NOT FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-13002
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD COLVIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:24-cr-00098-TFM-B-1

Before LUCK, LAGOA, and MARCUS, Circuit Judges.

PER CURIAM:

Richard Colvin appeals his conviction for transmitting a phone call in interstate commerce threatening to kill and assault an individual. The offense arose out of an alleged threat Colvin made over the telephone to a pastor at a local church -- that he would "come up there and f*cking kill" the pastor -- as their conversation about Colvin's ailing mother unraveled. After a mistrial on this count was declared in an initial trial, he was convicted in a second trial. On appeal, he argues that the district court erred in the second trial when it: (1) declined to use his requested recklessness instruction in the jury charge; (2) granted the government's motion in limine to limit information about his mental health; and (3) allowed a phone company employee to testify as a lay witness. After thorough review, we affirm.

I.

We review jury instructions de novo to determine whether the instructions misstated the law or misled the jury to the prejudice of the objecting party. *United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir. 2013). "When the jury instructions, taken together, accurately express the law applicable to the case without confusing or prejudicing the jury," then the conviction should not be reversed even if "isolated clauses may, in fact, be confusing, technically imperfect, or otherwise subject to criticism." *Id.* (citation modified).

We review a district court's refusal to give a particular jury instruction for abuse of discretion. *United States v. Anderson*, 1 F.4th 1244, 1259 (11th Cir. 2021). A district court's refusal to give an instruction is reversable error when "the requested instruction (1) was correct, (2) was not substantially covered by the charge actually given, and (3) dealt with" such an important part of the trial that the missing instruction "seriously impaired the defendant's ability to conduct his defense." *Id.* at 1260. As for the jury charge actually given by the trial court, we apply a deferential standard of review. *Id.* "Under this standard, we will only reverse if we are left with a substantial and eradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* (citation modified). When "the district court's jury instructions accurately reflect the law, the trial judge has wide discretion to decide on the style and wording of the instruction." *United States v. Singer*, 963 F.3d 1144, 1162 (11th Cir. 2020) (citation modified). Further, jury instructions are reviewed for harmless error. *United States v. Seabrooks*, 839 F.3d 1326, 1332 (11th Cir. 2016). "An error is harmless if the reviewing court is satisfied beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 1332–33 (citation modified).

We normally review a district court's ruling on a motion in limine for abuse of discretion. *United States v. Thompson*, 25 F.3d 1558, 1563 (11th Cir. 1994). Under this standard, we must affirm unless we find that the district court made a clear error of judgment or applied the wrong legal standard. *United States v. McGregor*, 960 F.3d 1319, 1323 (11th Cir. 2020). However, when an evidentiary ruling implicates a constitutional question, we review those legal questions de novo. *United States v. Shamsid-Deen*, 61 F.4th 935, 945 (11th Cir. 2023). An erroneous evidentiary error is not reversible if it is harmless, which means that the government must show the error did not cause "actual prejudice" by having "substantial and injurious effect or influence on the jury's verdict." *United States v. Moore*, 76 F.4th 1355, 1367 (11th Cir. 2023) (citation modified).

We review de novo challenges to the sufficiency of the evidence and the denial of a Rule 29 motion for judgment of acquittal. *United States v. Chafin*, 808 F.3d 1263, 1268 (11th Cir. 2015). We will not "disturb the denial of a Rule 29 motion so long as a reasonable trier of fact could find guilt beyond a reasonable doubt." *Id.* As with all evidentiary rulings, we use the abuse of discretion and harmless error standards to review the admission of testimony as expert or lay opinion. *United States v. Henderson*, 409 F.3d 1293, 1297, 1300 (11th Cir. 2005).

II.

First, we are unpersuaded by Colvin's claim that the district court erred when it did not include his requested jury instruction. It is a crime to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). While § 875(c) does not contain a mens rea requirement, the Supreme Court has held that some level of mental state is required. *See Elonis v. United States*, 575 U.S. 723, 740 (2015). The government must prove each element of the charged offense beyond a reasonable doubt. *United States v. Nerey*, 877 F.3d 956, 970 (11th Cir. 2017).

