A newsletter presenting relevant text from recent federal appellate decisions addressing provisions of the F.R.E. with quarterly tables of the volume's decisions by Rule.

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HIGHLIGHTS

The August 2024 issue of Federal Rules of Evidence News provides you with recently decided federal appellate court decisions addressing issues under the Federal Rules of Evidence. This month's issue includes the following highlights and selected secondary sources:

- Defendant was indicted for violating 18 U.S.C.A. § 922(g)(1) by possessing a firearm as a previously convicted felon. The government appealed a pretrial ruling applying Fed. R. Evid. 403 to exclude evidence that the firearm had a laser sight, which witnesses saw activated when the defendant brandished the firearm, finding that it would be unfairly prejudicial and would substantially outweigh the probative value of the evidence. The government moved to reconsider, proposing to limit the laser sight evidence to describing it as a "glowing red dot" without naming or demonstrating the laser sight itself. The trial court maintained its exclusion of the evidence and the government filed an interlocutory appeal of that ruling. Reviewing the district court's decision under an abuse-of-discretion standard, the Seventh Circuit reversed the district court's exclusion of the laser sight evidence, finding that the district court had abused its discretion by undervaluing its probative value and overestimating the risk of unfair prejudice. In its decision, the court emphasized the importance of allowing the prosecution to present a complete and descriptive narrative of the charged offense, especially when the evidence is central to proving a key element of the crime, and underscoring the careful balancing required under Rule 403 between probative value and the risk of unfair prejudice. The court remanded the case for further proceedings that allowed the government to introduce the limited laser sight evidence with appropriate limiting instructions. United States v. Johnson, 89 F.4th 997, 123 Fed. R. Evid. Serv. 976 (7th Cir. 2024).

- Using a pseudonym, Defendant engaged in sexually explicit conversations over a messaging platform with someone he believed to be a 14-year-old boy, but who was an undercover police officer. Defendant was convicted of attempted enticement of a minor in violation of 18 U.S.C.A. § 2422(b) and appealed the conviction arguing, inter alia, that the district court erred in instructing the jury on the term "grooming" in

violation of Fed. R. Evid. 605 as it constituted impermissible judicial testimony. The Tenth Circuit affirmed the conviction holding, inter alia, that the instruction on grooming did not violate Rule 605 as it did not add new evidence to the record but provided a legal definition to aid the jury. The court found that the instruction was based on established legal interpretations and was intended to clarify the law rather than introduce factual testimony and should be distinguished from cases where judges improperly added factual determinations to the trial record. United States v. Flechs, 98 F.4th 1235 (10th Cir. 2024).

- Plaintiffs in a putative consumer class action against manufacturers of pet health products alleged false and misleading marketing of a product as promoting healthy joints in dogs in violation of the California Consumers Legal Remedies Act. Under Fed. R. Civ. P. 23, the district court certified a class of California purchasers of the product who were exposed to the allegedly misleading statements. The defendant manufacturers filed an interlocutory appeal of the class certification on two grounds: (1) that damages were not susceptible to common proof, and (2) that reliance was not susceptible to common proof. As part of the first ground, defendants argued that the district court erred in relying on an unexecuted damages model proposed by plaintiffs' expert to find that common questions predominated as to injury. Defendants challenged the admissibility and reliability of the expert's unexecuted damages model under Rule 702 of the Federal Rules of Evidence, arguing that the expert proposed a "conjoint survey" to measure classwide damages, though he had not yet executed the survey at the time of class certification. The district court found the expert's credentials and methodology reliable for the purposes of class certification, noting that conjoint surveys are well-established for measuring class-wide damages in CLRA mislabeling cases. The district court conducted a limited analysis under *Daubert*, focusing on whether the expert's methodology was reliable for class certification purposes and concluding that the court the expert's model was sufficiently reliable and developed to satisfy the standard at the class certification stage, despite not being fully executed, and emphasizing that the focus at class certification is whether the method of proof would apply in common to all class members not whether it would prevail at trial. The Ninth Circuit affirmed the district court's grant of class certification holding, inter alia, that class action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial. The court also upheld the district court's finding that reliance could be established on a classwide basis through proof of material

misrepresentation. The court clarified that a full *Daubert* analysis is not always necessary at the class certification stage and that a limited inquiry into the reliability of the expert's methodology is sufficient. Lytle v. Nutramax Laboratories, Inc., 99 F.4th 557 (9th Cir. 2024).

RULES CONSTRUED IN THIS ISSUE: 403, 605, 702, 803

RECENT SECONDARY SOURCES ON FRE ISSUES.

- Smith, Close the Gate! A Daubert Argument for Excluding Industry-Funded "Science," 71 Drake L. Rev. 45 (2024)
- Kim, Google Searching for the Truth: Examining the Admissibility of Internet Search History, 19 Wash. J. L. Tech. & Arts 46 (Summer 2024)
- Rothstein and Imwinkelried, The Future Scope of the Character Evidence Prohibition: The Contextual Statutory Construction Argument That Could Finally Force the Policy Discussion, 60 No. 2 Crim. Law Bulletin Art. 1 (Summer 2024)
- Note, . . . Can You Tell I'm Startled?, 43 Rev. Litig. 289 (2024)

ARTICLE IV. RELEVANCY AND ITS LIMITS.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

Case Background: *Defendant was indicted for violating 18 U.S.C.A. § 922(g)(1) by possessing a firearm as a previously convicted felon. The government appealed a pretrial ruling applying Fed. R. Evid. 403 to exclude evidence that the firearm had a laser sight, which witnesses saw activated when the defendant brandished the firearm, finding that it would be unfairly prejudicial and would substantially outweigh the probative value of the evidence. The government moved to reconsider, proposing to limit the laser sight evidence to describing it as a "glowing red dot" without naming or demonstrating the laser sight. The trial court maintained its exclusion and the government filed an interlocutory appeal of that ruling. What follows is the court's opinion, in pertinent part:*

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III. *Standard of Review*

Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." In criminal cases, this determination is made against the backdrop of the general presumption that the prosecution is entitled to tell "a colorful story with descriptive richness" and "evidentiary depth." *Old Chief v. United States*, 519 U.S. 172, 187-90, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). The rule gives the district court discretion in the first instance, and appellate courts review Rule 403 decisions for abuse of discretion. E.g., *United States v. Chanu*, 40 F.4th 528, 544 (7th Cir. 2022). The question is not whether we would make the same decision as the district court. When we review the context-sensitive application of Rule 403, " 'we give special deference' to the district court's findings and reverse only when 'no reasonable person could take the view adopted by the trial court.' " *United States v. LeShore*, 543 F.3d 935, 939 (7th Cir. 2008), quoting *United States v. Cash*, 394 F.3d 560, 564 (7th Cir. 2005).

