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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EARL HARDY MORROW,

Defendant - Appellant.

No. 22-5060

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:20-CR-00335-CVE-1)

Benjamin Miller, Salt Lake City, Utah, for Defendant - Appellant.

Jeffrey Andrew Gallant, Assistant United States Attorney (Amy E. Potter, Assistant United States Attorney, District of Oregon, and Clinton J. Johnson, United States Attorney, Northern District of Oklahoma, on the brief), Office of the United States Attorney, Tulsa, Oklahoma, for Plaintiff - Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

Defendant Earl Hardy Morrow appeals his convictions for distribution, receipt, and possession of child pornography. *See* 18 U.S.C. § 2252. Mr. Morrow argues that the district court erred in (1) permitting the government to present evidence that his

electronic devices contained pornographic anime, contrary to the restrictions on the use of other-act evidence under Fed. R. Evid. 403 and 404(b); (2) preventing him from offering statements against interest by his brother Kory under Fed. R. Evid. 804(b)(3); and (3) failing to correct the government's statement at closing argument that Kory had not yet been prosecuted when charges against him had in fact been dropped. Mr. Morrow also argues that the cumulative effect of these errors requires reversal.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Mr. Morrow's convictions. The district court did not abuse its discretion in admitting the government's other-act evidence or in excluding Kory's statements against interest, nor did it commit reversible error in failing to correct the government's misstatement during closing argument. There being at most one error, Mr. Morrow's cumulative-error argument also fails.

I. BACKGROUND

Between January 23 and February 20, 2020, the Tulsa Police Department (TPD) used the BitTorrent peer-to-peer filesharing network to download multiple files of child pornography from a local IP address.[1] One of these Torrent files,

[1] The BitTorrent process works as follows: (1) "You open a Web page and click on a link for the file you want"; (2) "BitTorrent client software communicates with a tracker to find other computers running BitTorrent that have the complete file (seed computers) and those with a portion of the file (peers that are usually in the process of downloading the file)"; (3) "The tracker identifies the swarm, which is the connected computers that have all of or a portion of the file and are in the process of sending or receiving it"; (4) "The tracker helps the client software trade pieces of the

entitled "Web Video Collection" and containing 99 individual video files, was downloaded on February 20 from an individual using version 4.2.1 of a BitTorrent software program called qBitTorrent.

TPD obtained a search warrant for a residence in Broken Arrow, Oklahoma, that was associated with the IP address from which they had downloaded the files. Mr. Morrow lived at that address with his brother Kory and his mother Karla. On February 27, officers executed the warrant. They took 20 electronic devices from the home.

Ten computers and digital-storage devices were seized from Mr. Morrow's bedroom. Five of those 10 devices were later found to contain over 4,000 illegal images and videos depicting the sexual abuse of children: (1) a password-protected, custom Diablotek desktop computer built by Mr. Morrow himself on which the qBitTorrent program and over 600 images and videos were stored; (2) a password-protected Acer laptop on which over 100 images and videos were stored; (3) a thumb drive (a small, portable digital-storage device) connected to a keychain holding Mr. Morrow's car keys, on which over 3,000 images and videos were stored; (4) a second thumb drive on which 5 videos were stored; and (5) a third thumb drive on which

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file you want with other computers in the swarm. Your computer receives multiple pieces of the file simultaneously"; (5) "If you continue to run the BitTorrent client software after your download is complete, others can receive .torrent files from your computer; your future download rates improve because you are ranked higher in the 'tit-for-tat' system." Carmen Carmack, *How BitTorrent Works*, howstuffworks, https://computer.howstuffworks.com/bittorrent2.htm (emphasis omitted).

over 500 images and videos were stored.[2] In addition to images and videos, both the Acer laptop and the third thumb drive also contained a text file titled "Daddy's Collection," which listed search terms to be used in locating child pornography online; TPD's forensics software identified the author of the document as "Earl."

Mr. Morrow's Diablotek desktop computer was the only device in the home on which was installed qBitTorrent, the program that had distributed the "Web Video Collection" Torrent file from the Morrows' IP address to the police; the version number of the qBitTorrent program installed on the Diablotek computer matched the version number of the program to which the police had connected. And the Diablotek was also the only device containing the file itself. Forensic analysis showed that the file had been accessed multiple times on that device. On the Acer laptop, most of the illegal files were created on February 13 and 14, shortly after a new user profile and password were set up in Mr. Morrow's name. Other documents that Mr. Morrow admitted to authoring, including files of creative writing and a letter to a prospective publisher, were created under the same user profile on February 13, and the author of these files was identified as "Earl." TPD analysts found neither viruses nor evidence of remote control (that is, hacking) on Mr. Morrow's computers.