In *Elonis v. United States*, the Supreme Court reversed the defendant's conviction under § 875(c), holding that the district court erred where the "jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats." 575 U.S. at 740. The Court explained that federal criminal liability must consider "the defendant's mental state." *Id.* The Court declined to decide whether a finding of recklessness would be sufficient to satisfy the mental state requirement in § 875(c), but determined that the mental state requirement "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.*

In *Counterman v. Colorado*, the Supreme Court addressed "whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases," and held that the government must prove in these cases "that the defendant had some understanding of his statements' threatening character" so the mens rea of recklessness "is enough." 600 U.S. 66, 72, 73 (2023). "A person acts recklessly, in the most common formulation, when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another." *Id.* at 79 (citation modified). "In the threats context, it means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway." *Id.* (citation modified). Knowledge is a more culpable level of mental state than recklessness and exists when a person "is aware that a result is practically certain to follow -- so here, when he knows to a practical certainty that others will take his words as threats." *Id.* (citation modified). Instead, in the threats context, the government "must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* at 69. We've explained that "courts and commentators have historically understood and explained criminal recklessness" in terms of an individual's "subjective awareness of the risk posed by his own conduct." *Wade v. McDade*, 106 F.4th 1251, 1261 (11th Cir. 2024) (en banc).

Here, Colvin claims that the jury instructions were erroneous because they should have said that the government bore the burden to "prove beyond a reasonable doubt that the defendant sent the communication recklessly, that is, consciously disregarding a substantial risk that it would be viewed as true threat." Instead, the district court's jury instructions describing the elements of the crime required the government to prove beyond a reasonable doubt that "the defendant sent the message with the intent to communicate a true threat or with knowledge that it would be viewed as t[rue] threat." In *Counterman*, the Supreme Court held that reckless mens rea was "enough" in a true threats context. 600 U.S. at 73, 79; *but see Elonis*, 575 U.S. at 740. Because knowledge is a more culpable mental state than recklessness, the district court may have erred by requiring knowledge. However, this possible error was harmless and did not prejudice Colvin because it required the government to prove a *more culpable* level of mens rea. So, although the district court's instruction did not use the word recklessly, the district court had wide discretion on the wording of the instruction, which encompassed the definition of recklessness and required the higher knowledge mens rea. *Singer*, 963 F.3d at 1162; *Counterman*, 600 U.S. at 79.

Likewise, the district court's failure to give Colvin's requested instruction did not seriously impair his ability to conduct his defense. The record reflects that Colvin's primary defense was that he never made a threat to kill the pastor, not that he was not aware that the words he said would be perceived as a threat by the pastor. Accordingly, the district court did not abuse its discretion in denying Colvin's proposed recklessness jury instruction.

III.

We also find no merit in Colvin's argument that the district court erred when it granted the government's motion in limine to limit information about his mental health. The due process requirements of the Fifth Amendment and the compulsory process provision of the Sixth Amendment give rise to the "idea that criminal defendants must be afforded the opportunity to present evidence in their favor." *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004). This includes evidence that (1) directly pertains to the elements of the charged crime or an affirmative defense; (2) could reasonably make an element of the crime less certain or an affirmative defense more certain; (3) could substantially impact "the credibility of an important government witness"; and (4) could "tend[] to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently." *Id.* at 1363.

A defendant has no constitutional right to introduce, and a district court may properly exclude, evidence that does not logically relate to, or is "too attenuated" from, an element of the offense or an affirmative defense. *Id.* at 1365–66. For example, in *Hurn*, the defendant "failed to offer the vital link in the chain that would have made [a] collateral matter relevant to an element of the charged defense." *Id.* at 1366. She had been charged with making false statements on workers' compensation forms, and attempted to offer evidence of the "concurrent dissimilar employment" legal doctrine -- which would have shown that whether she lied or told the truth, her benefits would have been the same, thus eliminating a motive to lie -- as evidence that she did not have the required mens rea. *Id.* at 1361, 1366. However, this evidence was not relevant because she did not prove that she knew of the legal doctrine at the time of the offense, meaning it could not have impacted her thought processes in filling out the forms. *Id.* at 1366.

Notably, the right to provide context is not unlimited, applying only to how the jury perceives the "material facts of the case," and evidence is not erroneously excluded where the jury "would have lacked a reason in law not to convict" if it had heard the evidence. *Id.* at 1367 (citation modified). Additionally, a defendant's right to a complete defense is not violated when the court excludes cumulative evidence. *United States v. Ahmed*, 73 F.4th 1363, 1380 (11th Cir. 2023). As we've said, "a defendant's right to present a complete defense is not absolute, and is subject to reasonable restrictions," including evidentiary rules. *United States v. Mitrovic*, 890 F.3d 1217, 1221 (11th Cir. 2018). "Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (citation modified). Indeed, the Supreme Court "has never held that a federal rule of evidence violated a defendant's right to present a complete defense." *Id.* at 1222 (citation modified).