Abuse of discretion is a high standard but not an insurmountable one. The Supreme

Court reversed a Rule 403 finding in *Old Chief v. United States*, also a felon-in-possession prosecution. 519 U.S. at 191-92, 117 S.Ct. 644. Or compare appellate review of Rule 403 decisions to review of grants and denials of preliminary injunctions, which are also subject to abuse-of-discretion review. Reversals of Rule 403 exclusions are rarer than preliminary injunction reversals, but they are not unknown. From this circuit's decisions, see *Thompson v. City of Chicago*, 722 F.3d 963, 976 (7th Cir. 2013) (abuse of discretion to exclude guilty-plea testimony of non-party officers to corruption charges; risk that evidence would cause jury to decide case on an improper basis—the outrageous conduct of other officers—did not substantially outweigh its probative value); *Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981, 994 (7th Cir. 2005) (abuse of discretion to exclude all evidence from before the parties entered into agreement that formed basis of contract dispute when some excluded evidence was central to case); *Mihailovich v. Laatsch*, 359 F.3d 892, 910-13 (7th Cir. 2004) (abuse of discretion to exclude all evidence of prior car accidents at same allegedly dangerous curve in road); *United States v. Centracchio*, 265 F.3d 518, 530-32 (7th Cir. 2001) (abuse of discretion to exclude statements of a deceased co-conspirator), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *United States v. Messino*, 181 F.3d 826, 830-31 (7th Cir. 1999) (abuse of discretion to exclude testimony of defendants' co-conspirator despite attorney conflict of interest); *Buscaglia v. United States*, 25 F.3d 530, 533-34 (7th Cir. 1994) (clear error to exclude expert witness affidavit; court erred by discounting probative value of affidavit while significantly overstating risk of unfair prejudice and confusion from admission).[1]

IV. *Analysis*

In our analysis, we focus on the most limited version of the laser sight evidence proposed by the government in its motion for reconsideration. The government sought to introduce laser sight evidence in the following manner:

> 1. Testimony by Thompkins and Walton that each saw a "glowing red dot" or "red dot" on the defendant's gun as he brandished it;
>
> 2. The recording of Walton's second 911 call without redacting her description of the gun as having a "red dot glowing on it"; and
>
> 3. Testimony by an ATF agent explaining that the gun found in defendant's car had a feature that would appear as a "red glowing dot" when pressure was applied to the pressure pad located beneath the gun's trigger guard, along with a photograph of the feature rather than a demonstration.[2]

In denying the motion for reconsideration, the district court explained that while the proffered evidence was probative, it was not "central" to the government's case. The court reasoned that the government had ample other evidence to prove possession and that the laser sight evidence would be so highly prejudicial that it could not be mitigated by the government's proposed limits. The court based its finding of prejudice on several factors, including: (1) the current environment of frequent mass shootings in the United States; (2) the laser sight served no purpose other than to make the gun more dangerous by increasing its accuracy; and (3) the likelihood that the evidence would turn a simple possession case into one where the jury viewed the defendant as "an assassin preying on women and children."

Reversal is warranted on two grounds. First, the district court unduly discounted the probative value of the laser sight evidence. It is central to a contested element of the offense—possession—including the credibility of the government's eyewitnesses on the issue of possession. Second, the

district court gave undue weight to the risk of unfair prejudice if the government is held to its proposed limited version of the laser sight evidence. Based on considerably greater probative value and less risk of unfair prejudice than the district court recognized, the Rule 403 balance shifts decisively in favor of admitting the evidence. The risk of unfair prejudice clearly does not substantially outweigh the probative value.

A. *Probative Value of the Laser Sight Evidence*

1. *The Central Issue of Possession*

The district court found that the laser sight evidence would be probative but is not "central" to the government's case. We respectfully disagree. The laser sight evidence tends to prove a key disputed element of the charged crime—possession of a particular firearm. See *United States v. Kapp*, 419 F.3d 666, 677 (7th Cir. 2005) ("[I]f evidence is probative of an issue relevant to an element of the offense, it must be admitted in all but the most extreme cases."). On another Rule 403 issue in a felon-in-possession case, the Supreme Court reminded courts of "the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice," that "making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness," and that the "persuasive power of the concrete and particular is often essential" for jurors to do their jobs. *Old Chief*, 519 U.S. at 186-87, 117 S.Ct. 644; accord, *id.* at 195, 117 S.Ct. 644 (O'Connor, J., dissenting) ("Although petitioner's possession of any number of weapons would have satisfied the requirements of § 922(g)(1), obviously the Government [is] entitled to prove with specific evidence that the petitioner possessed the weapon he did.").

2. *Probative Value*

It seems to us axiomatic that identifying features of a firearm a defendant is charged with unlawfully possessing—including evidence of an attached laser sight—are central to a felon-in-possession case. Defendant and the district court have not cited, nor have we found, cases in which evidence of any distinguishing features—even dangerous features—of the firearm in question was even controversial, let alone actually excluded under Rule 403.

Beyond this general axiom, the laser sight evidence is highly probative for two reasons specific to this case: (a) the district court's broad exclusion of other evidence has increased the probative value of the laser sight evidence; and (b) the defense intends to attack the credibility of the government witnesses, and evidence of the laser sight tends to corroborate their testimony, thereby increasing its probative value.

a. *Limits on Other Evidence*

In finding that the laser sight evidence was not "central" for the prosecution, the district court observed that the government had "ample other evidence" to prove possession. It is true that the probative value of evidence is relative. The probative value of a single piece of evidence may decrease with every additional piece of evidence a party introduces to prove the same point. At the same time, "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story." *Old Chief*, 519 U.S. at 190, 117 S.Ct. 644. The prosecution is not limited to providing bare-bones proof of the elements of the crime. It is entitled to tell "a colorful story with descriptive richness." *Id.* at 187, 117 S.Ct. 644. Here, the government should not be required to sanitize its description of the firearm when the details are probative of possession. This is true even when other evidence relevant to possession is available to the government.

The district court's challenged Rule 403 exclusion bars any mention of a key identifying feature of the gun—either by the government's witnesses or in the second 911 recording. Absent the laser sight evidence, all the jury will hear from the witnesses is that they saw Johnson wielding a nondescript black gun.

Other rulings by the district court, which are not challenged on appeal, will exclude almost all mention of the events leading up to the defendant's alleged brandishing of the gun. The government's witnesses have been ordered to refer to the preceding events only as an "argument." The first 911 call was to be excluded in its entirety. The district court also ordered the second 911 call redacted to eliminate any reference to the first 911 call or the domestic dispute. This excluded evidence speaks to the defendant's possible motives for possessing and brandishing the gun, so the court's order eliminates from the government's case circumstantial evidence that is probative of possession. The court also ordered that all audio on the police officers' body-camera recordings be muted for trial. The audio includes numerous statements by Thompkins relevant to possession.

We have previously explained that a district court may abuse its discretion when it narrows evidence so strictly that a litigant is essentially prevented from presenting his or her case. See *Thompson v. City of Chicago*, 722 F.3d 963, 971 (7th Cir. 2013) (reversing exclusion of evidence that non-party police officers pled guilty to related crimes); *Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981, 994 (7th Cir. 2005) (reversing exclusion of parties' dealings before entering into contract). Under the district court's rulings, we are concerned that "jurors may well wonder what they are being kept from knowing." *Old Chief*, 519 U.S. at 189, 117 S.Ct. 644.

