No. 06-50461

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-50461

UNITED STATES OF AMERICA,

Appellee

v.

GABRIEL GONZALEZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

STATEMENT OF JURISDICTION. 1

STATEMENT OF THE ISSUES. 2

STATEMENT OF THE CASE. 2

STATEMENT OF FACTS. 3

1. *Rape Of Cecilia Tirado (Count One)*. 3

2. *Pamela Fields Forced To Perform Oral Sex (Count Three)*. 7

3. *Investigation Of The Rape Of Cecilia Tirado (Count One)*. 15

4. *Fondling Of Kussy Guzman (Count Two)*. 17

5. *Prior Incidents Of Sexual Misconduct*. 18

   a. *Shirley Munoz*.. 18

   b. *Elizabeth Castillo Chavez*. 20

6. *Identification Of Gonzalez*. 21

7. *Gonzalez's Defense*.. 22

SUMMARY OF ARGUMENT.. 24

ARGUMENT

I THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING, AS A PRIOR CONSISTENT STATEMENT, SERGEANT GARZA'S TESTIMONY CONCERNING CECILIA TIRADO'S ACCOUNT OF THE NIGHT SHE WAS RAPED BY GONZALEZ.. 27

TABLE OF CONTENTS (continued): PAGE

A. Standard Of Review. 27

B. The District Court Correctly Admitted Sergeant Garza's Testimony Concerning Tirado. 27

C. Any Error In The Admission Of Sergeant Garza's Testimony Was Harmless. 31

II THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PAMELA FIELDS' PRIOR STATEMENTS TO SERGEANT KAGY AND NURSE MCCLUNG.. 34

A. The District Court Properly Admitted, As A Prior Consistent Statement, Sergeant Kagy's Testimony Concerning Pamela Fields' Account Of The Night She Was Forced To Perform Oral Sex On Gonzalez. 34

1. Standard Of Review. 34

2. The District Court Correctly Admitted Sergeant Kagy's Testimony Pursuant To Rule 801(d)(1)(B), Fed. R. Evid.. 34

3. Any Error In The Admission Of Sergeant Kagy's Testimony Was Harmless. 35

B. The District Court Properly Admitted Nurse McClung's Testimony Pursuant To Rule 803(4) Of The Federal Rules Of Evidence.. 35

1. Standard Of Review. 35

2. The District Court Correctly Admitted Nurse McClung's Testimony Regarding Fields' Out-Of-Court Statement. 36

TABLE OF CONTENTS (continued): **PAGE**

3. *Any Error In The Admission Of Nurse McClung's Testimony Was Harmless.* 38

III EXCLUSION AS IRRELEVANT OF TESTIMONY RELATING TO THE RESTRAINING ORDER AGAINST RORY FITZHUGH DID NOT VIOLATE GONZALEZ'S RIGHT UNDER THE CONFRONTATION CLAUSE. 38

A. *Standard Of Review.* 38

B. *Exclusion Of Evidence Relating To The Restraining Order Did Not Implicate Gonzalez's Right Under The Confrontation Clause.* 39

1. *The Excluded Evidence Was Not Relevant.* 40

2. *Legitimate Interests Outweighed Gonzalez's Interest In Presenting The Excluded Evidence* 42

3. *The Excluded Evidence Was Not Necessary To Give The Jury Sufficient Information To Assess Fields' Credibility.* 43

C. *Any Error In Excluding Testimony About The Restraining Order Was Harmless Beyond A Reasonable Doubt.* 45

IV THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF TWO PRIOR ACTS OF SEXUAL MISCONDUCT BY GONZALEZ. 46

A. *Standard Of Review.* 46

B. *The District Court Properly Admitted, Pursuant To Rule 404(b), Fed. R. Evid., The Testimony Of Shirley Munoz And Elizabeth Castillo Chavez That They Had Been Abused By Gonzalez.* 46

TABLE OF CONTENTS (continued): **PAGE**

C. The District Court Also Properly Admitted, Pursuant To Rule 413, Fed. R. Evid., Evidence Of Gonzalez's Prior Act Of Sexual Misconduct Involving Chavez. 52

1. Standard Of Review. 52

2. The Evidence Concerning Chavez Is Admissible Under Rule 413 53

D. Any Error In The Admission Of Evidence Relating To Munoz And Chavez Was Harmless.. 55

V "CUMULATIVE PREJUDICE" DOES NOT WARRANT REVERSAL. 56

CONCLUSION. 58

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

PAGE

CASES:

Arizona v. *Johnson*, 351 F.3d 988 (9th Cir. 2003), cert. denied, 543 U.S. 836 (2004). 27-28

Barajas v. *Wise*, 481 F.3d 734 (9th Cir. 2007). 45

Doe by Glanzer v. *Glanzer*, 232 F.3d 1258 (9th Cir. 2000). 53-54

Olden v. *Kentucky*, 488 U.S. 227 (1988). 45

Tome v. *United States*, 513 U.S. 150 (1995).. 28

United States v. *Acosta*, No. 05-50477, 2007 WL 1788937 (9th Cir. June 14, 2007). 57

United States v. *Alvarez*, 358 F.3d 1194 (9th Cir.), cert. denied, 543 U.S. 887 (2004). 27

United States v. *Ayers*, 924 F.2d 1468 (9th Cir. 1991).. . . . . 48, 51

United States v. *Beardslee*, 197 F.3d 378 (9th Cir. 1999). 40

United States v. *Beaulieu*, 194 F.3d 918 (8th Cir. 1999). 37

United States v. *Beltran*, 165 F.3d 1266 (9th Cir.), cert. denied, 528 U.S. 881 (1999) 31

United States v. *Bridgeforth*, 441 F.3d 864 (9th Cir. 2006). 44

United States v. *Ellis*, 147 F.3d 1131 (9th Cir. 1998).. 31

United States v. *Hall*, 419 F.3d 980 (9th Cir.), cert. denied, 126 S. Ct. 838 (2005). 36

United States v. *Holler*, 411 F.3d 1061 (9th Cir.), cert. denied, 126 S. Ct. 597 (2005). 56

CASES (continued): PAGE

United States v. *Iriarte-Ortega*, 113 F.3d 1022 (9th Cir. 1997), cert. denied, 523 U.S. 1012 (1998). 31

United States v. *Jahagirdar*, 466 F.3d 149 (1st Cir. 2006). 30

United States v. *Kappell*, 418 F.3d 550 (6th Cir. 2005), cert. denied, 547 U.S. 1056 (2006). 37

United States v. *Kenyon*, 397 F.3d 1071 (8th Cir. 2005). 32-33

United States v. *Larson*, Nos. 05-30076, 05-30077, 2007 WL 2192256 (9th Cir. August 1, 2007). . . . . *passim*

United States v. *LeMay*, 260 F.3d 1018 (9th Cir. 2001), cert. denied 534 U.S. 1166 (2002). 52-54

United States v. *Munoz*, 233 F.3d 1117 (9th Cir. 2000). 40-41

United States v. *Ogles*, 406 F.3d 586 (9th Cir. 2005).. . . . . 46, 50

United States v. *Pang*, 362 F.3d 1187 (9th Cir.), cert. denied, 543 U.S. 943 (2004). 27, 31, 36

United States v. *Shabani*, 48 F.3d 401 (9th Cir. 1995).. 41

United States v. *Sioux*, 362 F.3d 1241 (9th Cir. 2004).. 53

United States v. *Smith*, 893 F.2d 1573 (9th Cir. 1990).. . . . . 27, 30-31

United States v. *Stuart*, 718 F.2d 931 (9th Cir. 1983). 30

United States v. *Sua*, 307 F.3d 1150 (9th Cir. 2002), cert. denied, 537 U.S. 1221 (2003). 42-43

United States v. *Tome*, 61 F.3d 1446 (10th Cir. 1995). 32-33

United States v. *Yazzie*, 59 F.3d 807 (9th Cir. 1995). 36

STATUTES: **PAGE**

18 U.S.C. 242 2

18 U.S.C. 3231 1

28 U.S.C. 1291. 1

RULES:

Federal Rule of Appellate Procedure 4(a).. 1

Federal Rules of Evidence
401. 41
403. . . . . 46, 49, 53, 57
404(b). . . . . *passim*
413. . . . . *passim*
801(d)(1)(B). . . . . *passim*
803(4). . . . . *passim*

IN THE UNITED STATES COURT OF APPEALS
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GABRIEL GONZALEZ,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291. Defendant was sentenced on August 3, 2006, and final judgment was entered on August 4, 2006. E.R. 275.[1] The notice of appeal was filed on August 14, 2006, and is timely under Rule 4(a) of the Federal Rules of Appellate Procedure. E.R. 275.

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[1] This brief uses the following abbreviations: "E.R. __" for the page number of Appellant's Excerpts of Record; "S.E.R. __" for the page number of the Appellee United States' Supplemental Excerpts of Record; and "Br. __" for the page number of Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by admitting Sergeant Garza's testimony concerning Cecilia Tirado's account of the night she was raped by defendant-appellant Gonzalez.

2. Whether the district court abused its discretion by admitting Pamela Fields' prior statements to Sergeant Kagy and Nurse McClung concerning her abuse by Gonzalez.

3. Whether the district court violated Gonzalez's constitutional right to confrontation by excluding as irrelevant questioning related to the restraining order against Rory Fitzhugh.

4. Whether the district court abused its discretion by admitting evidence of two prior acts of sexual misconduct by Gonzalez.

5. Whether "cumulative prejudice" from the alleged errors warrants reversal.

STATEMENT OF THE CASE

A federal grand jury indicted Gabriel Gonzalez on August 25, 2004. E.R. 262. A superseding three-count indictment charged Gonzalez with acting under color of law to deprive three women of their right to bodily integrity, in violation of 18 U.S.C. 242. E.R. 1-4. The indictment charged in Count One that Gonzalez, while on duty as a Los Angeles County Sheriff's deputy, forced Cecilia Tirado to have vaginal intercourse with him by placing her in fear of death and serious

bodily injury. E.R. 1-2. Count Two alleged that Gonzalez used his official position to touch Kussy Guzman's "breasts through her clothing without her consent." E.R. 3. Count Three charged that Gonzalez, while on duty, forced Pamela Fields to perform oral sex on him without her consent by placing her in fear of death and serious bodily injury. E.R. 4.

Before trial, the district court ruled that the government could introduce evidence of two prior incidents of sexual misconduct by Gonzalez, pursuant to Federal Rule of Evidence 404(b). E.R. 250-257. The court ruled that evidence of one of these prior incidents was alternatively admissible under Federal Rule of Evidence 413. E.R. 257-259.