The other 10 devices were seized from Kory's bedroom. From two of these, police later recovered 37 image files (but no videos) depicting the sexual abuse of

[2] These figures are estimates testified to by TPD Cyber Detective Jessica Jennings at trial.

children. Also, Kory's computer was the only seized device to contain version 3.55 of a Torrent program called uTorrent (although Mr. Morrow's Diablotek computer contained a search history and icons indicating that uTorrent version 3.5.5 may have been installed on it at an earlier time). This may have been significant because on January 23, 2020, TPD had downloaded a file with unlawful content from the Morrows' IP address from an individual using that version of that program.

A grand jury in the United States District Court for the Northern District of Oklahoma indicted Mr. Morrow on one count of distribution and receipt of child pornography and one count of possession of child pornography. Kory was indicted on the same two charges but they were dismissed before Mr. Morrow's trial. The charges were tried to a jury in November 2021. Mr. Morrow was the sole witness for the defense. He denied downloading, distributing, or knowingly possessing the illegal photos and videos found on his devices. The jury convicted him on both counts.

We will include additional background as we discuss the specific issues raised on appeal.

II. DISCUSSION

A. Admission of Pornographic Anime as Other-Act Evidence

Mr. Morrow contends that the district court abused its discretion in admitting evidence that police recovered from Mr. Morrow's devices not only 4,000 illegal photos and videos but also 300 anime images depicting child sex abuse in cartoon form. (Such images are not covered by 18 U.S.C. § 2252.)

1. Evidentiary Rules and Standard of Review

Under Fed. R. Evid. 404(b)(1), "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Such evidence is commonly referred to as propensity evidence. But Fed. R. Evid. 404(b)(2) provides that such other-act evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." "This list of permissible uses is illustrative, not exhaustive," and, generally speaking, Rule 404(b) "admits all other-act evidence except that tending to prove only [the defendant's] propensity" to commit the crime charged. *United States v. Armajo*, 38 F.4th 80, 84 (10th Cir. 2022). Four requirements must be satisfied to protect against unduly prejudicial evidence being admitted under Rule 404(b): (1) the evidence must be offered for a proper purpose, (2) it must be relevant under Fed. R. Evid. 401, (3) its probative value cannot be substantially outweighed by its prejudicial effect under Fed. R. Evid. 403, and (4) the district court must, upon request, instruct the jury on the proper (and improper) use of the evidence. *See Huddleston v. United States*, 485 U.S. 681, 691–92 (1988).

The determination of admissibility under Rule 404(b)(2) "involves a case-specific inquiry that is within the district court's broad discretion." *United States v. Cushing*, 10 F.4th 1055, 1075 (10th Cir. 2021) (internal quotation marks omitted). The court's ruling will be upheld on appellate review "if it falls within the bounds of

permissible choice in the circumstances and is not arbitrary, capricious or whimsical." *United States v. Martinez*, 923 F.3d 806, 814 (10th Cir. 2019) (internal quotation marks omitted).

2. Additional Background

Before trial the government submitted a notice of its intent to offer as evidence the pornographic anime files found on Mr. Morrow's devices. The government contended that the anime was admissible as res gestae[3] or under Rule 404(b) as evidence that Mr. Morrow intended to engage in the charged crimes, that he knew the relevant search terms, and that it was no mistake or accident that depictions of real child abuse were also found on his devices. Mr. Morrow opposed admission of the evidence, contending that it was not res gestae and that the government's allegedly proper Rule 404(b)(2) purposes were a veneer obscuring its true intent: "to convince the jury that if [Mr.] Morrow possessed child erotica that depicts the animated sexual abuse of children, then it is more likely that he would possess child pornography." R., Vol. I at 84 (internal quotation marks omitted). The district court did not rule on the matter before trial and the parties renewed these arguments at the outset of trial. The district court determined that the evidence was not res gestae and might not be admissible under Rule 404(b); it said that it would wait to see if Mr. Morrow asserted

[3] This court has said that res gestae evidence "encompasses conduct inextricably intertwined with the charged crime such that a witness's testimony would have been confusing and incomplete without mention of the prior act." *United States v. Piette*, 45 F.4th 1142, 1155 (10th Cir. 2022) (internal quotation marks omitted.)

a defense that the government might rebut through proper use of the evidence under Rule 404(b).

