showed that Nixon did *not* reasonably believe that G.G. was abusing S.G. Instead, S.G. testified that Nixon told her to falsely accuse G.G. of abuse. 12/19/16 Tr. 163-75. PTSD cannot possibly explain Nixon's active coaching of S.G. to lie. Any error therefore was harmless.

E. The court did not abuse its discretion by excluding evidence of S.G.'s statements about alleged sexual abuse.

Nixon also challenges the district court's exclusion of testimony by Dr. Buetow, Debra Poblano, and Meghan Murphy regarding the alleged sexual abuse of S.G. Br. 38-50. The district court did not abuse it discretion by excluding this evidence.

1. The proffered testimony was inadmissible hearsay.

Nixon first argues that Buetow, Poblano, and Murphy's testimony was admissible because it was "not offered for the truth of the matter asserted," but to show Nixon's reasonable belief that abuse had occurred. Br. 40. These three witnesses had "engaged in conversations with [S.G.] and formed a belief that she had been sexually abused by G.G., and at least two had reported their findings to others." *Id.* Nixon argues that "it would have been just one small evidentiary step for Nixon to call these witnesses to show that Nixon herself

was aware of these assessments and reports," which would have supported "the reasonableness of her belief that abuse happened." Br. 41.

Nixon is incorrect on a number of levels. First, it would make no sense to call these witnesses to testify about *Nixon*'s awareness of their reports. They would be unlikely to know whether Nixon had seen their reports. In her briefing below, Nixon pointed out that she sat through state-court hearings at which "medical professionals" testified. Doc. 27 at 27. Although Buetow and Murphy might have been able to testify that Nixon was present at these hearings and "aware of the[ir] assessments," Br. 41, Nixon did not want to call them for such a limited (and unusual) purpose. She wanted to question them about the substance of their conclusions—that G.G. had abused S.G.—and the basis for those conclusions—S.G.'s hearsay statements. A.20. *See* Doc. 27 at 27-28.

The district court allowed Nixon herself to testify about what S.G. allegedly said regarding G.G.'s abuse. A.42. *See, e.g.,* 12/16/16 Tr. 59, 61, 64-65, 73-74. The court ruled that "[s]tatements made by S.G. directly to [Nixon]" were admissible to show the effect on the listener (Nixon). A.42. Thus, it would have been needlessly cumulative to show that (a) S.G. made similar statements about abuse to Buetow, Poblano, and Murphy; (b) Nixon learned about those statements, and (c) they had an effect on her. Nor would

it have been useful to show that these witnesses concluded that S.G. had been abused, since it was Nixon's reasonable belief, not theirs, that mattered (assuming "reasonable belief" is the appropriate standard).

Nixon next argues that, even if this proffered testimony were hearsay, Dr. Buetow's testimony was admissible substantively under Rule 803(4)'s exception for statements made for medical diagnosis and treatment.[9] Br. 41-42. She points out that other courts of appeals have used this exception to admit child abuse victims' statements identifying their abusers. *See United States v. Peneaux*, 432 F.3d 882, 893-94 (8th Cir. 2005); *United States v. Pacheco*, 154 F.3d 1236, 1240 (10th Cir. 1998); *People of the Territory of Guam v. Ignacio*, 10 F.3d 608, 612-13 (9th Cir. 1993). This approach is not universally accepted, however, and this Court has called it "questionable." *United States v. Cherry*, 938 F.2d 748, 756 n.14 (7th Cir. 1991). But, in any event, these cases do little to help Nixon because the question is not whether Buetow's testimony *could* have been admitted under Rule 803(4), but whether the district court abused its discretion by excluding the testimony.

Hearsay is admissible under Rule 803(4) if the statements "are of the type reasonably pertinent to a physician in providing treatment." *Cook v.*

[9] Nixon does not argue that Poblano and Murphy's testimony fits any hearsay exception.

Hoppin, 783 F.2d 684, 690 (7th Cir. 1986). The district court "thoroughly read Dr. Buetow's testimony" at the custody trial and concluded that it was "questionable whether [S.G.'s] statements were pertinent to any treatment" that Dr. Buetow provided. A.45-46. Indeed, the record does not indicate that Dr. Buetow provided S.G. with any treatment. *See* A.18-19; Doc. 27 at 5. "Rather, it appears [Nixon] had S.G. make the statements to get another mandated reporter on record as having heard of the abuse." A.46. In light of these concerns, the court did not abuse its discretion in excluding Dr. Buetow's testimony.