At trial, the jury convicted Gonzalez on all three counts. S.E.R. 4-5. The jury found that the conduct charged in Count One (forced vaginal intercourse with Cecilia Tirado) and Count Three (forcing Pamela Fields to perform oral sex on him) amounted to aggravated sexual abuse. S.E.R. 4-5.

The district court sentenced Gonzalez to 360 months' imprisonment and five years' supervised release. S.E.R. 2.

STATEMENT OF FACTS

1. Rape Of Cecilia Tirado (Count One)

In the early morning hours of a Sunday during the summer of 2002, Cecilia Tirado was alone in her car driving on Imperial Highway when she noticed a police car following her. S.E.R. 345, 349-350. Defendant-appellant Gabriel

Gonzalez, who was then a deputy sheriff with the Los Angeles County Sheriff's Department, pulled her over. S.E.R. 349. Gonzalez, dressed in police uniform and armed with his service weapon, came to Tirado's car. S.E.R. 351. He shined his flashlight all over Tirado and the inside of her car. S.E.R. 351.

Gonzalez said that he stopped her for swerving, and performed some sobriety tests. S.E.R. 352-353. Tirado had consumed one glass of wine several hours earlier, and was able to follow Gonzalez's instructions. S.E.R. 353. Gonzalez then put Tirado in his patrol car, saying he needed to take her to the police station to check her alcohol level. S.E.R. 354.

Gonzalez did not handcuff Tirado or conduct a pat-down search before placing her in the back of his police car. S.E.R. 354-355. He asked Tirado to show him where she lived. S.E.R. 355. Thinking he might drop her off there, she gave him directions to her house in the City of Southgate. S.E.R. 355. When they reached her house, she pointed it out but he just drove by it slowly. S.E.R. 355-356. As they were driving past her house, Gonzalez asked her if she had a husband or a boyfriend. S.E.R. 357. He asked where she worked, and she told him the location of the Southgate beauty salon she owned. S.E.R. 357. He drove by the salon. S.E.R. 357.

After they had been driving around for a long time, Tirado asked Gonzalez to take her to the police station. S.E.R. 359. He responded that she would lose her license and be arrested when they got to the station. S.E.R. 359. She replied that

she would like to be taken there anyway. S.E.R. 359. Gonzalez just kept driving, and repeatedly asked Tirado to give him information. S.E.R. 360. Tirado did not understand what kind of information he wanted. When she asked him to clarify his request, he ignored her and kept driving slowly. S.E.R. 361.

Gonzalez eventually stopped the car in a dark alley. S.E.R. 362. He got out of the car and looked around. S.E.R. 362. At this point, Tirado became concerned. She did not scream or try to run away, however, because she was afraid that Gonzalez would shoot her with the gun she saw at his hip. S.E.R. 363-364. Without saying anything, Gonzalez got back in the car and drove out of the alley. S.E.R. 364. He drove to a large, desolate parking lot. S.E.R. 364.

Gonzalez entered the parking lot through an open gate and drove around. S.E.R. 365-366. He stopped the patrol car between two trailers. S.E.R. 366. He got out of the car and told Tirado that he was going to check her for drugs. S.E.R. 366. He stood in front of the back door of the car and ordered Tirado to take off her brassiere and dress, instructing her to "become naked slowly, little by little." S.E.R. 364. She tried to pull her brassiere and dress down just part of the way, but Gonzalez told her to take them off completely. S.E.R. 368. While she was undressing, Gonzalez shined his flashlight at her. S.E.R. 368. After she took off her brassiere and dress, Gonzalez told her to take her pantyhose off too, so that she was completely naked. S.E.R. 369.

Gonzalez instructed Tirado to position her feet so he could shine his light in her vagina to check for drugs. S.E.R. 370. He also made her open her vagina with her fingers. S.E.R. 371. At this point, Tirado was in shock, trembling, and praying for help. S.E.R. 370-371.

Gonzalez told Tirado to stand up so he could check her from the back. S.E.R. 372. He told her to bend over with her hands on the car. S.E.R. 372. Gonzalez stood behind her and shined his flashlight on her. S.E.R. 373. Tirado then saw Gonzalez unzip his pants and take out his erect penis. S.E.R. 373-374. He began to push his penis into her vagina. S.E.R. 374. She asked him what he was doing, and he responded with laughter. S.E.R. 374. During the entire ordeal, she was thinking about trying to stay alive for the sake of her children. S.E.R. 375. While Gonzalez's penis was inside of her, she was shaking from head to toe. S.E.R. 376. She pleaded with him not to ejaculate inside of her, saying that she impregnates easily. S.E.R. 375. He did not respond and continued raping her. S.E.R. 376. Gonzalez eventually removed his penis from Tirado's vagina and ejaculated on the ground. S.E.R. 376, 389-390. When Gonzalez was finished raping her, he told Tirado to put her clothes on. S.E.R. 377.

Gonzalez eventually drove Tirado back to her car. S.E.R. 378-379. Before they got to Tirado's car, Gonzalez said he was going to visit her sometime. S.E.R. 378. Tirado felt that Gonzalez said this to mock her and threaten her privacy. S.E.R. 378. She said she never wanted to see him again. S.E.R. 378.

Tirado drove home. S.E.R. 379. She felt dirty. S.E.R. 379. She bathed, washing herself again and again, while crying. S.E.R. 379.

Tirado did not initially report the rape. S.E.R. 380. She knew that Gonzalez knew where she lived, and feared that he might have her killed. S.E.R. 380. She decided to remain quiet for her own safety and that of her children. S.E.R. 380.

2. Pamela Fields Forced To Perform Oral Sex (Count Three)

Late at night on January 8, 2003, Pamela Fields was walking in the center of Long Beach Boulevard when a police officer, Gonzalez, pulled his patrol car to the side of the road, turned on its lights, and motioned for her to come to him. S.E.R. 143-145. The patrol car was black and white, and had "Sheriff" written on it. S.E.R. 145. Gonzalez asked Fields for identification. S.E.R. 145.

Fields believed that Gonzalez would take her to jail because she was working as a prostitute at the time and had outstanding arrest warrants. S.E.R. 146. Gonzalez initially questioned Fields outside of his car on the well-lit boulevard. S.E.R. 147-149. He shined a flashlight in her eyes to determine sobriety. S.E.R. 149. Gonzalez did a normal pat-down search of Fields and placed her unhandcuffed in the back of his patrol car. S.E.R. 150-152. Fields had previously been transported to jail, and had always been handcuffed. S.E.R. 152. Gonzalez did not tell Fields where he was taking her, or mention her outstanding warrants. S.E.R. 154.

When Gonzalez began to drive, Fields believed they were on the way to the jail. S.E.R. 154-155. Instead, he stopped in a nearby alley. S.E.R. 155. Fields became concerned. S.E.R. 156. The alley was dark and bordered by a graffiti-covered metal fence. S.E.R. 156. There was an unoccupied white truck parked several car lengths behind where Gonzalez parked the patrol car. S.E.R. 156-157. The patrol car was parked very close to the metal wall on the right side of the alley. S.E.R. 157.

Gonzalez opened the back driver's-side door of the car and told Fields he was going to search her. S.E.R. 158-159. He told her to open her legs, tapping her inner thigh with his flashlight. S.E.R. 159. Fields said she was not wearing undergarments, and therefore could not be hiding anything. S.E.R. 159. He shined his flashlight at her vagina for about two minutes with his face about an arm's length away. S.E.R. 160-161. He placed his hand near his gun, leading Fields to believe that he might shoot her. S.E.R. 161-162. Gonzalez returned to the front of the patrol car without saying anything. S.E.R. 162.

Gonzalez got back out of the car, came around to the passenger side, and opened the back door. S.E.R. 162. Fields moved over to the passenger side of the car. S.E.R. 163. Gonzalez approached her with his erect penis out of his zipper. S.E.R. 163. There was a conversation about oral sex. S.E.R. 164. Fields did not want to perform oral sex on Gonzalez, but was frightened and felt she had no choice. S.E.R. 164-165. Fields asked if she could stand while she performed oral

sex because she was concerned that Gonzalez would push her into the vehicle, or shoot her and drop her body off somewhere. S.E.R. 164. She did not cry out for help, or try to fight him off or run, because he was agitated and had a gun. S.E.R. 165.

Before performing oral sex, Fields asked Gonzalez if she could use a condom. S.E.R. 165-166. He refused. S.E.R. 166. She performed oral sex, and stopped when she believed Gonzalez was about to ejaculate in her mouth. S.E.R. 166. She asked about a condom again. S.E.R. 167. Gonzalez said "bend over, bitch." S.E.R. 167. He had not yet ejaculated and Fields believed he was going to rape her from behind. S.E.R. 167, 180. He was very agitated. S.E.R. 167. She again asked about a condom and said she did not want to get pregnant. S.E.R. 168. Gonzalez then lost his erection. S.E.R. 168. He placed Fields back in the car. S.E.R. 168.

Gonzalez told Fields that she needed to give him information before he would let her go. S.E.R. 171. She told him about some drug dealers, but he said he needed something better. S.E.R. 171. During the conversation, Fields believed that Gonzalez would likely kill her and leave her in the alley, so she would not be able to tell anyone what he had done. S.E.R. 172. At one point, she walked away from the vehicle, but he motioned her back. S.E.R. 172. After asking if she needed a ride anywhere, Gonzalez finally let her go. S.E.R. 173. As she was walking away, Fields kept turning around to see if Gonzalez was going to shoot

her. S.E.R. 173. As she turned around, she saw the license plate. S.E.R. 174. Gonzalez moved over, blocking her view. S.E.R. 174.

At the end of the alley, Fields started running, and began screaming and yelling. S.E.R. 174. She paused outside a shoe repair shop, but continued on when she was unable to communicate with the man inside. S.E.R. 175. She found her then-husband, Rory Fitzhugh, and told him what Gonzalez had done. S.E.R. 176.

Shortly thereafter, Fields told her story to David Mertens, an L.A. County Deputy Sheriff assigned to the Compton Gang Enforcement Team. S.E.R. 262. Mertens stopped when he saw a man – apparently Fitzhugh – duck behind a car. S.E.R. 263. As he approached the car, he saw Fields, who was sobbing and appeared extremely upset. S.E.R. 263. She told Mertens what Gonzalez had done to her and described him. S.E.R. 178, 264.

Fields went to Daniel Freeman Hospital, where she spoke to Sergeant James Kagy of the L.A. Sheriff's Department Internal Criminal Investigations Bureau (ICIB) and his partner, Sergeant Deborah Jones. S.E.R. 91-93, 179. Fields described her encounter with Gonzalez to the ICIB investigators. S.E.R. 95-110.