Federal Rule of Evidence 402 dictates that "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402. "Evidence is relevant if it has any tendency to make a material fact more or less probable than it would be without the evidence." *United States v. Lewis*, 40 F.4th 1229, 1245 (11th Cir. 2022) (citing Fed. R. Evid. 401).

Under Federal Rule of Criminal Procedure 12.2, to present an insanity defense or expert testimony of a mental condition that bears on the issue of guilt, the defendant must notify the government of his intent to do so before the deadline for filing a pretrial motion. Fed. R. Crim. P. 12.2(a), (b). To establish an insanity defense, he must show that, "at the time of the commission of the acts constituting the offense, [he], as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a). "Mental disease or defect does not otherwise constitute a defense." *Id.* But, "[p]sychiatric evidence is admissible to negate mens rea," outside the bounds of an insanity defense, where the evidence focuses on the defendant's specific state of mind at the time the offense was committed. *United States v. Westcott*, 83 F.3d 1354, 1358 (11th Cir. 1996).

In *United States v. Litzky*, the defendant argued that the district court had "gutted her preferred theory of defense and thereby violated her constitutional rights," when it excluded a doctor's testimony about Litzky's intellectual disability and history of victimization, which made her vulnerable to her partner's requests to sexually abuse their daughters. 18 F.4th 1296, 1299–1302 (11th Cir.

2021). Specifically, the district court found that the doctor's opinions did not show how Litzky "was unable to form the required mens rea," nor focus on her "specific state of mind at the time of the charged offenses." *Id.* at 1301 (citation modified). It concluded that the testimony lacked "an adequate foundation" and "would only serve to confuse the jury." *Id.* (citation modified).

On appeal, we noted that "Litzky doesn't dispute that [the doctor's] testimony was inadmissible under Rule 702," so in order to prove a violation of her constitutional right to present a defense, she needed to "demonstrate a compelling reason for making an exception to the expert witness rules," which she did not do, since the doctor's testimony "wasn't geared to any issue that the jury was tasked with deciding." *Id.* at 1302–03 (citation modified). Because Litzky admitted "that she knew what she was doing was wrong," she disavowed any insanity defense under 18 U.S.C. § 17(a). *Id.* at 1303. Further, Litzky did not establish how the psychiatric evidence at issue "would negate intent and not merely present a dangerously confusing theory of defense more akin to justification and excuse than a legally acceptable theory of lack of mens rea." *Id.* (citation modified). The report failed to focus on her state of mind at the time of the offense. *Id.* Further, "Litzky's motive to produce child pornography -- whether the product of her mental condition or not -- is beside the point" and did not negate her mens rea. *Id.*

In addressing Litzky's claims, the relevant question was "whether Litzky knew what she was doing when she produced the pornographic images of her children -- not whether, as a general matter, she had mental health issues or was vulnerable to manipulation." *Id.* at 1305. We said that a district court cannot admit testimony that does not comply with the rules of evidence, just because it may be helpful to a defense, and here admission could have confused the jury. *Id.* We affirmed Litzky's conviction. *Id.* at 1306.

Here, Colvin argues that the district court committed reversible error when it excluded evidence -- during the trial testimony of Colvin himself, the pastor and the pastor's secretary -- about Colvin's mental health, including his post-traumatic stress disorder ("PTSD") and history of sexual abuse, which he says prevented him from presenting a complete defense. However, the record reflects that the district court did not abuse its discretion nor violate Colvin's constitutional rights by granting the government's motion in limine to limit this testimony.

