

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 8 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALLEN GESSEN,

Defendant - Appellant.

No. 24-2979

D.C. No.

3:22-cr-00276-JSC-1

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted July 7, 2026
San Francisco, California

Before: PAEZ, TALLMAN, and BENNETT, Circuit Judges.

Allen Gessen appeals his conviction for murder-for-hire under 18 U.S.C. § 1958. In this memorandum disposition, we resolve his evidentiary challenges and due process challenge. We address other issues in a concurrently filed opinion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. The district court did not abuse its discretion in allowing Special Agent David Rizzo to testify about his understanding of Gessen's statements. When Rizzo testified about his recorded communications with Gessen, the government asked Rizzo to explain Rizzo's understanding of statements that Gessen made. Gessen's counsel, in turn, objected on relevance grounds and that the question called for Rizzo to speculate as to Gessen's state of mind. But the district court largely overruled these objections, finding that Rizzo testified only "as to what he understood Mr. Gessen to be saying" and explaining that Rizzo "doesn't obviously know what was in Mr. Gessen's head."

On appeal, Gessen contends that this testimony was speculative and an improper opinion. The parties dispute whether Gessen's evidentiary challenge was properly preserved—and thus, whether the standard of review is abuse of discretion or plain error. *See* Fed. R. Evid. 103(a); *United States v. Gadson*, 763 F.3d 1189, 1199 (9th Cir. 2014); *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016). But because we find that the district court committed no error on either ground, it does not matter whether Gessen properly preserved these objections.

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. "[P]ersonal knowledge includes opinions and inferences grounded in observations and experience." *United States v. Whittemore*, 776 F.3d 1074, 1082

(9th Cir. 2015) (quoting *Great Am. Assurance Co. v. Liberty Surplus Ins. Corp.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009)). And for lay opinion testimony to be admissible, it must be “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701.

Rizzo testified about statements that Gessen made to him and vice versa. This is sufficient to satisfy the first requirement of Rule 701. *See United States v. Simas*, 937 F.2d 459, 464–65 (9th Cir. 1991).

“As to the second requirement, a lay witness’ opinion concerning the witness’ understanding of the declarant’s statements or conduct may be helpful to the jury.” *Id.* at 465. Gessen’s statements to the undercover agent were often “vague” or coded, so “[t]he listener’s understanding of the words and innuendo was helpful to the jury in determining what [the declarant] meant to convey.” *See id.*; *see also United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007).

As to the third requirement, Rizzo did not base his testimony on scientific, technical, or other specialized knowledge within the scope of Rule 702. He testified about his own understanding of his conversations with Gessen, which is an appropriate subject of a lay opinion. And Rizzo’s opinions were based on his own participation in the conversation and his personal knowledge of the investigation,

not any specialized training. *See United States v. Perez*, 962 F.3d 420, 436 (9th Cir. 2020) (“[W]hether evidence is more properly offered by an expert or a lay witness depends on the basis of the opinion, not its subject matter.” (citation modified)).

Gessen presses that Rizzo offered expert testimony on the ultimate question of fact, Gessen’s mental state, in violation of Rule 704(b). But Rizzo did not testify about Gessen’s intent. He offered his own understanding of their conversations. Indeed, the district court instructed the jury that Rizzo was not testifying about “what was in Mr. Gessen’s head.”

For these reasons, Rizzo’s testimony was properly admitted as a lay opinion and was not improperly speculative.

2. The district court did not abuse its discretion in admitting evidence of Gessen’s prior international abductions of his son and his parental kidnapping charge. “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.” Fed. R. Evid. 404(b)(1). But such “evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2).

Evidence of other acts may be admitted if: (1) the evidence tends to prove a material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that the defendant committed

the other act; and (4) (in cases where knowledge and intent are at issue) the act is similar to the offense charged.

United States v. Flores-Blanco, 623 F.3d 912, 919 (9th Cir. 2010) (quoting *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994)). “If the evidence meets this test under Rule 404(b), the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403.” *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (quoting *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002)). And by the text of Rule 403, we do not look at “prejudice” per se, we look at “unfair prejudice.” See Fed. R. Evid. 403; *United States v. Ruiz*, 167 F.4th 1024, 1036 (9th Cir. 2026).