Included in her description were the following: that Gonzalez placed her in the back of the patrol car without handcuffing her, S.E.R. 96-97; took her to a dark alley, S.E.R. 98; searched her vagina with a flashlight, S.E.R. 101; said she might be hiding something in her vagina, S.E.R. 101; mentioned something about calling

a female officer, S.E.R. 101; kept pressing her to give him information, S.E.R. 102; attempted to rape her from behind after forcing her to perform oral sex, but then lost his erection when she mentioned that she might get pregnant, S.E.R. 106-107; and later asked where she lived and mentioned seeing her again, S.E.R. 108.

Fields told Sergeant Kagy that Gonzalez was driving a black and white Sheriff's patrol car, S.E.R. 94-95, with hard plastic seats in the back, and a security screen with no opening separating the back and front seats of the car, S.E.R. 97. She described Gonzalez as Hispanic, with an olive complexion, about 32 years old, and 5'9" tall. S.E.R. 96. She said he was a bit overweight, had a military style haircut, no facial hair, and glasses. S.E.R. 96. She stated that he wore a deputy sheriff's uniform of a green jacket and pants. S.E.R. 96. Fields said that after performing oral sex, she noticed what she thought was the number 050 or 650 on the roof of the patrol car. S.E.R. 108, 141a. As she was walking away, she turned back and saw the license plate, and thought the number was similar to 3000795 or 000795. S.E.R. 109, 133a.

After Fields spoke to Sergeant Kagy, Nurse Clarissa McClung performed a sexual-assault examination on her. S.E.R. 35. Fields told Nurse McClung she was forced to perform oral sex, but that there was no ejaculation in her mouth. S.E.R. 36-37. McClung checked Fields' mouth for any injuries, but found none. S.E.R. 37. She swabbed the inside of Fields' mouth and prepared slides for analysis.

S.E.R. 37-38. Crime laboratory tests of the slides did not reveal semen or other DNA evidence. S.E.R. 39.

After the medical examination, at about 6 a.m. on January 9, Fields went with Sergeants Kagy and Jones to show them where Gonzalez had picked her up and where he had taken her. S.E.R. 111-112. Sergeant Kagy noticed that the alley matched the description Fields had given: that it was strewn with trash, had a white truck parked there, and had high walls. S.E.R. 113-114. Fields directed Sergeant Kagy to the shoe repair shop, and an ICIB investigator eventually spoke with the owner of the shop. S.E.R. 115. The owner confirmed that he heard a woman screaming and crying for help one morning between 12 and 1 a.m. in early January 2003. S.E.R. 266-267.

That morning, Sergeant Kagy continued his investigation at the Compton Sheriff's Station. S.E.R. 116. He identified a patrol car that had a rooftop number of 050 – the number Fields thought she had seen – and was on patrol the previous night. S.E.R. 117-119. One of the officers assigned to that car was Hispanic, S.E.R. 124-125; however, he had a partner, S.E.R. 118, and the car did not have a solid screen, S.E.R. 120-121. Additionally, the license plate number, 006073, was not similar to the number Fields thought she had seen, 3000795. S.E.R. 109, 121. Sergeant Kagy had a conversation with a Lieutenant at the Compton station, and relayed Fields' description of the suspect. S.E.R. 122. Based on that conversation, Sergeant Kagy determined that Gonzalez had worked alone the

previous night from 10 p.m., January 8, to 6 a.m., January 9, in a vehicle with a 560 rooftop number. S.E.R. 122.

Based on the information Sergeant Kagy had gathered, Sergeant Jones prepared a "photo six-pack" – a group of six photos of similar-looking people used to identify or eliminate suspects. S.E.R. 123-125. The photo six-pack included Deputy Arreta, the Hispanic officer that had been assigned to Vehicle 050, and Gonzalez, along with other similar-looking officers. S.E.R. 124-125.

Sergeant Kagy showed the photo six-pack to Fields at 12:30 p.m. on January 9. S.E.R. 125-126. She identified Gonzalez as the person who had forced her to perform oral sex the previous night. S.E.R. 127-131. She noted that when she saw the officer the previous night, he was wearing glasses. Although he was not wearing glasses in the photo, she was "absolutely positive" of her identification. S.E.R. 131.

Sergeant Kagy determined that the vehicle Gonzalez drove from 10 p.m., January 8, to 6 a.m., January 9, had a license plate number of 1007975 (similar to the 3000795 or 000795 license plate number reported by Fields). S.E.R. 109, 132, 133a. The car had a rooftop number of 560 (similar to the 050 or 650 number reported by Fields). S.E.R. 109, 122, 141a. The car had hard plastic seats and a solid screen between the front and back seats. S.E.R. 133.

Sergeant Kagy had the crime lab check the car for fingerprints. S.E.R. 133a. A crime lab latent fingerprint examiner discovered a fingerprint matching Fields' on the trunk of the car on the driver's side. S.E.R. 39a-39e.

Sergeant Kagy noticed a building security camera pointed at the alley. S.E.R. 134. He obtained video from the company that owned the camera. S.E.R. 134. The video showed a black and white patrol car enter the alley at 12:15 a.m., January 9, 2003, remain parked in the alley for about six minutes, and then leave the alley at 12:21 a.m. S.E.R. 135. Two minutes later, a black and white patrol car came back and parked in the same general area for about three minutes. S.E.R. 136-137.

Sergeant Kagy determined that Gonzalez had not used his Mobile Digital Terminal (MDT) – a device used extensively by officers to send and receive messages while on duty – between 12:06 and 12:28 a.m. on January 9. S.E.R. 140. At 12:28 a.m., Gonzalez's MDT entry indicated that he was in route to the Century Regional Detention Facility (CRDF); his next entry at 12:32 a.m. indicated that he had arrived. S.E.R. 138. Sergeant Kagy determined that it was 1.3 miles from the alley to CRDF, and would take about three minutes to drive at that time of night. S.E.R. 138-139. Sergeant Kagy also determined that there was no radio communication by Gonzalez during the time the video showed the patrol car parked in the alley. S.E.R. 141.

3. Investigation Of The Rape Of Cecilia Tirado (Count One)

In early January 2003, Tirado got a survey phone call asking about police service in the City of Southgate, and urging her to call if there was anything the police could do for her. S.E.R. 381-382. At that point, Tirado believed that it was a Southgate police officer who had raped her. S.E.R. 381. When the phone survey caller made these statements, Tirado "felt [the pain of being raped] all come up," and told her story to the caller. S.E.R. 381. The caller reported the complaint, and on January 24, 2003, investigator James Annes, working for the Southgate Police Department, came to Tirado's home and spoke with her about what she had told the caller. S.E.R. 451. Tirado told Annes that she was raped by a police officer. S.E.R. 452-453. Annes wrote a report, S.E.R. 454, and the Southgate Police Department requested an investigation by the L.A. Sheriff's ICIB (which sometimes does internal investigations for other police departments). S.E.R. 323.

On February 3, 2003, Sergeant Sam Silva of the L.A. Sheriff's ICIB was assigned to conduct the investigation. S.E.R. 323. After an initial interview of Tirado, Sergeant Silva spoke to his colleague Sergeant Kagy about his investigation. S.E.R. 324-326. Sergeants Silva and Kagy discussed similarities between Tirado's allegations and the conduct of Gonzalez in the case Sergeant Kagy was investigating involving Fields. S.E.R. 326-327.

Based on the similarities between the two cases, Sergeant Silva created a photo six-pack that included a picture of Gonzalez. S.E.R. 327. During Sergeant Silva's initial interview with Tirado, she had been certain that she would recognize a photo of the officer that raped her because "his face was ingrained in her mind." S.E.R. 325, 384. Sergeant Silva did not use the same photo six-pack that Sergeant Kagy used with Fields, but found a different photo of Gonzalez and created a new photo six-pack. S.E.R. 327-328. Sergeant Silva found photos of five other officers in the Sheriff's Department whose facial characteristics closely matched those of Gonzalez. S.E.R. 328. He also had the crime-lab superimpose glasses on the photos of officers not already wearing them, because Tirado said her assailant wore glasses. S.E.R. 328.

On February 19, 2003, when Sergeant Silva showed Tirado the photo six-pack, she immediately pointed to the picture of Gonzalez, and then left the room crying. S.E.R. 329-330. She told the interpreter, Sergeant Enrique Garza, that she was 100% certain that the man in the photograph she selected was the officer who raped her. S.E.R. 456. Sergeant Silva then had Tirado look at 85 photographs of Southgate police officers. S.E.R. 268a, 457-458. She examined them carefully, and had seen some of the officers in the community, but remained certain that the person she initially identified was the officer who raped her. S.E.R. 458-459.

Tirado again described her ordeal. S.E.R. 461-466. She said that Gonzalez pulled her over, placed her unhandcuffed in the back of his patrol car, and drove

her around. S.E.R. 462. She stated that Gonzalez repeatedly asked her to give him information. S.E.R. 463. She stated that he eventually took her to a truck yard and made her undress, telling her that it was common for females to hide things in certain parts of their bodies. S.E.R. 464. She recounted that Gonzalez made her spread her legs in the back of the car while he shined his flashlight on her vagina. S.E.R. 465. Finally, she said that Gonzalez had her get out of the car and bend over, and raped her from behind. S.E.R. 465-466.

Tirado took Sergeants Silva and Garza to the location where Gonzalez had first pulled her over, which was in an area patrolled by the L.A. Sheriff's Department. S.E.R. 417. She also took them to the parking lot where she was raped. S.E.R. 418. Sergeant Silva determined that Gonzalez worked alone in a patrol car late Saturday night to early Sunday morning four times in July 2002 and twice in August 2002. S.E.R. 429-432.

4. Fondling Of Kussy Guzman (Count Two)

Towards the end of 2002, Gonzalez pulled over Kussy Guzman sometime after 2:15 a.m. S.E.R. 269, 294-295. He indicated that she should turn onto a poorly-lit side street. S.E.R. 270. No one was around, and she was alone in the car. S.E.R. 270. Gonzalez put Guzman in the back of his patrol car without searching or handcuffing her. S.E.R. 271-272. He asked her whether she had a boyfriend, and she told him no. S.E.R. 272-273. Gonzalez asked why not. S.E.R. 273. He told her that he had to search her. S.E.R. 274. She asked him to call a

female officer to conduct the search. S.E.R. 274. Gonzalez said it would take a while for the female officer to arrive, and Guzman said she would wait. S.E.R. 274-275. Gonzalez did not wait for the female officer, but searched her himself, and found a box cutter in her back pocket that she used in her job at a fast-food restaurant. S.E.R. 275-276.