For starters, because Colvin did not give the government notice of an insanity defense, nor claim that his PTSD prevented him from appreciating that his acts were wrong, the evidence could not have been properly admitted to support an insanity defense. Fed. R. Crim. P. 12.2(a), (b); 18 U.S.C. § 17(a). Further, to the extent Colvin argues the evidence was relevant to negate the mens rea for the charged offense, he did not "offer the vital link in the chain that would have made that collateral matter relevant." *Hurn*, 368 F.3d at 1366. As we've noted, Colvin's presented defense was that he did not make the alleged threats, so any evidence about how his mental health and past trauma affected his subjective understanding of whether his words would be perceived as threats would have been irrelevant. It could have been relevant had he raised a different defense -- that, for example, due to his PTSD, he could not subjectively understand how his statements would be perceived -- but he did not. And even if the evidence could have led the jury to view him in a different light, that attenuated context would have acted only as disallowed evidence of motive; it would not have given the jury a "reason in law not to convict" him. *Id.* at 1367 (citation modified). It's also worth noting that Colvin never argued that his mental health and past abuse altered the credibility analysis of any witness. *Id.* at 1363. As in *Litzky*, Colvin failed to demonstrate how his psychiatric evidence "would negate intent and not merely present a dangerously confusing theory of defense more akin to justification and excuse than a legally acceptable theory of lack of mens rea." 18 F.4th at 1303 (citation modified).

In short, the evidence was not admissible under the Federal Rules, and he has not demonstrated that the rule was arbitrary in application in his case. *Mitrovic*, 890 F.3d at 1221–22; Fed. R. Evid. 401 & 402. What's more, because Colvin's presented defense was that he did not make the alleged threats, he has not shown how the jury's lack of in-depth knowledge about his PTSD and sexual abuse history substantially prejudiced him or otherwise was not harmless. *Moore*, 76 F.4th at 1367.

IV.

Finally, we reject Colvin's claim that the district court erroneously allowed a phone company employee to testify as a lay witness. The Federal Rules of Criminal Procedure provide that, at the defendant's request, the government must disclose to the defense a written summary of expert testimony it intends to present at trial. Fed. R. Crim. P. 16(a)(1)(G)(i). Under the Federal Rules of Evidence, expert opinion is opinion testimony based on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702(a). Expert witnesses must be properly "qualified," and their opinions are admissible only if certain reliability requirements are met. *See id.* In contrast, lay opinion must be "(a) rationally based on the witness's perception," "(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Id.* 701(a)–(c). Subsection (c) was added to the Rule in 2000 to prevent expert testimony from being offered nominally as lay opinion testimony. *Henderson*, 409 F.3d at 1300. "Lay opinion testimony cannot provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Great Lakes Ins. SE v. Wave Cruiser LLC*, 36 F.4th 1346, 1358 (11th Cir. 2022) (citation modified).

We examine the opinion's basis to determine if it is lay or expert, asking whether it relies on scientific, technical, or other specialized knowledge. *United States v. Williams*, 865 F.3d 1328, 1341 (11th Cir. 2017). The ability to answer hypothetical questions is a key difference between an expert and a lay witness. *Henderson*, 409 F.3d at 1300 (finding that an oral surgeon's statement that an individual's jaw had a hairline fracture was admissible lay testimony, but her hypothesis of how the fracture occurred was expert opinion, since she did not "need to determine how [the individual] was injured to treat him in this case"). Whether testimony is properly admitted as lay opinion is based upon the nature of the testimony, not whether the witness could be qualified as an expert. *United States v. LeCroy*, 441 F.3d 914, 927 (11th Cir. 2006).

Nevertheless, the distinction between lay and expert testimony "sometimes blurs when testimony is based on professional work." *United States v. Gbenedio*, 95 F.4th 1319, 1332 (11th Cir. 2024). A witness may offer "lay opinion testimony based on his professional experiences as long as the testimony is rationally based on those experiences, rather than on scientific or technical knowledge." *Williams*, 865 F.3d at 1341 (citation modified). Testimony that is not based on specialized knowledge, even if the testimony may otherwise constitute "particularized knowledge garnered from years of experience within the field," is not inherently expert testimony and may be lay opinion. *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1223 (11th Cir. 2003) (holding no abuse of discretion in finding that employees testifying to pricing and internal decisions for a project could do so as lay witnesses); *see also United States v. Hamaker*, 455 F.3d 1316, 1330–32 (11th Cir. 2006) (reasoning that a financial analyst gave lay testimony on thousands of financial documents where he "simply added and subtracted numbers from a long catalogue of [] records, and then compared those numbers in a straightforward fashion," which was "within the capacity of any reasonable lay person").

