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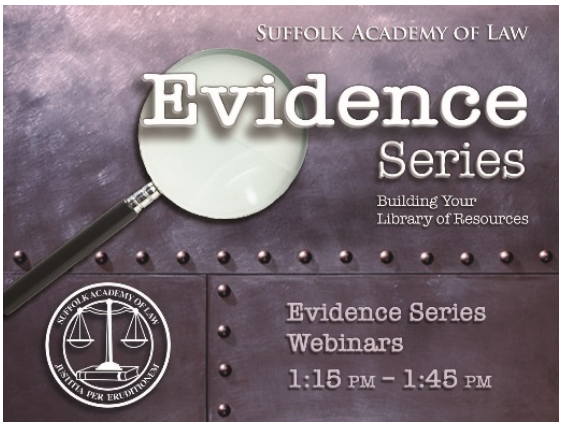

EVIDENCE SERIES:
Social Media Admissibility

FACULTY:

Harry Tilis, Esq.

Moderator: Hon. Jennifer A. Mendelsohn

November 9, 2021
Suffolk County Bar Association, New York

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HARRY TILIS, ESQ.

Harry is the law clerk to the Honorable Paul Hensley, County Court Judge and Acting Family Court Judge. Harry is also a past Dean of the Suffolk Academy of Law. A 1989 ***magna cum laude*** graduate of the Cornell Law School, Mr. Tilis lectures extensively for the Academy and other CLE providers on topics related to trial practices and developing trends in case law. He began his career in the corporate department of Proskauer, Rose, Goetz and Mendelsohn and has served as general counsel for industry leading companies before transitioning his practice to representation of small businesses, their entrepreneurs and their families. He is the author of The Art of Influence Simplified for Lawyers.

In addition to volunteering over 100 hours per year for the Empire Mock Trial Association and the American Mock Trial Association, Harry actively supports the American Foundation for Suicide Prevention. His work responsibilities include serving as one of the Counsel at First Appearance Attorneys in Suffolk County District Court.

Social Media Admissibility

Lunch and Learn CLE – The Evidence Series

Presented by: Harry Tilis, Esq.

SUFFOLK ACADEMY OF LAW

November 9, 2021

PRESENTER BIOGRAPHY

SUFFOLK ACADEMY OF LAW

Social Media Admissibility

HARRY TILIS, ESQ., is a past Dean of the Suffolk Academy of Law and past President of the Suffolk County Criminal Bar Association. A 1989 *magna cum laude* graduate of the Cornell Law School, Mr. Tilis lectures extensively on topics related to trial practices and developing trends in case law. He began his career in the corporate department of Proskauer, Rose, Goetz and Mendelsohn and served as general counsel for industry leading companies before transitioning his practice to representation of small businesses, their entrepreneurs and their families, including people facing addiction and other health issues in connection with court proceedings.

Now, he is the principal law clerk to Hon. Paul M. Hensley, a County Court Judge serving as an acting Family Court Judge.

Authentication of Social Media Images

• *People v Price,* 29 NY3d 472 (2017)

TWO LEVELS OF AUTHENTICATION

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TWO LEVELS OF AUTHENTICATION

ACCURATE REPRESENTATION OF WHAT WAS ON SOCIAL MEDIA

IMAGE ACCURATELY PORTRAYS WHAT IT PURPORTS TO PORTRAY

SAME FOUNDATION

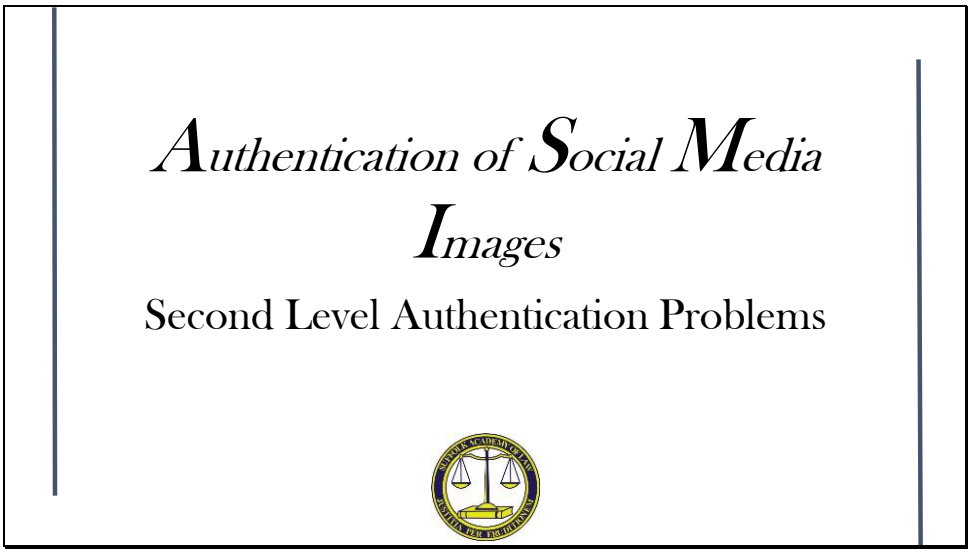
People v Byrnes, 33 NY2d 343 (1974)

Authentication of Social Media Images

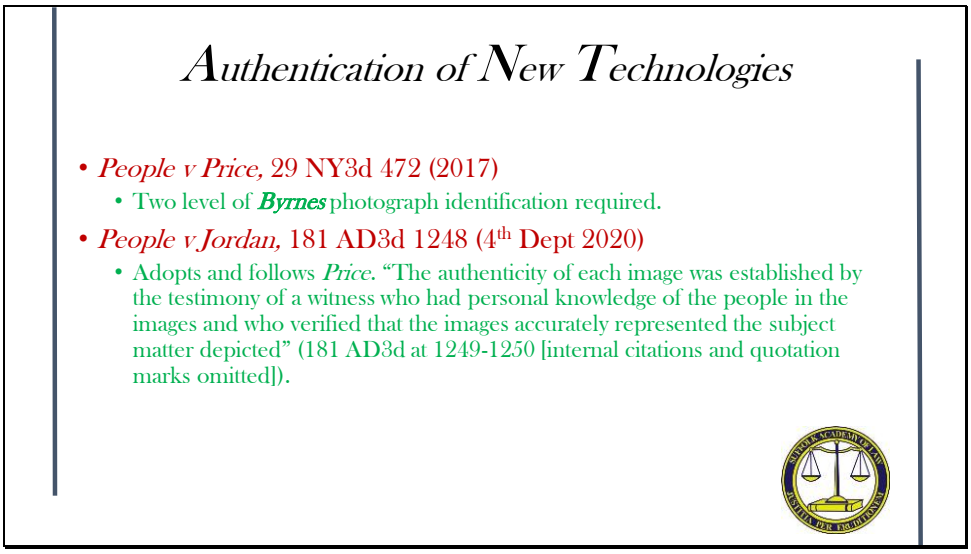
- *People v McGee*, 49 NY2d 48 (1979)
- The standard of proof for the foundation for real evidence is clear and convincing evidence, and, where evidence is fungible, like drugs, including a chain of custody.

Authentication of Social Media Images

- *People v McGee*, 49 NY2d 48, 59 (1979)
- "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it."

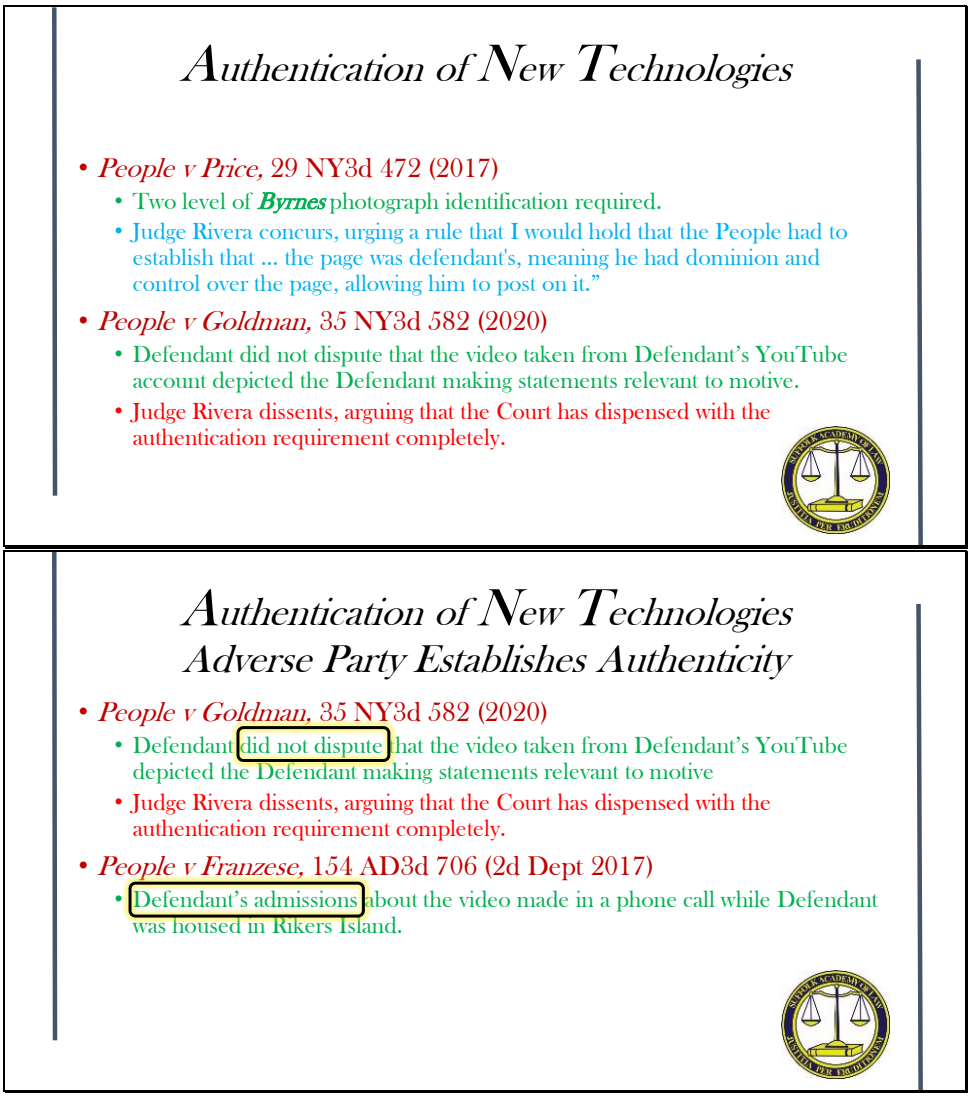


The most significant challenge that the second level authentication presents is that the available witnesses are unlikely to have witnessed the event that the image purports to depict or to have legal (non-eavesdropping) possession of the social media or other electronic message. This program provides a primer on how litigants and courts have surmounted (or, depending on your perspective) circumvented the requirements of second level authentication problems.

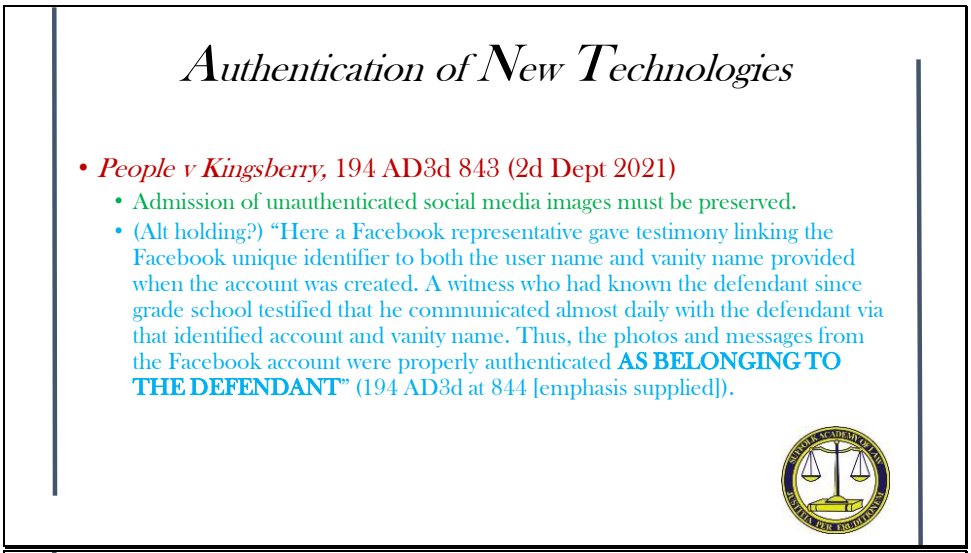


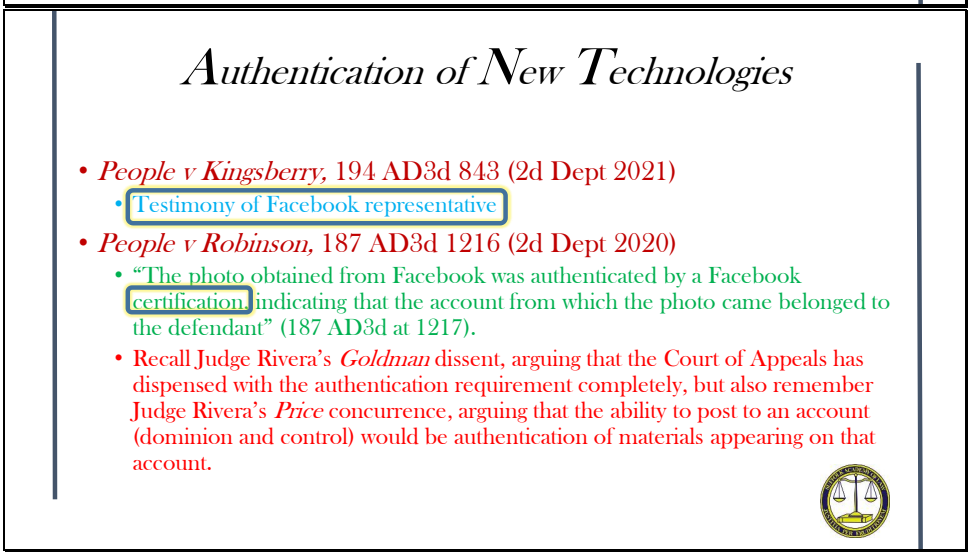
Jordan is classic *Price* second level authentication. The opinion is not clearly written because it uses the relative pronoun "who" twice. Thus, the opinion seems to say that one witness had personal knowledge of the people in the images (which *Oglivie* and *Gordon*, *infra*, discuss) and another witness, perhaps without knowledge of who the people were, testified that the images accurately portrayed what the images depicted. If the second branch—accurate portrayal of an actual event—exists, then the first branch—testifying about the contents—is not an authenticity point; the contents testimony may have been needed to establish relevance of some other admissibility issue, but not authenticity.