Gonzalez then made Guzman untuck her shirt and undo her brassiere. S.E.R. 277. He then put the palms of his hands on top of her shirt and caressed her breasts, moving his fingers as he did. S.E.R. 279. She was very frightened and crying, but did not move while he was feeling her breasts. S.E.R. 279-281. He then brought his hands down to her waist and hips. S.E.R. 281. He let her go without giving her a ticket or telling her why he had pulled her over. S.E.R. 282.

Guzman told a friend about what happened, but decided not to report the incident because she did not think the police would believe her. S.E.R. 283-284. Sometime later, she responded to a letter from the FBI, told an agent what had happened, and identified Gonzalez from a FBI photo lineup as the officer who had fondled her. S.E.R. 27-30, 284-285.

5. Prior Incidents Of Sexual Misconduct

a. Shirley Munoz

Gonzalez pulled Shirley Munoz over in the early morning hours of November 16, 2001. S.E.R. 61-63. She was driving alone. S.E.R. 62. She admitted to him that she was on parole. S.E.R. 66. Gonzalez did a normal pat-

down search of Munoz, and placed her unhandcuffed in the back of his patrol car. S.E.R. 70-72.

Gonzalez searched her car, opened the rear passenger door of the patrol car, and asked her some questions about what he found. S.E.R. 72-75. He made her remove her shoes and socks, and then her brassiere. S.E.R. 75-77. Munoz's breasts were visible through the lace top she was wearing, and she tried to cover them with her hands. S.E.R. 77-78. Without allowing her to put her brassiere back on, Gonzalez asked her to stand up and run her thumbs on her waistband. S.E.R. 78. He said, "[Y]ou women tend to hide things pretty good." S.E.R. 78. He had her pull down her pants and underwear, and squat and cough with the backdoor of the patrol car open. S.E.R. 78-79. He shined his flashlight at her buttocks. S.E.R. 80.

He allowed her to get back into the patrol car, and told her twice she was pretty and had a lot of potential. S.E.R. 81. He repeatedly asked her to give him information. S.E.R. 81-82. He asked whether she was married, and told her "to give him a good reason" why he should just let her go. S.E.R. 82. He asked her to meet him at 6 a.m. at a doughnut shop, and she agreed in order to get him to release her. S.E.R. 84. He let her go without issuing a ticket, on the condition that she meet him two hours later. S.E.R. 86. She did not meet him. S.E.R. 85.

Munoz told her parole officer what had happened. S.E.R. 87. She did not report the incident to the Sheriff's Department, because she did not think they

would believe her. S.E.R. 88. Sometime later, she responded to a letter from the FBI, and told them about what Gonzalez had done to her. S.E.R. 89.

b. Elizabeth Castillo Chavez

Around 4:50 a.m. one morning at the end of December 2001, Elizabeth Castillo Chavez was pulled over in a dark and deserted area by Gonzalez, who was driving a black and white Sheriff's Department car. S.E.R. 42-43, 51. Gonzalez waived off another patrol car that drove past. S.E.R. 46. He placed her unhandcuffed in the back of his patrol car. S.E.R. 46-47. After initially sitting in the front seat, Gonzalez came and sat next to Chavez in the back. S.E.R. 48. He seemed to be trying to think of an excuse for having pulled her over, and settled on the explanation that she had something hanging from her rearview mirror. S.E.R. 49. He asked whether she "go[es] out." S.E.R. 49. He said he might take her car away from her, because she perhaps had drugs in the car. S.E.R. 49.

Chavez gave him permission to search her car, and told him she needed it to get to doctor's appointments because she was pregnant. S.E.R. 50. He did not search her car, but had her get out of the patrol car so he could search her. S.E.R. 52-53. He left the rear passenger door open, faced her, and rubbed his hands palm-down all over her thighs, hips, and buttocks, while squeezing with his fingers. S.E.R. 53-55. While doing this, he looked at her with an expression on his face that gave her the impression he was enjoying himself. S.E.R. 55. She was

scared, but stepped back while he was doing this. S.E.R. 55. When she stepped back, he stopped and let her go without giving her a ticket. S.E.R. 55-56.

She told coworkers and family members what had happened, but did not report it because she did not think the police would believe her. S.E.R. 57. Later, she responded to a letter from the FBI and reported the incident. S.E.R. 57-58. She identified Gonzalez from a photo six-pack, after having described him as Hispanic, with green eyes and black hair. S.E.R. 59-60.

6. Identification Of Gonzalez

Tirado, Fields, Guzman, and Munoz identified Gonzalez in court as the person who sexually abused them. S.E.R. 24a-c, 146, 319-322, 350.

In addition, FBI Special Agent Bernard Riedel testified that he sent letters to Kussy Guzman, Shirley Munoz, and Elizabeth Chavez because their names had come up during a search of the records created by Gonzalez's onboard computer. S.E.R. 25. The letter did not mention Gonzalez or the Sheriff's Department, but merely inquired whether the recipient had had contact with a police officer in which the conduct of the officer had been inappropriate. S.E.R. 25-27.

Agent Riedel testified that Guzman identified Gonzalez from a photo six-pack when she spoke to him. S.E.R. 28-30. He determined that Gonzalez entered Chavez's information into his computer at 4:51 a.m. on Saturday, December 29, 2001. S.E.R. 30-32. Sandy Poole, a dispatcher specialist, testified that, at 2:36

a.m. on November 16, 2001, Gonzalez made a computer inquiry about Shirley Munoz. S.E.R. 40-41.

7. Gonzalez's Defense

In opening statement and cross-examination of Tirado and Fields, defense counsel emphasized that both victims had filed civil lawsuits to collect damages. S.E.R. 249-256, 402-403. Defense counsel first focused on Fields' lawsuit, stating in the opening statement: "She is suing Deputy Gonzalez in federal court seeking money damages for what occurred that evening. So she does have an interest in the outcome of this case. She has a motive, an interest and a bias as to the outcome because if our client is convicted of her charge, she can collect big time." S.E.R. 341-342. The court then sustained an objection by the government and, referring to the statement about collecting "big time," instructed the jury to "disregard the comment." S.E.R. 342.

Defense counsel cross-examined Fields extensively about her private lawsuit. S.E.R. 249-256. Counsel elicited that Fields' attorney apparently agreed to go forward with her case only after Gonzalez was indicted. S.E.R. 252-254. Counsel questioned Fields about two assertions in her civil complaint that appeared to be inconsistent with her testimony. S.E.R. 254-256. Fields testified on redirect that she had never read or signed the complaint. S.E.R. 259-260. Defense counsel brought up the lawsuit again during re-cross-examination. S.E.R.

261. Counsel noted that the suit had been filed well over a year earlier, and questioned whether Fields had really never seen it. S.E.R. 261.

Defense counsel also questioned Tirado about her civil lawsuit. S.E.R. 402-403. Counsel questioned Tirado about an inconsistency between the date of the rape alleged in her lawsuit and declaration filed in connection with the suit, and her testimony that the rape occurred on a Saturday. S.E.R. 402-403.

Defense counsel attempted to impeach the credibility of the victims in a variety of other ways as well. Counsel questioned Tirado about a number she thought she saw on the patrol car that did not match the number of the car Gonzalez had driven; about her initial belief that the assailant was a Southgate officer; her drawing of the shape of the badge that did not resemble the badge worn by Gonzalez; her ability to see the officer who raped her; and her belief that she had seen the officer after the incident during the day in Southgate. S.E.R. 396-431. Counsel questioned Fields about, *inter alia*, making untrue statements in the past, her criminal record, drug and alcohol use, her criminal occupation, and her failure to call the police immediately after the incident. S.E.R. 181-259. Counsel questioned Guzman about her preparation for trial, inability to remember exactly when the incident occurred, inconsistencies in FBI reports about precisely where she was pulled over, and an FBI report stating that Gonzalez fondled her under her shirt. S.E.R. 359-391.

SUMMARY OF ARGUMENT

In seeking to overturn his convictions, defendant challenges several evidentiary rulings the district court made during his lengthy trial. Contrary to defendant's contentions, the district court did not abuse its discretion or otherwise err in making any of the contested evidentiary rulings. Moreover, any error could not have affected the outcome of the case, and thus was harmless.

1. The district court properly admitted Cecilia Tirado's prior consistent description of events to Sergeant Garza, pursuant to Rule 801(d)(1)(B), Fed. R. Evid. Gonzalez's claim that defense counsel made no charge of improper motive is unsupported. Counsel repeatedly questioned Tirado during cross-examination about her lawyer and her lawsuit. Counsel asked these questions emphasizing Tirado's civil lawsuit soon after arguing in opening statement that a victim who files a lawsuit seeking monetary damages has "a motive, an interest and a bias as to the outcome" of the criminal trial. Cross-examination about Tirado's lawsuit impliedly charged an improper motive. In any event, any error in the admission of this testimony was harmless, because it was cumulative of Tirado's detailed testimony. See pp. 27-34, *infra*.

2. The district court's admission under Rule 801(d)(1)(B) of Pamela Fields' prior consistent description of the incident to Sergeant Kagy was also proper. Gonzalez's argument that Fields' motive to lie was present before she made the statement ignores defense counsel's extensive cross-examination about the lawsuit

she filed long after the challenged statement. Defense counsel expressly charged that Fields' testimony was influenced by her desire to gain money damages. The testimony about the prior statement was also cumulative of Fields' trial testimony, and therefore any error in admitting it was harmless. See pp. 34-35, *infra*.

The district court also properly admitted Fields' statement to Nurse McClung under Rule 803(4), Fed. R. Evid. The record supports the finding that the sexual assault examination had a diagnostic as well as evidence-gathering purpose. In any event, any error in admitting it was harmless, as this testimony was cumulative of testimony properly before the jury. See pp. 36-38, *infra*.

3. Gonzalez was not denied his constitutional right to confront the witnesses against him by the district court's excluding, as irrelevant, questions about the restraining order against Rory Fitzhugh. The jury members would not likely have concluded that Fields invented her story to distract police from learning about the restraining order against Fitzhugh, since they believed her testimony despite cross-examination about more compelling motives to lie. Moreover, this questioning was properly excluded as a potentially time-consuming distraction from the central issues in the case. Any error in excluding testimony about the restraining order was harmless. See pp. 39-46, *infra*.

4. The district court properly admitted evidence of Gonzalez's prior sexual misconduct under Rule 404(b), Fed. R. Evid., because it was probative of modus operandi and therefore identity. As to these incidents involving Munoz and

Chavez, Gonzalez's claim that the district court based its conclusion on incorrect facts is a misreading of the court's opinion. The similarities between the charged and uncharged conduct are striking, and fully support the district court's ruling. See pp. 47-52, *infra*.