Evidence that Gessen took his son out of the country in 2019 and 2021 is admissible under Rule 404(b)(2) and is not barred by Rule 403. The evidence tended to prove the material issues of Gessen’s motive and intent. At trial, Gessen disputed his intent and denied any motive to murder Priscilla Chigariro, the mother of his children. But evidence of the abductions was probative of Gessen’s motive and intent: to obtain exclusive custody of his son by extreme means. Indeed, Gessen discussed the 2021 incident and his resulting criminal charges with Rizzo, explaining that he was “pissed off” at Chigariro for getting him arrested for kidnapping and that he wanted to “get rid of her.” The acrimonious custody proceedings, Gessen removing his son from the country, and his arrest all bear on Gessen’s motive and intent.

As to the timeliness requirement, Gessen's June 2019 kidnapping of his son, which continued until July 2021, occurred within three years of the charged conduct in June 2022. And Gessen's December 2021 flight to Canada occurred within six months of it. This is sufficiently contemporaneous to the charged conduct. *See, e.g., United States v. Lozano*, 623 F.3d 1055, 1059–60 (9th Cir. 2010) (per curiam) (concluding that three years is not too remote); *United States v. Banks*, 514 F.3d 959, 976 (9th Cir. 2008) (finding that prior act evidence which occurred four years prior was not too remote when the government introduced the evidence to show motive).

Gessen concedes that he removed his son from the country in 2019 and 2021 and intended to gain sole custody of him. Thus, there is no dispute that he committed the prior acts.

The prior acts are also similar enough to the murder-for-hire offense to show Gessen's motive and intent. “[P]ast conduct need not be identical to the conduct charged, but instead need only be similar enough to be probative of intent.” *United States v. Johnson*, 132 F.3d 1279, 1283 (9th Cir. 1997). The jury could reasonably conclude that Gessen's motive as to each was the same: to gain sole custody. And the prior abductions and the offense “involved the same participants,” *United States v. Cox*, 963 F.3d 915, 924–25 (9th Cir. 2020), Gessen, Chigariro, and their son.

Finally, the probative value of the evidence was not substantially outweighed by its potential for *unfair* prejudice. While the evidence was prejudicial in the

general sense of increasing the likelihood of conviction (as is the case with all damaging evidence), we see nothing about it that was *unfairly* prejudicial. The evidence neither “create[d] a risk that [Gessen] would be convicted ‘on a ground different from proof specific to the offense charged’” nor would it have “shock[ed] the average juror or otherwise render[ed] the jury incapable of weighing the evidence in a disinterested manner.” *See Banks*, 514 F.3d at 976–77 (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)). Even assuming the evidence had some unfairly prejudicial effect, it was “minimized” by the district court’s instructions to the jury, *see Flores-Blanco*, 623 F.3d at 920, and any danger of unfair prejudice did not substantially outweigh the probative value of the evidence as to Gessen’s motive and intent.

3. The district court’s failure to remedy one of the prosecutor’s cross-examination questions did not violate Gessen’s right to due process. A prosecutor’s misconduct is constitutional error only when it “so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see Greer v. Miller*, 483 U.S. 756, 765–67 (1987) (applying *Darden*’s quote from *Donnelly* to a prosecutor “asking an improper question in the presence of the jury”).

During Gessen's direct examination, counsel asked about the custody arrangement between Gessen and Chigariro. At one point, Gessen explained that he "wanted, at any cost, to be reunited with the children." In the next question, counsel sought to "clarify" Gessen's response: "Now, I want to clarify something. You just said by any means, or at any cost, you wanted to be reunited with the children. Would that include murder of Ms. Chigariro?" Gessen responded, "No, sorry. I - no. I meant not at any cost; at any reasonable cost."

On cross-examination, the prosecutor attempted to seize on Gessen's statement. She pressed, "you also said that you wanted to be reunited with your children at any cost." Gessen responded, "Oh, I testified that, right." And the prosecutor replied, "And then your lawyer helped you and said: Oh -." Gessen's counsel objected, and the prosecutor rephrased. Gessen did not then ask the court to rule on his objection, nor did he seek any further remedy, such as striking the question or instructing the jury to disregard it.

Even assuming that the prosecutor's question was improper, Gessen has not shown that the district court's failure to remedy it violated his right to due process. At issue is a single question, which the prosecutor voluntarily withdrew and rephrased—without further objection. The extensive and outrageous misconduct that the Supreme Court held insufficient in *Darden v. Wainwright*, see 477 U.S. at 179–81 & nn.9–12, is far worse than the single question here. And given the strength

of the evidence against Gessen, we see no basis to conclude that the question “so infected the trial with unfairness” as to deny Gessen due process. *See id.* at 181 (quoting *Donnelly*, 416 U.S. at 643).

AFFIRMED.