If two witnesses testified, the Fourth Department could have been more explicit given that a piecemeal authentication is precisely what *Price* rejected, not because it was piecemeal, but because it was inadequate to establish the *Byrnes* foundation. If, however, the Fourth Department was capturing the entirety of one witnesses' testimony, then it could have said "one witness who _____ and _____" thereby using the pronoun once and being even more obvious with the word "one."



Here, the Courts take the defendant's (party against whom the evidence will be offered) admission by silence or oral admission as sufficient proof that the video is an accurate portrayal of the events the video depicts, which, like *Jordan*, is the classic implementation of *Price*'s two-level authentication process. Evidence in the record establishes that the image is accurate.





Kingsberry and *Robinson* fall into the Judge Rivera concurrence model of proving that the party against whom the social media image is offered is, in fact, in control of the social media account from which the image was taken. This is the "dominion and control" test that Judge Rivera sets forth in the *Price* concurrence.

In effect, the "dominion and control" or "belongs to" test stands for the proposition that something that a social media account holder allows to remain on that social media account constitutes the social media account holder's acknowledgment or admission that the content is accurate.

Authentication of New Technologies

- *People v Kingsberry,* 194 AD3d 843 (2d Dept 2021)
  - Testimony of Facebook representative
- *People v Robinson,* 187 AD3d 1216 (2d Dept 2020)
  - Facebook certification
- *United States v Hunt*, 115 Fed R Evid Serv (Callaghan) 283 (EDNY 2021)
  - The content of a Facebook post or authorship of a Facebook message is NOT and cannot be established through a business record certification

Authentication of Social Media Images

- Whether defendant was known to use an account on the website in question.
- Whether defendant communicated with anyone through the account.
- Whether the account (or access to it) could be traced to electronic devices the defendant owned.
- Whether the account (and posting to it?) was password protected or accessible by others.

Altered? Photoshopped?

- Deletable by defendant?

Accurate?

People v Price, 29 NY3d 472 (2017)

Hunt and the circuit court of appeals cases it cites illuminates a key distinction about testimony or other evidence from the social media company—that company can establish facts relevant to and possibly sufficient to determine dominion and control/belongs to, but that company cannot establish that the content of the account, including images and messages thereon, are accurate. Although not explicit in *Hunt*, it would seem that testimony or other evidence from the social media company can satisfy the first level of *Price* authentication.

Authentication of New Technologies

- *Matter of Montalbano v Babcock,* 155 AD3d 1636 (4th Dept 2017)
  - Mother's testimony that Mother communicated with Father through the Facebook page was sufficient to provide second level authentication to a photograph on Father's Facebook page.
- *Matter of Rutland v O'Brien,* 143 AD3d 1060 (3rd Dept 2016)
  - Facebook messages were authenticated as coming from Mother's account because Father obtained them from an iPod of one of the children without password protection.

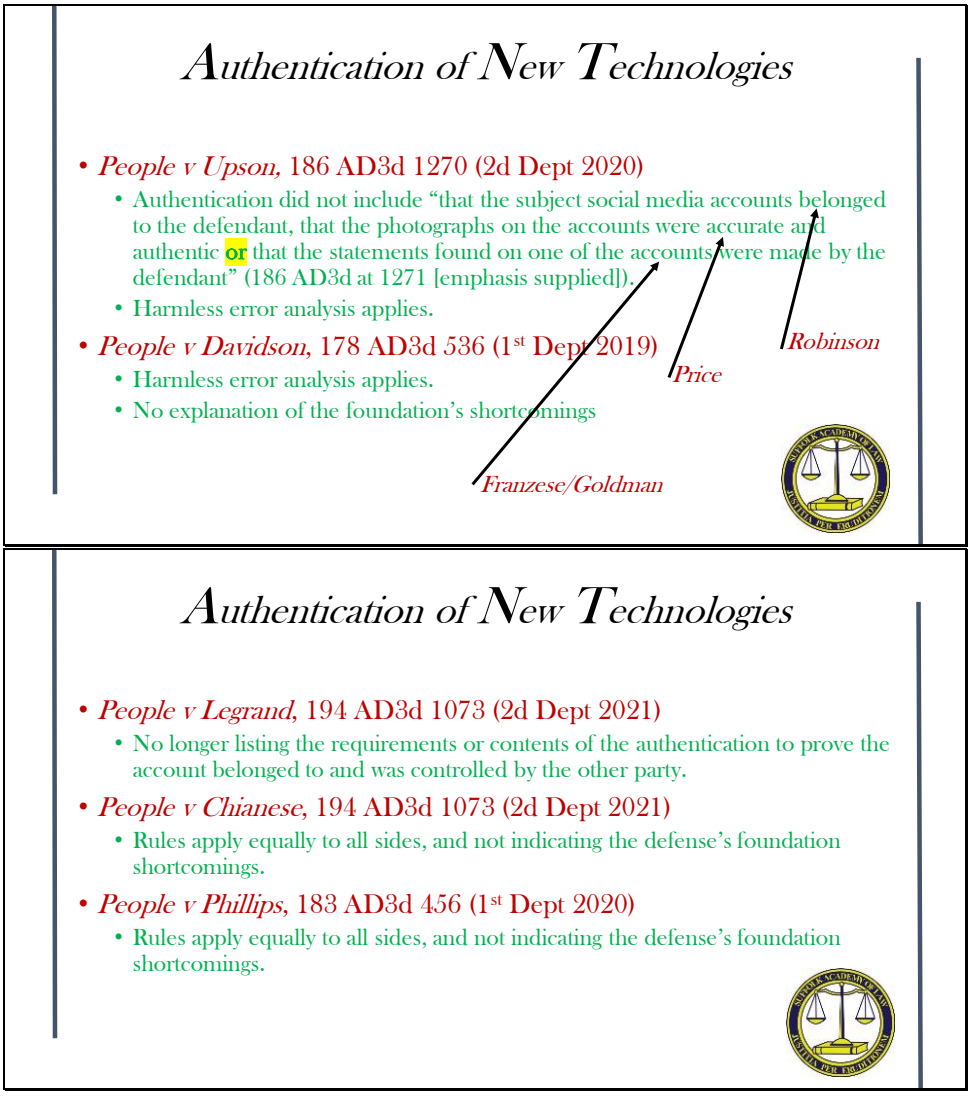
Authentication of New Technologies

- *Matter of Rutland v O'Brien,* 143 AD3d 1060 (3rd Dept 2016)
  - Facebook messages obtained from an iPod without password protection.
- CPLR 4506 – Eavesdropping Evidence is Inadmissible
- Penal Law § 250.05 – "A person is guilty of eavesdropping when [the person] engages in wiretapping, mechanical overhearing or intercepting or accessing of an electronic communication." [emphasis supplied]
- Penal Law § 250.00 [6] – " 'Intercepting or accessing of an electronic communication' and 'intentionally intercepted or accessed' mean the intentional acquiring . . . without the consent of the sender or intended receiver thereof . . .."

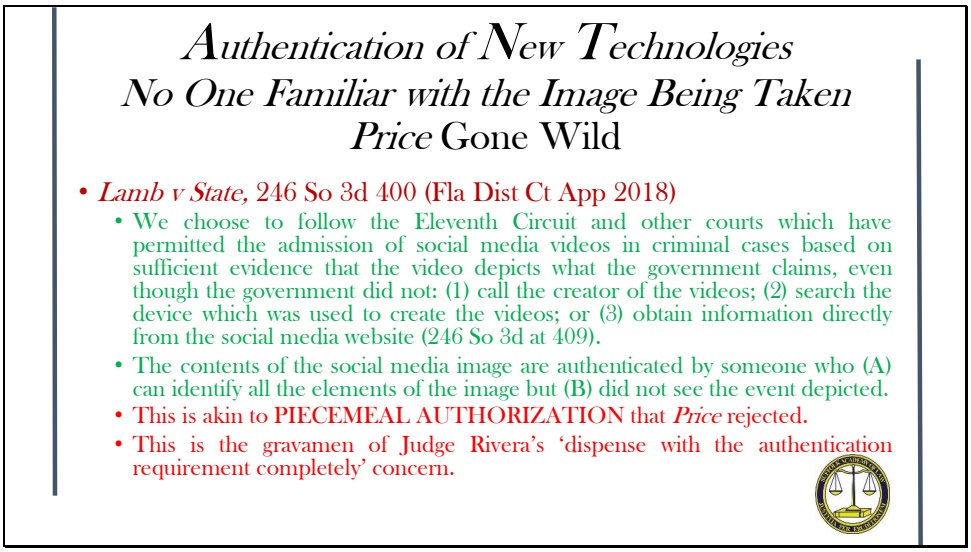
Authentication of New Technologies

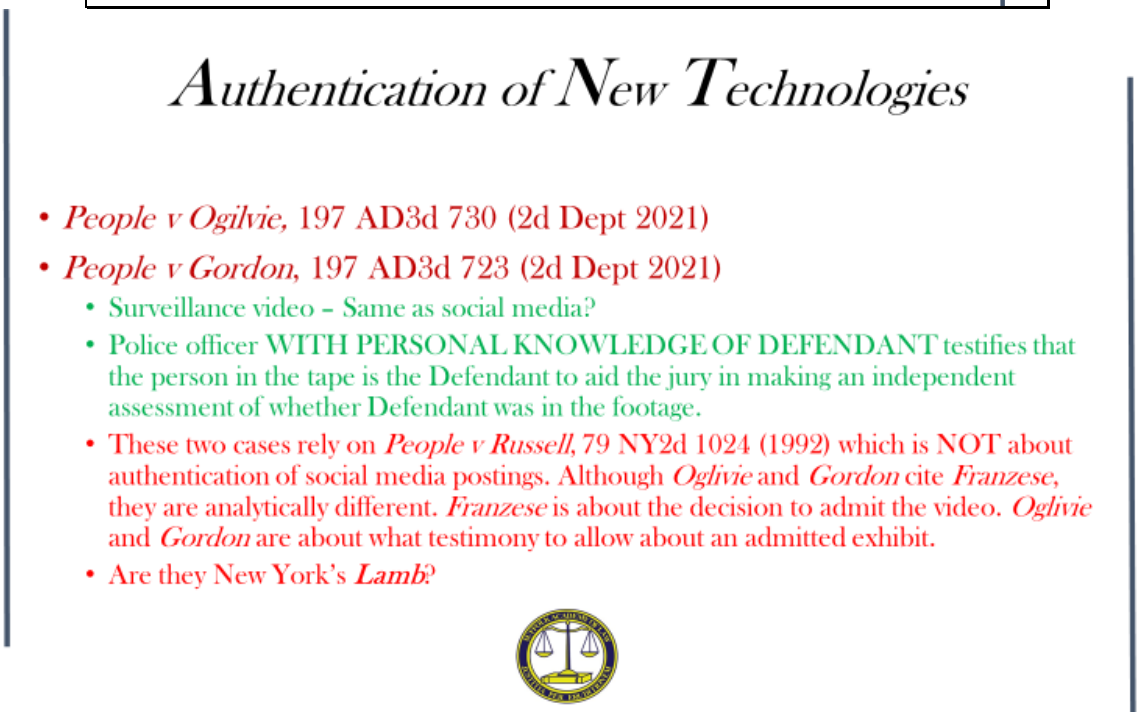
- *Matter of Rutland v O'Brien,* 143 AD3d 1060 (3rd Dept 2016)
  - Facebook messages obtained from an iPod without password protection.
- CPLR 4506 – Eavesdropping Evidence is Inadmissible
- *People v Badalamenti,* 27 NY3d 423 (2016)
  - A guardian with a good faith (subjective) and objectively reasonable reason to believe that accessing a child's otherwise protected communication may vicariously consent on the child's behalf.