The district court also properly concluded that evidence of the incident involving Chavez was admissible as a prior sexual assault under Rule 413, Fed. R. Evid. Admitting this testimony comports with the unambiguous language of the Rule. And, contrary to Gonzalez's contention, the district court correctly recognized and applied this Court's controlling precedent in admitting the evidence of uncharged conduct. See pp. 53-55, *infra*.

In any event, because the government had a strong case as to the defendant's identity even without this evidence, any error in its admission was harmless. See pp. 55-57, *infra*.

5. Even assuming the alleged errors occurred, reversal would not be warranted under defendant's "cumulative prejudice" theory. In light of the overall strength of the government's case, the alleged evidentiary errors could not have affected the verdict. See pp. 57-58, *infra*.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING, AS A PRIOR CONSISTENT STATEMENT, SERGEANT GARZA'S TESTIMONY CONCERNING CECILIA TIRADO'S ACCOUNT OF THE NIGHT SHE WAS RAPED BY GONZALEZ

A. Standard Of Review

This Court "review[s] a district court's determination of admissibility under Rule 801(d)(1)(B) for abuse of discretion." *Arizona* v. *Johnson*, 351 F.3d 988, 998 (9th Cir. 2003), cert. denied, 543 U.S. 836 (2004). A district court has "broad discretion regarding whether to admit a prior consistent statement under Fed. R. Evid. 801(d)(1)(B)." *United States* v. *Smith*, 893 F.2d 1573, 1581 (9th Cir. 1990). Even if this Court "find[s] error, [it] will only reverse if an erroneous evidentiary ruling more likely than not affected the verdict." *United States* v. *Pang*, 362 F.3d 1187, 1192 (9th Cir.) (citation omitted), cert. denied, 543 U.S. 943 (2004); see also *United States* v. *Alvarez*, 358 F.3d 1194, 1214 (9th Cir.), cert. denied, 543 U.S. 887 (2004) ("[W]e may consider the district court's error in admitting hearsay harmless 'unless we have grave doubt whether the erroneously admitted evidence substantially affected the verdict.'") (citation omitted).

B. The District Court Correctly Admitted Sergeant Garza's Testimony Concerning Tirado

Rule 801(d)(1)(B) of the Federal Rules of Evidence provides that an out-of-court statement is not hearsay if the declarant testifies at trial, is subject to

cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive." This Court has framed the test for admission of evidence under Rule 801(d)(1)(B) as follows:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

Arizona, 351 F.3d at 999. See also *Tome* v. *United States*, 513 U.S. 150 (1995). As explained below, admission of Sergeant Garza's testimony met the requirements of this Rule because (1) Tirado testified and was subject to cross-examination; (2) cross-examination of Tirado about her civil lawsuit constituted an implied charge of an improper motive for her to testify falsely; (3) Tirado's prior statement to Sergeant Garza was consistent with her challenged in-court-testimony; and (4) Tirado's statement to Sergeant Garza occurred well before she contacted a lawyer about filing a civil lawsuit.

Gonzalez argues (Br. 38) that the requirements of Rule 801(d)(1)(B) were not met with respect to Tirado's out-of-court statement to Sergeant Garza because there was no "express or implied charge of recent fabrication or improper influence or motive." He claims (Br. 38) to have argued at trial only that Tirado made a sincere but mistaken identification. The district court, however,

reasonably concluded that defense counsel's argument was not so limited. During cross-examination, defense counsel repeatedly questioned Tirado about her private lawsuit seeking monetary damages for the pain this rape caused her. S.E.R. 439-440. The obvious purpose of asking about Tirado's civil suit was to suggest an improper motive to falsify her testimony, *i.e.*, a desire to obtain monetary damages.

Moreover, this cross-examination took place on the first day of the trial, shortly after defense counsel's opening statement. During that statement, defense counsel stated of a different victim: "She is suing Deputy Gonzalez in federal court seeking money damages for what occurred that evening. So she does have an interest in the outcome of this case. She has a motive, an interest and a bias as to the outcome." S.E.R. 341-342.

Defense counsel focused on Tirado's civil lawsuit in cross-examination, soon after telling the jury that a victim who files a private suit for damages cannot be trusted to testify accurately. Defense counsel thus clearly implied that Tirado was motivated to recover monetary damages. To be sure, defense counsel did not expressly allege this improper motive – perhaps because Tirado was a sympathetic witness. But Rule 801(d)(1)(B) permits the introduction of prior consistent statements where the charge of improper motive is "express *or implied*" (emphasis added).

In addition – as required by Rule 801(d)(1)(B) – the out-of-court statement by Tirado to Sergeant Garza was made prior to the time the implied motive to falsify arose. Tirado testified that she contacted a lawyer to file a civil suit well *after* she made the statement to Sergeant Garza. See S.E.R. 437 (Tirado contacted a lawyer after her statement to Sergeant Garza, "towards the end after the whole investigation was done.").

The district court's decision allowing Sergeant Garza's testimony is supported by decisions in this and other circuits. Most directly on point is the First Circuit's decision in *United States* v. *Jahagirdar*, 466 F.3d 149, 156 (2006). In that case, the court held that cross-examination concerning a victim's civil lawsuit against the defendant was an implied charge of fabrication for purposes of Rule 801(d)(1)(B). Similarly, this Court has held that cross-examination about a witness's plea agreement with the government implies an improper motive for purposes of Rule 801(d)(1)(B). See *Smith*, 893 F.2d at 1582 (cross-examination about plea agreements implied that witnesses "were testifying out of a motive to reduce their criminal sentences"); *United States* v. *Stuart*, 718 F.2d 931, 934-935 (9th Cir. 1983) (same). A defense counsel's goals in bringing up a witness's plea agreement or lawsuit against the defendant are identical: counsel wants the jury to know that the witness has an ulterior motive for testifying, and wants the jury to conclude that this motive makes the witness's testimony likely to be false.

Accordingly, the district court did not abuse its "broad discretion" in allowing this testimony. *Smith*, 893 F.2d at 1581.

C. Any Error In The Admission Of Sergeant Garza's Testimony Was Harmless

Even if the district court abused its discretion in admitting this evidence, the ruling cannot reasonably be found "more likely than not [to have] affected the verdict." *Pang*, 362 F.3d at 1192. Where admission of evidence under Rule 801(d)(1)(B) "put[s] no new facts before the jury," this Court has concluded that any error is harmless. *United States* v. *Iriarte-Ortega*, 113 F.3d 1022, 1026 (9th Cir. 1997), cert. denied, 523 U.S. 1012 (1998); see also *United States* v. *Beltran*,165 F.3d 1266, 1270 (9th Cir.), cert. denied, 528 U.S. 881 (1999) (testimony of two police officers about prior statements of a child-witness, improperly admitted under Rule 801(d)(1)(B), was deemed harmless because "the prior consistent statements elicited by the Government were cumulative of other evidence"); *United States* v. *Ellis*, 147 F.3d 1131, 1134 (9th Cir. 1998).

As indicated above, Tirado gave detailed testimony at trial regarding her rape by Gonzalez. Sergeant Garza's summary of her prior out-of-court statement placed no new facts before the jury. Accordingly, under this Court's precedent, any error in admitting his testimony was harmless.

Gonzalez nevertheless argues (Br. 42-46) that Sergeant Garza's testimony "more likely than not affected the verdict" because it came from a police officer

testifying in English, rather than from Tirado testifying through a translator. This argument, however, finds no support in the cases he relies upon.

On remand from the Supreme Court, in *United States* v. *Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995), the Tenth Circuit concluded that "the erroneously admitted evidence was extremely compelling," because it "vividly described a particular instance of [sexual child] abuse with great specificity and in graphic terms. * * * By comparison, the victim's own testimony at trial was not nearly as articulate or comprehensive in its description of the abuse." *Ibid.* Similarly, in *United States* v. *Kenyon*, 397 F.3d 1071, 1081-1082 (8th Cir. 2005), erroneously admitted testimony by a physician's assistant about a child abuse victim's prior consistent statements was deemed not harmless, where the government failed to argue harmless error, and the testimony offered "additional detail" and a more "articulate description of the alleged abuse." In *Kenyon*, the Eighth Circuit used a modified harmless error analysis that required it to "err on the side of the defendant," because the government had waived the harmless error argument. *Id.* at 1081.

None of the factors relied on by the courts in *Tome* and *Kenyon* are present here. The key to both decisions was the additional detail present in testimony of an adult about prior statements the child-victim made concerning alleged sexual abuse. See *Tome*, 61 F.3d at 1455; *Kenyon*, 397 F.3d at 1082. Gonzalez does not argue that Sergeant Garza's testimony about Tirado's description of events

provided more detail, nor could he. Tirado vividly and emotionally recounted the details of what happened the night she was raped in direct testimony that spans 34 pages of transcript. S.E.R. 345-379; described at pp. 3-7, *supra*. Sergeant Garza's testimony about these same events spans only five pages of transcript, is much less detailed, and recounts facts already before the jury. S.E.R. 461-466; described at pp. 16-17, *supra*.

To be sure, *Tome* and *Kenyon* each noted that the objected-to testimony was more "articulate" than the testimony of the child-victim. See *Tome*, 61 F.3d at 1455; *Kenyon*, 397 F.3d at 1455. Gonzalez appears to rely upon this factor, arguing he was prejudiced by the "objective and authoritative manner" of a police officer testifying in English, without the "loss of persuasive power" inherent in the translation of Tirado's testimony through an interpreter. Br. 43-45. But Sergeant Garza's summary in English of Tirado's prior out-of-court statement is hardly akin to the more detailed adult testimony regarding sexual abuse of a child that was determined to have been improperly admitted in *Tome* and *Kenyon*. See *Tome*, 61 F.3d at 1455; *Kenyon*, 397 F.3d at 1082. Gonzalez makes no allegation of any instance in which Tirado's detailed testimony failed to clearly convey the substance of her allegations, nor is any apparent from the transcript. Rather, the transcript of Tirado's testimony contains very few "awkward phrasings" or "grammatical mistakes," and none that is even remotely likely to have confused

the jury. S.E.R. 343-450; cf. Br. 44-45 (citing an "awkward phrase" whose meaning is perfectly clear).