Moreover, even if evidence of the laser sight is admitted, witnesses Walton and Thompkins will be under court and prosecution instructions to say less than they remember about what they experienced. Such instructions impose additional pressures on lay witnesses in an already stressful situation. After all, the witnesses ordinarily will have just taken an oath to tell "the whole truth," but there are some truths they are not allowed to mention. The instructions to limit testimony may therefore impair the witnesses' credibility and, as a consequence, the credibility of the prosecution. "People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard." *Id.*

Gaps in the government's narrative risk the jury drawing an unfair negative inference against the government. See *id.* at 188, 117 S.Ct. 644. This can be a significant risk when the government bears the burden of persuasion beyond a reasonable doubt. The evidence probative of possession that has already been excluded serves to increase the probative value of the laser sight evidence.

b. *Corroboration and Attacks on Credibility*

None of the police officers saw defendant hold a gun or place one in his car. The body camera videos show only that Johnson put something in his car. The government must convince the jury to infer, beyond a reasonable doubt, that this "something" was the gun. Walton's and Thompkins' testimony offers the only direct evidence that the defendant possessed a firearm. The second 911 call helps to corroborate this evidence.

Walton's and Thompkins' credibility is likely to be pivotal. Acquittal or conviction will hinge on whether the jury believes Walton and Thompkins saw Johnson possess a

firearm before the police arrived and whether the firearm in question was the one found in Johnson's car. Johnson has made clear that his primary trial defense will be to attack Walton's and Thompkins' credibility, arguing that they fabricated their story and planted the gun in his car.

The defense will have grounds on which to attack their credibility, including a mistaken description of Johnson's car and a prior conviction for a crime of deception. Further, as Johnson was being arrested, Thompkins told him, "I told you not to play with me!" That statement suggests a motive and plan for revenge against him. The body camera recordings show that Thompkins walked up to Johnson's car, opened the rear door, and then announced to police that she had found a gun. We have not seen anything that conclusively refutes the possibility that Thompkins planted the gun in defendant's car.[3]

Given the likely attacks on Walton's and Thompkins' credibility, the prosecution's desire to offer more detailed and corroborated testimony is understandable. We believe the district court substantially underestimated the probative value of the evidence of the laser sight on the charged firearm. See generally *United States v. Norweathers*, 895 F.3d 485, 491 (7th Cir. 2018) (affirming admission of extremely prejudicial evidence under Rule 403 because it was "highly probative of the issues that, at the time, appeared to be central to [defendant's] anticipated defense").

B. *The Risk of Unfair Prejudice*

We agree with the district court that the laser sight evidence will likely cause some prejudice to the defendant, but as the judge recognized, the issue is the risk of *unfair* prejudice. See, e.g., *United States v. McKibbins*, 656 F.3d 707, 712 (7th Cir. 2011). "Evidence poses a danger of 'unfair prejudice' if it has 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009), quoting Fed. R. Evid. 403 advisory committee's note.

The district court found that even the government's limited version of the laser sight evidence could serve *only* to cause the jury to decide the case based on perceptions that the defendant is particularly dangerous. We disagree. As discussed above, the laser sight is a key identifying feature of the gun the defendant is charged with possessing. The description of any dangerous weapon may highlight the weapon's dangerousness. But it also helps to identify the weapon, which is often, as here, central to proving possession. See *United States v. West*, 53 F.4th 1104, 1108 (7th Cir. 2022) ("Depending on the nature of the offense, graphic or disturbing evidence may be central to the government's case.").

The district court overstated the risk that the laser sight evidence would cause the jury to decide the case based on perceptions about the defendant's dangerousness. First, any evidence of a firearm can be inflammatory given a firearm's innate dangerousness. Such evidence is still necessary in a felon-in-possession trial. Second, the government's proposed limits on the laser sight evidence mitigate the risk of unfair prejudice. We discuss these factors in turn.

1. *Descriptions of Firearms and Risk of Unfair Prejudice*

As a general matter, evidence that risks unfair prejudice often inheres in elements of a crime or civil claim. That's why we have cautioned district courts to avoid excluding evidence under Rule 403 when the governing law requires evidence that risks inflaming the jury or may cause the jury to decide the case on an improper basis. See *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 234 (7th Cir. 2021) ("By its nature, evidence

of a defendant's past violations creates a risk that the jury" will decide on improper grounds, but "it is usually necessary in *Monell* cases to introduce evidence of a prior pattern of similar constitutional violations"); *Thompson*, 722 F.3d at 976 (danger of introducing evidence of other officers' "outrageous conduct" was "heavily discounted" because "that risk is always present in a conspiracy claim").

Evidence about a dangerous weapon is unavoidable in a felon-in-possession trial. That need does not change in an era of highly publicized mass shootings. Some types of weapons are obviously more dangerous than others. Compare a modern AR-15 semi-automatic rifle with high-capacity magazines and a laser sight and bump stock to an old six-shot, single-action revolver. Yet evidence of the type of gun allegedly possessed is regularly introduced during felon-in-possession trials. In *United States v. Perryman*, 20 F.4th 1127, 1134-36 (7th Cir. 2021), for example, the defendant was convicted of being a felon in possession of a loaded AR-15 rifle. No one would think of requiring the government to sanitize evidence of that weapon so that it would be presented as a generic, nondescript firearm.

We generally agree with the district court that a laser sight tends to make a firearm more dangerous by making it easier to aim and shoot accurately. But identifying features and modifications of firearms, including laser sights and others that make firearms more dangerous, are regularly introduced as evidence at felon-in-possession trials with little or no controversy. *United States v. Holt*, 486 F.3d 997, 999-1000 (7th Cir. 2007) (testimony describing gun with laser sight admitted in felon-in-possession trial); *United States v. Adams*, 375 F.3d 108, 110 (1st Cir. 2004) (same); *United States v. Wilburn*, 473 F.3d 742, 743 (7th Cir. 2007) (laser sight admitted in felon-in-possession trial); *United States v. Tinsley*, 62 F.4th 376, 381-82 (7th Cir. 2023) (evidence of extended magazines admitted in felon-in-possession, bank-robbery, and drug trial); *United States v. Byers*, 603 F.3d 503, 505-06 (8th Cir. 2010) (evidence and argument about extended magazine and hollow-tipped ammunition was relevant in felon-in-possession trial; not prosecutorial misconduct to comment on them); *United States v. McCurdy*, 634 F. Supp. 2d 118, 121-22 (D. Me. 2009) (evidence of flash suppressor and collapsible stock admitted in felon-in-possession trial).[4]

2. Proposed Limits to Reduce Risk of Unfair Prejudice

In a felon-in-possession case, the identity of the charged firearm is often central to the case, as it will be here. The risk of *unfair* prejudice from describing the firearm is therefore modest, even if a description includes a dangerous feature. The description addresses the core element of possession—the basis upon which the jury should be deciding the case.