The communicated through the account is a specific factor that *Price* set forth as being absent. DISTINGUISH BETWEEN AUTHENTICATION AND ADMISSIBLITY. Authentication is a necessary but not sufficient condition for admissibility. For example, a social media image of a child driving a speedboat on July 15 is irrelevant to a case about a breach of contract case to sell apples. While the social media image may be authentic, it is inadmissible on relevance grounds. Similarly, hearsay, character evidence, *Molineux*, and all other conditions to admissibility must be satisfied or waived before authentic evidence is admissible.



The appellate opinions are becoming stingier with the facts about authentication that exist or are absent from the record, suggesting in the post-*Upton* world that the area of law is sufficiently developed to render unnecessary in-depth discussion.





Although we find no New York case that goes as far as *Lamb* which cannot stand for the proposition that a person with knowledge that the social media image accurately portrays what it purports to depict is sufficient. If *Lamb* involved someone or some people testifying akin to *Jordan* that established a *Byrnes* foundation for the social media image, then *Lamb* is too involved an opinion for such a simple proposition, particularly because *Lamb* cites *Franzese* which, in turn,

cites *Price*. *Lamb* could have simply cited *Price* as a sister state case that allows what *Lamb*'s record supports—that the record supported a finding that the social media image was accurate.

Oglivie and *Gordon* also show the importance of keeping cases within the doctrinal boundaries of the case. Those two cases relate to what testimony may be furnished once an exhibit has been admitted which is entirely different from *Price* and the *Price* line of cases which are about getting the exhibit admitted. In other words, the testimony discussed on appeal in *Oglivie* and *Gordon* is not authentication testimony.

# # #

834 F.3d 403 (2016)

UNITED STATES of America
v.
Tony Jefferson BROWNE, Appellant.

No. 14-1798.

United States Court of Appeals, Third Circuit.

Argued December 10, 2015.
Filed: August 25, 2016.

405*405 On Appeal from the District Court of the Virgin Islands, (D.C. No. 3-13-cr-00037-001), District Judge: Curtis V. Gomez.

Everard E. Potter, Esq. [ARGUED], Ronald Sharpe, Esq., Office of United States Attorney, 5500 Veterans Building, Suite 260, United States Courthouse, St. Thomas, VI 00802, Counsel for Appellee.

Omodare Jupiter, Esq. [ARGUED], Office of Federal Public Defender, 1115 Strand Street, Suite 201, Christiansted, VI 00820, Counsel for Appellant.

BEFORE: FISHER, KRAUSE, and ROTH, Circuit Judges.

OPINION OF THE COURT

Krause, Circuit Judge.

The advent of social media has presented the courts with new challenges in the prosecution of criminal offenses, including in the way data is authenticated under the Federal Rules of Evidence — a prerequisite to admissibility at trial. Appellant Tony Jefferson Browne was convicted of child pornography and sexual offenses with minors based in part on records of "chats" exchanged over Facebook and now contests his conviction on the ground that these records were not properly authenticated with evidence of his authorship. Although we disagree with the Government's assertion that, pursuant to Rule 902(11), the contents of these communications were "self-authenticating" as business records accompanied by a certificate from the website's records custodian, we will nonetheless affirm because the trial record reflects more than sufficient extrinsic evidence to link Browne to the chats and thereby satisfy the Government's authentication burden under a conventional Rule 901 analysis.

I. Background

A. Facts

Facebook is a social networking website that requires users to provide a name and email address to establish an account. Account holders can, among other things, add other users to their "friends" list and communicate with them through Facebook chats, or messages.

Under the Facebook account name "Billy Button," Browne began exchanging messages with 18-year-old Nicole Dalmida in November 2011. They met in person a few months later and then exchanged sexually explicit photographs of themselves through Facebook chats. Browne then threatened to publish Dalmida's photos online unless Dalmida engaged in oral sex and promised to delete the photos only if she provided him the password to her Facebook account.

Using Dalmida's account, Browne made contact with four of Dalmida's "Facebook friends," all minors — T.P. (12 years old), A.M. (15 years old), J.B. (15 years old) and J.S. (17 years old) — and solicited explicit photos from them by a variety of means. Once he had the minors' photos, he repeated the pattern he had established with Dalmida, threatening all of them with the 406*406 public exposure of their images unless they agreed to engage in various sexual acts and sent additional explicit photos of themselves to his Button Facebook account or to his phone number ("the 998 number"). He arranged to meet with three of the minors and sexually assaulted one.

On receiving information from the Virgin Islands Police Department, agents from the Department of Homeland Security (DHS) interviewed Dalmida and three of the minors. In June 2013, DHS arrested Browne and executed a search warrant on his residence. Among the items seized was a cell phone that matched the 998 number and from which text messages and photos of the minors were recovered. During questioning and at trial, Browne admitted the 998 number and phone belonged to him. DHS executed a search warrant on the Button Facebook account, which Browne also admitted belonged to him, and Facebook provided five sets of chats and a certificate of authenticity executed by its records custodian.

B. Proceedings

At trial, over defense counsel's objections, the District Court admitted the five Facebook chat logs and certificate of authenticity into evidence. Four of the chats involved communications between the Billy Button account and, respectively, Dalmida, J.B., J.S. and T.P.[1] The fifth chat did not involve Button's account and took place between Dalmida and J.B., on the subject of Browne's sexual assault of J.B. The certificate stated, in accordance with Rule 902(11) of the Federal Rules of Evidence, that the records that Facebook had produced for the named accounts met the business records requirements of Rule 803(6)(A)-(C). Tracking the language of Rule 803(6), the custodian certified that the records "were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook ... [and] were made at or near the time the information was transmitted by the Facebook user." App. 403; *see* Fed. R. Evid. 803(6).

Relevant to this appeal, seven witnesses testified for the Government: Dalmida and the four minors, and two Special Agents from DHS. Dalmida and the four minors provided extensive testimony about their communications with Button. According to that testimony, using Dalmida's Facebook account, Browne sent explicit photos of Dalmida to T.P. and A.M. and

requested photos in return, and using his own Facebook account, he contacted J.S. and offered to pay her for sexually explicit photos of herself. The testimony and chat logs also established that Browne used Dalmida's account to instruct J.B. to add him as a friend on Facebook, after which he used his own account to send her explicit photos of himself and asked her to do the same.

All four minors testified that after receiving requests for explicit photos, they complied by sending Facebook messages to the Button account or by texting images to the 998 number, and that they subsequently received threats that their photos would be published online if they did not comply with the sender's sexual demands. And on the stand, Dalmida and each of the four minors identified various Government exhibits as photos they took of themselves and sent to the Button account or the 998 number.

Dalmida and three of the minors (all but T.P.) also testified to meeting Browne in person and identified Browne in open court as the man they had met after making meeting arrangements through messages to the Button account or the 998 407*407 number. Two of the minors who met Browne in person testified that they were forced to do more than send additional explicit photographs. A.M. explained that after receiving instructions to text her photos to the 998 number, she received messages from the Button account demanding sexual intercourse and threatening her with the exposure of her images if she refused. After sending her the images, presumably to prove they were in his possession, the individual using the 998 number repeated his threat and instructed her to "play with [her]self" on a video chat site so he could watch. Fearful he would follow through on his threat, she complied. Another minor, J.B., testified that after she arranged to meet Browne through the Button account, Browne sexually assaulted her and recorded the encounter. She also confirmed that she exchanged Facebook messages with Dalmida describing the incident shortly after it occurred.

Special Agents Blyden and Carter testified to details of Browne's arrest and the forensics examination of the items seized from Browne's residence. Special Agent Blyden recounted Browne's post-arrest statements that he knew and had exchanged "nude photos" with Dalmida, that he admitted to knowing three of the minors (all but A.M.), and that he had paid minor J.S. for nude photos of herself. Special Agent Blyden also identified the Facebook chat conversations as records she had received from Facebook and testified that Facebook had provided the accompanying certificate. Special Agent Carter, the forensics agent, testified to the items recovered from Browne's home, including the phone associated with the 998 number, and identified sexually explicit photos of Dalmida and three of the minors (all but J.B.) as images that were recovered from the phone.[2]

The defense put only Browne on the stand. Browne testified that his Facebook name was Billy Button, and that he knew Dalmida and minors J.S. and J.B. and had corresponded with them on Facebook. He denied knowing or communicating with minor T.P., contradicting Special Agent Blyden's testimony that he had admitted to this after his arrest, and did not state whether he knew A.M. Browne also denied sending any photos to the victims or requesting photos from them. As to the incriminating data discovered on the phone with the 998 number, he testified that he loaned the phone to Dalmida in December of 2012 and intermittently between January and March 2013, and that he also loaned the phone to a

cousin at an unspecified time.[3] At one point during his testimony, he confirmed he owned a second phone and number ("the 344 number").

Browne was convicted by a jury after a two-day trial.[4] He now appeals his conviction 408*408 on the ground that the Facebook records were not properly authenticated and should not have been admitted into evidence.

II. Jurisdiction

The District Court had jurisdiction under 18 U.S.C. § 3231 and 48 U.S.C. § 1612(c), and we have jurisdiction under 28 U.S.C. § 1291. We review the District Court's decision regarding the authentication of evidence for abuse of discretion, *United States v. Turner,* 718 F.3d 226, 232 (3d Cir. 2013), and exercise plenary review over its interpretation of the Federal Rules of Evidence, *United States v. Console,* 13 F.3d 641, 656 (3d Cir. 1993).

III. Discussion

Browne argues that the Facebook records were not properly authenticated because the Government failed to establish that he was the person who authored the communications. More specifically, Browne contends that no witness identified the Facebook chat logs on the stand; nothing in the contents of the messages was uniquely known to Browne; and Browne was not the only individual with access to the Button account or the 998 number. The Government, for its part, argues the Facebook records are business records that were properly authenticated pursuant to Rule 902(11) of the Federal Rules of Evidence by way of a certificate from Facebook's records custodian.

The proper authentication of social media records is an issue of first impression in this Court. In view of Browne's challenge to the authentication and admissibility of the chat logs, our analysis proceeds in three steps. First, as with non-digital records, we assess whether the communications at issue are, in their entirety, business records that may be "self-authenticated" by way of a certificate from a records custodian under Rule 902(11) of the Federal Rules of Evidence. Second, because we conclude that they are not, we consider whether the Government nonetheless provided sufficient extrinsic evidence to authenticate the records under a traditional Rule 901 analysis. And, finally, we address whether the chat logs, although properly authenticated, should have been excluded as inadmissible hearsay, as well as whether their admission was harmless.

A. Self-authentication

To satisfy the requirement under Rule 901(a) of the Federal Rules of Evidence that all evidence be authenticated or identified prior to admission, the proponent of the evidence must offer "evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(b), in turn, sets forth a non-exhaustive list of appropriate methods of authentication, including not only "[t]estimony that an item is what it is claimed to be," Fed. R. Evid. 901(b)(1), but also "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," Fed. R.

Evid. 901(b)(4), and "[e]vidence describing a process or system and showing that it produces an accurate result," Fed. R. Evid. 901(b)(9).

The central dispute in this case is complicated, however, by the Government's contention that it authenticated the Facebook chat logs by way of Rule 902, under which extrinsic evidence is not required for 409*409 certain documents that bear sufficient indicia of reliability as to be "self-authenticating." Specifically, the Government relies on Rule 902(11), which provides that "records of a regularly conducted activity" that fall into the hearsay exception under Rule 803(6) — more commonly known as the "business records exception" — may be authenticated by way of a certificate from the records custodian, as long as the proponent of the evidence gives the adverse party reasonable notice and makes the record and certificate available for inspection in advance of trial. Fed. R. Evid. 902(11).[5]

The viability of the Government's position turns on whether Facebook chat logs are the kinds of documents that are properly understood as records of a regularly conducted activity under Rule 803(6), such that they qualify for self-authentication under Rule 902(11). We conclude that they are not, and that any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule.

First, to be admissible, evidence must be relevant, which means "its existence simply has some `tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Jones,* 566 F.3d 353, 364 (3d Cir. 2009) (quoting Fed. R. Evid. 401). Because evidence can have this tendency only if it is what the proponent claims it is, i.e., if it is authentic, *United States v. Rawlins,* 606 F.3d 73, 82 (3d Cir. 2010), "Rule 901(a) treats preliminary questions of authentication and identification as matters of conditional relevance according to the standards of Rule 104(b)," *United States v. Reilly,* 33 F.3d 1396, 1404 (3d Cir. 1994) (quoting Jack B. Weinstein & Margaret A. Berger, 5 Weinstein's Evidence ¶ 901(a)[01] at 901-15 (1993)).[6] Rule 104(b), in turn, provides that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Fed. R. Evid. 104(b). We have determined that to meet the Rule 104(b) standard of sufficiency, the proponent of the evidence must show that "the jury could reasonably find th[ose] facts ... by a preponderance of the evidence." *United States v. Bergrin,* 682 F.3d 261, 278 (3d Cir. 2012) (quoting *Huddleston* 410*410 *v. United States,* 485 U.S. 681, 690, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1998)) (alterations in original); *see also United States v. Khorozian,* 333 F.3d 498, 506 (3d Cir. 2003) ("Authentication does not conclusively establish the genuineness of an item; it is a foundation that a jury may reject.").

Here, the relevance of the Facebook records hinges on the fact of authorship. To authenticate the messages, the Government was therefore required to introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence, that Browne and the victims authored the Facebook messages at issue. The records custodian here, however, attested only that the communications took place as alleged between the named Facebook accounts. Thus, accepting the Government's contention that it fulfilled its authentication obligation simply by submitting such an attestation would amount to holding that social media evidence need not be subjected to a "relevance" assessment prior to

admission. Our sister Circuits have rejected this proposition in both the digital and non-digital contexts, as do we. *See* *United States v. Vayner,* 769 F.3d 125, 132 (2d Cir. 2014) (holding that a social media profile page was not properly authenticated where the government offered evidence only that the webpage existed and not that it belonged to the defendant); *United States v. Southard,* 700 F.2d 1, 23 (1st Cir. 1983) (observing that self-authentication "does not eliminate the requirement of relevancy" and requiring testimony linking the codefendant, who had a common name, to the driver's license and work permit issued under that name).

The Government's theory of self-authentication also fails for a second reason: it is predicated on a misunderstanding of the business records exception itself. Rule 803(6) is designed to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded.[7] *See* *E.C. Ernst, Inc. v. Koppers Co.,* 626 F.2d 324, 330-31 (3d Cir. 1980) (holding that pricing sheets satisfied Rule 803(6) because, among other things, "the sheets were checked for accuracy"); *see also* *United States v. Gurr,* 471 F.3d 144, 152 (D.C. Cir. 2006) ("Because the regularity of making the record is evidence of its accuracy, statements by `outsiders' are not admissible for their truth under Fed. R. Evid. 803(6)."); Fed. R. Evid. 803 advisory committee's note (1972) ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.").

Here, Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business. At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged 411*411 over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times. This is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter. *See* *United States v. Jackson,* 208 F.3d 633, 637-38 (7th Cir. 2000) (holding that Internet Service Providers' ability to retrieve information that their customers posted online did not turn the posts that appeared on the website of a white supremacist group into the ISP's business records under Rule 803(6)); *cf.* *In re U.S. for Historical Cell Site Data,* 724 F.3d 600, 611 (5th Cir. 2013) (for Fourth Amendment purposes, defining business records as "records of transactions to which the record-keeper is a party," in contradistinction to "[c]ommunications content, such as the contents of letters, phone calls, and emails, which are not directed to a business, but simply sent via that business").

We have made a similar determination in the banking context. In *United States v. Furst,* 886 F.2d 558 (3d Cir. 1989), we held that the district court erred in admitting bank records as business records under Rule 803(6), even though the records verified the dates and amounts of certain deposits and receipts, because "significant" other portions of these documents had not been independently verified, and the records custodians lacked "knowledge as to the accuracy of the information on which the [bank] documents was based or as to the knowledge of the persons who prepared the records." *Id.* at 572.

If the Government here had sought to authenticate only the timestamps on the Facebook chats, the fact that the chats took place between particular Facebook accounts, and similarly technical information verified by Facebook "in the course of a regularly conducted activity," the records might be more readily analogized to bank records or phone records conventionally authenticated and admitted under Rules 902(11) and 803(6). *See id.* at 573 (concluding that the district court erred in admitting bank statements in the bank's possession under Rule 803(6) "to the extent the statements contained any data other than confirmations of transactions" with the bank). We need not address the tenability of this narrow proposition here, however, as the Government's interest lies in establishing the admissibility of the chat logs in full. It suffices for us to conclude that, considered in their entirety, the Facebook records are not business records under Rule 803(6) and thus cannot be authenticated by way of Rule 902(11). In fact, the Government's position would mean that all electronic information whose storage or transmission could be verified by a third-party service provider would be exempt from the hearsay rules — a novel proposition indeed, and one we are unwilling to espouse.

B. Authentication by way of extrinsic evidence

Our conclusion that the Facebook chat logs were not properly authenticated under Rule 902(11) does not end our inquiry, for we may consider whether the Government has presented sufficient extrinsic evidence to authenticate the chat logs under Rule 901(a). *See* *Vatyan v. Mukasey,* 508 F.3d 1179, 1184 (9th Cir. 2007); *United States v. Dockins,* 986 F.2d 888, 895 (5th Cir. 1993). To answer this question, we look to what the rule means in the social media context and how it applies to the facts here.

Conventionally, authorship may be established for authentication purposes by way of a wide range of extrinsic evidence. 412*412 *See* Fed. R. Evid. 901(b). In *United States v. McGlory,* 968 F.2d 309 (3d Cir. 1992), for example, we rejected a defendant's challenge to the authentication of notes that he had allegedly handwritten because, despite being unable to fully establish authorship through a handwriting expert, the prosecution had provided "sufficient evidence from which the jury could find that [the defendant] authored the notes." *Id.* at 329. The notes had been seized from the trash outside the defendant's known residences; some of the notes were torn from a notebook found inside his residences; some notes were found in the same garbage bag as other identifying information; and certain notes were written on note paper from hotels where the defendant stayed during the alleged conspiracy. *Id.* at 328-29.

Similarly, in *United States v. Reilly,* 33 F.3d 1396 (3d Cir. 1994), when considering whether the government's evidence "support[ed] the conclusion that the radiotelegrams are what the government claims they are, namely radiotelegrams to and from the *Khian Sea,* many of which were sent or received by [the defendant]," we determined that the government had met its authentication burden by way of not only direct testimony from individuals who identified the radiotelegrams but also "multiple pieces of circumstantial evidence." *Id.* at 1405-06. This included testimony explaining how the witness who produced the radiotelegrams had come to possess them, the physical appearance of the radiotelegrams, and evidence that the radiotelegrams were sent to the defendant's office or telex number. *Id.* at 1406.

We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence. The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, *see generally Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534 (D. Md. 2007), and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter, *cf. Griffin v. State,* 419 Md. 343, 19 A.3d 415, 424 (2011) (analyzing state analogue to Rule 901). But the authentication rules do not lose their logical and legal force as a result. *See Tienda v. State,* 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012) (describing the legal consensus as to the applicability of traditional evidentiary rules to electronic communications and identifying the many forms of circumstantial evidence that have been used to authenticate email printouts, internet chat room conversations, and cellular text messages); *see also Parker v. State,* 85 A.3d 682, 687 (Del. 2014) (analyzing state evidentiary rules and concluding that "[a]lthough we are mindful of the concern that social media evidence could be falsified, the existing [rules] provide an appropriate framework for determining admissibility."); *Burgess v. State,* 292 Ga. 821, 742 S.E.2d 464, 467 (2013) ("Documents from electronic sources such as the printouts from a website like MySpace are subject to the same [state] rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence."). Depending on the circumstances of the case, a variety of factors could help support or diminish the proponent's claims as to the authenticity of a document allegedly derived from a social media website, and the Rules of Evidence provide the courts with the appropriate framework within which to conduct that analysis.

Those Courts of Appeals that have considered the issue have reached the 413*413 same conclusion. In *United States v. Barnes,* 803 F.3d 209 (5th Cir. 2015), the Fifth Circuit held that the government laid a sufficient foundation to support the admission of the defendant's Facebook messages under Rule 901 where a witness testified that she had seen the defendant using Facebook and that she recognized his Facebook account as well as his style of communicating as reflected in the disputed messages. *Id.* at 217. In *United States v. Hassan,* 742 F.3d 104 (4th Cir. 2014), the Fourth Circuit held that the government properly linked the Facebook pages at issue to the defendants by using internet protocol addresses to trace the Facebook pages and accounts to the defendants' mailing and email addresses.[8] *Id.* at 133. And in *Vayner,* the Second Circuit held that the government failed to adequately authenticate what it alleged was a printout of the defendant's profile page from a Russian social networking site where it offered no evidence to show that the defendant had created the page. 769 F.3d at 131. In all of these cases, the courts considered a variety of extrinsic evidence to determine whether the government had met its authentication burden under Rule 901 — each reiterating, in the course of that analysis, that conclusive proof of authenticity is not required and that the jury, not the court, is the ultimate arbiter of whether an item of evidence is what its proponent claims it to be. *Barnes,* 803 F.3d at 217; *Vayner,* 769 F.3d at 131; *Hassan,* 742 F.3d at 133.

Applying the same approach here, we conclude the Government provided more than adequate extrinsic evidence to support that the disputed Facebook records reflected online conversations that took place between Browne, Dalmida, and three of the four minors, such

that "the jury could reasonably find" the authenticity of the records "by a preponderance of the evidence." *Bergrin,* 682 F.3d at 278.

First, although the four witnesses who participated in the Facebook chats at issue — Dalmida and three of the minors — did not directly identify the records at trial, each offered detailed testimony about the exchanges that she had over Facebook. This testimony was consistent with the content of the four chat logs that the Government introduced into evidence. Dalmida and two of the minors whose chat logs are at issue further testified that after conversing with the Button Facebook account or the 998 number that they received through communications with Button, they met in person with Button — whom they were able to identify in open court as Browne. This constitutes powerful evidence not only establishing the accuracy of the chat logs but also linking them to Browne. *See United States v. Tank,* 200 F.3d 627, 630-31 (9th Cir. 2000) (holding government made a prima face showing of authenticity under Rule 901(a) in part because several co-conspirators testified that the defendant was the person who showed up to a meeting that they had arranged with the person who used that screen name).

Second, as reflected in the trial testimony of both Browne and Special Agent Blyden, Browne made significant concessions that served to link him to the Facebook conversations. Most notably, Browne testified that he owned the "Billy Button" Facebook account on which the search warrant had been executed and that he knew and had conversed on Facebook with Dalmida and two of the minors. *See, e.g., Tank,* 200 F.3d at 630-31 (holding government met authentication burden where, among other things, defendant admitted 414*414 that screenname used in disputed text messages belonged to him). Browne also testified that he owned the phone that was seized from his residence — the same phone from which DHS recovered certain images that the victims identified on the stand as those they sent in response to commands from either the Button or Dalmida Facebook account or the 998 number. *Cf. United States v. Simpson,* 152 F.3d 1241, 1249-50 (10th Cir. 1998) (rejecting the defendant's claim that the trial court erred in admitting a printout of an alleged chat room discussion between the defendant and an undercover officer where, among other things, the pages seized from the defendant's home contained identifying information that the undercover officer had given the individual in the chat room). And Browne admitted that he owned a second phone with the 344 number, which is significant because, although Browne attempted to distance himself from the incriminating phone with the 998 number with the unsupported contention that he loaned it to other individuals at various points in the relevant time period, one of the challenged Facebook conversations shows that "Button" also provided the 344 number to minor J.S. on two occasions while trying to elicit sexual acts and photos. In addition, in Browne's post-arrest statements, which were introduced at trial, he provided the passwords to the Button Facebook account and to the phone with the 998 number and admitted to exchanging nude photos with Dalmida, paying J.S. for nude photos, going to J.B.'s home, and knowing a third minor, T.P., whom he referenced by Facebook account name.

Third, contrary to Browne's contention that "there is no biographical information in the [Facebook] records that links [him] to the documents," Appellant's Br. at 17, the personal information that Browne confirmed on the stand was consistent with the personal details that "Button" interspersed throughout his Facebook conversations with Dalmida and three of the minors. For example, Browne testified that his address was 2031 Estate Lovenlund, that

he was a plumber, and that he had a fiancée. The Facebook messages sent by "Button" are, in turn, replete with references to the fact that the sender was located or resided at Lovenlund. "Button" also stated to one minor, "I'm a plumber." App. 503. The chats reflect that somewhere on his Facebook profile, Button represented himself as being engaged. And in one of the disputed Facebook chats, Button informed a minor that his name was "Tony... Browne."[9] App. 519.

Lastly, the Government not only provided ample evidence linking Browne to the Button Facebook account but also supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems. To the extent that certified records straight from the third-party service provider are less likely to be subject to manipulation or inadvertent distortion than, for instance, printouts of website 415*415 screenshots, the method by which the Government procured the records in this case constitutes yet more circumstantial evidence that the records are what the Government claims.

In short, this is not a case where the records proponent has put forth tenuous evidence attributing to an individual social media or online activity that very well could have been conducted or fabricated by a third party. *See, e.g.,* *Vayner,* 769 F.3d at 131; *see also* *Smith v. State,* 136 So.3d 424, 433 (Miss. 2014) (holding that name and photo on Facebook printout were not sufficient to link communication to alleged author); *Griffin,* 19 A.3d at 423 (holding that the trial court abused its discretion in admitting MySpace website evidence because the state both failed to explain how it had obtained the challenged records and failed to adequately link the records to the defendant's girlfriend). Far from it. This record reflects abundant evidence linking Browne and the testifying victims to the chats conducted through the Button Facebook account and reflected in the logs procured from Facebook. The Facebook records were thus duly authenticated.

Browne makes much of the fact that the Government failed to ask the testifying witnesses point-blank to identify the disputed Facebook chats. As we explained, however, in *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916 (3d Cir. 1985), where we reversed the district court's determination that certain records could not be admitted into evidence unless they were introduced by a testifying witness, circumstantial evidence can suffice to authenticate a document. *Id.* at 928; *see also* Fed. R. Evid. 903 ("A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity."). Although a witness with personal knowledge may authenticate a document by testifying that the document is what the evidence proponent claims it to be, this is merely one possible means of authentication and not, as Browne would have it, an exclusive requirement. *See* Fed. R. Evid. 901(b)(1); *Simpson,* 152 F.3d at 1249-50 (rejecting the defendant's contention that statements from a chat room discussion could not be attributed to him where the government could not identify that they "were in his handwriting, his writing style, or his voice," as "[t]he specific examples of authentication referred to by [the defendant]... are not intended as an exclusive enumeration of allowable methods of authentication").

In sum, Browne's authentication challenge collapses under the veritable mountain of evidence linking Browne to Billy Button and the incriminating chats.

C. Admissibility

Having concluded that the Facebook records were properly authenticated by way of extrinsic evidence, we turn to Browne's more general argument that the records were inadmissible. Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception enumerated under Federal Rule of Evidence 802. *McGlory,* 968 F.2d at 331.

Here, the Government offered more than sufficient evidence to authenticate four of the five Facebook records as chats that Browne himself participated in by way of the Button account, and these four records were properly admitted as admissions by a party opponent under Rule 801(d)(2)(A). *See id.* at 334 & n.17 (observing that handwritten notes were admissible as admissions by a party opponent if the prosecution established defendant's authorship by a preponderance of the evidence); 416*416 *see also United States v. Brinson,* 772 F.3d 1314, 1320 (10th Cir. 2014) (same conclusion regarding Facebook messages); *United States v. Siddiqui,* 235 F.3d 1318, 1323 (11th Cir. 2000) (same conclusion regarding authenticated email).[10] Not so for the fifth.

We agree with Browne that the single chat in which Browne did not participate and which took place between Dalmida and J.B. regarding Button's "almost rape[]" of J.B. was inadmissible hearsay. App. 483. Notwithstanding the other reasons the Government may have sought to admit it, the record functioned at least in part to prove the truth of the matter asserted, that is, that Browne sexually assaulted J.B. and subsequently threatened her with video evidence of the assault. *See McGlory,* 968 F.2d at 332 ("This Court ... has disfavored the admission of statements which are not technically admitted for the truth of the matter asserted, whenever the matter asserted, without regard to its truth value, implies that the defendant is guilty of the crime charged.").[11]

Although we conclude that the District Court erred in admitting this chat log, we do not perceive grounds for reversal. Reversal is not warranted if it is "highly probable that the error did not contribute to the judgment." *United States v. Brown,* 765 F.3d 278, 295 (3d Cir. 2014) (quoting *United States v. Cunningham,* 694 F.3d 372, 391-92 (3d Cir. 2012)). This "high probability" standard for non-constitutional harmless error determinations "requires that the court possess a sure conviction that the error did not prejudice the defendant." *United States v. Franz,* 772 F.3d 134, 151 (3d Cir. 2014) (quoting *Cunningham,* 694 F.3d at 392).

We are confident there was no prejudice here. As detailed above, the Government 417*417 set forth abundant evidence that not only served to tie Browne and the victims to the chat logs but also supported Browne's guilt on all of the counts for which he was convicted irrespective of those records. Indeed, the two individuals who made the hearsay statements reflected in the fifth chat log, Dalmida and J.B., testified at length to the very details included in that Facebook chat log. Because there was overwhelming, properly admitted evidence supporting Browne's conviction on every count, and the sole improperly admitted Facebook record was "at most, duplicative of [the witnesses'] admissible testimony," *United States v. Kapp,* 781 F.2d 1008, 1014 (3d Cir. 1986), the erroneous admission was harmless and Browne's convictions must be sustained. *See Barnes,* 803

F.3d at 218 (concluding that any potential error in admitting disputed Facebook messages was harmless, as "the content of the messages was largely duplicative" of witness testimony and "given the overwhelming evidence of [the defendant's] guilt").

* * *

For the foregoing reasons, we will affirm the judgment of the District Court.

[1] The Government did not seek to admit into evidence any Facebook messages sent from the Button account to the remaining minor victim, A.M., but photos of A.M. were among those recovered from the phone seized from Browne's home and admitted into evidence.

[2] At trial, however, J.B. identified several Government exhibits as photos she had sent to Button's Facebook account or the 998 number.

[3] Dalmida testified that she never had Browne's phone in her possession, and Special Agent Blyden testified that during the investigation Dalmida denied ever receiving a phone from Browne.

[4] The jury convicted Browne on twelve counts, including the production of child pornography in violation of 18 U.S.C. § 2251(a) (Counts 1-4); the coercion and enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) (Count 8); the receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (Counts 9-12); and the transfer of obscene material to minors under age 16, in violation of 18 U.S.C. § 1470 (Count 17, 19-20). The jury acquitted Browne on three counts for coercion and enticement, in violation of 18 U.S.C. § 2422(b) (Counts 5-7), and on the count of aggravated first degree rape in violation of 14 V.I.C. § 1700(c) (Count 22). Before the jury rendered its verdict, the defense successfully moved to dismiss a charge of extortion using interstate commerce, in violation of 18 U.S.C. 875(d) (Count 21), and the Government successfully moved to dismiss one of the counts for the transfer of obscene material to minors under age 16 (Count 18) and all charges for possession of child pornography under 18 U.S.C. 2252(a)(4)(B) (Counts 13-16) in light of the fact that possessing child pornography is a lesser-included offense of the receipt of child pornography, *United States v. Miller,* 527 F.3d 54, 71-72 (3d Cir. 2008).

[5] Rule 803(6) allows for the admission of "[a] record of an act, event, condition, opinion, or diagnosis" containing hearsay if: "(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6). Rule 902(11), in turn, was adopted by amendment in 2000 to allow records of regularly conducted activity to be authenticated by certificate rather than by live testimony and provides that the proponent of a business record who meets certain notice requirements need not provide extrinsic evidence of authentication if the record meets the requirements of Rule 803(6)(A) through (C) "as shown by a certification of the custodian or another qualified person," Fed. R. Evid. 902(11); *see* Fed. R. Evid. 902 advisory committee's note (2000).

[6] Put differently, "[a]uthenticity is elemental to relevance." *Rawlins,* 606 F.3d at 82; *see* Fed. R. Evid. 901(a) advisory committee's note (1972) ("This requirement of showing authenticity or identity [under Rule 901(a)] falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).").

[7] When we stated in *United States v. Console* that "Rule 803(6) does not require that the person transmitting the recorded information be under a business duty to provide accurate information," 13 F.3d 641, 657 (3d Cir. 1993), we were observing that accuracy need not be guaranteed, but in no way suggested that accuracy is irrelevant. On the contrary, we went on to state: "[I]t is sufficient if it is shown that ... [the] standard practice was *to verify the information provided,* or that the information transmitted met the requirements of another hearsay exception." *Id.* at 657-58 (citations omitted) (alterations in original) (emphasis added).

[8] The Fourth Circuit also ruled that those Facebook pages were properly authenticated under Rule 902(11). *Hassan,* 742 F.3d at 133-34. For the reasons already stated above, we do not agree with this portion of the court's authentication holding.

[9] Browne argues that none of these biographical details constituted "information that only [he] could be expected to know," Appellant's Br. at 19, but we need not determine that, by itself, the information could suffice to authenticate the chat logs to conclude that they have some authentication value when considered in combination with all of the other available evidence. *See Simpson,* 152 F.3d at 1244 (computer printout of alleged chat room discussions properly authenticated not only by physical evidence recovered from defendant's home but also in light of the fact that the individual participating in the chat gave the undercover officer the defendant's first initial and last name and street address); *Bloom v. Com.,* 262 Va. 814, 554 S.E.2d 84, 86-87 (2001) (defendant was sufficiently identified as individual who made statements over instant message where detailed biographical information provided online matched that of the defendant).

[10] As for the statements in the chat logs that the victims made to Browne, under our precedent they were not hearsay because they were not offered into evidence to prove the truth of the matter asserted; rather, they were introduced to put Browne's statements "into perspective and make them intelligible to the jury and recognizable as admissions." *United States v. Hendricks,* 395 F.3d 173, 184 (3d Cir. 2005) (quoting *United States v. McDowell,* 918 F.2d 1004, 1007 (1st Cir. 1990)); *see also McDowell,* 918 F.2d at 1007-08 ("[The defendant's] part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context.... Moreover, because [the informant's] statements were introduced only to establish that they were uttered and to give context to what [the defendant] was saying, they were not hearsay at all.").

[11] As with authentication, we do not foreclose the possibility that the chat log might have warranted a different hearsay analysis had the Government sought the admission of only limited portions of it. In *United States v. Turner,* 718 F.3d 226 (3d Cir. 2013), for example, where we assessed the admissibility of certain bank records, we held that the district court did not clearly err in applying the residual hearsay exception, which permits a district court to admit an out-of-court statement not covered by Rules 803 or 804 where, among other things, "the statement has equivalent circumstantial guarantees of trustworthiness." *Id.* at 233 (quoting Fed. R. Evid. 807). But the Government here does not contend that this hearsay exception or any others enumerated in Rule 803 are applicable to this chat log. And with good reason. For instance, although the log reflects that the chat participants made a number of emotionally charged statements, it purports to describe an event that occurred the previous day and thus was not admissible under the present sense impression or excited utterance exception to the hearsay rule. Fed. R. Evid. 803(1)-(2); *see United States v. Green,* 556 F.3d 151, 156 (3d Cir. 2009); *United States v. Brown,* 254 F.3d 454, 458 (3d Cir. 2001). And nothing in the record or the Government's brief suggests the chat log was introduced to show Dalmida or J.B.'s "then-existing state of mind," Fed. R. Evid. 803(3). *See United States v. Donley,* 878 F.2d 735, 737 (3d Cir. 1989).

895 F.3d 859 (2018)

UNITED STATES of America, Plaintiff-Appellee,
v.
Malik F. FARRAD, Defendant-Appellant.

Nos. 16-5102/6730.

United States Court of Appeals, Sixth Circuit.

Argued: May 3, 2018.
Decided and Filed: July 17, 2018.
Rehearing En Banc Denied August 17, 2018.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville, No. 3:14-cr-00110-1—Thomas A. Varlan, Chief District Judge.

ARGUED: Michael M. Losavio, Louisville, Kentucky, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. ON BRIEF: Michael M. Losavio, Louisville, Kentucky, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

Before: MOORE, THAPAR, and BUSH, Circuit Judges.

864*864 OPINION

KAREN NELSON MOORE, Circuit Judge.

Although the phrase "going undercover" may still connote high-stakes masquerading, twenty-first century undercover investigations can begin and end in cyberspace. This case stems from an undercover investigation on Facebook. The subject of the investigation, Defendant-Appellant Malik Farrad, was a felon prohibited by federal law from possessing a firearm. In June 2015, after a two-day trial, a jury found Farrad guilty of breaking that prohibition. No physical evidence was presented, no witness claimed to have seen Farrad with a gun, and Farrad himself never made any statements suggesting that he owned a gun; instead, the Government relied primarily on photographs obtained from what was evidently Farrad's Facebook account. To help prove its case, however, the Government called two police officers: Officer Garrison, who testified that criminals are particularly likely to upload photos of criminal deeds soon after committing those deeds, and Officer Hinkle, who testified at length about the similarities between the photos and a real gun, as well as the dissimilarities between the photos and the closest fake gun of which he was aware.

Farrad now challenges the sufficiency of the evidence, the admission of the photos into evidence, and the testimony that Officers Garrison and Hinkle were allowed to offer, as well as the district court's denial of his motion for a new trial, his sentencing as an armed career criminal, and the district court's failure to suppress the photos on Fourth Amendment grounds. For the reasons that follow, we AFFIRM.

I. BACKGROUND

A. Investigation, Indictment, and Pre-Trial Motions

After serving time in prison for a previous felony, Farrad was released from federal custody in January 2013. *See, e.g.,* R. 5-1 (Warrant Application at 3) (Page ID #9). Farrad came to the attention of local law enforcement sometime after June 10 of that same year, when "[v]arious confidential informants and concerned citizens" evidently "reported observing Farrad to be in possession of one or more firearms while in Johnson City, Tennessee." *Id.* at 4 (Page ID #10). Some time later, a Johnson City police officer named Thomas Garrison, using an undercover account, sent Farrad "a friend request on Facebook." R. 71 (Trial Tr. Vol. I at 81, 90-91) (Page ID #679, 688-89). After Farrad

"accept[ed] 865*865 the friend request," Garrison was able to see more of Farrad's photos. *See id.* at 81 (Page ID #679). "One [photo] in particular" "caught [his] interest": a photo that showed what appeared to be three handguns "sitting on a closed toilet lid in a bathroom." *Id.* at 81-82 (Page ID #679-80); *see also* Appellant's App'x at 6. The photo had been uploaded on October 7, 2013. R. 71 (Trial Tr. Vol. I at 83) (Page ID #681); Appellant's App'x at 7.

Garrison brought the photo to the attention of Johnson City police officer and FBI task force officer Matthew Gryder, who applied on October 25, 2013, for a warrant to search Facebook's records for "information associated with the Facebook user ID MALIK.FARRAD.5." R. 5-1 (Warrant Application at 4, 10-11) (Page ID #10, 16-17). A federal magistrate judge granted the warrant application. R. 5-4 (Search and Seizure Warrant at 1) (Page ID #25). The warrant mandated execution "on or before November 6, 2013," *id.,* and the return executed by federal law enforcement indicates that the warrant was "served electronically" on Facebook on November 1, 2013, *id.* at 2 (Page ID #26).

The resulting data yielded a series of additional photos that are central to this case: some show a person who looks like Farrad holding what appears to be a gun, *see, e.g.,* Appellant's App'x at 11-14, while others show a closer-up version of a hand holding what appears to be a gun, *see, e.g., id.* at 16-26.[1] While none of the photos shows a calendar, date, or one-of-a-kind distinguishing feature, the person in the photos has relatively distinctive tattoos, and some of the photos show, as backdrop, the décor of the room in which they were taken. *See id.* at 6, 11-12, 19-20, 22-23, 25-26. Facebook records revealed that the photos had been uploaded on October 11, 2013. *See id.* at 12, 15, 18, 21, 24, 26.

In September 2014, a federal grand jury charged Farrad with having, "on or about October 11, 2013, ... knowingly possess[ed]... a firearm, namely, a Springfield, Model XD, .45 caliber, semiautomatic pistol." R. 3 (Indictment) (Page ID #3). On March 26, 2015, Farrad filed a pro se motion seeking an evidentiary hearing, dismissal of the indictment against him, and suppression of the Facebook photos on Fourth Amendment grounds. R. 22 (Pro Se Mot.) (Page ID #85-91). The magistrate judge assigned to Farrad's case denied that motion on April 9, 2015, on the grounds that Farrad already had appointed counsel and the local rules prohibited a represented party from "act[ing] in his or her own behalf" without "an order of substitution." R. 24 (Order at 1) (Page ID #93) (quoting E.D. Tenn. Local Rule 83.4(c)). Farrad's trial counsel did not renew Farrad's motion.

The parties did, however, litigate the admission of the photos on evidentiary grounds. The Government argued that the Facebook photos qualified as business records under Federal Rule of Evidence 803(6) and that they were, as such, self-authenticating under Federal Rule of Evidence 902(11). R. 26 (Gov't's Mot. in Limine at 1) (Page ID #100). In support of its assertion, the Government introduced a certification by a Facebook-authorized records custodian, who attested that the records provided by Facebook — including "search results for basic subscriber information, IP logs, messages, photos, [and] other content and records for malik.farrad.5" — "were made and kept by the automated systems of Facebook in the course 866*866 of regularly conducted activity as a regular practice of Facebook" and "made at or near the time the information was transmitted by the Facebook user." R. 26-1 (Facebook Certification) (Page ID #105). In addition to disputing admissibility under Federal

Rules of Evidence 401, 402, 403, 404, 405, and 406, R. 30 (Def.'s Response to Gov't's Tr. Br. at 3) (Page ID #119), Farrad's trial counsel argued that the photos, despite the custodian's affidavit having been "done correctly under the federal rules," were "hearsay within hearsay" and did not "authenticate who took the pictures, when the pictures were taken, by whom, at what time," R. 60 (Pretrial Conf. Tr. at 11) (Page ID #456). All that the custodian could attest to, trial counsel emphasized, was "that at some point these pictures were uploaded to what [was] allegedly [Farrad's] Facebook account"; the custodian could not "testify as to ... who took [the photos], when they were taken, where they were taken." *Id.* at 12 (Page ID #457). On June 15, 2015, the district court concluded that it had "found no indication of a lack of trustworthiness" and that the photos qualified as business records under Rules 803(6) and 902(11). *See* R. 73 (Pretrial Hr'g Tr. at 33) (Page ID #872). It also determined that the photos were relevant. *See id.* at 35-37 (Page ID #874-76).

B. Trial

Trial began the next day. At trial, the jury first heard from Garrison, who not only detailed his discovery of the precipitating toilet-seat photo, R. 71 (Trial Tr. Vol. I at 83) (Page ID #681), but also, in his capacity as an experienced user of social media in the service of police investigations, *see id.* at 80 (Page ID #678), discussed broader trends in how people who have committed crimes behave on social-media platforms. After Garrison conceded that users "can upload ... pictures to Facebook that were taken at different times," *id.* at 84 (Page ID #682), the following exchange occurred:

GOVERNMENT: Okay. Now, in your training and experience and drawing upon the hundreds of cases you said you've been involved in using social media, when you come across people involved in criminal conduct who have uploaded photographs to their social media account, how quickly do they do that, relative to when that photograph is actually taken?
DEFENSE COUNSEL: Object as speculation, Your Honor.
THE COURT: Your response.
GOVERNMENT: Your Honor, Mr. Garrison has testified about his training in social media investigations, hundreds of cases he said. He can certainly testify as to what his experience has been when people upload photographs in the past, other investigations he's been involved in.
THE COURT: With those parameters in mind, the Court will overrule the objection.
GARRISON: Generally, in my experience, it's been more of a — you know, like I say, it can be instantaneous. But it is more of a present-type of thing.

Id.

Although Garrison admitted that he could not "think of a specific instance" in which he had "talked to a target about specific things on Facebook" or recall "specific instances of training" on the subject, *id.* at 85 (Page ID #683), the Government asked him to explain why "people choose to post criminal conduct that they're involved in, to social media," *id.* at 86 (Page ID 684). This exchange followed:

GARRISON: I would say that it mirrors the same reason that — that people in general post things on Facebook. But 867*867 criminals specifically, they like to brag about their — their

activities, they're proud of it, and just like anyone, they want to let their friends know what they're doing, let their friends know, you know, where they're at, what's going on.
GOVERNMENT: In terms of your training and experience, is it more likely or less likely in terms of all of the cases you've seen before, that someone uploads those photographs immediately as opposed to sitting and waiting to upload them weeks or months or years later?
GARRISON: In my experience, I would consider that more likely.
GOVERNMENT: Now, in the context of social media applications that someone uses on their cell phone, say, does the use of those applications on someone's cell phone make it more or less likely in your training and experience that those photographs are going to be uploaded at the time they're actually created?

Id. Defense counsel again objected on speculation and relevancy grounds, and the district court again allowed the questioning to continue "within the limited circumstances of [Garrison's] experience." *Id.* at 86-87 (Page ID #684-85). Garrison answered that "the apps makes it easier and more likely for someone to immediately upload a photograph taken with their cell phone." *Id.* This line of questioning then concluded with the following exchange:

GOVERNMENT: In contrast, then, how many times relative to instances in which people have uploaded immediately, contrasted that [sic] to the number of times you've seen photographs depicting criminal conduct that have been held back for extended periods of time, weeks, months or years?
GARRISON: I would — I would consider that more rare. I can't — I can't think of a specific number or a — or an instance just off the top of my head.

Id. at 87-88 (Page ID #685-86). Garrison also explained via direct examination that while digital photographs generally contain "metadata" that preserves, for example, "the time and date that the photograph was taken," "Facebook actually strips that metadata as the photograph is uploaded to Facebook," rendering the date of creation unknown. *Id.* at 89 (Page ID #687).[2]

The jury also heard about and saw the photos obtained from Farrad's Facebook account, chiefly through testimony by Gryder. *See id.* at 94-109 (Page ID #692-707). Gryder identified Farrad and, while introducing the photos, noted that each photo had come from a Facebook account identified as "Malik.Farrad.5," registered to a "Malik Farrad" with the email address "AllaFarrad@gmail.com," and associated with Knoxville, Tennessee. *Id.* at 96-98 (Page ID #694-96). As Gryder explained, aside from the toilet-seat photo, all of the Facebook photos had been uploaded on October 11, 2013. *Id.* at 99-104 (Page ID #697-702). Gryder further explained that he had visited Farrad's residence as part of his investigation and that he had learned that Farrad had occupied two different units in the same complex, first residing in Apartment 15 and then moving to Apartment 9. *Id.* at 105 (Page ID #703). Gryder then identified Apartment 15 as the backdrop of several of the photos, noting an apparent match with the "mirror in the bathroom, ... the color of the door, and the color of the walls," as well as with a distinctive paint job on "the edge of [a] door frame." *Id.* at 107 (Page ID #705). The jury later learned from the property 868*868 manager of the apartment complex that Farrad had lived in Apartment 15 from February 6, 2013, until October 15, 2013. *Id.* at 119-20 (Page ID #717-18).

The jury also heard from Morristown police officer Kenneth Hinkle, who served as his department's armorer, had been a gunsmith "for over 30 years," "started apprenticing" when he was thirteen years old, and had "handled or worked on" "[t]housands" of firearms over the years. *Id.* at 124-25 (Page ID #722-23). With reference to the Facebook photos, a real Springfield XD .45 caliber handgun, and photos of a real Springfield XD .45 caliber handgun, Hinkle pointed out various commonalities that led him to conclude that the item in the Facebook photos was a real Springfield XD .45 caliber handgun.[3] *See id.* at 126-46 (Page ID #724-44). These commonalities included, for example, distinctive symbols and markings on the gun's slide, *id.* at 131-32 (Page ID #729-30), a common lever above the trigger guard and ridges across that lever, *id.* at 137 (Page ID #735), cocking serrations along the rear left side of the slide, *id.* at 139-40 (Page ID #737-38), and the shape and position of the firing pin on the rear of the slide, *id.* at 143-44 (Page ID #741-42). *Compare* Appellant's App'x at 16-17, 26, *with id.* at 34, 36, 38.

Hinkle then discussed the possibility of "any replicas, toys, fakes, airsoft[]" versions of the Springfield XD .45 caliber handgun. R. 71 (Trial Tr. Vol. I at 146) (Page ID #744). Hinkle testified that he had "not been able to locate, during any of [his] research, a toy, airsoft, BB firearm of the XD, XD series pistol in any caliber." *Id.* The Government then asked if he knew whether Springfield had "ever provided the licenses to manufacture an imitation of this firearm to another company." *Id.* Hinkle responded: "No, sir, they have not." *Id.*

Hinkle proceeded to compare the Facebook photos against real and photographic versions of what he testified was the nearest non-gun comparator to the Springfield XD .45 caliber handgun: an airsoft replica of a Springfield XD(m) .40 caliber handgun. *See id.* at 147-50 (Page ID #745-48). He noted, for example, distinctions between the muzzles, including the presence of an orange tip, *id.* at 151-52 (Page ID #749-50), and between the cocking serrations, *id.* at 154-55 (Page ID #752-53). He compared the shape of the rear of the replica XD(m) .40 to the shape of the rear of the real XD .45 and the shape of the rear of the gun in the Facebook photos, noting that the former was angled along the side whereas the latter two were boxier. *See id.* at 155-58 (Page ID #753-56). *Compare* Appellant's App'x at 16-17 (Facebook photos, boxy), *with id.* at 36-38 (real XD .45, boxy), *with id.* at 42-44 (replica XD(m) .40, trapezoidal). At the end of Hinkle's direct examination, Hinkle concluded that the two were "totally different firearms" and suggested again that the image in the photos must be "an actual firearm" because "[t]hey never made an airsoft." *Id.* at 159 (Page ID #757). Although Farrad's attorney attempted to get Hinkle to admit on cross examination that he could not tell from photographs whether something was in fact a "real firearm," Hinkle insisted that he could tell from the photographs alone.[4] *Id.* at 169 (Page ID #767).

869*869 Following Hinkle's testimony, the Government rested, and Farrad moved without argument for a directed verdict. *Id.* at 186 (Page ID #784). Following the Government's equally cursory opposition and a brief recitation of the standard, the district court denied Farrad's motion. *Id.* at 187 (Page ID #785). Farrad did not testify, nor did the defense call any other witnesses. *See* R. 72 (Trial Tr. Vol. II at 7) (Page ID #795).

Closing arguments occurred on June 17, 2015. The Government began its closing argument by noting that the offense at issue was "charged to have happened on or about October the 11th, 2013, ... because that was the date the vast majority of the photos ... were uploaded to Facebook by the defendant." *Id.* at 9 (Page ID #797). The Government

argued that while it could not prove exactly when the photos were uploaded because "Facebook strips all of that data out of the photographs that it receives when people upload them," Garrison's testimony "based upon his training and experience" was that "when people are involved in criminal conduct and then they document that conduct in photos or videos, they're uploading it right away." *Id.* The Government also suggested that Garrison's testimony was "in line with what we do on a daily basis." *Id.* at 10 (Page ID #798).

Farrad's trial counsel argued, meanwhile, that the Government's case was built on "[p]ure speculation," and that people project false images of themselves all the time, for all sorts of reasons — for example, employing "a sign out front that says this house is protected by a security system" when in fact no such security system exists, or a sticker that says "[t]his house protected by Smith & Wesson" when in fact no firearm exists. *Id.* at 14-15 (Page ID #802-03). Defense counsel also emphasized that there was no physical evidence connecting Farrad to a real firearm, argued that the lack of physical evidence belied the Government's argument, and questioned whether the photos were clear enough or Hinkle believable enough to conclude beyond a reasonable doubt that the photos in fact showed a real firearm. *Id.* at 17-21 (Page ID #805-09).

The district court then instructed the jury, noting among other directives that because "[t]he indictment charges the crime happened on or about October 11, 2013, ... the government does not have to prove that the crime happened on that exact date, but the government must prove that the crime happened reasonably close to that date." *Id.* at 33 (Page ID #821). Farrad summarily renewed his motion for a judgment of acquittal after the jury had been excused for deliberations, which motion the district court again summarily denied. *Id.* at 44-45 (Page ID #832-33). The jury found Farrad guilty. R. 40 (Verdict Form) (Page ID #159).

C. Sentencing and Motion for New Trial

Prior to sentencing, the probation department determined that Farrad qualified as an armed career criminal under 18 U.S.C. § 924(e) ("the ACCA") based on a Tennessee conviction for simple robbery and federal convictions for eight counts of distribution and intent to distribute crack cocaine. *See* R. 53 (Revised Presentence Investigation Report ("PSR") at 6-9) (Page ID #411-14). Farrad objected, arguing (among other issues) that the record did not establish that his eight drug-trafficking convictions were committed on different occasions, that the application of the ACCA to him at sentencing violated his Fifth Amendment right to due process and Sixth Amendment right to a jury trial, and that his eight drug-trafficking convictions did not categorically qualify as serious drug offenses under the ACCA. R. 47 870*870 (Def.'s Objections to PSR) (Page ID #311-28); R. 48 (Def.'s Supp. Objections to PSR) (Page ID #515-24).

On January 14, 2016, the district court rejected each of these contentions. R. 65 (Sentencing Tr. at 53-65) (Page ID #560-72). After applying the sentencing factors to Farrad's case, the district court pronounced a sentence of 188 months of imprisonment. *Id.* at 73 (Page ID #580); *see also* R. 56 (Judgment at 1) (Page ID #423).

One week later, Farrad moved pro se for a new trial, arguing in part that the Government had presented "false and misleading perjured testimony to the jury" in the form of Hinkle's

claims regarding the existence of fake-gun versions of the Springfield XD .45. R. 59 (Pro Se Mot. for New Trial at 6-12) (Page ID #439-40). The district court appointed counsel to assist Farrad, R. 70 (Mem. & Order) (Page ID #597-98), and counsel filed a reply that — potentially contrary to Hinkle's testimony — pointed out two websites offering to sell "inert replicas or simulated versions of the Springfield [XD] .45" produced by a company called Ring Manufacturing, R. 88 (Def.'s Reply re Mot. for New Trial at 1-2) (Page ID #932-33); *see also* R. 88-1 (Ex. 1, Def.'s Reply re Mot. for New Trial) (Page ID #936-37) (website printouts).

On November 15, 2016, the district court denied Farrad's motion, stating that it could not "find that Hinkle's testimony was false and that the government knew it was false," given both that Farrad had "provide[d] no evidence as to the date Ring Manufacturing began producing the firearm replicas of the Springfield .45 caliber Model XD" and that no evidence had been presented suggesting knowledge of any falsity. R. 89 (Mem. Op. & Order at 11) (Page ID #948). The district court also concluded that any falsity was nevertheless immaterial, given that the replicas were "painted bright blue for quick recognition as inauthentic" and therefore "would be easily distinguishable from an actual firearm and easily distinguishable from the firearms in the photographs." *Id.* at 11-12 (Page ID #948-49).

Farrad filed timely notices of appeal following both (1) the entry of final judgment after sentencing, R. 58 (First Notice of Appeal) (Page ID #433), and (2) the denial of his motion for new trial, R. 90 (Second Notice of Appeal) (Page ID #951). Those appeals have since been consolidated and are now before this court.

II. DISCUSSION

Farrad raises seven arguments on appeal: (1) that there was insufficient evidence introduced at trial to support his conviction; (2) that the Facebook photos should not have been admitted into evidence; (3) that Officers Hinkle and Garrison should not have been permitted to testify as experts; (4) that the district court should have granted Farrad's motion for a new trial; (5) that Farrad did not in fact qualify as an armed career criminal under the ACCA; (6) that finding him to be an armed career criminal at sentencing violated his Fifth and Sixth Amendment rights; and (7) that the district court should have excluded the Facebook photos on Fourth Amendment grounds.[5] We consider each in turn.

871*871 A. Sufficiency of the Evidence

"We review a challenge to the sufficiency of the evidence *de novo,* considering `whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Tocco,* 200 F.3d 401, 424 (6th Cir. 2000) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). "A defendant making such a challenge bears a very heavy burden," *id.,* especially given that "[c]ircumstantial evidence alone is sufficient to sustain a conviction," *United States v. Spearman,* 186 F.3d 743, 746 (6th Cir. 1999) (citation omitted), *cert. denied,* 528 U.S. 1033, 120 S.Ct. 560, 145 L.Ed.2d 435 (1999), and a "jury may draw any reasonable inferences from direct, as well as circumstantial, proof," *Tocco,* 200 F.3d at 424. Accordingly, we "will reverse a judgment for

insufficiency of evidence only if this judgment is not supported by substantial and competent evidence upon the record as a whole," regardless, of "whether the evidence is direct or wholly circumstantial." *United States v. Stone,* 748 F.2d 361, 363 (6th Cir. 1984).

"To obtain a conviction pursuant to § 922(g)(1), the government must prove beyond a reasonable doubt: (1) that the defendant has a prior conviction for a crime punishable by imprisonment for a term exceeding one year; (2) that the defendant thereafter knowingly possessed the firearm and ammunition specified in the indictment; and (3) that the possession was in or affecting interstate commerce." *United States v. Schreane,* 331 F.3d 548, 560 (6th Cir. 2003) (quoting *United States v. Daniel,* 134 F.3d 1259, 1263 (6th Cir. 1998)). In addition, "[w]hen `on or about' language is used in an indictment, proof of the exact date of an offense is not required as long as a date reasonably near that named in the indictment is established." *United States v. Ford,* 872 F.2d 1231, 1236 (6th Cir. 1989); *see also United States v. Harris,* 293 F.3d 970, 975 (6th Cir. 2002) ("Under 18 U.S.C. § 922(g), the government must prove beyond a reasonable doubt that (1) the defendant had a previous felony conviction and (2) on or about the night in question, the defendant possessed a firearm."). "Under § 922(g), either actual or constructive possession is sufficient." *Harris,* 293 F.3d at 975.

As the foregoing helps make clear, there are a few potential theories on which Farrad's trial and appellate counsel could have challenged his indictment and conviction, respectively. First, could any rational juror have concluded beyond a reasonable doubt that the photos were taken on or about October 11? (Call this the "date" theory.) Second, could any rational juror have concluded beyond a reasonable doubt that the item in the photos was not a *fake* gun? (Call this the "replica" theory.) Third, could any rational juror have concluded beyond a reasonable doubt that the photos were not altered to suggest the appearance of a real gun? (Call this the "Photoshop" theory.) Fourth, could any rational juror have concluded that Farrad was in fact the person in the photos? (Call this the "lookalike" theory.)[6] We discuss each in turn.

872*872 1. Date Theory

As noted above, and as the jury was instructed here, "[w]hen `on or about' language is used in an indictment, proof of the exact date of an offense is not required as long as a date reasonably near that named in the indictment is established." *Ford,* 872 F.2d at 1236; R. 72 (Trial Tr. Vol. II at 33) (Page ID #821); *see also* R. 3 (Indictment) (Page ID #3). In other words, sufficient proof of "a date reasonably near" October 11, 2013, was required to support Farrad's conviction. *See, e.g., Harris,* 293 F.3d at 975; *United States v. M/G Transp. Servs., Inc.,* 173 F.3d 584, 588-89 (6th Cir. 1999); *see also United States v. Grubbs,* 506 F.3d 434, 439 (6th Cir. 2007) ("[I]t is not enough that the defendant possessed a firearm at some unidentified point in the past; the evidence must prove that the defendant possessed the same handgun `identified in the indictment.'" (quoting *United States v. Arnold,* 486 F.3d 177, 183 (6th Cir. 2007) (en banc)).

Here, Farrad was charged with having knowingly possessed a Springfield XD .45 "on or about October 11, 2013." R. 3 (Indictment) (Page ID #3). The jury heard that nearly all of the Facebook photos in evidence had been uploaded on that day (with the other having been uploaded four days earlier), R. 71 (Trial Tr. Vol. I at 83, 99-104) (Page ID #681, 697-

702), and the jury also heard Garrison's testimony that, in his training and experience, "criminals specifically ... like to brag about their ... activities," and thus tend to upload inculpatory materials near in time to commission of criminal acts, *id.* at 86 (Page ID 684). The jury also heard, however, that Facebook users "can upload ... pictures to Facebook that were taken" at any given time, *id.* at 83 (Page ID #681), and that Facebook "strips [a photograph's] metadata as the photograph is uploaded to Facebook," making it impossible to tell when an uploaded photo was actually taken, *id.* at 89 (Page ID #687). And the jury likewise heard that while the backdrop of some of the Facebook photos matched Farrad's apartment, Farrad had lived in that apartment as early as February 6, 2013. *Id.* at 119-20 (Page ID #717-18). In other words, there was a potential gap of as long as eight months between when Farrad could have taken the photo and the date alleged in the indictment.

Regardless of the merit of the date theory, however — a question on which we express no opinion — the undisputable problem here for Farrad is that his trial counsel never focused on this theory, *see* R. 71 (Trial Tr. Vol. I at 17-21) (Page ID #802-11),[7] or filed any motions relating to it. And his appellate counsel, moreover, eschewed this argument in his briefing and then disclaimed it at oral argument.[8] 873*873 Oral Arg. at 9:05-9:22, 11:56-12:14, 29:22-29:37, 31:39-32:17. Accordingly, while the date issue is relevant to our opinion for reasons discussed below, *see* section II. C.2 *infra,* it is not an argument that could support relief here.

2. Replica Theory

Farrad's trial counsel and appellate counsel both focused, instead, primarily on the replica theory. *See* R. 71 (Trial Tr. Vol. I at 17-21) (Page ID #802-04); Appellant's Br. at 40-41. But there are two big problems with the replica theory — one general and legal, the other specific and factual — in Farrad's case. Even if Farrad could overcome the general and legal problem — an issue on which we express no ultimate opinion — the facts of his case doom the argument.

The legal problem is this: Farrad is not the first person in our circuit to argue that what appears in images to be a gun is really a sophisticated replica, though he may be the first to argue it in this particular context. If a defendant is convicted of armed robbery, however, and claims the gun that witnesses saw was merely a convincing fake, reasonable jurors may infer — at least when corroborated by images or the testimony of a witness with law-enforcement experience — that the gun was real. *See, e.g., United States v. Cobb,* 397 F. App'x 128, 131-32 (6th Cir. 2010) (upholding conviction based on witness testimony and law-enforcement analysis of video); *United States v. Conner,* 306 F. App'x 978, 981-82 (6th Cir. 2009) (upholding conviction based on testimony of three eyewitnesses alongside video and photographs from surveillance camera); *United States v. Crowe,* 291 F.3d 884, 887 (6th Cir. 2002) (upholding conviction based on testimony of eyewitness law-enforcement agent with "extensive experience and training in handling firearms"). "Indeed, `[t]he mere possibility that the object seen by witnesses may have been a sophisticated toy or other facsimile does not necessarily create a reasonable doubt, nor is the government required to disprove that theoretical possibility.'" *Crowe,* 291 F.3d at 887 (quoting *United States v. Jones,* 16 F.3d 487, 491 (2d Cir. 1994)). If Farrad is like the bank robber who later protests that what his victims saw was not real, his claim fails.