Because Sergeant Garza's summary of Tirado's out-of-court statement put no new facts before the jury, any error in its admission was harmless.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PAMELA FIELDS' PRIOR STATEMENTS TO SERGEANT KAGY AND NURSE MCCLUNG

A. The District Court Properly Admitted, As A Prior Consistent Statement, Sergeant Kagy's Testimony Concerning Pamela Fields' Account Of The Night She Was Forced To Perform Oral Sex On Gonzalez

1. Standard Of Review

This Court reviews the district court's Rule 801(d)(1)(B) ruling for abuse of discretion, and will reverse only if the ruling was an error that more likely than not affected the verdict. See p. 27, *supra*.

2. The District Court Correctly Admitted Sergeant Kagy's Testimony Pursuant To Rule 801(d)(1)(B), Fed. R. Evid.

Gonzalez argues (Br. 48-50) that the district court abused its discretion in admitting, under Rule 801(d)(1)(B), Sergeant Kagy's testimony recounting Fields' description of her ordeal. Gonzalez concedes that he charged Fields with a motive to lie, but argues (Br. 49) that this motive was present before Fields told her story to Sergeant Kagy. This argument simply ignores the fact that defense counsel extensively cross-examined Fields about her civil lawsuit, and expressly argued to the jury that the lawsuit gave Fields a financial motive to lie. S.E.R. 249-256,

341-342. Fields told Sergeant Kagy what had happened to her just a few hours after the event, and well before she filed a civil lawsuit against Gonzalez. S.E.R. 91-92, 253-254. Sergeant Kagy's testimony concerning this description was consistent with Fields' trial testimony, but less detailed. All the requirements for admission under Rule 801(d)(1)(B) were therefore satisfied. See p. 28, *supra* (discussing admissibility of Tirado's prior out-of-court statement to Sergeant Garza under Rule 801(d)(1)(B)).

3. *Any Error In The Admission Of Sergeant Kagy's Testimony Was Harmless*

Gonzalez claims (Br. 55-56) that admission of Sergeant Kagy's testimony about Fields' prior consistent statement requires reversal. He does not argue that Sergeant Kagy conveyed any new information to the jury or provided more detail about the events; rather, he contends (Br. 55) only that Sergeant Kagy's demeanor was more "professional and persuasive." This is not a basis, however, for concluding that the ruling more likely than not affected the verdict. See p. 31, *supra,* citing cases. Accordingly, any error in the admission of Sergeant Kagy's testimony was harmless.

B. *The District Court Properly Admitted Nurse McClung's Testimony Pursuant To Rule 803(4) Of The Federal Rules Of Evidence*

1. *Standard Of Review*

This Court reviews a district court's decision to admit testimony as an exception to hearsay under Rule 803(4), Fed. R. Evid., for abuse of discretion.

United States v. *Yazzie*, 59 F.3d 807, 812 (9th Cir. 1995). Even if this Court "find[s] error, [it] will only reverse if an erroneous evidentiary ruling more likely than not affected the verdict." *United States* v. *Pang*, 362 F.3d 1187, 1192 (9th Cir.), cert. denied, 543 U.S. 943 (2004).

2. The District Court Correctly Admitted Nurse McClung's Testimony Regarding Fields' Out-Of-Court Statement

Gonzalez argues (Br. 50-55) that the district court abused its discretion by admitting the testimony of Nurse McClung that Fields told her that "she had been forced to have oral copulation on a suspect." S.E.R. 36. He argues (Br. 50-55) that the examination had a purely evidence-gathering purpose, and therefore the statement was not admissible under the Rule. This argument is without merit.

Rule 803(4) permits, as admissible hearsay, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." This Court has recognized that Rule 803(4) allows admission of *all* statements made for the purpose of medical diagnosis or treatment. See, *e.g.*, *United States* v. *Hall*, 419 F.3d 980, 987 (9th Cir.), cert. denied, 126 S. Ct. 838 (2005); *Yazzie*, 59 F.3d at 813.

The record indicates that Fields' statement to Nurse McClung was "made for purposes of medical diagnosis or treatment," as required by Rule 803(4). Fields was examined at the Daniel Freeman Memorial Hospital by Nurse Clarissa

McClung, a registered nurse and sexual assault nurse examiner. S.E.R. 34, 179a. McClung had been a registered nurse since 1978 and a sexual assault nurse examiner since 1995. S.E.R. 34. Nurse McClung testified that she is trained to evaluate sexual assault injuries. S.E.R. 34. She stated that, in examining Fields, she checked the inside of Fields' mouth for injury. S.E.R. 37. She testified that a victim's description of the sexual assault influences the type of examination she conducts. S.E.R. 36-37. Gonzalez's assertion (Br. 51) that the examination was done purely for evidence-gathering purposes thus is not supported by the record.

Gonzalez relies (Br. 52-53) on *United States* v. *Kappell*, 418 F.3d 550 (6th Cir. 2005), cert. denied, 547 U.S. 1056 (2006), and *United States* v. *Beaulieu*, 194 F.3d 918 (8th Cir. 1999), but neither case supports his position. *Kappell* upheld admission of testimony of a psychotherapist about a child abuse victim's statements made in a "forensic interview" that had an evidence-gathering as well as diagnostic purpose. 418 F.3d at 552, 557. The holding in *Kappell* thus supports admission of Nurse McClung's testimony.

Beaulieu held that a child abuse victim's statements to a nurse and psychologist about "the identity of her abuser" were not admissible under Rule 803(4). 194 F.3d at 921. The victim in *Beaulieu,* however, testified that she understood the purpose of her visits with the nurse and psychologist as being "just to get evidence." *Ibid*. Here, in contrast, Fields' statement to Nurse McClung did not indicate the identity of her assailant, and nothing in the record suggests that

either Fields or Nurse McClung viewed the examination as having only an evidence-gathering purpose.

Accordingly, Nurse McClung's testimony was properly admitted pursuant to Rule 803(4).

3. *Any Error In The Admission Of Nurse McClung's Testimony Was Harmless*

Nurse McClung's testimony simply reiterated Fields' assertion that "she had been forced to have oral copulation on a suspect." S.E.R. 36. Accordingly, any error in its admission was harmless beyond any doubt. This testimony did not put any new evidence before the jury. See p. 31, *supra*, citing cases. Instead, it merely stated something the jury already knew, in a brief, objective way. Moreover, the statement did not identify Gonzalez as the "suspect." Its admission could not conceivably have affected the jury's verdict.

III

EXCLUSION AS IRRELEVANT OF TESTIMONY RELATING TO THE RESTRAINING ORDER AGAINST RORY FITZHUGH DID NOT VIOLATE GONZALEZ'S RIGHT UNDER THE CONFRONTATION CLAUSE

A. *Standard Of Review*

Gonzalez's Confrontation Clause claim challenges the district court's limitations on the scope of cross-examination within an area of inquiry, *i.e.*, the bias and motivation of a government witness to lie. As such, his claim is reviewed

for an abuse of discretion. *United States* v. *Larson*, Nos. 05-30076, 05-30077, 2007 WL 2192256, at *5 (9th Cir. August 1, 2007) (en banc).

B. Exclusion Of Evidence Relating To The Restraining Order Did Not Implicate Gonzalez's Right Under The Confrontation Clause

Gonzalez contends (Br. 56-65) that the district court violated his right under the Confrontation Clause to confront the witnesses against him by preventing him from cross-examining Fields about a restraining order she had obtained against Fitzhugh, who was then her husband. This contention, however, is baseless.

During cross-examination of Fields, defense counsel sought to question her about a restraining order that purportedly prevented Fitzhugh from being within 100 yards of her. S.E.R. 248. The judge questioned whether the evidence was relevant, and gave defense counsel an opportunity to explain his theory of relevance. S.E.R. 248. Defense counsel argued that Fields had concocted her story about being forced to perform oral sex on a police officer in order to "tak[e] attention off of the fact that [Fitzhugh] was violating his restraining order." S.E.R. 249. The district court responded, "I don't think that's relevant to anything[,] with all due respect." S.E.R. 249.

This Court has "identified three factors courts should consider in determining whether a defendant's Confrontation Clause right to cross-examination was violated: '(1) [whether] the excluded evidence was relevant; (2) [whether] there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) [whether] the exclusion of evidence

left the jury with sufficient information to assess the credibility of the witness.'" *Larson*, 2007 WL 2192256, at *6, quoting *United States* v. *Beardslee*, 197 F.3d 378, 383 (9th Cir. 1999). As explained below, consideration of these factors demonstrates that the exclusion of evidence relating to the restraining order did not violate Gonzalez's Confrontation Clause right.

1. The Excluded Evidence Was Not Relevant

The district court was justifiably puzzled by defense counsel's explanation of the relevance of the restraining order. See S.E.R. 248 ("I hate to tell you [but] I don't know what you just said to me. I'm not following. * * * You are suggesting he's violating the restraining order and therefore what? What is the motivation?"). Simply put, whether there was a restraining order against Fitzhugh does not make it "more or less probable" that Fields was telling the truth about her mistreatment by Gonzalez. See Rule 401, Fed. R. Evid. The district court therefore properly excluded cross-examination regarding the restraining order as irrelevant.

The district court's ruling on relevance is supported by this Court's decisions. In *United States* v. *Munoz*, 233 F.3d 1117, 1122-1123 (9th Cir. 2000), for example, defendants appealed mail fraud convictions for perpetrating investment fraud through the use of an illegal "Ponzi" scheme. After the illegal investment scheme became bankrupt, it was reorganized by some of the victim investors. *Id.* at 1123. The rebuilt company was sold at a $37 million profit that

was "deposited in escrow as restitution for the victim investors." *Ibid.* The district court prevented a defendant from cross-examining victims about their recovery from the sale. *Id.* at 1134. The defendant argued the evidence was relevant to rebut the implication that the victims had lost all their investment money. *Ibid.* This Court held "that the district court did not abuse its discretion in excluding" the evidence, because it was "not relevant" for purposes of Confrontation Clause analysis. *Ibid.*

Similarly, in *United States* v. *Shabani*, 48 F.3d 401, 403-404 (9th Cir. 1995), this Court held that the district court did not deprive defendant of a Confrontation Clause right by excluding as irrelevant a question to a co-conspirator about "where her [drug] customers came from, * * * because counsel's question involved details and transactions beyond the time frame charged in the indictment." *Id.* at 403. This Court also concluded that the district court correctly ruled irrelevant defense counsel's question to another drug trafficker "about the amount of drugs she had sold," since counsel had already established the witness's motive to get her own drug charge dismissed by testifying against the defendant. *Id.* at 403-404.