2. The court properly excluded the testimony under Rule 403.

The district court correctly concluded in the alternative that "statements made by Poblano, Murphy, and Buetow about what S.G. told them" should be excluded under Rule 403 because they would "needlessly confuse the issues and mislead the jury" and would "potentially present[ ] cumulative evidence as to what S.G. told Defendant directly." A.42. The primary point of these witnesses' testimony was to show that, because other people believed that G.G. abused S.G., Nixon must have reasonably believed it happened. But in light of S.G.'s unimpeached testimony that Nixon coached her to falsely accuse G.G., additional testimony from Poblano, Murphy, and Buetow would

have done Nixon little good. Their conclusions were entirely consistent with Nixon's coaching of S.G.

Nixon argues that the district court "misappl[ied] the Rule 403 balancing test" by failing to "weigh[ ] the potential probative value of the evidence." Br. 43. She asserts that "[t]his Court has repeatedly held that 'a district court commits error by not clearly articulating its Rule 403 rationale.'" *Id.* (quoting *United States v. Miller*, 688 F.3d 322, 327 (7th Cir. 2012)). The case she cites actually says that "a district court commits error by not clearly articulating its Rule 403 rationale *before admitting adverse character evidence against a defendant*." *Miller*, 688 F.3d at 327 (emphasis added). This case obviously does not involve adverse character evidence under Rule 404(b). And even in 404(b) cases, this Court has affirmed even where the district court could have "better explained the rationale behind its Rule 403 conclusion" so long as the "ultimate reason" for the ruling is discernable. *United States v. Gorman*, 613 F.3d 711, 720 (7th Cir. 2010).

Moreover, the district court *did* articulate the reasons for its Rule 403 holding. *See* A.42, 47. The court explained that the witnesses' testimony "about what S.G. told them would be more prejudicial than probative under Rule 403 because it would needlessly confuse the issues and mislead the jury, along with potentially presenting cumulative evidence as to what S.G. told

[Nixon] directly." A.42. This statement was in the context of a 41-page order that thoroughly examined the nature of the proposed hearsay and explained why it was not admissible under various exceptions to the hearsay rule. *See* A.15-55.

Nixon also asserts that the district court "accorded near-dispositive weight" to the state court's findings and failed to recognize that Dr. Buetow's testimony served a different purpose in this trial than in the state custody trial. Br. 45. She is incorrect. Although the district court said it agreed with Judge Blockman's concerns about Dr. Buetow's testimony, it made clear that it was applying the Federal Rules of Evidence and that it understood the purpose of Buetow's proffered testimony in this trial, *i.e.*, to prove Nixon's state of mind. A.41-42, 46-47.

Nixon also argues that the district court erred by failing to consider "alternatives to complete exclusion." Br. 46. She suggests that the jury could have been instructed to "only consider the testimony of Nixon's witnesses for the purposes of assessing her affirmative defense." *Id.* at 46-47. Nixon points to no authority suggesting that a district court must detail for the record which alternatives to exclusion it has considered and rejected. And the limiting instruction she proposes would not have addressed the reasons that the court excluded the testimony. There was no abuse of discretion.

3. The court properly concluded that Nixon's experts could not simply repeat hearsay statements.

Nixon next argues that the district court erred when it "severely truncated the expert testimony of Buetow and Murphy." Br. 47. The district court concluded that these witnesses "could testify as general experts in the field of child abuse," but that "their testimony must be limited to generalizations about sexual abuse victims, and they may *not* testify as to any statements told to them by S.G. or reach any legal conclusion about the alleged abuse."[10] A.51. For them to repeat S.G.'s "hearsay statements . . . alleging abuse" would be "an improper circumvention" of the court's exclusion of those hearsay statements. A.51.