To ensure that the evidence is not relied upon for an improper purpose, we assume that the district court may have discretion to exclude evidence of threatening actions taken by the defendant. This might include here evidence that, according to the prosecution witnesses, Johnson pointed a firearm at Thompkins and her children with the laser sight activated. Cf. *United States v. Hite*, 364 F.3d 874, 878, 881-82 (7th Cir. 2004) (affirming convictions in illegal firearm possession case; district court did not abuse discretion by allowing witness to testify that defendant held charged revolver, placed one round in it, spun the barrel, and pulled the trigger to demonstrate knowing possession, but barring witness under Rule 403 from characterizing those events as "Russian roulette" or testifying that defendant pointed revolver at her), judgment vacated on other grounds,

543 U.S. 1103, 125 S.Ct. 1027, 160 L.Ed.2d 1012 (2005).

In its motion to reconsider, the government suggested limits on the evidence to reduce the risk of unfair prejudice to Johnson. Again, the government proposed to limit the evidence to identifying a glowing red dot on the gun, as opposed to describing a laser sight by name. The government also said it would not have witnesses testify that they saw a red dot on anyone's clothing, indicating that the firearm was aimed at them with the laser sight activated. These limits on the laser sight evidence should minimize any risk that it will cause the jury to view the defendant as an "assassin" or as unusually dangerous. Far from conveying any explicit or implied message that the red dot was a dangerous feature of the firearm, the limited laser sight evidence should keep the jury focused on the central issue in the case: did the defendant possess the firearm recovered from the scene—a black handgun with a glowing red dot?

Limiting the evidence to descriptions of a "glowing red dot" on the gun should ensure that any prejudice caused by the laser sight evidence is not *unfairly* prejudicial to the defendant. Compare *Holt*, 486 F.3d at 999 (allowing testimony describing gun with a laser sight in felon-in-possession trial), with *United States v. Klebig*, 600 F.3d 700, 715-16, 722 (7th Cir. 2009) (reversing conviction in unlawful firearm possession case; district court should have limited under Rule 403 a live courtroom demonstration of defendant's two dozen *legally* possessed firearms). In our view, the district court did not adequately account for the government's proposed limits on the laser sight evidence. This led the district court to overweigh the risk of unfair prejudice in its Rule 403 analysis.

C. *Balancing*

Rule 403 requires a balance. The district court must determine whether the danger of unfair prejudice (or other problems such as confusion or wasting time) *substantially* outweighs the challenged evidence's probative value. The balancing test under Rule 403 is a "sliding scale." *United States v. West*, 53 F.4th 1104, 1108 (7th Cir. 2022). "The amount of prejudice that is acceptable varies according to the amount of probative value the evidence possesses. '[T]he more probative the evidence, the more the court will tolerate some risk of prejudice, while less probative evidence will be received only if the risk of prejudice is more remote.' " *United States v. Boros*, 668 F.3d 901, 909 (7th Cir. 2012), quoting *United States v. Vargas*, 552 F.3d 550, 557 (7th Cir. 2008), quoting in turn *United States v. Menzer*, 29 F.3d 1223, 1234 (7th Cir. 1994).

Our disagreements with the district court affect the weights assigned to both sides of the scale. The district court erred by unduly discounting the probative value of the laser sight evidence while simultaneously overstating the danger of unfair prejudice, at least with the limits the government proposed. These differences in weight are so substantial that they necessarily change the result of the Rule 403 balance and require us to reverse.

Our ruling today is intended to be narrow. First, we do not mean to imply that any of the limits the government has proposed on the laser sight evidence are essential to a fair trial in this or similar cases. Other judges in other cases might well exercise their discretion under Rule 403 to allow such evidence of a firearm's identifying characteristics or relevant events without such limits. We hold only that the district court abused its discretion when it excluded under Rule 403 even the limited version of the laser sight evidence proposed in the government's motion for reconsideration. We also do not endorse all portions of the government's proposed limiting instruction about the gun's

dangerousness. We leave the framing of appropriate limiting instructions to the district court's sound discretion.

The district court's exclusion of the limited laser sight evidence under Rule 403 as proposed in the government's motion for reconsideration is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

Cite: United States v. Johnson, 89 F.4th 997, 123 Fed. R. Evid. Serv. 976 (7th Cir. 2024)

West's Key Number Digest, Criminal Law ⚿337, 338(1), 338(7), 1134.49(1), 1153.3, 1158.8, 1158.9

West's Key Number Digest, Weapons ⚿263, 266

ENDNOTES:

[1]This circuit is not alone in reversing Rule 403 exclusions in appropriate cases, though such reversals are relatively rare. See, e.g., *United States v. Soler-Montalvo*, 44 F.4th 1, 18-19 (1st Cir. 2022) (abuse of discretion to exclude defense expert's testimony on how defendant's behavior differed from a typical sexual predator); *United States v. Pepin*, 514 F.3d 193, 207-09 (2d Cir. 2008) (abuse of discretion to exclude from guilt phase of capital trial prosecution's evidence that murder victims had been dismembered); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83 (3d Cir. 1986) (abuse of discretion to exclude evidence of increased future risk of cancer on theory that "mere mention of that dread disease" would unfairly prejudice defendant); *United States v. Bajoghli*, 785 F.3d 957, 966 (4th Cir. 2015) (abuse of discretion to exclude post-scheme conduct showing guilty mind); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1155 (5th Cir. Unit A 1981) (abuse of discretion to exclude results of blood alcohol test); *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 360 (6th Cir. 1997) (abuse of discretion to exclude taped interviews showing pastor told defendant of non-public facts about murder before defendant confessed and included those details); *American Modern Home Ins. Co. v. Thomas*, 993 F.3d 1068, 1071-72 (8th Cir. 2021) (abuse of discretion to exclude three prior convictions when witness credibility was paramount); *Obrey v. Johnson*, 400 F.3d 691, 697-99 (9th Cir. 2005) (abuse of discretion to exclude anecdotal evidence of past discrimination); *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1435 (10th Cir. 1990) (abuse of discretion to bar use of pleadings from another case containing prior inconsistent statements); *Busby v. City of Orlando*, 931 F.2d 764, 783-84 (11th Cir. 1991) (abuse of discretion to exclude chart showing number of employees fired each year by race); *Henderson v. George Washington Univ.*, 449 F.3d 127, 135-36, 141 (D.C. Cir. 2006) (abuse of discretion to exclude post-surgery report for a different patient in medical malpractice suit).

[2]The government also proposed a limiting jury instruction that would say:

> You have heard testimony regarding a feature of the firearm allegedly possessed by defendant that makes a glowing red dot appear on the firearm when pressure is applied to the pressure pad located beneath the firearm's trigger guard. This feature is not illegal, and it does not make a gun any more dangerous than a gun without this feature

We agree with the district judge that a laser sight probably tends to make a gun more dangerous, or at least makes a shooter more accurate. We also agree that instructions focusing the jury on the issue of possession are likely to be helpful, given the potential for collateral issues to distract the jury. We also recognize that some jurors might infer that the "red dot" on the gun is a laser sight. Given these considerations, we leave the framing of appropriate limiting instructions to the sound judgment of the district court on remand.

[3]Our decision addresses evidence the government should be allowed to introduce in its case-in-chief. The parties, the district judge, and this court are all aware that attacks on these witnesses' credibility could easily open the door to subjects the district court hopes to avoid. These include details of the confrontation in which the witnesses say Johnson brandished the firearm, particularly the witnesses' claim that Johnson pointed the laser sight at Thompkins and her children. Regardless of the outcome of this appeal, such doors could still be opened by

Johnson's trial strategy.