Mr. Morrow took the stand as the first and only witness for the defense. Direct examination was very brief. He merely denied downloading or distributing child pornography, though he admitted having seen it accidentally. On cross-examination he said that no one else in the home regularly used his computers but also testified that he had witnessed his computer "doing all kinds of stuff by itself," suggesting that this may have been a sign of hacking or the result of "the computer [being] fed false information." *Id.* at 381–82. He also admitted to downloading anime using Torrent programs but described that anime as "[u]sually TV shows, slice of life, action, that sort of stuff." *Id.* at 384.

At this point the government argued (at a sidebar conference) that Mr. Morrow had "open[ed] the door to [further questioning about the] types of anime and animation that [he] was downloading" from Torrent sites. *Id.* at 385. It argued that the evidence was relevant to show lack of mistake and to rebut any allegation that a virus or other user was responsible for the downloads. The court excused the jury and discussed the matter with counsel in open court. Mr. Morrow conceded that the government had offered a proper purpose for admissibility but disagreed that the evidence satisfied Rules 401 and 403. He further argued that the government was attempting to introduce the evidence to prove a propensity to download real child pornography based on his downloading similar animated images.

Although the district court did not rule at that time, it engaged in a thorough colloquy with counsel and concluded by advising the parties that the anime evidence could be admissible provided the government laid the proper foundation. It indicated that it thought there was now a proper purpose for admitting the evidence: "I am concerned by the fact that the defendant has now taken the position that things were on his devices that he didn't place there. In other words that there is a mistake on his computer." *Id.* at 387. And it expressed a tentative conclusion that the anime evidence was relevant under Rule 401:

> [T]he testimony has established[] that this exhibit that's at issue was located in the defendant's computer in the same place with the child pornography that he claims "don't know why it's there, don't know how it got there[."] And so couldn't a jury reasonably conclude that his concession of downloading anime and placing it on his device next to child pornography provides a basis for them to conclude he knew about the child pornography.

Id. at 391.

The jury was recalled and Mr. Morrow retook the witness stand. The government asked him to describe the content of several anime child-pornography images. When asked if he was aware that approximately 300 such images were found on his desktop computer, he said only that he had "been told so, yes." *Id.* at 400. He admitted to using a Torrent site called HorribleSubs to download anime. But he denied knowing how the 4,000 unlawful files got stored on his devices, saying that it was unlikely the result of a virus but likely the work of a hacker or someone with "physical access." *Id.* at 408. He had no explanation of how any of the files had come to be found on the thumb-drive storage devices, which do not connect to the internet.

He insisted that the files were not on any of his devices before February 2020 (when the search warrant was executed).

On rebuttal the government recalled Detective Jennings to testify about the pornographic anime. She said that she recovered over 300 such images from Mr. Morrow's Diablotek desktop and the thumb drive attached to his car keys. She also said that some of the anime files had file names indicating that they had been downloaded from HorribleSubs and that they had been viewed on a video player called VLC, which had also been used to view real child pornography contained on the same computer. At least some of the anime files were also saved in the same folder as some of the real child pornography.

The government moved to admit the anime images into evidence, arguing that, given Mr. Morrow's concession that he used Torrent programs to download anime and the similarities between the abuse depicted in the anime and the real child pornography, the anime rebutted Mr. Morrow's defense of mistake. Over Mr. Morrow's objection the court admitted the anime exhibit, telling counsel at a bench conference:

> I conclude that the offer of [the anime exhibit] is for a proper purpose because the defendant has now invoked that he does not know why those are on his device, they're there by accident or mistake or otherwise, that they are closely situated to things that are at issue in this case, children pornographic images, and that the place of those and the timing of those at least is relevant under [Rule] 401 for the jury to consider whether they refute his assertion of mistake, accident, lack of knowledge. . . . The [Rule] 403 analysis [is] perhaps the most difficult but in light of the other content from his computer that's been admitted, I cannot find and do not find that its prejudicial effect substantially outweighs its probative value.

Id. at 416. The court then gave an agreed-upon limiting instruction, requiring that the jury consider the anime evidence solely in evaluating Mr. Morrow's "knowledge, absence of mistake or accident and for no other purpose," and cautioning that "the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case." *Id.* at 417. The court gave the same limiting instruction at the close of the evidence.