Nixon first argues that Buetow and Murphy's proposed testimony "was not hearsay or, at a minimum, fell within the hearsay exception under Rule 80[3]([4])." Br. 47. As discussed above, these witnesses' repetition of S.G.'s out-of-court statements would be hearsay that was not admissible under Rule 803(4) and was excludable under Rule 403.

Nixon next argues that these experts could repeat S.G.'s statements without circumventing the rule against hearsay. Br. 47-48. She points out (*id.*

[10] Nixon never provided notice of her intent to call Buetow and Murphy as experts, as required by Rule 16(b)(1)(C). This would have justified excluding them altogether, *see Causey*, 748 F.3d at 319, but the court permitted them to give appropriate expert testimony.

at 48) that the district court cited a portion of *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (en banc), in which the en banc court was actually quoting the vacated panel decision. *See Boim*, 549 F.3d at 703. But, contrary to Nixon's suggestion (Br. 48), the *en banc* court did not hold that experts may repeat inadmissible hearsay. *See Boim*, 549 F.3d at 704.

Indeed, it is well established that expert witnesses may not be used to circumvent the hearsay rule. In *Williams v. Illinois*, 567 U.S. 50, 80 (2012), the plurality opinion noted that "trial courts can screen out experts who would act as mere conduits for hearsay" by strictly enforcing Rule 702's requirement that the expert testify to specialized knowledge that is helpful to the trier of fact. And it observed that "experts are generally precluded from disclosing inadmissible evidence to a jury." *Id.* at 80-81. *See United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (noting that an expert may not "simply transmit . . . hearsay to the jury"). For Buetow and Murphy to testify about their "conversations with [S.G.]," Br. 48, rather than about their own expert opinions, would have been an impermissible end-run around the hearsay rule.

Nixon also argues that the district court "failed to properly apply the Rule 403 balancing test in excluding the expert testimony." Br. 48. The district court never mentioned Rule 403 in connection with Buetow and Murphy's expert testimony, but only in connection with the admissibility of

the underlying hearsay statements. *See* A.50-51. Although Rule 403 would have provided an alternative basis for excluding their testimony, the court cannot be faulted for "fail[ure] to properly apply" a rule that it never applied. Br. 48.

F. Any error in failing to admit hearsay statements was harmless.

Even if the district court abused its discretion by excluding Buetow, Poblano, and Murphy's testimony, the resulting error was harmless. In Nixon's view, "whether the abuse actually occurred was irrelevant." Br. 41. So these witnesses' only potential relevance was to show that Nixon "was on notice that three separate medical and psychological professionals determined that [S.G.] had been abused and two had reported this to the authorities." *Id.* But they reached their conclusions only *after* Nixon made the allegations and—according to S.G.'s unimpeached testimony—coached S.G. to falsely claim abuse. If the jury believed S.G., then these witnesses' testimony did little more than establish that Nixon's coaching of S.G. was effective. If the jury disbelieved S.G. and concluded that the abuse actually occurred, then these witnesses did nothing more than confirm what Nixon already knew.

V. No Cumulative Error Occurred.

Nixon finally contends that cumulative error occurred. In order to succeed on a claim of cumulative error, Nixon must show "(1) that multiple

errors occurred at trial; and (2) those errors, in the context of the entire trial, were so severe as to have rendered [her] trial fundamentally unfair." *United States v. Powell*, 652 F.3d 702, 706 (7th Cir. 2011). Because she has "not shown any trial error, [s]he cannot show cumulative error." *United States v. Keskes*, 703 F.3d 1078, 1090 (7th Cir. 2013). And even if she could show multiple errors, Nixon cannot show that those errors rendered her trial unfair "[i]n light of the quantity and quality of evidence of [her] guilt adduced at trial." *Powell*, 652 F.3d at 707.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

JOHN E. CHILDRESS
United States Attorney
Central District of Illinois

ELLY M. PEIRSON
LAUREN S. KUPERSMITH
Trial Attorneys
Child Exploitation and Obscenity Section

JOHN P. CRONAN
Acting Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

WILLIAM A. GLASER
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 532-4495
William.Glaser@usdoj.gov

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DATED: April 9, 2018

s/ William A. Glaser
WILLIAM A. GLASER
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice

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I hereby certify that on April 9, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ William A. Glaser
WILLIAM A. GLASER
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice