No. 14-4623

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEAN CLAUDE ROY,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

ROD J. ROSENSTEIN
United States Attorney

VANITA GUPTA
Principal Deputy Assistant
Attorney General

SUJIT RAMAN
KRISTI O'MALLEY
Assistant United States Attorneys
United States Attorney's Office
District of Maryland
6500 Cherrywood Lane, Suite 400
Greenbelt, MD 20770
(301) 344-4433

MARK L. GROSS
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

GUIDELINES:

GUIDELINES (continued): **PAGE**

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4623

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEAN CLAUDE ROY,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on August 5, 2014 (JA 892-897),[1] and defendant filed

[1] "JA __" refers to the page number of the Joint Appendix filed by defendant-appellant Jean Claude Roy. "__ SJA __" indicates the volume and page number of the Supplemental Joint Appendix filed by the United States along with this brief. "Br. __" refers to the page number of Roy's opening brief. "Doc. __" indicates the docket entry number of documents filed in the district court. "ECF __" refers to the docket entry number of documents filed in this Court.

a timely notice of appeal on August 5, 2014 (JA 898-899). This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

STATEMENT OF THE ISSUES

1. Whether 18 U.S.C. 1594(c), which makes it unlawful to conspire to violate 18 U.S.C. 1591, is unconstitutionally vague.

2. Whether sufficient evidence supports Roy's conviction under 18 U.S.C. 1594(c).

3. Whether the district court erred by excluding evidence of Brittany Creason's acts of prostitution after Roy's arrest.

4. Whether Roy's sentence is procedurally and substantively reasonable.

STATEMENT OF THE CASE

1. Procedural History

On October 16, 2013, a federal grand jury in the District of Maryland returned a thirteen-count Second Superseded Indictment (indictment) charging defendant-appellant Jean Claude Roy with violating 18 U.S.C. 1591(a) (sex trafficking by force, fraud, or coercion and attempted sex trafficking by force, fraud, or coercion); 18 U.S.C. 1594(a) (attempted sex trafficking by force, fraud, or coercion); 18 U.S.C. 1594(c) (conspiracy to commit sex trafficking by force, fraud, or coercion); 18 U.S.C. 2421 (interstate transportation for prostitution); 18 U.S.C. 924(c) (firearm offense in furtherance of a crime of violence); and 18 U.S.C.

1512(b)(2)(B) (witness and evidence tampering). JA 24-48. The indictment also charged Brittany Creason with conspiracy to commit sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1594(c). JA 29-34.[2] Prior to trial, the district court granted the government's motion to dismiss three of Roy's charges: one count of firearm offense in furtherance of a crime of violence, one count of interstate transportation for prostitution, and one count of sex trafficking by force, fraud, or coercion. JA 37-39; 1 SJA 1-47, 103-105.

On March 19, 2014, following a ten-day trial, the jury convicted Roy on five counts: Counts 4, 7, and 9 (interstate transportation for prostitution with respect to victims J.D., D.W., and K.M.); Count 5 (conspiracy to commit sex trafficking by force, fraud, or coercion); and Count 10 (witness and evidence tampering). JA 892. The jury acquitted Roy on the remaining five counts. The district court sentenced Roy to 120 months in prison on Counts 4, 7, and 9; 240 months in prison on the conspiracy count; and 240 months in prison for witness and evidence tampering, to be served concurrently. JA 885. In addition, the court sentenced Roy to a total of ten years of supervised release and a $500 special assessment. JA 886. On appeal, Roy challenges only his conviction under 18 U.S.C. 1594(c), for

[2] Creason pled guilty to one count of violating 18 U.S.C. 1952(a)(3) (use of a facility of interstate commerce in aid of an unlawful activity) pursuant to a Superseding Information. JA 466; see also Doc. 73 (plea agreement).

conspiracy for sex trafficking through force, fraud, or coercion, and his sentence. Br. 16-55.[3]

2. Facts

Viewed in the light most favorable to the government, see *United States* v. *Jaensch*, 665 F.3d 83, 93 (4th Cir. 2011), cert. denied, 132 S. Ct. 2118 (2012), the evidence establishes the following:

a. Roy admits that starting in August 2012, he "tr[ied] to make some extra money" by recruiting women to work for him as prostitutes while he acted as their pimp. Br. 2. On August 16, he found his first victim, J.D., through her ad on backpage.com, a website where individuals advertise prostitution services. JA 131-132, 141-142. J.D. testified that Roy convinced her to work for him by promising to protect her, and by telling her they would make money so she could return to school. JA 138-139, 229. J.D. further testified that when Roy arrived in her hotel room, he was carrying a gun. JA 143, 146. Tanisha Barney, who drove Roy to pick up J.D., confirmed that Roy took a gun with him when he went to

[3] On May 18, 2015, Roy filed a motion for leave to file a pro se supplemental brief and attached his proposed brief. ECF 70-71. This Court deferred action on his motion. ECF 72. Because Roy is represented by counsel who has filed a merits brief, he is not entitled to file a pro se supplemental brief. See *United States* v. *Penniegraft*, 641 F.3d 566, 569 n.1 (4th Cir.) (denying motion to file pro se supplemental brief because defendant was represented by counsel), cert. denied, 132 S. Ct. 564 (2011). Accordingly, the government has chosen not to respond to the claims raised in Roy's pro se supplemental brief.

J.D.'s hotel room. JA 274-276. Roy searched J.D.'s room and told her to leave with him. JA 146. When they arrived at Roy's apartment, Roy strip-searched J.D. and went through her bag to confiscate her identification and social security cards as well as her cell phone. JA 152-154. J.D. testified that she then learned for the first time that she owed Roy a "choosing fee" of $1000 to pay him for being her pimp, and that she would need to work that off through prostitution. JA 154; see also JA 213.

Although J.D. said that she had some "good times" with Roy, the "bad outweigh[ed] [the] good." JA 193-194, 226. She learned how "controlling" Roy was. JA 208. With Roy as her pimp, J.D. worked as a prostitute in Virginia, Maryland, and Washington, D.C., but did not get to keep any of the money she earned. JA 154, 157, 159. Roy told her that he handled all the money and made it clear that he would give her money only for expenses related to getting more customers. JA 157, 166. On her second or third day with Roy, he told J.D. about how he beat a murder charge in Boston and showed her articles about that case when she did not believe him. JA 178. And when Roy realized that J.D. was turning down "calls" for anal sex, he forced her to have anal sex with him against her will. JA 188-190.

J.D. testified that during her entire time with Roy, he always carried a gun and had several firearms in his apartment. JA 143, 146, 151, 169-179. When she

tried to leave Roy on September 12, he prevented her from leaving his apartment by grabbing her by the neck and putting a gun to her head. JA 186, 237. He pulled the trigger several times, while J.D. screamed with each click the gun made because she did not know whether the gun was loaded. JA 186. J.D. told the jury that, after this incident, J.D. felt "stuck." JA 187. She felt that she could not leave Roy because he would probably kill her (JA 186-187), and would harm her family as he had threatened in the past. JA 186-187, 195. Roy specifically threatened that he would hurt her son. JA 195. He told J.D. that if she left him, "he would find [her] son" and that he knew where her son and her grandmother lived. JA 195. In one text, Roy wrote to J.D., "I guarantee I'll make you wish you never crossed me. Now respect that." JA 235.[4]

b. In November 2012, Roy met Brittany Creason, an 18-year old prostitute who was working for another pimp. JA 335-336. As with J.D., Roy contacted Creason through her ad on "backpage.com" (JA 337), confiscated her driver's license and social security card (JA 351-352), and told Creason that "he would keep all the money" that she would earn as a prostitute (JA 357). Similarly, Roy showed Creason his cache of firearms and "bragg[ed]" to her about how he beat a

[4] J.D. told the jury that she started "sneaking money" for alcohol when she realized that she could not leave Roy without risking harm to her family. JA 194-195. Roy ultimately abandoned J.D., without any money, in mid-September 2012. JA 196, 221.

murder charge in Boston. JA 352, 354. Roy also told Creason that she had to learn to provide anal sex to clients "[in order to] bring in more money," and insisted on having anal sex with her. JA 427-428. Creason said she "pretended" to enjoy it so as not to "upset" Roy. JA 428. Creason testified that although Roy never threatened her with a gun, he "verbally threatened [her] a lot" over the course of their relationship. JA 496.

Despite Roy's treatment of her, Creason said she was in love with Roy and told Roy that she wanted to marry him and have a family. JA 371-375. Roy assured her that "[they] could accomplish that someday" as long as she continued making him money as a prostitute. JA 373, 389. Creason testified that she and Roy discussed recruiting other girls to make their dreams for the future happen. JA 376-377, 389, 498. As Roy's "bottom bitch" – his "main girl" – she needed to help recruit other women. JA 389. Creason stated that she and Roy often reviewed ads on backpage.com for women to recruit. JA 382. The jury was shown a video of Roy and Creason doing just that – reviewing backpage.com ads to target women to recruit. JA 381-382. Creason also tried to recruit women through Facebook and in person, and worked together with Roy on what she should say on Facebook in order to attract recruits. JA 377, 538-539. She texted Roy that she was "going to come home with hos," and was "bagging hos for [him]." JA 382, 388.

c. As part of her agreement with Roy to recruit more women to work as his prostitutes, Creason reached out to D.W., a woman from Creason's hometown in Decatur, Illinois, through Facebook, even though she and D.W. "never got along." JA 393, 400. At Roy's request, Creason continued communicating with D.W. and "exaggerating certain things," such as how she earned $1000 per day, drove a Porsche, and owned her own home (JA 393, 530, 548-549), in order to persuade D.W. to join them as one of Roy's prostitutes. JA 393-394. D.W. testified that she told Creason that she was "nervous" and "scared" about the prospect of working as a prostitute, but Creason downplayed D.W.'s fears. JA 551, 555. For example, Creason responded, "LOL. Scared of what? To get rich?" JA 555.

After D.W. agreed to join Creason and Roy to work as a prostitute (JA 549, 551), Roy purchased a bus ticket for D.W. to come to Washington, D.C. JA 396, 552. When D.W.'s bus reached Chicago, however, D.W. called Creason to say she changed her mind about prostituting. JA 557, 588-590, 595. Creason responded that Roy agreed to let her work for his photography business instead. JA 557-558.

On December 12, Creason and Roy met D.W. at the bus terminal in D.C. JA 559. In the car leaving the terminal, Creason reminded D.W. to give her government identification and money to Roy. JA 560. As with J.D. and Creason, Roy took D.W.'s state identification card. JA 560-561. He also took the $200 D.W. had with her. JA 560. Creason had previously informed D.W. that Roy

controlled all the money. JA 553-554. D.W. testified at trial that Creason said if she ever "kept any of the money, she got beat." JA 589.

When they got to a hotel, Roy took pictures of D.W., which she believed were for "advertising for his business." JA 571. Thereafter, Creason had "date[s]" in the hotel room, while D.W. and Roy sat in his car. JA 572. During this time, D.W. and Roy spoke about "why [she] was scared about being there," but Roy spent most of the time on the phone. JA 572. At one point, Roy referred to D.W. on the phone when he said that "he had a new one there and that she was scared, but he would get [D.W.] used to it." JA 572-573. Afterwards, while they were eating dinner in their hotel room, D.W. saw Roy "smack[]" Creason when he thought she forgot to order lobster sauce with his dinner. JA 574. Later that night, Roy insisted that D.W. go with Creason on a "date" with two customers. Although D.W. did not have sex with a customer that night, she decided overnight that she would leave. JA 574-575, 589.

D.W. testified that she was scared, and the next morning she told Creason that she wanted to go home and began packing her things to leave. JA 403-404, 577. Roy had already gone to his day job so Creason texted Roy that D.W. "want[ed] to leave." JA 404, 410. Roy immediately called D.W., after which D.W. was "shaking" and told Creason that Roy was "trying to hold her hostage." JA 410-411. According to D.W., when Roy arrived, he told Creason to leave the

hotel room. JA 578. D.W. said that Roy was initially calm but then got angry when D.W. insisted on leaving. JA 578. He then said that he spent $500 to get D.W. to D.C., and she would need to earn $500 as a prostitute to pay him back. JA 578. She refused and told him she would send him the money from Decatur. JA 578-579. D.W. testified that Roy then threatened her, telling her that if she called the police, he could have her "whole family killed and no one would ever know about it." JA 579.

At that time, D.W.'s mother called her cell phone, and Roy answered. 1 SJA 115. D.W.'s mother testified that Roy told her that he "was in control" and that D.W. owed him over $400 and "he was going to get his money back." 1 SJA 115-116. After D.W.'s sister called and threatened to call the police (JA 580), however, Roy drove D.W. to the bus station, initially refusing to return her belongings. JA 411. Roy took D.W.'s cell phone and gave her only four dollars for her trip home. JA 580.

d. Shortly after D.W.'s departure, Roy and Creason recruited R.C. in North Carolina and brought her back to Maryland to be another of Roy's prostitutes. JA 413-414. Around this time, Creason reached out to K.M., another friend from Decatur, to persuade her to work for Roy as a prostitute. JA 414-415, 598-600. Again, Creason "exaggerated" when she described the prostitute's lifestyle, even stating that she "made $9,000 her first week." JA 414-415, 600. Creason had

"[q]uite a lot" of communication with K.M. through Facebook, text messages, and phone calls, until K.M. agreed to work for Roy. JA 415, 598. Roy bought K.M. a bus ticket to D.C. JA 415. Roy, Creason, and R.C. then met K.M. at the bus terminal when she arrived a few days before Christmas. JA 415-416.

As with J.D., D.W., and Creason, Roy immediately took K.M.'s government identification cards and all her money. JA 617-618. Roy told K.M. that she was not allowed to hold any money and that he controlled all the money. JA 617. Like J.D., K.M. was not allowed even to touch the money that she earned on "dates." JA 157, 620. Roy also made a point of telling K.M. that he was acquitted of a murder charge. JA 635, 638. K.M.'s reaction to hearing that was Roy "wasn't just some normal person who just decided to start doing this" and that "[t]his man had a criminal past and it was a very serious criminal past." JA 638.

K.M. noticed right away that Roy had a bad temper. JA 611. When Creason broke one of Roy's rules and spoke to a stranger, he said, "what the fuck is wrong with you" and lectured her about not speaking out of turn. JA 611. According to K.M., "it didn't really take very much for him to just kind of trip out on her." JA 611-612.

The next day, R.C. tried to leave while Roy and Creason were out. JA 622-623. K.M. texted Creason about R.C., and Creason told her to call Roy. JA 435, 623-624. Roy told K.M. to keep R.C. in the hotel room "by any means necessary"

until he and Creason returned. JA 435, 624. Both Creason and K.M. testified that Roy "was angry" when he entered the hotel room. JA 435, 627. Roy tried to talk to R.C. and then told her she could leave with only what she came with and made R.C. return everything he had purchased for her, including her hair weave. JA 435-437, 628-629. Roy instructed Creason to put dirt and water in R.C.'s shoes and told Creason and K.M. to follow R.C. out. JA 435-437, 628-629. R.C. left barefoot, with only the clothes she was wearing, and a few personal belongings. JA 628. Creason described R.C. as "terrified." JA 439. Thereafter, Roy told K.M. and Creason that "now would be the time to [leave], because the next person that leaves [him] is not going to leave so easily." JA 439, 629. Creason told the jury that she was "scared." JA 439. K.M. testified that seeing Roy so angry made her "nervous," and she thought it was best that she "kept [her] mouth shut." JA 627, 629.

Creason testified that she became jealous of the attention that Roy gave K.M. and felt that Roy lied to her about having a future together. JA 421-422. On December 25, Creason texted her family expressing her desire to leave, which enraged Roy when he found out. JA 452-454. Roy told Creason to "shut the 'F' up because he's two seconds away from slapping the shit out of [her]." JA 454. Creason described fearing for her life. JA 455. Roy drove them to the hotel and gathered Creason's belongings while threatening to "beat the 'F' out" of her. JA

456, 641. Creason then returned to her room and called her mother, telling her that she was scared that Roy would return to kill her, especially because Roy owned guns. JA 457-458. Meanwhile, Roy and K.M. went to his apartment; K.M. stayed in the car while Roy was in his apartment for about ten minutes. JA 643. When Roy got back in the car and K.M. tried to defend Creason, Roy "reached over and grabbed [her] wrist" and told her to "mind [her] own damn business." JA 644. By the time Roy and K.M. returned to Creason's hotel, the police were there because Creason had called them. JA 457, 644. The police arrested Roy when he entered the hotel. JA 459, 645-646.

SUMMARY OF ARGUMENT

This Court should affirm Roy's conviction and sentence.

1. With respect to his conviction for conspiracy to commit sex trafficking through force, fraud, or coercion, Roy has failed to show that 18 U.S.C. 1594(c) is unconstitutionally vague as applied to him. Section 1594(c) makes it unlawful to conspire to recruit, entice, harbor, transport, provide, obtain, or maintain a person, "knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion * * * will be used to cause the person to engage in commercial sex act." 18 U.S.C. 1591(a), 1594(c). Contrary to Roy's assertion that the term "knowing" in the statute requires a defendant to "predict the future," an ordinary person would understand that "knowing" only requires that a defendant know in

the sense of being aware of an established pattern of conduct that would in the future cause a person to engage in prostitution.

2. Roy's challenge to the sufficiency of the evidence also fails. He argues that there is no evidence that he forced or coerced anyone to engage in acts of prostitution. Ample evidence, however, shows that, starting with J.D., Roy had an established pattern of conduct of using force, fraud, or coercion to cause women to engage in prostitution. This evidence was more than sufficient to show that when Roy conspired with Creason to recruit women to engage in prostitution, he knew that he would use force, fraud, or coercion to cause D.W. and K.M. to engage in commercial sex acts. Roy's other evidentiary challenge is similarly unavailing. Evidence of Creason's acts of prostitution after Roy's arrest had no probative or impeachment value. Thus, exclusion of that evidence did not violate Roy's Sixth Amendment rights. And even if exclusion of the evidence was error, the error was harmless because Roy was permitted to introduce evidence of Creason's activities during that time period through other means.

3. Roy also challenges his 240-month sentence as procedurally and substantively unreasonable. Because the district court unequivocally stated twice during sentencing that it would impose this exact sentence regardless of the applicable advisory Sentencing Guidelines range, this Court need only determine whether the sentence is substantively reasonable, which it is.

Accordingly, this Court should affirm Roy's conviction and sentence.

ARGUMENT

I

18 U.S.C. 1594(c) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE FACTS OF THIS CASE

A. Standard Of Review

As Roy concedes (Br. 16), he failed to challenge the constitutionality of Section 1594(c) below. Accordingly, this Court may review this issue only for prejudicial plain error. See Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). To prove plain error, Roy must establish that (1) there was an error; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; and (3) the error affected his substantial rights. *United States* v. *Seignious*, 757 F.3d 155, 160-161 (4th Cir. 2014) (quoting *Puckett*, 556 U.S. at 135). If Roy satisfies all three prongs, this Court may exercise its discretion to remedy the error "only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Ibid.*

B. Section 1594(c) Is Not Unconstitutionally Vague As Applied

A statute is void for vagueness under the Fifth Amendment's Due Process Clause if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008).

Roy claims that (Br. 18-24) no ordinary person could understand that he would be violating 18 U.S.C. 1594(c) based on the facts of this case, and that Section 1594(c) is therefore unconstitutionally vague as applied to him. Contrary to Roy's assertions, the language of Section 1594(c) and the underlying statute that Roy conspired to violate, 18 U.S.C. 1591(a), plainly and unambiguously state what conduct is prohibited. Accordingly, Roy has failed to show that the district court committed any legal error, let alone a "clear or obvious" error. *Seignious*, 757 F.3d at 160-161.

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." *Staples* v. *United States*, 511 U.S. 600, 605 (1994). If the statute's language is plain, courts "apply it according to its terms." See *Lincoln* v. *Director, Office of Workers' Comp. Programs*, 744 F.3d 911, 914 (4th Cir.), cert. denied, 135 S. Ct. 356 (2014) (citation omitted).

Section 1594(c) provides that "[w]hoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both." 18 U.S.C. 1594(c). Section 1591, the underlying statute, provides, in relevant part:

> (a) Whoever knowingly --
>
> (1) in or affecting interstate or foreign commerce * * * recruits, entices, harbors, transports, provides, obtains, or maintains, by any means a person; or

> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion * * * or any combination of such means will be used to cause the person to engage in a commercial sex act * * * shall be punished as provided in subsection (b).

18 U.S.C. 1591(a).[5] The plain language of both provisions makes it a crime to enter into an agreement to knowingly, recruit, entice, harbor, transport, provide, obtain, or maintain an individual where the defendant knows, or acts in reckless disregard of the fact, that force or threats of force, fraud, or coercion will be used to cause the victim to engage in a commercial sex act.

1. Roy first contends (Br. 18) that it is impossible for two people to enter into an agreement knowing that any action by the co-conspirators would be "perceived by [the victim] as force, fraud, or coercion, and will cause her to perform a commercial sex act." In other words, according to Roy, no ordinary person could agree to act with "knowledge of a future outcome" because no one can "accurately predict[] the future." Br. 18-19. Section 1591(a), however, does not require what Roy asserts.

[5] Congress recently amended Section 1591(a) to include advertising, patronizing, and soliciting among the proscribed conduct. 18 U.S.C. 1591(a) (amendments effective May 29, 2015).

Both the Supreme Court and this Court define "knowingly" simply in terms of a defendant's subjective awareness of the risk that a particular outcome would result from his actions, rather than whether a particular outcome will result, as Roy contends. In *United States* v. *Carr*, for example, the Court stated that "a person acts 'knowingly' as to the result of his conduct 'when he knows that the result is *practically certain* to follow from his conduct.'" 303 F.3d 539, 546 (4th Cir. 2002) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 445 (1978)) (emphasis added), cert. denied, 537 U.S. 1138 (2003).

Although this Court has not addressed the definition of "knowing" in Section 1591(a), the Ninth Circuit has specifically addressed and rejected an identical "impossible to predict the future" argument in that context. See *United States* v. *Todd*, 627 F.3d 329 (9th Cir. 2010). In *Todd*, 627 F.3d at 333-334, the court of appeals affirmed convictions under 18 U.S.C. 1591(a) after analyzing what "knowing" that force, fraud, or coercion "will be used" in the statute means. Indeed, the court asked the same question that Roy raises: "How does anyone 'know' the future?" *Id.* at 334. The court concluded, however, that "[w]hat the statute means to describe, and does describe awkwardly, is a state of mind in which the knower is familiar with a pattern of conduct." *Ibid.* More specifically, the court stated that "[w]hen an act of Congress requires knowledge of a future action, it does not require knowledge in the sense of certainty as to a future act." *Ibid.*

Rather, "[w]hat the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future cause a person to engage in prostitution." *Ibid.*

In *Todd*, as in this case, the defendant had an "established practice" of recruiting women to work as prostitutes and then living off their earnings and controlling them through strict rules that limited their access to money and making them feel like they had nowhere else to go. 627 F.3d at 334. The court found that the jury could have concluded from the defendant's treatment of the first woman he recruited that "he would follow the same pattern" with his next two victims. *Ibid.* Based on this modus operandi, the court of appeals found that the defendant "*knew* that he would use coercion to cause his sex workers to make money for him." *Ibid.* (emphasis added). Similarly, Roy had an established pattern of conduct, starting with J.D., that supported the jury's finding that, as part of his conspiracy to recruit women for prostitution, he knew that he would use force, fraud, or coercion to cause his victims to engage in prostitution. See pp. 25-28, *infra*.

Furthermore, far from the "unclear trap" that Roy describes (Br. 20), the "knowing" mens rea requirement in the statute weighs heavily against a finding of vagueness. See *Gonzales* v. *Carhart*, 550 U.S. 124, 149 (2007) (stating a scienter requirement "alleviate[s] vagueness concerns"); *Colautti* v. *Franklin*, 439 U.S.

379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea."), overruled in part on other grounds, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490 (1989).[6]

2. Roy next argues (Br. 21-23) that a statute cannot make conduct criminal based on the subjective views of the victims, especially when the identity of the victims was unknown at the time the co-conspirators entered their agreement. This argument likewise lacks merit. Roy's reliance on *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971), where the prohibited conduct was any behavior that would "annoy" people passing by and the statute basically provided no notice as to what conduct was unlawfully annoying, is misplaced. Br. 23. Here, the proscribed conduct is not determined by the victim's perception of the defendant's actions. Instead, Section 1591(a) proscribes conduct that the defendant would know amounts to force, fraud, or coercion because he had an established pattern of using that precise conduct to cause his victims to engage in prostitution.

---

[6] Roy implies (Br. 26 n.6) that the jury was confused about the sex trafficking statute's force, fraud, or coercion element when it posed a question about its burden for finding force, fraud, or coercion. Roy's counsel at trial, however, specifically agreed with the district court's proposal to direct the jury to consult the jury instructions for proving conspiracy. JA 772-773. Nor did Roy argue below or in his opening brief that the jury instruction for conspiracy was incorrect.

As stated above, Section 1591(a) requires that the defendant know that "if things go as he has planned, force, fraud or coercion will be employed to cause his victim to engage in a commercial sex transaction." *Todd*, 627 F.3d at 334. The Ninth Circuit stated that "[t]hat required knowledge brings the predictable use of force, fraud, or coercion into the definition of" Section 1591(a). *Ibid.* An ordinary person would understand that the statute is directed at the *defendant's* knowledge, and not the victim's subjective responses to the defendant's action. This common sense interpretation of the statute is not only compelled by the text of the statute but also adheres to the canon of statutory construction of avoiding constitutional questions where possible. See *Skilling* v. *United States*, 561 U.S. 358, 403 (2010) (stating that courts should construe the language of a statute, if fairly possible, to avoid finding that a statute is unconstitutional); *United States* v. *Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (same), cert. denied, 134 S. Ct. 1936 (2014).

3. Roy's final vagueness argument is also unavailing. He asserts (Br. 23-24) without elaboration that it is impossible for anyone to knowingly enter an agreement to commit a crime when the underlying crime has two different mens rea requirements, one of which requires only a "reckless disregard." It appears that Roy is arguing that the statute cannot require that a defendant knowingly agree to recruit, entice, harbor, or transport an individual as one element of the offense, while allowing a "reckless disregard" standard for the fact that force, threat of

force, fraud, or coercion will be used to force the victim to commit commercial sex acts. Without more, this seems to challenge the use of two separate mens rea requirements for different elements of a crime. Courts, however, have long accepted the use of different mens rea requirements for different elements of an offense, and this feature can widely be found in criminal statutes. See *Liparota* v. *United States*, 471 U.S. 419, 423 n.5 (1985) ("The required mental state may of course be different for different elements of a crime."). In any event, the evidence at trial made clear to the jury that, based on his pattern of conduct with respect to J.D. and Creason, Roy knew that he would use force, fraud, or coercion in furtherance of his conspiracy to cause D.W. and K.M. to engage in prostitution.

Because Section 1594(c) is not unconstitutionally vague, Roy has failed to carry his burden of showing the existence of a legal error, let alone a clear or obvious error. See *United States* v. *Mozie*, 752 F.3d 1271, 1282-1283 (11th Cir.) (holding Section 1591(a)'s recklessness element is not unconstitutionally vague), cert. denied, 135 S. Ct. 422 (2014). Thus, this Court need not consider the remaining prongs for showing plain error.

II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT ROY'S CONVICTION UNDER 18 U.S.C. 1594(c)

A. Standard Of Review

This Court reviews the sufficiency of evidence supporting a conviction de novo. See *United States* v. *Reed*, 780 F.3d 260, 269 (4th Cir.), cert. pending, No. 14-10176 (filed June 11), No. 14-10190 (filed June 12), and No. 14-10485 (filed June 29, 2015). A defendant challenging the sufficiency of the evidence faces "a heavy burden." *United States* v. *McLean*, 715 F.3d 129, 137 (4th Cir. 2013) (citation omitted). The jury verdict must be sustained if, viewed in the light most favorable to the government, there is substantial evidence in the record to support the convictions. See *United States* v. *Jaensch*, 665 F.3d 83, 93 (4th Cir. 2011), cert. denied, 132 S. Ct. 2118 (2012). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Ibid.* (brackets and citation omitted). This Court does not weigh the evidence or assess the credibility of the witnesses, but assumes that the jury resolved any discrepancies in favor of the government. *United States* v. *Roe*, 606 F.3d 180, 186 (4th Cir.), cert. denied, 131 S. Ct. 617 (2010). "Reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States* v. *Ashley*, 606 F.3d

135, 138 (4th Cir.) (citation and internal quotation marks omitted), cert. denied, 562 U.S. 987 (2010).

B. Ample Evidence Supported Roy's Conspiracy Conviction

To prove a conspiracy under 18 U.S.C. 1594(c), the government needed to show that Roy knowingly and willingly entered an agreement to commit sex trafficking through the use of force, fraud, or coercion.

In challenging the sufficiency of the evidence, Roy argues (Br. 28-31) only that (1) "[t]here is no evidence that any person was caused to engage in a commercial sex act by any act of force, fraud, and coercion"; (2) Roy and Creason could not have agreed to commit sex trafficking through force, fraud, or coercion because they could not have known what actions their victims would consider coercive; and (3) Creason could not have agreed to exercise coercion on the women she and Roy recruited for prostitution because she did not consider what Roy did to her to be coercive. Roy does not challenge the jury's finding that Roy and Creason had an agreement to recruit women to engage in prostitution.

1. With respect to his first point, Roy emphasizes that D.W. never engaged in any commercial sex acts, that there is nothing in the record about what compelled R.C. to engage in prostitution, and that K.M. worked as a prostitute because she "had her own reasons." Br. 30-32. He appears to be arguing that the

government needs to link any act of force, fraud, or coercion specifically to individual acts of commercial sex by D.W., R.C., and K.M. Br. 28-31.

Conviction for conspiracy to violate Section 1591(a), however, does not require proof of a strict causal relationship between an act of force, fraud, or coercion and a specific commercial sex act. Indeed, a charge of conspiracy does not require proof that the conspiracy was successful. See *United States* v. *Jimenez Recio*, 537 U.S. 270, 274-275 (2003) (holding that charge of conspiracy was not defeated where police action frustrated completion of the conspiracy); *United States* v. *Min*, 704 F.3d 314, 321-322 (4th Cir.) (same), cert. denied, 133 S. Ct. 2752 (2013). Rather, the statute requires only proof that, in furtherance of his conspiracy, Roy knew that, based on his pattern of conduct, he would use force, fraud, or coercion to cause his victims to participate in a commercial sex act at some time. See *United States* v. *Todd*, 627 F.3d 329, 334 (9th Cir. 2009). That is precisely what the evidence showed.

Starting with J.D., the evidence at trial established Roy's pattern of recruiting young women through deception by promising that they would make money together, thereby fraudulently suggesting that the women would have a better life and possibly return to school. JA 138-139, 228-229 (J.D.); JA 548-549 (D.W.); JA 415, 598 (K.M.). Although each woman initially agreed to be one of Roy's prostitutes based on his (or Creason's) promises, things changed quickly.

Once the victim was ensnared, Roy quickly took control of their lives and made it difficult for the women to leave him. He immediately confiscated their government-issued identification and any money they had. JA 152-154 (J.D.); JA 351-352 (Creason); JA 560-561 (D.W.); JA 617-618 (K.M.). The women were not allowed to keep any of the money they earned as prostitutes; instead, they would need to ask him for money. JA 154, 157, 159, 166 (J.D.); JA 357 (Creason); JA 553-554 (D.W.); JA 620 (K.M.).

Roy also cultivated a violent persona to intimidate the women and to keep them in line. He kept guns on his person and in his apartment and made sure his victims knew it. JA 143, 146, 151, 169-179 (J.D.); JA 352, 354 (Creason). He bragged to them about escaping a murder charge. JA 178 (J.D.); JA 352, 354 (Creason); JA 635, 638 (K.M.). Indeed, J.D. testified that if Roy did not care about killing a man, "what do you think he care about [killing] a prostitute." JA 186-187. K.M. testified that she felt Roy "wasn't just some normal person" who decided to be a pimp; rather, he had "a very serious criminal past." JA 638.

The jury heard evidence that if a woman wanted to leave or did something he did not like, Roy threatened her or threatened to harm her family. He threatened J.D. that if she left him, he would hurt her son. JA 195. He even assaulted J.D. when she tried to leave him. J.D. testified that when she tried to leave him, Roy held a gun to her head and repeatedly pulled the trigger, terrifying her because she

did not know whether the gun was loaded. JA 186, 237. After that, J.D. said, she knew that she was "stuck" and could not leave Roy because he would probably kill her and harm her family. JA 186-187, 195. Roy told J.D. another time, "I guarantee I'll make you wish you never crossed me." JA 235. Creason testified that Roy "verbally threatened [her] a lot." JA 496. He also forced J.D. to have anal sex with him. JA 188-190. D.W. was able to leave Roy after one day but not before he threatened to kill her whole family if she called the police. JA 579.

As K.M. testified, it did not take much for Roy to lose his temper. JA 611-612. K.M. saw Roy become irate when Creason spoke out of turn (JA 611), and D.W. saw Roy hit Creason when he thought she got his dinner order wrong (JA 574). Both Creason and K.M. testified that they were "scared" and "nervous" after seeing how Roy treated R.C. when she wanted to leave. JA 439, 627, 629. K.M. told the jury that after seeing Roy so angry, she thought it was best that she "kept [her] mouth shut." JA 627, 629.

This was Roy's modus operandi. Based on J.D.'s and Creason's testimony and corroborating text messages, as well as testimony by D.W. and K.M., the jury could find that if Roy used deception and physical, psychological, and sexual abuse on his first two prostitutes, he would follow his established pattern of behavior and use such fraud and abuse on other women he later recruited for prostitution, in furtherance of his conspiracy. See *United States* v. *Bell*, 761 F.3d

900, 909 (8th Cir.) (rejecting defendant's sufficiency argument relating to conspiracy and sex trafficking charges where evidence showed that defendant threatened victims' physical and psychological well-being), cert. denied, 135 S. Ct. 503 (2014).

Indeed, with each woman Roy recruited to prostitute for him, he created an atmosphere of psychological and financial dependence, and of fear, in order to cause them to engage in commercial sex acts. This kind of harm falls squarely within the statute's definition of coercion. The statute defines "coercion" as "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person." 18 U.S.C. 1591(e)(2)(B). The term "serious harm" includes physical as well as nonphysical harm such as psychological and financial harm. 18 U.S.C. 1591(e)(4). D.W. was fortunate to get away from Roy after just one day. But had she not been able to escape, Roy had said that "he would get [D.W.] used to [prostitution]." JA 572-573. Roy well knew that he would use force, fraud, or coercion to cause D.W. to engage in prostitution. That Roy had not succeeded in causing D.W. to prostitute herself did not make his efforts any less criminal or undermine the evidence supporting his conspiracy conviction. See *Jimenez Recio*, 537 U.S. at 274-275.

2. Roy's remaining arguments are meritless. Contrary to Roy's assertions (Br. 29-31), the knowledge requirement in Section 1591(a) does not require co-conspirators under Section 1594(c) to know what a future victim would consider coercive. The knowledge required of a defendant like Roy is that, in furtherance of his conspiracy, he knew he would use force, fraud, or coercion in order to make a victim engage in prostitution. As discussed above, ample evidence in the record supported the jury's finding that Roy had such knowledge based on his modus operandi.

Roy also argues (Br. 30) that he could not have entered an agreement to commit sex trafficking through force, fraud, or coercion because Creason did not consider Roy's rules or his actions to be coercive to her. That argument ignores the fact that "one may be a member of a conspiracy without knowing its full scope * * * and without taking part in the full range of its activities or over the whole period of its existence." *United States* v. *Allen*, 716 F.3d 98, 103 (4th Cir.), cert. denied, 133 S. Ct. 2819 (2013) (citation omitted). The focus of a conspiracy charge is whether there was an agreement to violate the law. *Ibid.* The record, viewed in the light most favorable to the government, belies Roy's claim. The record shows that Roy's rules, which Creason enforced, created an atmosphere not only of fear, but also of psychological and financial dependence on Roy. JA 553-554, 560-561, 617-618, 620, 635. Creason knew that force, fraud, or coercion

would be used because she deceived D.W. and K.M. about how much money she made as a prostitute in order to entice them to engage in prostitution. JA 415, 548-549, 598. A conspiracy to violate Section 1591(a) clearly occurred here.

What matters in this appeal is Roy's knowledge. The record contains more than sufficient evidence that, based on his established practice, Roy knew that, in furtherance of his conspiracy, he would use force, fraud, or coercion to cause his victims to engage in commercial sex acts.

III

THE DISTRICT COURT DID NOT ERR BY EXCLUDING POST-CONSPIRACY CONDUCT UNDER RULE 412

A. Standard Of Review

This Court reviews evidentiary rulings implicating constitutional claims de novo. *United States* v. *Williams*, 632 F.3d 129, 132 (4th Cir. 2011). If the Court finds a constitutional violation, the erroneous evidentiary ruling is subject to review for harmless error under Federal Rule of Criminal Procedure 52. *Ibid.* To warrant reversal, an error "must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Any trial error which occurs "during the presentation of the case to the jury * * * may * * * be qualitatively assessed in the context of other evidence presented in order to determine whether its [effect] was harmless beyond a reasonable doubt." *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991).

B. Exclusion Of Creason's Post-Conspiracy Sexual Activity Is Not Reversible Error

Roy asserts (Br. 32) that the district court violated his Sixth Amendment Confrontation Clause rights by not allowing him to introduce evidence about Creason's engaging in prostitution activities after Roy's arrest, pursuant to Federal Rule of Evidence 412. Roy is incorrect. Rule 412 provides that evidence offered "to prove that a victim engaged in other sexual behavior" or "to prove a victim's sexual predisposition" is not admissible in cases involving alleged sexual misconduct. Fed. R. Evid. 412(a)(1) and (2). Roy contends (Br. 34-37) that (1) Rule 412 does not apply to Creason's testimony, and (2) if Rule 412 covers Creason, he should have been able to cross-examine Creason about her post-conspiracy acts of prostitution under the exception to Rule 412 for "evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412(b)(1)(C).

1. In support of his argument that Rule 412 does not apply to Creason, Roy claims (Br. 34) that Creason is not a "victim of alleged sexual misconduct" under the rule because "Roy was not charged with any crime against Ms. Creason." Not so. Nothing in Rule 412 requires that a defendant be charged with a crime against an individual in order for that individual to qualify for protection under the rule. Although Rule 412 does not define "victim," the Advisory Committee Notes for the 1994 Amendments provide that Rule 412 should be applied broadly to any

person who can "reasonably be characterized as a 'victim of alleged sexual misconduct.'" Fed. R. Evid. 412 advisory notes. Indeed, the advisory notes further provide that Rule 412 applies to "all cases involving alleged sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation." *Ibid.* Here, Creason can reasonably be characterized as one of Roy's victims even though she was also a co-conspirator. He recruited her, just like he recruited J.D., and subjected Creason to psychological, physical, and sexual abuse. JA 337, 349-352, 354, 427-428, 496.[7]

Roy argues (Br. 35), however, that Rule 412 should not apply to Creason because the government had already elicited testimony from her about her prostitution activity that occurred prior to meeting Roy and during her time with Roy. According to Roy, any additional evidence of Creason's prostitution activities could hardly have invaded her privacy and "[t]here is no indication that fear of having these few incremental acts of prostitution mentioned in court" would

[7] Creason's counsel argued in the district court that Rule 412 applies to Creason and strongly opposed admission of any evidence of Creason's sexual activity before and after the conduct alleged in the Second Superseding Indictment. 2 SJA 122-126. Although the United States took no position below on whether Rule 412 applies to Creason, the government argued that any evidence of Creason's sexual behavior or alleged sexual predisposition outside of her relationship with Roy should be excluded under Federal Rule of Evidence 403 because such evidence "has no probative value" and "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." JA 85-86.

have discouraged her from reporting any criminal sexual assaults. Br. 35. Aside from evidence of Creason's prostitution for Roy, the government asked Creason during her direct examination only if she was working as a prostitute when she met Roy. JA 336-337. Following the logic of Roy's argument, any time the government introduces evidence of a victim's sexual behavior in connection with the defendant's conduct in a sex trafficking case, that victim would no longer be covered by Rule 412, effectively turning Rule 412 on its head. This argument should be rejected.

2. Roy's argument that he should have been allowed to cross-examine Creason about her post-conspiracy prostitution under Rule 412's exception for evidence whose exclusion would violate a defendant's constitutional rights also fails. Br. 36-38; see also Fed. R. Evid. 412(b)(1)(C). Specifically, he asserts (Br. 36) that the district court's ruling precluding him from cross-examining Creason about her reasons for leaving Roy, and introducing evidence showing her acts of prostitution after Roy's arrest, violated his "rights to confront witnesses against him and his right to present a defense."

At trial, Creason had testified on direct that when she was giving the police her statement after she called 911, she lied to the police that Roy had held a gun to her head and threatened to kill her. JA 460-461. She testified that she told these lies because she was "scared" and "just wanted to go home to [her] mom." JA

461. On cross-examination by the defense, Creason testified that she was "crushed" because Roy told her to lose weight and paid more attention to K.M. than to Creason, so she wanted to go home to Decatur and "get away from this life." JA 513-514. Creason then testified that she went home to Decatur. JA 518. The district court allowed defense counsel to question Creason about how she traveled to five different cities across the country soon after returning home but, over defense counsel's objection, precluded counsel from introducing her backpage.com ads from that time period or asking Creason how she earned money to travel to these cities once she left Roy. JA 515-519.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *United States* v. *Dargan*, 738 F.3d 643, 650 (4th Cir. 2013) (alteration in original). Roy claims that Creason lied about "why she parted company with" Roy and that he should have been allowed to impeach her with evidence of her acts of prostitution after his arrest. Br. 37. This evidence, according to Roy, would have "destroy[ed] her credibility on that point and damage[d] her credibility as a whole." Br. 37.

Contrary to Roy's assertions, evidence of Creason's acts of prostitution after Roy's arrest is simply not relevant. Such evidence would not have provided a defense for any of the crimes with which Roy was charged and convicted. It

would not have contradicted evidence at trial that Roy entered into a conspiracy to commit sex trafficking or evidence that Roy had an established pattern of using force, fraud, or coercion to cause women to engage in prostitution. Therefore, its exclusion did not violate Roy's constitutional rights. See *United States* v. *Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995) (holding that evidence of victim's sexual relations occurring over a year after the alleged rape was not relevant to the charges against the defendant and exclusion of that evidence did not violate defendant's confrontation or due process rights), cert. denied, 516 U.S. 1077 (1996); see also *United States* v. *Cephus*, 684 F.3d 703, 708 (7th Cir.) (holding that exclusion of evidence that victim was a prostitute before meeting defendant did not violate defendant's constitutional rights because the evidence did not show that she consented to be beaten and threatened as part of defendant's "modus operandi" in violation of Section 1591), cert. denied, 133 S. Ct. 588, and 133 S. Ct. 807 (2012); *United States* v. *Elbert*, 561 F.3d 771, 777-778 (8th Cir. 2009) (holding that excluding evidence of victims' acts of prostitution before and after their encounters with defendant did not violate the Sixth Amendment because that evidence had minimal probative value and a high prejudicial effect).

Nor does this evidence carry any impeachment value because it does not contradict Creason's testimony about why she wanted to leave Roy. The record shows that Creason testified that she wanted to go home, and she did. JA 461, 518.

The record also shows, on cross-examination, that Creason testified that she was upset that Roy paid more attention to K.M. than to her (JA 513-514), and as a result she wanted to "get away from this life" and "stay far, far away from it." JA 513-514. Roy interprets these statements as Creason stating that she wanted to leave prostitution. Br. 38. But Creason never said she wanted to get away from prostitution. She said only that she wanted to get away from her life with Roy. JA 513-514. This was consistent with her testimony in the government's direct examination. She contacted her family and said that she wanted to go home because she was jealous of Roy's attention to K.M. and felt that Roy had lied to her about having a future together. JA 421-422. Even assuming evidence of Creason's later acts of prostitution had any impeachment relevance, any probative value of the evidence was "substantially outweighed by * * * [the] danger of unfair prejudice." Fed. R. Evid. 403.

In any event, defense counsel did in fact attempt to impeach Creason about what she did after Roy's arrest. On cross-examination, counsel showed that Creason did not stay home for long and that in a seven-month period after Roy's arrest, she left home and traveled to five different cities even though she had no money. JA 518-519. Her testimony was as follows:

> Q: You traveled, correct?
> A: Yes.
> Q: Now, at this point, you had no money because Jean had been keeping and taking your money, correct?

A: Yes.
Q: But you were able to travel to Atlanta, correct?
A: Yes.
Q: Nashville, correct?
A: Yes.
Q: Tuscaloosa, Alabama, correct?
A: Yes.
Q: Los Angeles.
A: Yes.
Q: Las Vegas.
A: Yes.

JA 518-519.

Furthermore, Roy had ample opportunity to cross-examine Creason to "damage[] her credibility as a whole." Br. 37. During the defense's cross-examination, Creason testified that she "lied" to police to avoid getting in trouble for prostitution (JA 480) and that she admitted that she "lied deliberately," "lied with calculation," and "lied with a purpose." JA 481. She told the jury that she lied to the police that Roy put a gun to her head (JA 482); she lied that he physically beat her (JA 482, 499); she lied that on the day she called the police, that was the first time she had been left alone (JA 482-483); she lied that Roy arranged for Creason to come to Maryland from Decatur (JA 483); she lied that she did not know that she was coming to Maryland to engage in prostitution (JA 483); she lied that Roy picked her up from the bus station (JA 484); and she lied that Roy started hitting her immediately after they got to his home (JA 484).

Accordingly, given defense counsel's elicitation of this significant testimony that went to Creason's credibility, the exclusion of evidence about Creason's conduct after leaving Roy did not violate Roy's constitutional rights. See *Elbert*, 561 F.3d at 777; see also *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994) ("A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable.").

3. Even if the Court finds that the district court erred in excluding this evidence, the error is harmless beyond a reasonable doubt. See *Williams*, 632 F.3d at 132 (stating that a constitutional violation is harmless if the evidentiary "error complained of did not contribute to the verdict obtained") (citation omitted).[8] Not only did defense counsel impeach Creason about her whereabouts after Roy's arrest, but he also got Creason to repeatedly admit that she had lied. JA 481-484,

[8] Alternatively, this Court may assume error and hold that any error was harmless. See *United States* v. *Reed*, 780 F.3d 260, 269 (4th Cir. 2015) (assuming a Confrontation Clause violation and holding that the error was harmless) (quoting *Norfolk S. Ry. Co.* v. *City of Alexandria*, 608 F.3d 150, 156-157 (4th Cir. 2010) ("[T]he principle of constitutional avoidance * * * requires the federal courts to strive to avoid rendering constitutional rulings unless absolutely necessary.")), cert. pending, No. 14-10176 (filed June 11), No. 14-10190 (filed June 12), and No. 14-10485 (filed June 29, 2015).

518-519. Thus, exclusion of the evidence concerning Creason's acts of prostitution after Roy's arrest cannot have affected the jury's verdict.

IV

ROY'S SENTENCE WAS REASONABLE

A. Standard Of Review

This Court reviews the reasonableness of a sentence under a deferential abuse of discretion standard. *United States* v. *Lynn*, 592 F.3d 572, 576 (4th Cir. 2010) (citing *Gall* v. *United States*, 552 U.S. 38, 40 (2007)). The Court first reviews the sentence to confirm that the district court committed "no substantial procedural error." *United States* v. *Worley*, 685 F.3d 404, 409 (4th Cir. 2012). If no procedural error exists, the Court then reviews the substantive reasonableness of the sentence imposed for abuse of discretion. *United States* v. *Strieper*, 666 F.3d 288, 292 (4th Cir. 2012). "[A]n appellate court *must* defer to the trial court and can reverse a sentence *only* if it is unreasonable, even if the sentence would not have been the choice of the appellate court." *United States* v. *Evans*, 526 F.3d 155, 160 (4th Cir.), cert. denied, 555 U.S. 977 (2008).

B. The District Court's Sentencing Determination

Prior to sentencing, both parties submitted sentencing memoranda. In his sentencing memoranda, Roy strenuously objected to the Guideline calculation in the Presentence Report (PSR). He argued that the base offense level for each count

of his conviction was 14, and the combined offense level should be 22 (41 to 51 months). 1 SJA 58-61, 76. Roy also argued that the district court should not consider any acquitted conduct and that a leadership enhancement was inappropriate because "Creason was a co-equal operator of the prostitution scheme." 1 SJA 61-68. In addition, Roy's memoranda highlighted 18 U.S.C. 3553 factors for the court's consideration. 1 SJA 71-76.

In its responsive memorandum, the government recommended that the court impose a sentence of 365 months of imprisonment on Count 5 (conspiracy to commit sex trafficking through force, fraud, or coercion); a concurrent sentence of 120 months of imprisonment on each count of interstate transportation for prostitution (Counts 4, 7, and 9); and a concurrent sentence of 240 months of imprisonment on Count 10 (witness and evidence tampering). 1 SJA 84. The government's memorandum extensively addressed the applicable base offense level for Roy's conspiracy conviction. The government argued that under U.S.S.G. § 2X1.1(a), the base offense level for a conspiracy is "the level from the guideline for the substantive offense." 1 SJA 88. A "[s]ubstantive offense" is defined as "the offense that the defendant was convicted of soliciting, attempting, or conspiring to commit." U.S.S.G § 2X1.1, Commentary Note 2. Thus, the government argued the base offense level for Count 5 should be 34, as specified in U.S.S.G. § 2G1.1(a)(1), which applies to sex trafficking through force, fraud, or

coercion.[9] 1 SJA 87-92. The government's memorandum also argued, *inter alia*, that the court should impose an enhancement for Roy's leadership role in the conspiracy and that the Section 3553 factors support a 365-month sentence. 1 SJA 96-100.

At sentencing, the district court began by stating that it would not consider any disputed facts in the PSR for sentencing. JA 795. The court then turned to the legal issues raised in Roy's sentencing memorandum. First, the court addressed Roy's argument that the district court should not take acquitted conduct into account in the sentence. The court discussed in detail the cases that it relied on in reaching its decision that it may consider evidence related to the sex trafficking and attempted sex trafficking offenses. JA 798-802. Second, the district court addressed Roy's opposition to an aggravating role enhancement for his leadership

---

[9] U.S.S.G. § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other Than a Minor)

> (a) Base Offense Level:
> (1) **34**, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
> (2) **14**, otherwise.

Section 1591(b)(1), in turn, provides that the punishment for a violation of 18 U.S.C. 1591(a), "if the offense is effected by means of force, fraud or coercion" is "a fine under this title and imprisonment for any term of years not less than 15 or for life." 18 U.S.C. 1591(b)(1). Ignoring that Section 1591(b)(1) is directed at violations of Section 1591(a), Roy argued in his sentencing memorandum that Section 2G1.1(a)(1) applies only to offenses under Section 1591(b)(1) and therefore Section 2G1.1(b)(2) applies to Roy's conviction for violating 18 U.S.C. 1594(c). 1 SJA 58-60.

role in the conspiracy. Again, the court discussed the applicable cases from this Circuit and other circuits. The court explained that such an enhancement was appropriate because Roy had exercised authority over Creason. JA 802-807.

The court next announced that it was giving notice required for a firearm departure under U.S.S.G. § 5K2.6 that was not raised in the PSR and was not requested by the government. The court stated that it would consider only one incident involving a firearm – when Roy and Tanisha Barney had a firearm when they went to pick up J.D. in Richmond – to support this departure, noting that case law supports imposing a two-level enhancement for offenses involving a firearm. JA 807-812.

Turning to the Guidelines, the court stated that it was not going to follow the PSR, which was "extremely complicated and highly disputed," to calculate the advisory Guidelines range. JA 811-812. The court then made the following factual findings: (1) Roy was the leader of the criminal activity with respect to J.D.; (2) Roy was the leader of the conspiracy with Creason; (3) Roy used force, fraud, and coercion on J.D., D.W., K.M., and R.C.; and (4) Roy willfully attempted to obstruct or impede justice when he attempted to have his sister delete the voluminous data on his iPhone and computer that was used in support of all the counts against him. JA 812-818. The court provided specific evidentiary support for each finding. JA 812-818.

The court noted that it is undisputed that criminal history category I applies. Next, the court addressed the parties' disagreement over the appropriate base offense level for the conspiracy charge. The court stated that the Sentencing Commission increased the base offense level for violations of Section 1591(b)(1) to 34 after Congress imposed a 15-year mandatory minimum for violations of Section 1591(a). JA 819-820. But Congress did not include any mandatory minimum when it subsequently provided for conspiracy in Section 1594(c). Because no mandatory minimum sentence applies to conspiracies under Section 1594(c), while 18 U.S.C. 1591 has a mandatory minimum of 15 years of imprisonment, the court concluded that the base offense level for Section 1594(c) should not be the same as for Section 1591. JA 818-820. The court ruled that U.S.S.G. § 2X1.1, which directs courts to apply a base offense level of 34 for Section 1594(c) offenses, is "inconsistent with Congress's intent." JA 822.

The district court stated that it would use a base offense level of 14 to calculate the Guidelines range for the conspiracy charge. JA 823. But because, as the court stated, the proper base offense level is "not clear," the court calculated the Guideline range using both a base offense level of 14 as well as 34 for Count 5. JA 822-831. Using a base offense level of 14 and after applying enhancements for obstruction of justice, fraud and coercion, and Roy's leadership role, the court ended up with a combined offense level of 26 (63-78 months) before any

departures and variances. JA 823-828. Using a base offense level of 34 for Count 5, the court arrived at a combined offense level of 41 (324 to 405 months) before the firearm departure and any variance. At this point, the court stated that it would not recalculate the Guidelines range and if the sentence is vacated on appeal, the court will "issue a variance sentence to get to the exact same sentence" as the one imposed now, using a base offense level of 14 for Count 5. JA 831.

The district court next heard argument from counsel for both parties and from Roy. JA 832-877. The government focused on how the base offense level for Count 5 should be 34, on the seriousness of Roy's crimes and on the need for deterrence. JA 832-854. Defense counsel mainly argued that the court should not consider any acquitted conduct and that the court should take into account such mitigating factors as Roy's emotional difficulties and a childhood that included time spent in foster care. JA 854-866. Roy asserted that he is "not a pimp" and apologized to the victims "for not helping them see a way out and not dragging them out if I could." JA 868, 873.

The court stated that, based on the parties' arguments, a two-level upward departure for use of a firearm with respect to the interstate transportation for prostitution of J.D. was appropriate. With this departure, the combined offense level became 28 (78 to 97 months). JA 876.

Before imposing the sentencing, the district court addressed a number of the factors outlined in 18 U.S.C. 3553(a). With respect to Roy's "history and characteristics," the court stated that Roy's attempt through his sister to destroy evidence "combined with the braggadocio claim that he beat a murder rap to use to intimate the victims here * * * make his history and characteristics remarkable and worthy of consideration as part of an appropriate sentence under 3553(a)." JA 881-882. The court emphasized that the obstruction and physical and emotional manipulation of the victims were, in the court's opinion, "the most salient aspects of [Roy's] history and characteristics." JA 882-883.

The court also found Roy's statements during his allocution to be insincere. The court noted that Roy is an "effective communicator." JA 882. The court found that Roy's statement in court about how he wished the best for the victims demonstrated how he was able to emotionally manipulate his victims. JA 882. The court stated that the evidence at trial revealed Roy's "willingness to coerce and manipulate, to humiliate, to dominate, to take advantage of emotional vulnerability, youth, desperate family circumstances, drug or alcohol dependency and for the purpose of earning money on the wages of women who were trafficked." JA 882.

The court also rejected Roy's argument in his sentencing memorandum that "mere prosecution" serves as deterrence. JA 884. The court stated that Roy's use

of his acquittal for murder to intimidate and coerce his victims underscored that mere prosecution for a crime was not sufficient deterrence for Roy and that the sentence needed to reflect the need for deterrence and the seriousness of his crimes. JA 880-881, 883-884. The court further stated that the presence of a firearm when Roy picked up J.D., Roy's "callous" and "degrading" treatment of R.C. when she left, and his threatening remark to K.M. and Creason that "the next one who leaves won't leave so easy" all distinguished Roy from "just some maladjusted pimp who is working the block." JA 883. The court also emphasized that Roy did not respect the law, and his sentence should promote respect for the law by Roy and by the public by making it clear what happens to people who commit this type of crime. JA 883. Lastly, the district court said the sentence should reflect the seriousness of Roy's conspiracy charge and by doing so, it would protect the public from sex traffickers. JA 884-885.

At the end of the three-hour sentencing hearing (JA 879), the district court sentenced Roy to 240 months in prison for the conspiracy charge, 120 months for interstate transportation for prostitution, and 240 month in prison for witness and evidence tampering, to be served concurrently. JA 885. The court reiterated that it would impose the same sentence regardless of whether it used a base offense level of 14 or 34. JA 885. As the court stated, "I would vary either up or down

depending upon whether you start from the 14 or the 34 to get to this sentence." JA 885.

C. Even If The District Court Made Procedural Errors, Those Errors Were Harmless

Roy contends (Br. 45-51) that his sentence is procedurally unreasonable because the court erred in calculating the advisory Guidelines range by (1) applying a two-level increase for use of a firearm and a two-level increase for Roy's leadership role to Count 4 (interstate transportation for prostitution with respect to J.D. in violation of the Mann Act, 18 U.S.C. 2421); (2) applying a four-level increase for fraud and coercion to Counts 4, 7, and 9 (Mann Act violation with respect to J.D., D.W., and K.M.) and Count 5 (conspiracy to sex traffic through force, fraud, or coercion in violation of 18 U.S.C. 1594(c)); and (3) failing to adequately explain the sentence to allow for meaningful appellate review.

This Court, however, need not reach Roy's claims of procedural error because the district court unequivocally stated that it would have imposed the same sentence irrespective of the applicable Guidelines range. Consistent with this Circuit's precedent, rather than review the merits of each of these challenges, the Court may proceed directly to an "assumed error harmlessness inquiry." *United States* v. *Hargrove*, 701 F.3d 156, 162 (4th Cir. 2012), cert. denied, 133 S. Ct. 2403 (2013); *United States* v. *Savillon-Matute*, 636 F.3d 119, 123-124 (4th Cir.), cert. denied, 132 S. Ct. 454 (2011). In *Savillon-Matute*, this Court, in affirming an

above-Guidelines sentence, held that harmless error review applies to a district court's procedural sentencing errors made during its Guidelines calculation. 636 F.3d at 123-124 (stating that "procedural errors at sentencing * * * are routinely subject to harmlessness review" (quoting *Puckett* v. *United States*, 556 U.S. 129, 141 (2009))).

A Guidelines error is considered harmless if (1) "the district court would have reached the same result even if it had decided the guidelines issue the other way," and (2) "the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor." *Savillon-Matute*, 636 F.3d at 123 ("[I]t would make no sense to set aside [a] reasonable sentence and send the case back to the district court" where the district court would "impose exactly the same sentence.") (alteration in original).

Here, the district court specifically stated at two different times during the sentencing hearing that regardless of what the court of appeals determined is the appropriate base level offense to be for conspiracy, the district court would issue a variant sentence "to get to the exact same sentence" based on its consideration of the Section 3553(a) factors. JA 831. The court further stated that "to the extent that the guidelines require a different sentence, I would vary either up or down depending upon whether you start from the 14 or the 34 to get to this sentence." JA 885. Thus, no matter if the applicable advisory Guidelines range were between

78 and 87 months or 324 and 405 months (or any other Guidelines range), the district court was firm that it would impose 240 months imprisonment if this case were to be remanded. Thus, the first element of the "assumed error harmlessness" inquiry is satisfied, and this Court need only determine if the sentence is substantively reasonable. See *Savillon-Matute*, 636 F.3d at 123 (citation omitted).

D. Roy's 240-Month Sentence Was Substantively Reasonable

When reviewing the substantive reasonableness of a sentence, this Court examines the totality of the circumstances to determine whether the district court abused its discretion in finding that the 18 U.S.C. 3553(a) factors supported the sentence and justified a deviation from the Guidelines range. *United States* v. *Diosdado-Star*, 630 F.3d 359, 366 (4th Cir.) (quoting *Gall*, 552 U.S. at 56), cert. denied, 131 S. Ct. 2946 (2011). The Court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Ibid*.; see also *Evans*, 526 F.3d at 164-165. While the Court presumes that sentences within the advisory Guidelines range are substantively reasonable, even sentences that vary outside the Guidelines range are entitled to deference and are reviewed only for abuse of discretion. See *United States* v. *Engle*, 592 F.3d 495, 504 (4th Cir.), cert. denied, 562 U.S. 838 (2010).

The circumstances of Roy's crimes, coupled with a consideration of the relevant sentencing factors, support the district court's overall sentence of 240

months imprisonment. As the district court stated, conspiracy to engage in sex trafficking through force, fraud, or coercion is a serious offense, and Roy showed a "willingness to coerce and to manipulate, to humiliate, to dominate, [and] to take advantage of emotional vulnerability." JA 882. Roy conspired to commit sex trafficking for his financial gain by taking his victims' earnings and manipulating and intimidating them to keep them under his control. JA 813-817, 882.

The record shows that Roy preyed on vulnerable women, starting with J.D.[10] Right from the start, he showed that he was in control of her. He arrived at her hotel brandishing a gun. Then, when he and J.D. got to his apartment, he strip-searched her. He threatened her and her son, and sexually assaulted her by forcing her to have anal sex. All this time, he showed he was in control – he took J.D.'s identification card, her cell phone, and her money. Roy made sure she knew he had guns. He intimidated her by telling her that he beat a murder rap. He made J.D. completely dependent on him to the point where she felt she could not leave him. JA 812-815.

---

[10] Roy contends (Br. 51-55) that the district court should not have considered facts in the record relating to acquitted charges. It is well established, however, that "a district court may consider conduct of which a defendant has been acquitted if the conduct has nonetheless been proved by a preponderance of the evidence." *United States* v. *Lawing*, 703 F.3d 229, 241 (4th Cir. 2012) (citing *United States* v. *Watts*, 519 U.S. 148, 157 (1997)), cert. denied, 133 S. Ct. 1851 (2013).

Roy also manipulated Creason, who had just turned 18 when he recruited her. He took her identification card and her money, as he had done with J.D. But he also told Creason that he loved her and that made her more willing not only to continue engaging in prostitution for his financial gain but also to recruit other women to be his prostitutes. Creason was his co-conspirator, but he controlled her, too. JA 813.

Although D.W. and K.M. were not with Roy for long, he exerted control and intimidated them from the outset. As with J.D. and Creason, he took their money and identification cards to make them entirely dependent on him psychologically and financially. He told K.M. about beating a murder charge. He threatened to kill D.W.'s whole family if she called the police and bragged that he would be able to do it without getting caught. He humiliated R.C. when she wanted to leave; he made her leave with only the clothes she was wearing and a handful of possessions. JA 815-817. After R.C. left, he threatened Creason and K.M. that the next person to leave was not going to leave "so easy." JA 815-817, 883. The district court characterized Roy's treatment of R.C. – taking back her hair extensions and muddying her shoes – and threatening her afterwards as "purposeful, callous, manipulative, [and] degrading." JA 883.

The district court also emphasized the fact that Roy purposefully informed his victims that he beat a murder rap in order to make them fear him supported

imposing a lengthy 240-month sentence. According to the court, this showed that Roy did not respect the rule of law. The court stated that being charged with murder itself should have had a deterrent effect on Roy (JA 880), and it should have promoted a respect for the law. Instead, the acquittal "resulted not in a respect for and appreciation for how the law operates, but rather a belief that the law was something that could be manipulated." JA 881. Roy used that acquittal as another tool in his arsenal to intimidate and to control his victims. JA 880-881. Thus, the 240-month sentence reflects not only a need for a just punishment to reflect the seriousness of his crimes, but also the need for a lengthy sentence to serve as a specific deterrent for Roy and to get him to respect the rule of law. JA 883-884.

Roy argues (Br. 51) that the concurrent 240-month sentence for Count 10 (witness and evidence tampering) is "the most egregious over sentencing." Not so. The "voluminous information" that Roy tried to have his sister delete from his iPhone and computer made up a substantial part of the government's evidence against Roy. JA 817. If he had been successful, the loss of those data would have seriously impaired the government's ability to prosecute him, and he knew that. JA 818. This was another example of how Roy treated the law as something he could manipulate. As the district court said, "Mr. Roy is a very technically savvy and intelligent person." JA 881. Roy knew exactly what he was doing when he

tried to destroy that evidence. The district court found that Roy simply "does not have" respect for the law. JA 883. For a defendant with no respect for the law and the judicial process, and who believed that the law and judicial process could be manipulated at his will, the sentence must necessarily be lengthy in order to promote deterrence and serve as just punishment. JA 881- 883. This sentence would in turn protect the public from Roy and also serve as adequate deterrence to criminal conduct for the public as well. JA 883-884.

Under the totality of the circumstances, the district court imposed a substantively reasonable sentence for a dangerous offender who committed very serious crimes, victimized several young women, and believed he could manipulate the law and the judicial system just as he had his victims. The court did not abuse its discretion by determining that a 240-month sentence was sufficient, but not greater than necessary, to satisfy the purposes of sentences set forth in Section 3553(a). Because Roy's sentence was substantively reasonable, and the district court would have reached the same result no matter the applicable advisory Guidelines range, this Court should apply an assumed harmlessness test and affirm the sentences imposed below.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the district court below.

Respectfully submitted,

ROD J. ROSENSTEIN
United States Attorney

SUJIT RAMAN
KRISTI O'MALLEY
Assistant United States Attorneys
United States Attorney's Office
District of Maryland
6500 Cherrywood Lane, Suite 400
Greenbelt, MD 20770
(301) 344-4433

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Teresa Kwong
MARK L. GROSS
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument if the Court believes it would be helpful.

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 13,123 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: July 31, 2015

CERTIFICATE OF SERVICE

I certify that on July 31, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that eight paper copies of the foregoing brief were sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by first-class certified mail.

s/ Teresa Kwong
TERESA KWONG
Attorney