In *United States v. Stahlman*, Stahlman argued that the district court had erred by admitting an agent's expert opinions without the proper disclosure. 934 F.3d 1199, 1222 (11th Cir. 2019). We held that, to the extent the agent's opinions were expert opinions, the error was harmless, since Stahlman failed to prove how the government's failure to disclose under Fed. R. Crim. P. 16 prior to trial "prejudiced his substantial rights," where he knew that the agent would testify and what it would be about prior to trial. *Id.* at 1222–24. Additionally, the district court explicitly noted that it would have admitted the agent as an expert, if asked to do so, meaning any motion in limine to exclude the expert testimony likely would not have prevailed. *Id.* at 1224. Also, Stahlman failed to prove that "the outcome of the trial would have been different absent [the agent's] allegedly improper lay testimony" due to the ample evidence supporting the defendant's conviction. *Id.*

In *United States v. Spila*, at trial, prior to the forensic accountant's testimony, Spila objected to the government's failure to certify the forensic accountant as an expert, but the district court allowed the testimony, directing Spila to object if the testimony moved into expert opinion territory. 136 F.4th 1296, 1301 (11th Cir. 2025). Spila did not make any specific objections that the "testimony was an improper expert opinion." *Id.* at 1302. On appeal, we applied the plain error standard of review to Spila's argument that the district court erred when it admitted the forensic account's testimony as lay testimony. *Id.* at 1308. Nevertheless, we held that regardless of the standard of review, the district court did not err because there were no expert opinions within the lay witness's testimony. *Id.* at 1309. We noted that the forensic accountant testified about "her education and experience, described and explained six charts that she created about information from three bank accounts, and offered basic descriptions of how bank transfers work and the records" connected to the transfers. *Id.* Further, we noted that the forensic accountant only potentially went beyond a description of Spila's investigation once when explaining that a transaction over $10,000 must be reported. *Id.*

Here, Colvin argues that the district court abused its discretion by allowing Christopher Welch, a Media-Com Communications employee, to testify that the phone call between Colvin and the pastor, while both were in Mobile County, Alabama, traveled in interstate commerce. He argues that Welch's testimony was improperly categorized as lay witness opinion under Rule 701 because it was based "on his examination of highly technical engineering information contained in" call detail records, among other things.

The district court did not abuse its discretion in allowing Welch to testify. As the record reveals, his testimony was based on his "particularized knowledge garnered from years of experience within the field," which can be considered lay opinion testimony. *Tampa Bay Shipbuilding*, 320 F.3d at 1223; *Williams*, 865 F.3d at 1341. Like the forensic accountant in *Spila*, who testified about his experience, bank account documents, related charts, and "how bank transfers work," Welch testified on direct about his experience at Media-Com, the documents related to the phone calls at issue, and how phone calls are transferred. To the extent some of Welch's explanations of the phone calls' routes and interpretation of the spreadsheet appeared technical and may not have been within a reasonable lay person's capacity, we've noted that the distinction between lay and expert testimony "sometimes blurs when testimony is based on professional work." *Hamaker*, 455 F.3d at 1330–32; *Gbenedio*, 95 F.4th at 1332; *Great Lakes Ins. SE*, 36 F.4th at 1358.

Further, the nature of Welch's testimony included very few hypotheticals; most of his testimony related to the route which Colvin's calls traveled or which calls in general must travel. But to the extent it included hypotheticals -- when, for example, Welch explained that even if there was a natural disaster, the call still would have been routed out of state -- the information was rationally based on Welch's past professional experience. *Williams*, 865 F.3d at 1341. Thus, the district court did not abuse its discretion by admitting Welch's testimony as lay testimony.

Finally, even if some of Welch's testimony included specialized knowledge or hypotheticals that should have only been included in expert opinion, the possible error in admitting this testimony was harmless. First, the failure to disclose Welch as an expert under Fed. R. Crim. P. 16 did not substantially prejudice Colvin's rights. Colvin was on notice of Welch's testimony -- which was substantially similar to the testimony Welch gave at his first trial -- and he even attached Welch's transcript from the first trial to his motion in limine. Also, the district court found that Welch's testimony would have been admissible as expert testimony, so any motion in limine by Colvin to stop the admission of expert testimony likely would not have prevailed, especially since Colvin does not argue on appeal that Welch would not have qualified as an expert witness. In any event, Welch's potentially hypothetical and technical testimony about call routes was not necessary for the jury to find that the call moved in interstate commerce. Meanwhile, his testimony that any call originating in Alabama would move through Georgia was necessary *and* properly admitted lay testimony rationally related to Welch's work experience. Accordingly, any error in admitting the challenged testimony was harmless. *Henderson*, 409 F.3d at 1300.

AFFIRMED.