[4]The opinions in these cited cases do not indicate that any defendant objected to evidence of firearm characteristics under Rule 403. We cite them on this point to indicate that evidence of firearm characteristics, even dangerous ones, seems to be admitted routinely and with little controversy. As noted, neither the defense, the district court, nor our research has found a prior case excluding under Rule 403 evidence of characteristics of a firearm that is the subject of the charged offense.

ARTICLE VI. WITNESSES.

Rule 605. Judge's Competency as a Witness.

Case Background: *Using a pseudonym, Defendant engaged in sexually explicit conversations over a messaging platform with someone he believed to be a 14-year-old boy but who was actually an undercover police officer. Defendant was convicted of attempted enticement of a minor in violation of 18 U.S.C.A. § 2422(b) and appealed the conviction arguing, inter alia, that the district court erred in instructing the jury on the term "grooming" in violation of Fed. R. Evid. 605 as it constituted impermissible judicial testimony. What follows is the court's opinion, in pertinent part:*

♦♦♦♦

B. *Jury Instruction*

The Government proposed and the district court adopted the following jury instruction without objection:

> Definition of "Grooming"
>
> "Grooming" refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity.
>
> "Grooming" can constitute a "substantial step."

ROA, Vol. I at 43 (capitalization altered without notation).

Mr. Flechs argues the district court erred in instructing the jury on the meaning of "grooming," asserting the instruction constituted (1) error because it was impermissible judicial testimony in violation of Federal Rule of Evidence 605, (2) plain error because it established a mandatory presumption on the element of intent, and (3) plain error because it misstated the law regarding substantial step. Each of these arguments fails.

As a general matter, "[w]e review [a] district court's decision to give a particular jury instruction for abuse of discretion." *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014). We review jury instructions as a whole "de novo in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Jean-Pierre*, 1 F.4th 836, 846 (10th Cir. 2021) (alterations and quotations omitted).

1. Rule 605

Rule 605 provides, "The presiding judge may not testify as a witness at the trial." It also states, "A party need not object to preserve the issue." We therefore review de novo whether a district court violated Rule 605. *See United States v. Andasola*, 13 F.4th 1011, 1014 (10th Cir. 2021).

a. *Legal background*

"The district court violates Rule 605 when it adds to the record evidence." *Id.* at 1016 (quotations omitted).

"The purpose of jury instructions is to give jurors the correct principles of law applicable to the facts so that they can reach a correct conclusion as to each element of an offense according to the law and the evidence."

United States v. Kahn, 58 F.4th 1308, 1317 (10th Cir. 2023). An instruction on the applicable law falls outside Rule 605 because the court is not "testify[ing] as a witness." Fed. R. Evid. 605.

As one leading treatise states, "[t]he most important factor" in determining whether a court's statement triggers Rule 605 "should be whether the judge's statement is essential to the exercise of some judicial function or is the functional equivalent of witness testimony." 27 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6063 (2d ed. rev. 2023). "Criminal-statute elements often contain terms needing defining." *Moya*, 5 F.4th at 1180. And "courts commonly provide jury instructions that define an element's terms separate from the element itself." *Id.*

b. *Analysis*

In *Faust*, we said that § 2422(b) "criminalizes the sexual grooming of minors, regardless of any intent to consummate the illegal sexual activity." 795 F.3d at 1249 (quotations omitted). The term "grooming" thus carries legal significance because we have interpreted the statute to proscribe such behavior. The district court's instruction relied in substantial part on *Isabella*, *see* 918 F.3d at 833, and accurately restated our caselaw. It did not improperly "add[ ] to the record evidence." *Andasola*, 13 F.4th at 1016 (quotations omitted). Rather, it was comparable to "provid[ing] [a] jury instruction[ ] that define[d] an element's terms separate from the element itself." *Moya*, 5 F.4th at 1180. We find *Fox*, 600 F. App'x 414, persuasive. There, the Sixth Circuit rejected a challenge to a substantially similar grooming instruction because the instruction "adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision." *Id.* at 420 (quotations omitted).[14] The instruction thus did not violate Rule 605.

Mr. Flechs argues that our opinion in *Andasola* demonstrates the instruction here was erroneous. But his reliance on *Andasola* is misplaced. There, the judge instructed the jury: "[T]here is only one video that exists in this case. . . . To the extent there was any implication that another video exists, that is not an accurate statement. There is only one video." 13 F.4th at 1014 (quotations omitted). We held the instruction was erroneous because it "introduced new evidence to the jury by deciding a disputed factual issue for the jury," namely whether there was only one video. *Id.* at 1016. The grooming instruction here added no such factual finding to the trial record and instead provided the jury a definition to aid its application of the law to the evidence.

* * * *

Cite: United States v. Flechs, 98 F.4th 1235 (10th Cir. 2024)

West's Key Number Digest, Criminal Law ⚿777, 1139

West's Key Number Digest, Witnesses ⚿673, 675(1), 800

ENDNOTES:

[14]Consistent with the district court here, courts have instructed on the meaning of "pyramid scheme," *see, e.g., United States v. Gold*, 177 F.3d 472, 478 (6th Cir. 1999), "check kiting," *see, e.g., United States v. Montgomery*, 980 F.2d 388, 392-93 (6th Cir. 1992); *United States v. Bonnette*, 781 F.2d 357, 360 n.6 (4th Cir. 1986), and "churning," *see, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1212-13 (8th Cir. 1990), even though none of these terms appeared in the underlying statute of conviction.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

Rule 702. Testimony by Expert Witnesses.

Case Background: *Plaintiffs in a putative consumer class action against manufacturers of pet health products alleged false and misleading marketing of a product as promoting healthy joints in dogs in violation of the California Consumers Legal Remedies Act. Under Fed. R. Civ. P. 23, the district court certified a class of California purchasers of the product who were exposed to the allegedly misleading statements. The defendant manufacturers filed an interlocutory appeal of the class certification on two grounds: (1) that damages were not susceptible to common proof, and (2) that reliance was not susceptible to common proof. As part of the first ground, defendants argued that the district court erred in relying on an unexecuted damages model proposed by plaintiffs' expert to find that common questions predominated as to injury. Defendants challenged the admissibility and reliability of the expert's unexecuted damages model under Rule 702 of the Federal Rules of Evidence, arguing that the expert proposed a "conjoint survey" to measure classwide damages, though he had not yet executed the survey at the time of class certification. What follows is the court's opinion, in pertinent part:*

♦♦♦♦

B.

Having concluded that there is no categorical prohibition on a district court relying on an unexecuted damages model to certify a class, we must nevertheless determine whether, on the facts of this case, it was error for the district court to grant certification. In particular, Nutramax argues that the district court erred in concluding that Dr. Dubé's opinions were sufficiently reliable to satisfy FRE 702 or FRCP 23.

Nutramax argues that because Dr. Dubé had not yet obtained all of the data necessary to fully execute his model, the district court could not have found that his opinion satisfied the requirements of FRE 702 that his testimony be "based on sufficient facts or data." Fed. R. Evid. 702(b). But here again, we think Nutramax confuses a class certification proceeding with a summary judgment motion. As applied to class certification where the issues are commonality and predominance, the Rule 702(b) question concerns whether the data suffices to show that a common question predominates over individual issues, not whether the subsequently executed model applied to a more complete dataset would then meet the requirements of 702(b) as applied to a summary judgment motion. By the same token, we do not agree with Nutramax that the "rigorous analysis" required at the class certification stage means that every expert opinion offered at that stage must be subjected to a full evidentiary hearing to see if each such opinion meets the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

1.

The manner and extent to which the *Daubert* framework applies at the class certification stage is an unsettled question. A leading treatise has suggested that there is at least some divergence among the Circuits on this question, with some employing a "full" *Daubert* inquiry and others employing a more limited one. *See* 3 Newberg and Rubenstein on Class Actions § 7:24 (6th ed. 2022).[6]

Our own precedent has somewhat oscillated between these two approaches. In *Ellis v. Costco Wholesale Corp.*, we affirmed a district court's application of the *Daubert*

standard at the class certification stage. 657 F.3d 970, 982-83 (9th Cir. 2011); *see also* 3 Newberg and Rubenstein on Class Actions § 7:24 (6th ed. 2022) (characterizing *Ellis* as adopting a full *Daubert* test). Similarly, in *Olean*, we stated in dicta that "[i]n a class proceeding, defendants may challenge the reliability of an expert's evidence under *Daubert*," although the defendants in *Olean* did not actually raise a Daubert challenge. 31 F.4th at 665 n.7. In *Sali v. Corona Regional Medical Center*, however, we noted that while "a district court should evaluate admissibility under the standard set forth in *Daubert*," whether testimony is admissible under that standard is "not . . . dispositive," but instead "should go to the weight that evidence is given at the class certification stage." 909 F.3d at 1006. We cited with approval the Eighth Circuit's decision in *In re Zurn Pex Plumbing Products Liability Litigation*, which is the leading decision endorsing a more limited *Daubert* inquiry. *Id.* at 1004; *see Cox v. Zurn Pex, Inc. (In re Zurn Pex Plumbing Prods. Liab Litig.)*, 644 F.3d 604, 613 (8th Cir. 2011) ("The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.").

We think that, at least for purposes of this case, the distinction between a "full" and "limited" *Daubert* inquiry is a function of what aspect of FRCP 23 is being addressed. Here, the question under FRE 702 is whether the model that the plaintiffs' expert is offering on the issues of commonality and predominance is reliable for FRCP 23 purposes. Accordingly, such *Daubert* factors as peer review of the proffered model may be highly relevant, while others, such as known error rate, may be more applicable to the later-executed results of the test. *Daubert* itself stressed that its suggested factors were simply illustrative and needed to be applied flexibly, and this surely means applying them only to the extent helpful to the issue at hand. *See Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786 (noting that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one" and disclaiming any intent "to set out a definitive checklist or test").

Thus, for example, whether a "full" or "limited" *Daubert* analysis should be applied may depend on the timing of the class certification decision. If discovery has closed and an expert's analysis is complete and her tests fully executed, there may be no reason for a district court to delay its assessment of ultimate admissibility at trial. By contrast, where an expert's model has yet to be fully developed, a district court is limited at class certification to making a predictive judgment about how likely it is the expert's analysis will eventually bear fruit. This still requires determining whether the expert's methodology is reliable, so that a limited *Daubert* analysis may be necessary, but the more full-blown *Daubert* assessment of the results of the application of the model would be premature.

Here, we are satisfied that the district court's limited *Daubert* analysis was sufficient for the immediate purposes. As the district court expressly recognized, "the court considers only if expert evidence is useful in evaluating whether class certification requirements have been met," and for that purpose a more limited *Daubert* inquiry may be sufficient. This is consistent with the Supreme Court's general rule that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466, 133 S.Ct. 1184.

In finding that the prerequisites of FRE 702 were met for FRCP 23 purposes, the district

court relied on Dr. Dubé's unchallenged credentials, Dr. Dubé's review of documentary evidence and marketing data, the fact that "[c]onjoint surveys, like the one proposed by [Dr. Dubé], are a well-established method for measuring class-wide damages in CLRA mislabeling cases," and the fact that Dr. Dubé had successfully performed conjoint analyses in prior cases similar to this. It is true Dr. Dubé has not collected all of the necessary data to perform his calculations in the instant case, but implicit in Dr. Dubé's opinion—which the district court credited—is the conclusion that he would be able to obtain such information, and Nutramax offers no reason to think he would be unable to do so. Nor, as explained below, has Nutramax shown either that Dr. Dubé's methodology is flawed or that there is a likelihood that he will improperly apply that method to the facts. In light of the foregoing, we cannot say that the district court abused its discretion in rejecting Nutramax's *Daubert* challenge to Dr. Dubé's opinion.

2.

Nutramax also argues that, even if an unexecuted damages model may in some circumstances support class certification, on the facts of this case Dr. Dubé's model is too underdeveloped to satisfy the "rigorous analysis" required under FRCP 23. Nutramax contends that Dr. Dubé has not designed the survey questionnaire, has not determined the precise demographic makeup of the individuals to be surveyed, has not selected all of the parameters for his model, and lacks certain data needed to finalize his calculations. Plaintiffs respond that Dr. Dubé has in fact fully designed the conjoint analysis and the methodology behind it, including by identifying the target population, analyzing economic data to determine the structure of the market, and specifying the mathematical analysis he will perform on the survey results. While Plaintiffs acknowledge Dr. Dubé has not yet programmed the survey (i.e., written the questions), they cite to Dr. Dubé's testimony describing this as merely "an implementation detail," and argue that it makes sense not to finalize the survey questions until the exact scope of the class is known. In short, according to Plaintiffs, the survey is fully designed and all that remains is for it to be executed.

As already discussed above, Plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof. To be sure, the fact the model has not been executed remains relevant. *Olean* makes clear that "[t]he determination whether expert evidence is capable of resolving a class-wide question in one stroke may include '[w]eighing conflicting expert testimony' and '[r]esolving expert disputes' where necessary to ensure that Rule 23(b)(3)'s requirements are met." 31 F.4th at 666 (internal citation omitted) (quoting *In re Hydrogen Peroxide*, 552 F.3d at 323-24). This assessment of a "model's reliability" required by *Olean* goes beyond the *Daubert* analysis, and the fact that an expert's model is sufficiently reliable to meet the standard of FRE 702 as applied to a FRCP 23 determination may not be sufficient to satisfy the standard. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (suggesting FRCP 23 requires a distinct analysis beyond an assessment of admissibility under *Daubert*); *Olean*, 31 F.4th at 665-66 nn. 7, 9. Rather, the district court must also probe the likelihood that the model will be capable of generating common answers. A district court may not, however, "decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed." *Id.* at 667.[7]

In applying this test to an unexecuted damages model, the question a district court must ask is whether the model will likely be able to generate common answers at trial.

The fact that a model is underdeveloped may weigh against a finding that it will provide a reliable form of proof. Merely gesturing at a model or describing a general method will not suffice to meet this standard. Rather, plaintiffs—or their expert—must chart out a path to obtain all necessary data and demonstrate that the proposed method will be viable as applied to the facts of a given case.[8]

Here, the district court recognized that Plaintiffs were required to "show that damages are capable of measurement on a classwide basis," while acknowledging they may do so without executing the model. On appeal, Nutramax raises a flurry of attacks on the reliability of Dr. Dubé's model that were never presented to the district court. While Nutramax referenced the underdeveloped nature of Dr. Dubé's model throughout its briefing below, the only such argument it developed with any thoroughness was the contention that Dr. Dubé lacked critical data needed to complete his analysis. Since we cannot say that the district court abused its discretion in failing to consider arguments with which it was not presented, *see Van v. LLR, Inc.*, 61 F.4th 1053, 1066 n.9 (9th Cir. 2023) ("An issue cannot form part of the district court's class certification decision if it was never raised at the class certification stage." (cleaned up)), we focus our analysis on those matters considered by the district court.[9]

With respect to the data Dr. Dubé had not yet collected, the district court acknowledged defendant's argument but credited Dr. Dubé's implicit conclusion that he would be able to obtain such data prior to trial. Nutramax has not convincingly demonstrated that the district court erred in reaching this conclusion.

Nutramax's other attacks on Dr. Dubé's methodology, to the extent they were presented to the district court, fare no better. As the district court observed, conjoint analysis is a well-accepted technique that is frequently used to establish damages in CLRA actions. *See, e.g., Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654, 657 (9th Cir. 2017) (describing conjoint analysis as a "well-established damages model"); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1107 (N.D. Cal. 2018) ("[C]onjoint analysis is a well-accepted economic methodology." (quoting *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 320 F.R.D. 326, 331 (D.N.H. 2017)). Where an expert's proposed method is novel or untested, it makes sense to demand a greater degree of specificity and completeness before it is relied upon to certify a class. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 26-30 (1st Cir. 2008) (finding that "novelty and complexity of the theories advanced" by plaintiffs and their expert made certification of a class based upon incomplete model less appropriate). By contrast, here there is no dispute that a conjoint analysis is capable of measuring classwide damages, at least in the abstract, and the only real question at this stage is whether Dr. Dubé will properly apply the method to the facts of the case.

Nutramax cites a variety of potential errors Dr. Dubé might commit in executing his damages model. For example, Nutramax argues "the precise wording of a questionnaire is critical" and could "bias[ ] the results," and that "assumptions underlying [his] economic model" may not account for real-world factors. While unanswered questions such as these, and the attendant possibility of errors, are certainly relevant, Nutramax offers no reason to think that Dr. Dubé will commit any of these errors. Dr. Dubé's qualifications are undisputed, he has successfully conducted conjoint analyses in the past, and Dr. Dubé testified he did not "envision anything particularly unique about this survey." The speculative possibility that

Dr. Dubé might slip up in executing his model, standing alone, is insufficient to defeat class certification. *See Sali*, 909 F.3d at 1004-05 ("Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies [Rule 23]." (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).[10]

Accordingly, the record was sufficient to support the district court's conclusion that Dr. Dubé's model is capable of showing damages on a class wide basis.

C.

As the above discussion makes clear, it is not required that a plaintiff's expert must execute their damages model prior to class certification provided it is shown that the model provides a reliable and adequate method for calculating damages. We do, however, think it important to make clear that a plaintiff may not avoid ultimate scrutiny of the admissibility of their experts' final opinions simply by declining to develop those opinions in advance of class certification. Accordingly, on remand, Nutramax must be given the opportunity in advance of trial to test the sufficiency and reliability of Dr. Dubé's model once it has been fully executed, including through a motion for summary judgment and/or a renewed *Daubert* motion.

* * * *

Cite: Lytle v. Nutramax Laboratories, Inc., 99 F.4th 557 (9th Cir. 2024)

West's Key Number Digest, Evidence ⚿2277

West's Key Number Digest, Federal Civil Procedure ⚿165, 172

ENDNOTES:

[6]The Supreme Court originally granted certiorari in *Comcast* to resolve this question, but ultimately resolved the case on other grounds once it became apparent the question was not properly presented. *Comcast*, 569 U.S. at 39-40, 133 S.Ct. 1426 (Ginsburg, J., dissenting).

[7]*Olean* gave the following examples of expert evidence that, while otherwise admissible under *Daubert*, might be unable to generate common answers: where "the expert evidence was inadequate to prove an element of the claim for the entire class [i.e., is not common to all]; where the damages evidence was not consistent with the plaintiffs' theory of liability; where the evidence contained unsupported assumptions; or where the evidence demonstrated nonsensical results such as false positives, i.e., injury to class members who could not logically have been injured by a defendant's conduct." *Id.* at 666 n.9 (internal citations omitted).

[8]Plaintiffs' briefing on appeal seems to advance a rule that merely putting forward a viable method is sufficient. To the extent that is Plaintiffs' position, we disagree. Even where a method is otherwise valid and reliable under FRE 702, it may nonetheless fail to produce common answers for any number of reasons, such as when the model does not apply in a manner common to the class. Hence, we underscore that the ultimate inquiry is whether a proposed model is likely to provide common answers at trial.

[9]In particular, on appeal Nutramax relies heavily upon the rebuttal report of their expert, Dr. Toubia, to challenge the reliability of Dr. Dubé's methodology. Had Dr. Toubia's report been fairly presented to the district court as a basis for denying class certification, it might have been error for the district court to not address it. *See Olean*, 31 F.4th at 666 (suggesting a district court must "[r]esolv[e] expert disputes" at class certification). However, our review of the record reveals that Nutramax never attempted to use Dr. Toubia's rebuttal report to attack Dr. Dubé's model, and instead cited Dr. Toubia's rebuttal report only a single time, and for an entirely unrelated proposition.

[10]This is especially true here given that "[c]lass wide damages calculations under the . . . CLRA are particularly forgiving" and "require[ ] only that some reasonable basis of

computation of damages be used." *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818 (9th Cir. 2019) (quoting *Lambert*, 870 F.3d at 1183).

ARTICLE VIII. HEARSAY.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness.

Case Background: *Defendants were convicted of conspiring to fraudulently obtain United States citizenship for a noncitizen and making false statements in their efforts to do so, and their post-verdict motions for judgment of acquittal and for new trial were denied. During the trial, the government argued that the defendants' marriage was over by the spring of 2016 and that everything after that was part of a conspiracy to obtain immigration benefits. Seeking to rebut that claim, defendants each sought to introduce seemingly loving Facebook messages they sent each other after one of them moved to a different state, including those in which the couple sent photos, used emojis, or called each other by pet names. The district court excluded those messages as inadmissible hearsay under Fed. R. Evid. 801 during the trial and reiterated that conclusion when denying a post-trial motion focused exclusively on the court's failure to admit the more limited set of messages offered by one of the defendants. Defendants appealed. What follows is the court's opinion, in pertinent part:*

♦♦♦♦

IV.

Our conclusion the convictions on Count 2 must be vacated leaves us with the question of what to do about Counts 1 and 3. Kalugin and Gallagher make two arguments for vacating those convictions as well. First, they say some evidence was admitted at trial only because of the legally inadequate theory charged in Count 2 and that evidence was prejudicial to their defense on Counts 1 and 3. Second, Kalugin and Gallagher assert the district court erred in excluding certain evidence they offered. We need not decide whether the first challenge, standing alone, would require vacating the jury's verdict on Counts 1 and 3. Instead, we hold the district court exceeded its discretion in excluding the defendants' evidence and we cannot say that error was harmless.

The government's theory at trial was that Kalugin and Gallagher's marriage was over by the spring of 2016 and that everything after that was part of a conspiracy to obtain immigration benefits. See JA 1362-63 (government arguing in closing argument that Kalugin and Gallagher "decided to separate" in April 2016 but remained "in agreement" about seeking Kalugin's naturalization). Seeking to rebut that claim, Kalugin and Gallagher each sought to introduce seemingly loving Facebook messages the two sent each other after Kalugin left Virginia to return to California, including those in which the couple sent photos, used emojis, or called each other pet names. The district court excluded those messages as inadmissible hearsay during trial, and reiterated that conclusion when denying a post-trial motion focused exclusively on its failure to admit the more limited set of messages offered by Kalugin.

This Court, of course, reviews a district court's evidentiary rulings for an abuse of discretion. See *United States v. Lighty*, 616 F.3d 321, 351 (4th Cir. 2010). But it is equally well-established that "[a] district court abuses its discretion when it . . . commits an error of law." *United States v. Dillard*, 891 F.3d 151, 158 (4th Cir. 2018). And here the district court erred as a matter of law because many—if not all—of the proffered messages either are not hearsay or appear to fall within a valid hearsay exception.

Not everything a person says or writes is hearsay. Hearsay is an out-of-court statement offered "*to prove the truth of the matter asserted in the statement.*" Fed. R. Evid. 801(c)(2) (emphasis added). If a statement is offered for any other reason, it is not hearsay and may not be excluded on that basis. See Fed. R. Evid. 802 (providing hearsay is generally not admissible but establishing no broad rule against out-of-court statements). A classic example are statements offered for their effect on the listener. See *United States v. Simmons*, 11 F.4th 239, 263-64 (4th Cir. 2021). Such statements are not hearsay because their relevance does not depend on whether the declarant spoke the truth. Instead, they are admissible because they are offered to "establish the state of mind thereby induced" in the recipient or "to show the information which [the recipient] had as bearing on the reasonableness [or] good faith . . . of subsequent conduct." 2 McCormick on Evid. § 249 (8th ed.) (McCormick).

That is exactly what we have here. Whether Gallagher truly loved Kalugin when she wrote him saying she did, the messages were relevant to show what Kalugin could have believed about the state of the marriage based on what he was hearing from Gallagher. And the affectionate messages Kalugin sent Gallagher are similarly relevant to show the effect they would have had on her. In concluding otherwise, the district court "relie[d] on [an] erroneous . . . legal premise[ ]." *Wall v. Rasnick*, 42 F.4th 214, 220 (4th Cir. 2022).

The district court also outpaced its discretion in concluding each defendant's expressions of their own affection fell outside the hearsay exception for statements of a "declarant's then-existing state of mind" under Rule 803(3).[3] A key step in the court's rationale for denying Kalugin's post-trial motion for a new trial was its conclusion that such statements were relevant exclusively to "support Kalugin's argument that he did not falsely select 'married' on the Form N-400." JA 1673. From there, the court reasoned that "Kalugin's state of mind in May" 2016, when some (but not all) of the messages were sent, "is not relevant to Kalugin's state of mind in August" 2016, when the Form N-400 was signed. JA 1675.

Both steps of that analysis encounter problems when the question becomes whether we should affirm the district court's judgment. For one thing, the messages were not, as the district court thought, exclusively relevant to Count 2 and the charges stemming from the Form N-400. Instead, the messages were relevant to rebutting the government's central contention at trial: that after Kalugin left Virginia to return to California in May 2016, the marriage was a sham and Kalugin and Gallagher were co-conspirators seeking to obtain his citizenship. That contention underlays the Count 1 conspiracy charge and puts the defendants' state of mind from spring 2016 at issue. And even if only the defendants' mental states in August and September of 2016 (when the Form N-400 was signed and submitted) were at issue, some of the Gallagher-offered messages the district court excluded mid-trial are from that exact period.

The district court also cited an unpublished opinion of this Court for the view that a statement may not be admitted under Rule 803(3) unless there are "no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his thoughts." JA 1674 (citing *United States v. Srivastava*, 411 Fed. Appx. 671, 684 (4th Cir. 2011)). No precedential opinion of this Court announces such a requirement, which appears nowhere in the text of Rule 803(3) or the advisory committee notes. Indeed, a leading treatise notes that "[t]he federal courts are in some conflict over" whether Rule 803(3) authorizes a court "to exclude statements based on questionable motivation[s] of

the declarant" or whether such matters go instead "only to the weight to be given to the statement by the jury." 2 McCormick § 274 n.8. We need not make any broad ruling on that point. Instead, we conclude that the district court's Rule 803(3) ruling (which, again, involved only the more limited set of messages offered by Kalugin rather than the broader set of messages offered by Gallagher) cannot be sustained given the other errors described above.

The same flaws in the district court's Rule 803(3) analysis infect the court's post-trial ruling that it would have excluded the set of messages offered by Kalugin under Federal Rule of Evidence 403. There too, the court described the Facebook messages as being "of limited relevance where they occurred months before the Form N-400 was filed." JA 1676. But this reasoning once again fails to grapple with how those statements cast doubt on the government's overarching theory of the case. The district court also reiterated its earlier conclusion that Kalugin's and Gallagher's "statements of affection" could not be considered by the jury for their "truth" value. *Id.* But the whole point of Federal Rule of Evidence 803 is to permit certain out-of-court statements to be offered for their truth value, so the district court's Rule 403 ruling depends on the validity of its Rule 803(3) ruling.

* * * *

Cite: United States v. Gallagher, 90 F.4th 182, 123 Fed. R. Evid. Serv. 918 (4th Cir. 2024)

West's Key Number Digest, Criminal Law ⚿338(7), 419(2), 419(3), 675

ENDNOTES:

[3]We assume for the sake of argument that all such statements satisfy the definition of hearsay in the first place. That said, it seems reasonably clear that Gallagher's reference to Kalugin as "my angel" (JA 2479) was not being offered to show he was, in fact, a supernatural being. See 2 McCormick § 250 (discussing "so-called 'implied assertions' " and explaining that "an out-of-court assertion is not hearsay if offered as proof of something other than the matter asserted" in the statement itself).

Related Titles

McCormick on Evidence, 8th (Practitioner Treatise Series); Rothstein, Federal Rules of Evidence; Kirkpatrick, Federal Evidence 4th; Jones on Evidence; and Graham, Handbook on Federal Evidence.

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