3. Analysis

We perceive no abuse of discretion in the district court's careful application of the four-prong *Huddleston* inquiry. Mr. Morrow suggests the court erred in its analysis on prongs one and three—that the anime evidence was not offered for a proper purpose under Rule 404(b) and that its admission resulted in unfair prejudice substantially outweighing any probative value. We are not persuaded.

The district court admitted the evidence to rebut Mr. Morrow's "assertion of mistake, accident, lack of knowledge." *Id.* at 416. "[W]hen a defendant denies an element of the crime," including the "knowledge" required for a conviction, "evidence of prior acts is admissible to rebut the denial." *United States v. Isabella*, 918 F.3d 816, 841 (10th Cir. 2019). At trial, defense counsel did not dispute that the government had identified a proper purpose for admitting the anime.

Now, however, Mr. Morrow argues that the district court cannot have admitted the anime evidence for a proper purpose under Rule 404(b) because he did not open

the door to other-act evidence. He asserts that his defense at trial was that "he did not have anything to do with all the images the government found, he did not know how they got there, and he believed it must have been an 'outside source'" that placed the files on his computer, Aplt. Br. at 25, not that the files were downloaded by accident or mistake. And his testimony at trial, he argues, was consistent with that defense.

But we think the district court got the analysis right. The gist of Mr. Morrow's defense was that he did not intentionally introduce the photos and images onto his computer. Whether they were introduced by accident (say, a computer glitch), a mistake (by himself or someone else), or intentional sabotage (by an "outside source") is beside the point. Each possibility would render him innocent; and evidence inconsistent with those possibilities would point to his culpability.

In our view, the evidence that Mr. Morrow intentionally downloaded child-pornographic anime from a website he admitted to using and into the same folder that contained illegal child-pornography files helps rebut his claim that the charged material appeared by some accident, mistake, or act of an outside source. We have previously affirmed the admission of similar evidence for similar purposes. *See United States v. Schene*, 543 F.3d 627, 643 (10th Cir. 2008) (uncharged child-pornography images admissible as other-act evidence because they showed "intent and knowledge"); *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (uncharged child-pornography images admissible as other-act evidence "to prove that (1) [the defendant's] possession of child pornography on his computer was not a

mistake or accident, and (2) he had knowledge of the nature of the material he was receiving"). The district court, after thoroughly exploring the evidence and the relevant law with counsel, ruled that the anime evidence could reasonably persuade the jury that Mr. Morrow intentionally accessed the illegal images and videos. We see no abuse of discretion in that ruling.

Mr. Morrow's other challenge is that the admission of all 300 anime files was unfairly prejudicial and also heightened the risk that the jury would interpret the anime as evidence of his propensity to download real child pornography. In the context of Rule 403, *unfair prejudice* means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules.

In support of his argument that the anime was prejudicial and would be used for such an improper purpose, Mr. Morrow contends that two government statements to the court argued that the anime was relevant because it showed his propensity to commit the offense. In the pretrial notice of its intent to offer the anime evidence, the government asserted, among other things, that the evidence was relevant because "someone who is interested in and knowingly downloads cartoon child pornography is also likely to do the same with child pornography of real children." R., Vol. I at 35. And in arguing to the court at sidebar that the evidence should be admitted to rebut Mr. Morrow's defense of mistake or lack of knowledge, the government argued (in part) that the evidence satisfied Rule 401 because "the vast majority of the [real]

child pornography found on the defendant's devices depicts the sexual abuse . . . [of] female children" and that the proffered anime evidence depicted "the exact same thing . . . except [in] anime form." *Id.* at 390. Mr. Morrow's concerns about these arguments are not unfounded. But they were made out of the hearing of the jury, and the record shows that the court considered only the appropriate proposed purpose (absence of knowledge or mistake) in admitting the evidence. In addition, given that the jury saw dozens of images depicting the sexual abuse of real children and heard Detective Jennings's testimony that over 4,000 similar files and a checklist of child pornography search terms authored by Mr. Morrow were discovered on his devices, the district court reasonably found that any prejudicial (inflammatory) effect of the anime evidence did not outweigh its probative value. Further, the district court instructed the jury when the evidence was admitted (as well as the next day at the close of the evidence) on the limited proper use (and the forbidden improper use) of the anime evidence.[4] We conclude that the district court's decision fell "within the

[4] The prosecution made two additional apparently improper statements during closing argument, urging the jury to conclude that the common abusive themes depicted in the anime and the real images and videos were proof that Mr. Morrow had a "type of content he liked." R., Vol. I at 452. But even if these statements were contrary to the court's instructions, Mr. Morrow did not object to the statements at trial, and he has not argued on appeal that these statements constitute independent prosecutorial misconduct. In any event, the remedy for improper statements would not be to exclude the evidence, which had already been properly admitted. *See United States v. Richards*, 719 F.3d 746, 763–64 (7th Cir. 2013) (although district court did not abuse its discretion in admitting other-act evidence under Rule 404(b), reversal required because of government's propensity arguments in closing).

bounds of permissible choice." *Martinez*, 923 F.3d at 814 (internal quotation marks omitted).

B. Kory's Statements Against Penal Interest

Mr. Morrow argues that the district court erred in excluding statements against interest by his brother Kory that Mr. Morrow sought to admit under Fed. R. Evid. 804(b)(3). The district court determined that Kory's statements were indeed against his interest because they exposed him to criminal liability but concluded that they were not sufficiently corroborated to justify admission.

1. Evidentiary Rules and Standard of Review

An unavailable declarant's prior statement is "not excluded by the rule against hearsay" if the statement is one that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to . . . criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as [a statement] that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3). We review for abuse of discretion the district court's decision to admit or exclude evidence under Rule 804(b)(3).[5] *See United States v. Lozado*, 776 F.3d 1119, 1124 (10th Cir. 2015).

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[5] Mr. Morrow argues that we should review the district court's decision de novo because it limited his right to present a defense. The government appears to concede that we would review de novo a claim of a denial of a constitutional right. But even if a defendant contends that an evidentiary ruling violated his constitutional right to present a defense, the proper application of standard rules of evidence does not violate that right. *See Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)

Among the grounds for finding that a declarant is unavailable is that "the declarant . . . is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." Fed. R. Evid. 804(a)(1). One such privilege is the declarant's Fifth Amendment right against self-incrimination. *See United States v. Miller*, 954 F.3d 551, 561 (2d Cir. 2020); *cf. United States v. Salerno*, 505 U.S. 317, 321 (1992) (parties agreed that witnesses were unavailable because they had properly invoked their privilege against self-incrimination); *Lozado*, 776 F.3d at 1123 (district court determined that witness was unavailable because he had properly invoked privilege against self-incrimination).

The corroboration requirement of Rule 804(b)(3)(B) is included because "statements . . . tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness." Fed. R. Evid. 804(b)(3)(B) advisory committee's note to 1974 enactment; *see also United States v. Henderson*, 736 F.3d 1128, 1130 (7th Cir. 2013) ("The rule's corroboration requirement reflects a long-standing concern that a criminal defendant might get a pal to confess to the crime the defendant was accused

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("While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."); *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). Thus, because we hold that the standard rules of evidence were properly applied, Mr. Morrow has no constitutional claim.

of, the pal figuring that the probability of his actually being prosecuted either for the crime or for perjury was slight." (ellipsis and internal quotation marks omitted)). "The inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable." *Lozado*, 776 F.3d at 1132 (brackets and internal quotation marks omitted). "This is not an insignificant hurdle, though the court does not have to conclude that the statements sought to be admitted were surely true, for it is the role of the jury—not the court—to assess the credibility of witness testimony." *Id.* (brackets, citation, and internal quotation marks omitted).

We have said that "the close relationship" between the declarant and the defendant and "the inconsistencies in [the declarant's] statement," are both "circumstances that counsel against the trustworthiness of the statement." *Id.* at 1133; *see United States v. Hammers*, 942 F.3d 1001, 1011 (10th Cir. 2019) (similar). Also, "[w]hen there is proof the declarant knowingly lied in making the statement against penal interest, the statement would almost certainly be excluded for lacking corroboration of its trustworthiness." *Lozado*, 776 F.3d at 1126 n.4; *see United States v. Taylor*, 848 F.3d 476, 487 (1st Cir. 2017) ("[A] statement may be corroborated by the circumstances in which the statement was made if . . . there is no indication that the speaker had motive to lie."). [6]

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[6] An amendment to Rule 804(b)(3)(B) is currently pending. *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence* 297–99 (Aug. 2022), https://www.uscourts.gov/file/45217/download. Under the proposed

2. Additional Background

On the morning of February 27, 2020, as police executed the search warrant at Mr. Morrow's home, detectives also conducted separate interviews of Mr. Morrow and his brother Kory in a police vehicle. It is Kory's interview that is at issue here.

When detectives explained to Kory why they were searching the house, he denied having downloaded child pornography and repeatedly expressed disbelief that anyone in his family would have intentionally done so. He said he had regularly and recently downloaded adult pornography but that he was "always careful" to avoid files with names suggesting the contents might include the abuse of children. R., Vol. I at 137. He admitted to accidentally downloading and viewing part of a video

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amendment, a statement against interest may be admitted if it is "offered in a criminal case as one that tends to expose the declarant to criminal liability [and] is supported by corroborating circumstances that clearly indicate its trustworthiness *after considering the totality of circumstances under which it was made and evidence, if any, corroborating it*." *Id.* at 298 (emphasis added). The proposed Committee Note states:

> A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

Id. at 299. We understand the proposed amendment as consistent with this court's current approach and, were the amendment already in effect, it would not alter the analysis or outcome here.

involving a girl who looked underage, but said he deleted it immediately. He provided the detectives with the passcode to his computer.

When TPD Detective McCoy acknowledged that perhaps Mr. Morrow or his mother, and not Kory, was the one responsible, the tone and substance of Kory's responses shifted:

> DETECTIVE MCCOY: Well, maybe it's not you. Maybe it's, you know, your brother or mom, I don't know.
>
> KOR[]Y: No, never.
>
> DETECTIVE MCCOY: Never what?
>
> KOR[]Y: Never my mother or my brother.
>
> DETECTIVE MCCOY: I take – take it back. I'm sorry, man.
>
> KOR[]Y: Fuck. Shit. I – I'll fucking take the blame for that shit.
>
> DETECTIVE MCCOY: I don't want you to take the blame.
>
> KOR[]Y: I don't give a damn. That's my fucking family, man. I'm sorry. And please forgive me, but God damn it. We've been here – you know what the – the hell we've been through here? I would never ever, ever want to see a child get hurt or anything like that.
>
> DETECTIVE MCCOY: Okay.
>
> KOR[]Y: If it was downloaded, it was on accident and – shit, even if it was, like, you're going to say, Hey, you know what, it's on there; it's an accident. Fuck it, I'll take it. There ain't no way in hell I'm going to let my family pay for some shit like that on an accident. I'll go fucking down.
>
> DETECTIVE MCCOY: Kor[]y –
>
> KOR[]Y: I love my family, man.
>
> . . .
>
> DETECTIVE MCCOY: Kor[]y, I'm not lying to you and I totally get what you're saying, but the thing is, somebody has downloaded a bunch of movies here.

> KOR[]Y: Then I'll fucking take it. Throw it on me.
>
> DETECTIVE MCCOY: I'm not throwing anything on you.
>
> KOR[]Y: I want you to.
>
> DETECTIVE MCCOY: Why would I want to?
>
> KOR[]Y: Because at the end of the damn day, I know those two idiots are innocent.

Id. at 156–58.

For the remainder of his interview, Kory made inconsistent statements in which he alternated between insisting that no one in his family (including himself) would intentionally download unlawful material and offering to take the fall for any files TPD found. First, he insisted he had "never downloaded anything intentional in [his] life." *Id.* at 158. Then he admitted that, contrary to his earlier statements, he had in the past downloaded files labeled "Too young" or "Lolita"; he said he did not realize that these terms would not simply refer to 18-year-olds or other young-looking adults until someone "warned [him] about that." *Id.* at 160–61. Kory repeated: "I wouldn't dream of doing that crap on purpose," followed shortly thereafter by "no way, not a chance my family. Me, blame me. I don't give a damn." *Id.* at 163–64.

After McCoy reiterated that he only wanted Kory to tell the truth and questioned whether Kory was responsible for all files TPD downloaded from the Morrows' IP address, Kory responded: "No, I'm not going to tell you that's the truth because it's never been anything I've downloaded intentionally. I've mass downloaded music and games." *Id.* at 165. Then he stated, "If something happened,

my dumb ass did it and I'll take the blame for it" but repeated that he had never intentionally downloaded illegal materials and said that if he'd ever seen "anything like remotely too young, [he] would delete it immediately." *Id.* at 166–67. And when McCoy mentioned the child-pornography term PTHC—a term contained in the filenames of several of the files TPD downloaded from the Morrows' IP address—Kory said he did not know what it meant and McCoy had to explain that it referred to preteen hard-core. When McCoy said that many illegal files had been downloaded, Kory expressed skepticism and said, "I got to try to think who's been on my computer. Earl, no." *Id.* at 169.

McCoy said he would interview both Kory's mother and brother. Kory responded: "Pick on me. I know it's not either one of them." *Id.* at 170. His final acceptance of blame was again internally inconsistent:

> KOR[]Y: I'll take the blame if there's anything on there, even – even if there's a picture.
>
> DETECTIVE MCCOY: Okay.
>
> KOR[]Y: But there's never been nothing intentional.

Id. at 171.

McCoy explained, "I need more details from you if you're going to take the blame," *id.*, and ended the interview with the words, "tell me the details and the truth," *id.* at 173–74. Kory responded: "That's all I can tell you." *Id.* at 174.

At a pretrial conference on November 10, 2021, defense counsel first raised the possibility that Kory, who had been placed on Mr. Morrow's witness list, would

invoke his Fifth Amendment right against self-incrimination if he was called. The court agreed with the defense suggestion that the matter be resolved before the start of trial. On the first day of trial Kory was questioned under oath outside the presence of the jury about using BitTorrent and downloading child pornography; he invoked the Fifth Amendment. The government conceded that Kory was unavailable as a witness for trial.

During the government's case, defense counsel attempted to cross-examine Detective Jennings about Kory's interview with the police. At the ensuing bench conference, defense counsel argued that she could elicit testimony under Rule 804(b)(3) because Kory made statements to law enforcement taking responsibility for any downloads of child pornography in the household, which was "clearly contrary to his interest." *Id.* at 328. Defense counsel also argued that the statements were corroborated, as required under Rule 804(b)(3)(B), by the presence of child pornography on Kory's computer. The government argued that the statements were not against interest because they were not inculpatory and were, instead, the statements of a man who had never intentionally downloaded child pornography but was nonetheless attempting to protect his family.

The district court ruled that several statements qualified as statements against interest but ruled that they were not sufficiently corroborated to be admissible, saying that Mr. Morrow "failed to identify any corroborating circumstances for Kory[]'s statements that he[would] take the blame." *Id.* at 347. And the court noted the close

relationship between the brothers and Kory's apparent motive to protect his family as reasons to doubt the veracity of the statements.

3. Analysis

We see no abuse of discretion in the district court's corroboration ruling. To be sure, 37 unlawful image files were found on Kory's devices, and he might have been prosecuted for that. But it is hard to conceive why he would access so many more illegal images and videos on his brother's devices than on his own. And when the officer interviewing him said that he needed "more details from you if you're going to take the blame," and later said, "tell me the details," Kory was unable to provide such details, responding, "That's all I can tell you." *Id.* at 171, 173–74. This failure to provide any corroboration at the time of the "confession" is particularly telling and is almost dispositive. Also, Kory had a motive to lie when he attempted to take responsibility for any illegal files downloaded within the home; he made the statements only when interviewing detectives suggested that his brother or mother, and not Kory, might have been responsible for the files downloaded by TPD. "A close relationship between the declarant and the defendant can damage the trustworthiness of a statement." *Lozado*, 776 F.3d at 1133. Further, Kory's interview—particularly the final portion when he was attempting to take responsibility—is rife with inconsistencies. He repeatedly asked detectives to place any blame on him because he knew his mother and brother were innocent, but he also insisted over and over that he never intentionally downloaded child pornography.

These statements alternate in quick succession. Mr. Morrow argues that Kory's *consistent* defense of his family weighs in favor of corroboration but the transcript as a whole indicates that Kory's inculpatory statements were untrustworthy.

Mr. Morrow's additional arguments to the contrary—that Kory's awareness of the severity of the situation, minimal familiarity with child-pornography terms, and use of BitTorrent corroborate his statements against interest—provide little support. Almost anyone being interviewed in the back of a police car while officers executed a search warrant on his home would recognize the seriousness of the situation. That a statement is made to police makes it more likely that an inculpatory statement will be used against him, but it is not itself necessarily a source of corroboration. *Cf. United States v. Barone*, 114 F.3d 1284, 1301 (1st Cir. 1997) ("the fact that [the declarant] made the statements to close relatives in a noncustodial setting rather than to the police" constituted a "corroborating circumstance[] that clearly indicate[d] the trustworthiness of the [declarant's] statements" (original brackets and internal quotation marks omitted)). And although Kory was aware of terms such as "too young" and "Lolita," he also told the detectives that he had believed they referred to young-looking but nonetheless adult women. And when McCoy mentioned the term PTHC, Kory was not familiar with it. Further, Kory's frequent use of BitTorrent, although relevant had the government taken his case to trial, does not explain why he would have so frequently used it to download content on his brother's password-protected devices in addition to his own. Mr. Morrow's purported evidence of

corroboration does not overcome the substantial indicia of unreliability. The district court did not abuse its discretion in excluding Kory's statements.

C. Prosecutor's Statement During Closing Argument

Mr. Morrow argues that the district court plainly erred in not correcting the following false statement about Kory made by the government during its closing argument:

> Now, there's nothing stopping two people from independently downloading child pornography from each other. Maybe the Morrow brothers just share a sexual interest in children or maybe Earl just used Kory's computer, but as the judge instructed you today, Kory Morrow's computer, Earl's brother, should be of no concern to you. He's not on trial. *Not yet*.

R., Vol. I at 451 (emphasis added). As the parties and the court knew, however, the charges against Kory had been dismissed ten days before trial. Mr. Morrow did not object.

Mr. Morrow now contends that the district court's failure to correct the misstatement violated his due-process rights because it was a "false insinuation [that] allowed the jury to think both brothers were responsible, whether jointly or separately, instead of deciding if [Kory's] role raised any doubt for their decision in Mr. Morrow's case." Aplt. Br. at 49.

"We analyze whether a statement constitutes prosecutorial misconduct using a two-step process": we determine (1) "whether the prosecutor's statements were improper" and, (2) in the case of an improper statement, whether the impropriety was "harmless" because it did not prejudice the defendant. *United States v. Rodella*, 804

F.3d 1317, 1335 (10th Cir. 2015) (internal quotation marks omitted). "Although a prosecutor may comment on and draw reasonable inferences from evidence presented at trial, arguing *prejudicial* facts not in evidence is one type of prosecutorial misconduct." *Underwood v. Royal*, 894 F.3d 1154, 1167 (10th Cir. 2018) (emphasis added, and brackets, citation, and internal quotation marks omitted). "[W]hen a defendant fails to object to an allegedly improper statement during trial, we review only for plain error." *Rodella*, 804 F.3d at 1335 (internal quotation marks omitted). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Cushing*, 10 F.4th at 1081 (internal quotation marks omitted). An error affects substantial rights when it prejudices the defendant by likely affecting the outcome of the proceedings. "[I]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Rodella*, 804 F.3d at 1335 (internal quotation marks omitted).

Mr. Morrow has not carried his burden to establish the requisite prejudice. The misstatement, if anything, supported Mr. Morrow's defense that Kory alone may have been to blame for the files found on all devices, including those belonging to Mr. Morrow. The district court's instruction not to consider whether Kory was guilty further diminishes any possibility of prejudice.[7]

[7] The court instructed the jury as follows:

The Ninth Circuit decision in *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), upon which Mr. Morrow relies, does not support a contrary result. In *Kojayan*, a drug-conspiracy case, the defense argued that the government did not call a co-conspirator to testify because his testimony would have been unfavorable to the prosecution. *See id.* at 1317. At closing argument the government responded to that assertion by suggesting that the co-conspirator had invoked his Fifth Amendment right and could not be forced to testify. *See id.* at 1317–18. But the co-conspirator had, in fact, signed a cooperation agreement and the government (which was obliged to disclose such information to the defense) had substantial leverage to get him to testify. *See id.* at 1318, 1323. On appeal the defendant claimed prosecutorial misconduct, and the court reversed. *See id.* at 1324–25. *Kojayan* is easily distinguished. The false statement by the prosecutor in that case undermined a valid defense argument. Here, in contrast, the falsity actually supported Mr. Morrow's contention that someone else (perhaps his brother) must have been responsible for the illegal images and videos.

> It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person also may be guilty is no defense to a criminal charge.
>
> The question of possible guilt by others should not enter your thinking as you decide whether the government has proved the defendant guilty of the crimes charged.

Aplee. Supp. R. at 15 (Jury Instruction 10).

III. CONCLUSION

Because we discern, at most, one (nonreversible) error in Mr. Morrow's first three claims (the prosecution's "not yet" statement in closing argument), his cumulative-error claim also fails. *See Cushing*, 10 F.4th at 1082. We **AFFIRM** Mr. Morrow's convictions.