The existence of the restraining order here was even less relevant than the evidence deemed properly excluded in *Munoz* and *Shabani*. Surely, any motive for Fields to lie based on a desire to protect her abusive then-husband from the charge of violating a restraining order was far less important to her than avoiding

going to jail herself. See p.7, *supra*. Indeed, as indicated, it is far from clear from the record that the restraining order was even violated, since Fields initiated contact with Fitzhugh. The district court thus correctly excluded the testimony as irrelevant.

2. Legitimate Interests Outweighed Gonzalez's Interest In Presenting The Excluded Evidence

Allowing the excluded evidence about the restraining order would have likely led to confusion and delay. Permitting defense counsel to question Fields about the restraining order may have led to questions about, *inter alia*: why the restraining order had been entered; the precise terms of the restraining order; whether Fitzhugh was violating it when police officers talked to Fields on January 9, 2003; and whether Fields would have anticipated that an officer stopping to speak with her would check to see if a man she was with was prevented from being with her by a restraining order. Indeed, since the purpose of this evidence was lost on the trial judge, see S.E.R. 248-249, it is almost certain that its admission would have confused the jurors as well. Gonzalez's interest in having this evidence presented, if any, was thus far outweighed by the confusion, distraction, and delay it would have caused.

This Court's decisions demonstrate that exclusion of extraneous evidence such as this does not implicate a defendant's Confrontation Clause rights. In *United States* v. *Sua*, 307 F.3d 1150 (9th Cir. 2002), cert. denied, 537 U.S. 1221 (2003), for example, this Court held that exclusion of a key government witness's

plea agreement did not violate the Confrontation Clause. *Id.* at 1153. This Court reasoned that "[b]ecause the interests against confusing the jury and causing undue delay are legitimate interests that outweigh [defendant's] interest in presenting the marginally relevant evidence, [defendant's] right to confrontation was not violated." *A fortiorari*, exclusion of evidence relating to the restraining order did not deprive Gonzalez of his right to confront the witnesses against him.

3. The Excluded Evidence Was Not Necessary To Give The Jury Sufficient Information To Assess Fields' Credibility

Contrary to Gonzalez's assertion (Br. 62-63), excluding evidence regarding the restraining order did not impermissibly limit his ability to cross-examine Fields. Defense counsel attempted to impeach Fields' credibility in multiple ways – *e.g.*, concerning her arrests, criminal convictions, drug and alcohol use, motivation to collect damages in a civil lawsuit, desire to avoid jail, and failure to contact police immediately after the incident – that were far more significant than her supposed motive to distract the police to prevent them from discovering that Fitzhugh was possibly violating a restraining order. Accordingly, limiting cross-examination regarding the restraining order did not impair the jury's ability to assess Fields' credibility, in violation of the Confrontation Clause.

This conclusion is consistent with this Court's decisions. In *Larson*, 2007 WL 2192256, for example, the Court, sitting en banc, found no Confrontation Clause violation where defense counsel was prevented from exploring a minimum mandatory five-year sentence facing a government witness (Poitra), absent her

cooperation with the government. The majority held that despite this limitation, "defense counsel was able to adequately explore Poitra's motivation to lie such that the Court's restriction was not an abuse of discretion and did not violate Defendants' Confrontation Clause rights." *Id.* at *7

Similarly, in *United States* v. *Bridgeforth*, 441 F.3d 864 (9th Cir. 2006), the defendant argued "that the district court violated his Confrontation Clause rights when it (1) did not allow him to cross-examine [an FBI informant] on her alleged misstatements to the FBI, and (2) excluded extrinsic evidence of [the informant's] potential bias stemming from her car crash in Nevada." *Id.* at 868. This Court determined that the information was relevant because it reflected on the witness's "veracity," and "because she might have thought the FBI could help her avoid prosecution in Nevada." *Ibid.* This Court determined, however, that "neither limitation left the jury without sufficient information to appraise [the witness's] motivations and biases," because defense counsel was able to impeach her credibility in several other ways. *Ibid.* "Accordingly, there was no Confrontation Clause violation." *Ibid*.

The limitations imposed on defense counsel's cross-examination of key government witnesses in *Larson* and *Bridgeforth* were far more significant than the limitation at issue here. It thus follows from these decisions that the district court's ruling excluding testimony about the restraining order did not prevent defense counsel from putting before the jury sufficient information to assess

Fields' credibility. The ruling therefore did not violate Gonzalez's Confrontation Clause right.

C. *Any Error In Excluding Testimony About The Restraining Order Was Harmless Beyond A Reasonable Doubt*

If error, the district court's exclusion of evidence concerning the restraining order was harmless beyond a reasonable doubt. Cf. *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam). This Court determines harmless error for violations of the Confrontation Clause by "excluding any evidence as to which proper confrontation was denied and examining the remaining evidence presented at trial." *Barajas* v. *Wise*, 481 F.3d 734, 741 (9th Cir. 2007).

As explained above, the excluded evidence would have presented the jury with, at most, an extremely weak motive for Fields to invent her story about being forced to perform oral sex on a deputy sheriff. The jury believed Fields' testimony, corroborated by video and forensic evidence (see pp. 7-14, *supra*), in the face of cross-examination about much stronger motivations to lie. The excluded evidence would, therefore, not have affected the verdict.

Larson demonstrates that any error in limiting cross-examination about the restraining order was harmless beyond a reasonable doubt. In *Larson*, a majority of the members of the en banc court held that the district court did violate the Confrontation Clause when it prevented defense counsel from cross examining a second government witness (Lamere) regarding the mandatory minimum life sentence he faced absent his cooperation with the government. 2007 WL

2192256, at *7-10. The Court nevertheless held the error harmless beyond a reasonable doubt, with respect to both defendants. *Id*. at *10-11. In so ruling, the Court noted the strength of the government's case even without Lamere's testimony; that on cross-examination defense counsel explored Lamere's criminal past, drug use, and desire to obtain a lesser sentence through his testimony; and the trial court's instruction that the jury view the testimony of cooperating witnesses with greater caution than other witnesses. *Ibid*. *Larson* thus compels the conclusion that any error in limiting cross-examination regarding the restraining order was harmless beyond a reasonable doubt.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF TWO PRIOR ACTS OF SEXUAL MISCONDUCT BY GONZALEZ

A. Standard Of Review

This Court reviews a "district court's decision to admit evidence pursuant to Rules 404(b) and 403 for abuse of discretion." *United States* v. *Ogles*, 406 F.3d 586, 592 (9th Cir. 2005).

B. The District Court Properly Admitted, Pursuant To Rule 404(b), Fed. R. Evid., The Testimony Of Shirley Munoz And Elizabeth Castillo Chavez That They Had Been Abused By Gonzalez

Over the defendant's objection, the United States was allowed to present the testimony of two other women about incidents in which they alleged that they had

been abused by Gonzalez, in addition to the three incidents charged in the indictment.

Shirley Munoz testified that Gonzalez placed her unhandcuffed in the back of his patrol car; made her remove her brassiere, thereby exposing her breasts through her lace top; made her pull down her pants and underwear; and shined his flashlight at her naked lower body from behind. S.E.R. 61-80. He then had her get back in the car, told her she was pretty, repeatedly asked her for information, asked whether she was married, asked for a good reason why he should let her go, and released her without a citation on the condition that she meet him at a doughnut shop after his shift. S.E.R. 81-86.

Elizabeth Castillo Chavez testified that Gonzalez placed her unhandcuffed in the back of his patrol car, asked whether she goes out, had her get out of the car so he could search her, rubbed and squeezed her thighs, hips, and buttocks, and let her go without a ticket. S.E.R. 44-56.

Rule 404(b), Fed. R. Evid., provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court applies a four-part test in assessing the admissibility of other, uncharged bad acts by a defendant. "Evidence of prior bad acts is admissible under Rule 404(b) if (1) the evidence tends to prove a material element of the

offense charged, (2) the prior act is not too remote in time, (3) the evidence is sufficient to support a finding that the defendant committed the other act, and (4) (in cases where knowledge and intent are at issue) the act is similar to the offense charged." *Ibid.* This Court has "construed Rule 404(b) as being a rule of inclusion," stating that "[e]vidence of other crimes or acts is admissible under Rule 404(b), except where it tends to prove only criminal disposition." *United States* v. *Ayers*, 924 F.2d 1468, 1472-1473 (9th Cir. 1991).

In applying the four-part test set forth by this Court for determining admissibility under Rule 404(b), the district court made the following findings in its January 3, 2006, opinion:

> First, the Court finds that there is sufficient proof to support a finding by the jury that defendant committed the alleged acts involving [Munoz] and [Chavez]. Specifically, the detail with which [Munoz] and [Chavez] will testify regarding the incidents, the similarity of their accounts of the incidents to the charged offenses, and the evidence that defendant ran computerized checks of [Munoz] and [Chavez] close in time to the alleged incidents, would all support a jury finding that defendant committed the alleged acts. Second, the Court finds that the incidents involving [Munoz] and [Chavez] are not too remote in time. Third, the Court finds that there are sufficient similarities between the alleged incidents involving [Munoz] and [Chavez] and the charged offenses. Finally, the Court finds that the evidence of the incidents involving [Munoz] and [Chavez] is relevant for a non-character purpose. In particular, given the striking similarities between the alleged incidents involving [Munoz] and [Chavez] and the charged offenses, as well as the evidence that defendant ran computerized checks of [Munoz] and [Chavez] around the time the alleged incidents occurred, the evidence is extremely probative of identity and modus operandi.

E.R. 255-256.

The court also "conclude[d] that the probative value of the evidence sought to be admitted is not substantially outweighed by the danger of unfair prejudice, pursuant to Rule 403." E.R. 256. In so ruling, the court noted that the "evidence is, in ma[n]y respects, less inflammatory than the alleged conduct underlying the charged offenses," and that "a limiting instruction to the jury can reduce the danger of unfair prejudice." E.R. 256.

The district court's detailed findings support its conclusion that the evidence relating to these incidents "is properly admitted pursuant to Rule 404(b)." E.R. 257. The district court correctly determined that the uncharged incidents were "extremely probative" of modus operandi and identity. There were numerous factual similarities common to all five incidents: for example, the women were stopped while alone late at night or early in the morning; placed in the back of a patrol car without being handcuffed; "searched" in a sexual way for drugs; asked personal questions; and let go without a ticket or other citation.

There were also many additional similarities between the uncharged incidents and one or more of the charged incidents. See E.R. 47-48; S.E.R. 8-19. For example, the similarities in Gonzalez's conduct towards Munoz, Tirado, and Fields are striking. Indeed, the government pointed out that Gonzalez asked these victims to give him "information"; talked about the ability of women to hide things on their person; searched them with a flashlight while they were sitting in the back of his patrol car with the door open; searched their vaginas; viewed their

naked lower bodies from behind; and suggested further contact with the women before letting them go. S.E.R. 13-14. The government also noted the particular similarity between Gonzalez's conduct toward Chavez and Guzman, *i.e.*, that he faced them, and rubbed and squeezed their bodies with his palms down. S.E.R. 18-19.

Gonzalez nevertheless argues (Br. 67-72) that the district court erred in admitting this evidence under Rule 404(b). He contends that the district court's ruling was improperly based on the factually unsupported conclusion that the uncharged incidents were highly probative of modus operandi. His argument, however, mischaracterizes the district court's opinion, and ignores the many similarities between the charged and uncharged conduct.

Gonzalez argues, for example, that the district court erred when it "specifically focused on '[t]he evidence that defendant ran computerized checks of [Munoz] and [Chavez] around the time of the alleged incidents.'" Br. 67 (quoting E.R. 256). He argues (Br. 68-69) that this is not a similarity because no computerized check was run at the time of any of the charged incidents.

This argument misapprehends the district court's ruling. The opinion states that the computer checks establish that Gonzalez was the officer who detained Munoz and Chavez. This finding satisfies the requirement that the evidence must be sufficient to establish that "the defendant committed the other act." *Ogles*, 406 F.3d at 592. There is simply no legal basis for Gonzalez's suggestion (Br. 68) that

he must have run such checks on the named victims in order for this evidence of other bad acts to be admissible. The prior bad acts need only be similar, not identical. As the district court recognized, the computer checks establish that Gonzalez was the perpetrator of the uncharged acts; the similarities between the charged and uncharged acts tend to establish that Gonzalez was the perpetrator of the charged acts as well.

Gonzalez's contention (Br. 71) that the government "never argued that there was any aspect common to all" of the incidents is incorrect. See S.E.R. 338 (during opening statement, government counsel said that "the defendant stopped [all of the victims] when they were alone in the dark at night or in the early morning"); S.E.R. 340 (government counsel asserted in opening statement that the evidence of all five women would show that Gonzalez "used the same methods over and over again to isolate and intimidate his victims"); S.E.R. 20 (government counsel stated in closing argument that the five incidents form "a pattern of targeting women who were alone at night, isolating them, asserting his authority over them and then sexually assaulting them"); E.R. 47-48 (pointing out that all of the victims were alone and placed unhandcuffed in the back of a patrol car).

Given the striking similarities between the charged and uncharged incidents, it can hardly be said that this evidence was introduced "to prove only criminal disposition." *Ayers*, 924 F.2d 1473. Rather, this evidence served to establish the "identity" of the perpetrator of the charged crimes, as allowed by Rule 404(b).

Furthermore, the district court did not abuse its discretion under Rule 404(b) in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. See E.R. 256. As the court correctly observed, the evidence relating to the uncharged acts was "highly probative of identity and modus operandi," and "less inflammatory than the alleged conduct underlying the charged offenses." E.R. 256.

C. The District Court Also Properly Admitted, Pursuant To Rule 413, Fed. R. Evid., Evidence Of Gonzalez's Prior Act Of Sexual Misconduct Involving Chavez

1. Standard Of Review

This Court reviews a district court's application of Rule 413, Fed. R. Evid., for abuse of discretion. *United States* v. *LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001), cert. denied 534 U.S. 1166 (2002).

2. The Evidence Concerning Chavez Is Admissible Under Rule 413

The district court also ruled, in the alternative, that the evidence concerning Chavez was admissible pursuant to Rule 413, Fed. R. Evid.[2] Rule 413 provides:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

[2] The United States did not seek to introduce evidence relating to Munoz pursuant to Rule 413, because that incident did not involve a sexual assault. See E.R. 257 n.4.

This rule establishes "a presumption * * * favoring the admission of propensity evidence at * * * criminal trials involving charges of sexual misconduct." *United States* v. *Sioux*, 362 F.3d 1241, 1244 (9th Cir. 2004). However, "district judges retain the discretion to exclude evidence [under Rule 403] that is far more prejudicial than probative." *LeMay*, 260 F.3d at 1026 (citing *Doe by Glanzer* v. *Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)); see also 260 F.3d at 1027 (discussing factors relevant to this determination).

The district court correctly ruled that the evidence relating to Chavez was admissible as evidence of a prior sexual offense pursuant to Rule 413. See E.R. 258-259. In so holding, the court rejected defendant's contention that extensive expert testimony would be required to enable the jury "to determine whether the alleged conduct constitutes a sexual offense rather than an ordinary pat down." E.R. 259. The court further stated that the evidence is not "cumulative or redundant of the testimony regarding the charged offenses," and that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice pursuant to Rule 403." E.R. 259.

In language that this Court has described as "unmistakably pellucid," see *Sioux*, 362 F.3d at 1246, Rule 413 states that in sexual assault cases, "evidence of the defendant's commission of another offense * * * of sexual assault is admissible." In these circumstances, it can hardly be claimed that the district court abused its discretion in admitting this evidence pursuant to Rule 413. This is a

sexual assault case, and the evidence regarding Chavez is evidence that Gonzalez committed another sexual assault.

Gonzalez nevertheless argues (Br. 74) that the district court erroneously admitted evidence of the incident involving Chavez under Rule 413 because the court "failed to refer to and apply either the *LeMay* or *Glanzer* factors." This is incorrect. Citing *Glanzer*, 232 F.3d at 1268, the court stated that "for evidence to be admissible pursuant to Rule 413, three requirements must be satisfied: (1) the defendant must be accused of an offense of sexual assault; (2) the evidence being proffered must relate to the commission of another offense of sexual assault; and (3) the evidence must be relevant." E.R. 257. The district court cited both *Glanzer* and *LeMay* for the proposition that " [e]vidence of a prior sexual assault is relevant if it tends to show a defendant's propensity to take advantage of opportunities to sexually assault victims in circumstances similar to those which gave rise to the charged conduct." E.R. 257. The court also cited *LeMay* for the principle that "[t]he defendant need not have been charged with or convicted of the prior offense of sexual assault in order for it to be admissible pursuant to Rule 413." E.R. 257. Defendant's suggestion that the district court failed to properly apply *Lemay* or *Glanzer* is therefore baseless.[3]

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[3] On the other hand, defendant himself failed to cite *LeMay* or *Glanzer* in his brief or at oral argument to the district court concerning this issue. See E.R. 75-76; S.E.R. 468-471.

D. Any Error In The Admission Of Evidence Relating To Munoz And Chavez Was Harmless

The evidence of the prior incidents involving Munoz and Chavez was probative of identity, *i.e.*, it tended to identify Gonzalez as the perpetrator of the charged offenses. To be sure, by virtue of its relevance to that material issue in the case, the evidence is prejudicial. The government's evidence on identity, however, was strong, even excluding the evidence admitted pursuant to Rules 404(b) and 413. For example, all three victims of the charged offenses identified Gonzalez as their assailant when presented with a photo lineup and each was presented with a different photo lineup. All three victims identified him again in court. Additionally, Fields' fingerprint was lifted from the patrol car Gonzalez was driving on the night she alleged he forced her to perform oral sex on him. Indeed, defense counsel acknowledged that this fingerprint evidence "ties the victim to the patrol car driven by the defendant on the day in question." E.R. 74.

Furthermore, defense counsel argued below that the evidence of the uncharged acts should be excluded because it was cumulative of the charged acts. See E.R. 74-75 ("The government has ample evidence available from the charged conduct to prove its case. * * * [T]here exists no need for the Government to present this evidence given the quality and quantity of evidence it will have available from the testimonies at trial."). Having argued to the district court that this evidence was cumulative, Gonzalez's contention in this Court that its admission improperly affected the outcome of the trial rings hollow.

Moreover, the district court minimized any potential prejudice by giving several limiting instructions. See S.E.R. 21-22 ("The defendant is not on trial for any conduct or offense not charged in the indictment. You should consider evidence about the acts, statements and intentions of others or evidence about other acts of the defendant only as they relate to these charges against the defendant."); S.E.R. 23 (similar). Additionally, government counsel clearly explained the limited purpose of this evidence to the jury in its opening statement and closing argument. S.E.R. 7 ("[T]here are no crimes charged associated with [Munoz and Chavez], but you may consider their evidence as it goes to the defendant's identity and to his plan and his scheme of how he treats women."); S.E.R. 339 (similar).

In *United States* v. *Holler*, 411 F.3d 1061, 1067 (9th Cir.), cert. denied, 126 S. Ct. 597 (2005), this Court held that error in the admission of evidence under Rule 404(b) was harmless, where the district court gave a limiting instruction and the government's case was strong. Similarly, this Court should rule that any abuse of discretion in the district court's admission of this testimony pursuant to Rules 404(b) and 413 was harmless error.

V

"CUMULATIVE PREJUDICE" DOES NOT WARRANT REVERSAL

Gonzalez argues (Br. 76-77) that all of the allegedly erroneous evidentiary rulings of the district court add up to an error that more likely than not affected the

verdict. Even if this Court were to determine that each of the disputed evidentiary rulings was incorrect, however, it should not reverse Gonzalez's convictions.

Any possible prejudice resulting from the admission of the testimony of Sergeant Garza, Sergeant Kagy, and Nurse McClung under Rules 801(d)(1)(B) and 803(4) was extremely slight. The admitted testimony was consistent with, and less detailed than, the testimony about the incidents by Cecilia Tirado and Pamela Fields. Exclusion under Rule 403 of the evidence related to the restraining order against Fitzhugh had minimal potential prejudice. It removed one – distracting, confusing, and unconvincing – route for impeaching Fields' credibility, but left open a number of more effective ones. To be sure, the prejudice from admission of evidence of the uncharged acts under Rules 404(b) and 413 is potentially more significant, by virtue of its relevance to the material issue of identity. However, given the strength of the government's case as to the defendant's identity and the court's limiting instructions, the admission of the evidence relating to the uncharged acts could not have affected the verdict.

Thus, even assuming that all of the challenged evidentiary rulings were erroneous, the strength of the government's overall case – combined with the relatively low potential for prejudice and the court's limiting instructions – precludes a finding of reversible, cumulative error. See *United States* v. *Acosta*, No. 05-50477, 2007 WL 1788937, at *1 (9th Cir. June 14, 2007) (determining that

multiple erroneous evidentiary rulings did not amount to cumulative error because of the strength of the government's case).

CONCLUSION

This Court should affirm Gonzalez's convictions.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am not aware of any related cases pending in this Court.

____
NATHANIEL S. POLLOCK
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 13,995 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

____
NATHANIEL S. POLLOCK
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Dated: August 17, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on the following counsel of record:

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