There are reasons to believe that Farrad might not be sufficiently comparable to the bank robber in this analogy. After all, in the armed-robber cases, there is a clear (if often unstated) reason why any reasonable juror could credit witness testimony and image-based evidence to conclude beyond a reasonable doubt that a robber carried a real gun: robberies are violent and dangerous undertakings, and the fact that someone undertook to rob with what appears to be a weapon makes it somewhat more likely that they undertook to rob with an *actual* weapon. *Cf.* *United States v. Medved*, 905 F.2d 935, 940 (6th Cir. 1990) (discussing the dangers that arise in an armed robbery regardless of whether a weapon is or merely appears real). For much the same reason, people who show up to book-club meetings usually bring real, rather than fake, copies of the assigned book; they *could* bring a fake copy with blank pages inside, but the point is generally to bring a real one.

874*874 Facebook photos are, at least arguably, different. As Farrad's trial counsel noted in closing argument, R. 72 (Trial Tr. Vol. II at 14-15) (Page ID #802-03), people advertise false images of themselves all the time — putting signs on their doors suggesting that they have a fancy alarm system, a fierce guard dog, or a high-powered firearm that they do not in fact have. The Facebook poseur is in this sense not like the bank robber: his incentive is not necessarily to show a real gun, which is costlier, harder to procure, and, needless to say, more likely to subject its owner to criminal liability. The simple fact that a person is taking photos and posting them to Facebook does not necessarily allow the kind of behavior-based inference that armed robbery allows.

In any event, however, the replica theory falters on the facts, because this is not a case in which a jury was asked to draw a conclusion from a few grainy or ill-lit photos, or asked to guess at an object out of focus or in the distance. Rather, the jury in Farrad's case saw seven different photos, all from different angles, some remarkably close-up and of seemingly high resolution. *See* Appellant's App'x at 5-26. And it heard exceedingly meticulous testimony from Hinkle — pointing to, among other things, markings and serrations on the slide, a lever and ridges on the trigger guard, and the shape and position of the firing pin — that both (a) convincingly likened the item in the close-up photographs to a real Springfield XD .45, R. 71 (Trial Tr. Vol. I at 126-46) (Page ID #724-44), and (b) discredited the closest non-gun comparator that Hinkle could find, *id.* at 146-58 (Page ID #744-56). While images in a different case might be more suspicious, the combination of Hinkle's meticulous testimony and the plethora of photographic evidence here provided grounds for a rational juror to conclude that the item in the photos was in fact a real Springfield XD .45.

3. Photoshop Theory

Farrad argues only briefly on appeal that the photos could have been manipulated, *see* Appellant's Br. at 40, and we can likewise deal with this theory quickly. In the abstract, the Photoshop theory raises some of the same concerns as the replica theory, given that a person seeking to project a (false) image of himself might well manipulate an image to make it look as if they were holding a firearm. (Similarly, a person wishing ill on another might manipulate an image to inculpate them.) But these particular concerns generally cash out as a question of admissibility (an issue discussed in more detail below): whether "the item is what the proponent claims it is." FED. R. EVID. 901(a); *see, e.g.,* *Griffin*

v. Bell, 694 F.3d 817, 826-27 (7th Cir. 2012) (affirming exclusion of video of altercation in question from trial where party offering it was unable to authenticate it); *People v. Price,* 29 N.Y.3d 472, 80 N.E.3d 1005, 1009-10 (2017) (vacating conviction and ordering new trial where prosecution failed to authenticate photo of defendant holding gun ostensibly used in robbery). *See generally* Paul W. Grimm et al., *Authentication of Social Media Evidence,* 36 AM. J. TRIAL ADVOC. 433 (2013); Elizabeth A. Flanagan, Note, *#Guilty?* Sublet v. State *and the Authentication of Social Media Evidence in Criminal Proceedings,* 61 VILL. L. REV. 287 (2016). Moreover, while the various questions raised by potentially altered social-media images "could conceivably be quite interesting," *United States v. Thomas,* 701 F. App'x 414, 419 (6th Cir. 2017), this case does not present those questions. The jury heard evidence that the photos in question came from a Facebook account registered to a Malik Farrad from Knoxville, Tennessee, and saw photos that appeared to show 875*875 Farrad in his own apartment — largely ruling out the possibility that this was the work of a forger. *See* R. 71 (Trial Tr. Vol. I at 96-98) (Page ID #694-96); Appellant's App'x at 11-14. Farrad's trial counsel, meanwhile, never cross-examined a witness on potential alteration of the images, presented any evidence to that effect, or argued that theory to the jury. This theory is, accordingly, not a winning one for Farrad on appeal.

4. Lookalike Theory

Similar defects apply to the lookalike theory. Farrad adverts to this argument only briefly as well, asserting that "the pictures did not clearly disclose who, if anyone, was holding a gun." Appellant's Br. at 41. But again, the jury heard that personal details of the Facebook account that posted the photos matched Farrad's personal details, R. 71 (Trial Tr. Vol. I at 96-98) (Page ID #694-96); saw photos that looked like Farrad, Appellant's App'x at 11-14; heard and saw evidence suggesting that the photos were taken in an apartment belonging to Farrad, R. 71 (Trial Tr. Vol. I at 105) (Page ID #703); Appellant's App'x at 19-20, 22-23, 25-28; and heard a defense theory that all but admitted that Farrad was the person in the photos, R. 72 (Trial Tr. Vol. II at 15) (Page ID #803) ("Maybe it's a case of where Mr. Farrad needed to let the world know that he could protect himself, let them think that he can."). The jury could easily infer as much.

*** * ***

With Farrad's trial and appellate counsel having eschewed the date theory, Farrad's sufficiency-of-the-evidence challenge must rise and fall with the replica, Photoshop, and lookalike theories. But the number and detail of the photos, coupled with Hinkle's meticulous testimony and other corroborating details (such as the appearance of Farrad's apartment), render each uniquely ill-suited to Farrad's specific case. We therefore reject Farrad's sufficiency-of-the-evidence challenge on the record and arguments before us.

B. Admissibility of the Photos

Farrad also argues that the district court erred in admitting the Facebook photos into evidence in the first place. We review evidentiary challenges for an abuse of discretion.[9] *United States v. Morales,* 687 F.3d 697, 701-02 (6th Cir. 2012). Abuses of

discretion in evidentiary rulings, however, merit reversal only if the error is not harmless — "that is, only if the erroneous evidentiary ruling affected the outcome of the trial." *United States v. Marrero,* 651 F.3d 453, 471 (6th Cir. 2011).

Farrad's evidentiary challenge raises a number of issues, but his most central and colorable challenge is to the district court's authentication of the Facebook images.[10] *See* Appellant's Br. at 31-33. "Like other evidence, photographs must be authenticated prior to being admitted 876*876 into evidence." *Hartley v. St. Paul Fire & Marine Ins. Co.,* 118 F. App'x 914, 921 (6th Cir. 2004). "To satisfy [this requirement], the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a); *see also United States v. Jones,* 107 F.3d 1147, 1150 n.1 (6th Cir. 1997) ("The [authentication] rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. The rest is up to the jury." (quoting 5 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 901(a), at 901-19 (1996))).

This task can be accomplished in a number of ways — with testimony from someone with knowledge of the evidence offered, for example, or by pointing to distinctive characteristics that establish authenticity. *See* FED. R. EVID. 901(b)(1), (4). Some items, however, "are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted." FED. R. EVID. 902. This category of self-authenticating evidence includes "certified domestic records of a regularly conducted activity" — that is, a business "record that meets the requirements of Rule 803(6)(A)-(C)," so long as properly certified by a "custodian or other qualified person" and so long as the evidence is subject to challenge by the opposing party. FED. R. EVID. 902(11). The relevant portion of Rule 803 encompasses:

A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; [and]
(C) making the record was a regular practice of that activity[.]

FED. R. EVID. 803(6)(A)-(C). The final two prongs in Rule 803(6), in turn, complete the set of prerequisites for Rule 803(6)'s exception to the rule against hearsay: the first three conditions must have been demonstrated by a qualifying certification from an authorized source, FED. R. EVID. 803(6)(D), and the opponent must not have "show[n] that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness," FED. R. EVID. 803(6)(E).

Here, it is undisputed that the Government secured the requisite certification from Facebook to qualify the photos as self-authenticating business records. *See* R. 26-1 (Facebook Certification) (Page ID #105); R. 60 (Pretrial Conf. Tr. at 11) (Page ID #456). Instead, the principal question is whether the images qualified as self-authenticating business records at all.[11] Farrad argues, as he did to the district 877*877 court, that they did not so qualify, given that Facebook could not authenticate "who took the pictures, when the pictures were taken, by whom or at what time, what they actually showed." Appellant's Br. at 30; *accord* R. 60

(Pretrial Conf. Tr. at 11) (Page ID #456). The district court disagreed. R. 73 (Pretrial Hr'g Tr. at 33) (Page ID #872).[12] If Farrad is right, the question becomes whether the evidence would have been admissible for some other reason, or whether the error was in any event harmless to the outcome. *See, e.g.,* *United States v. Henderson,* 626 F.3d 326, 334 (6th Cir. 2010).

No opinion in this circuit has spoken directly to the proper standard for assessing the admissibility of photographs taken from an online social-media platform like Facebook. After reviewing analogous cases from inside this circuit and persuasive authority from other circuits, we conclude that the district court was correct to admit the photos, but that it should have done so under a more traditional standard: regular authentication under Rule 901.

One small issue is worth addressing at the outset: whether, as Farrad has argued throughout, the "pictures of guns were all out-of-court `statements' that Farrad illegally possessed a firearm" and thus hearsay. Appellant's Br. at 34; *see also* R. 60 (Pretrial Conf. Tr. at 11) (Page ID #456). They were not. Farrad is correct, of course, that hearsay is any out of court statement "offer[ed] in evidence to prove the truth of the matter asserted," FED. R. EVID. 801(c), and that hearsay encompasses "nonverbal conduct, if the person intended it as an assertion," FED. R. EVID. 801(a). A paradigmatic case of such nonverbal assertive conduct is "the act of pointing to identify a suspect in a lineup." FED. R. EVID. 801 advisory committee's note to 1972 proposed rules. And as Farrad points out, Appellant's Br. at 34, in *United States v. Martinez,* 588 F.3d 301 (6th Cir. 2009), we ruled that a video in which a doctor demonstrated the correct way to perform nerve-block injections qualified as hearsay, given that it was offered to show that the defendant had performed such injections incorrectly. *Id.* at 311. But demonstrating a particular procedure for the purpose of showing whether another has erred is more intrinsically and specifically assertive than simply appearing (or having one's possessions appear) in a photo, even if it may be true in some philosophical sense that posing for a photograph does itself encode the general sentiment: here I am. In any case, as the Government notes, Appellee's Br. at 32, even if the photos *were* statements, they would have (so long as authenticated) qualified as statements of a party opponent and thus were not hearsay all the same. *See* FED. R. EVID. 801(d)(2)(A).

The question, then, is the central one: the authentication of the photos. Although it did not discuss the business-records exception, the closest analogue from our precedents is *United States v. Thomas,* 701 F. App'x 414 (6th Cir. 2017) — a case that itself illustrates that the business-records exception was not necessary to admit the photos here. The defendant in 878*878 that case, Jabron Thomas, was charged with armed bank robbery, and he was identified at trial in part through photos obtained from Facebook and another social-media platform, Instagram. *Id.* at 418. He argued that the photos "could not be authenticated and were thus inadmissible in part because [the investigator who obtained them] admitted that he did not know who created the Facebook page or whether the Facebook page itself was authentic." *Id.* at 419. We turned that argument aside, however, noting that there was simply enough evidence presented "to support a finding that the [photograph] [was] what the proponent claim[ed] it to be." *Id.* (quoting FED. R. EVID. 901(a)). The photos "appeared to show Thomas with distinctive tattoos" and clothing, which was enough given that "the government was not seeking to authenticate Jabron Thomas's [or any] Facebook page or Instagram page (nor any of the factual information contained therein, such as Thomas's

workplace)[,] and the government was not even necessarily presenting the photographs as `pictures of Jabron Thomas' — the jury was free to consider the photographs as identifying Thomas or not." *Id.* Given that there was sufficient evidence that the photos were what they were claimed to be, in short, we ruled that there was no abuse of discretion in admitting them. *Id.* at 419-20.

That rationale is all that is needed to resolve the ultimate question here. As already mentioned above, not only did the details of the account match Farrad, R. 71 (Trial Tr. Vol. I at 96-98) (Page ID #694-96), but more importantly, the photos appeared to show Farrad, his tattoos, and (perhaps most probatively) distinctive features of Farrad's apartment, as confirmed by police investigation, R. 71 (Trial Tr. Vol. I at 105) (Page ID #703); Appellant's App'x at 6, 11-14, 19-20, 22-23, 25-28. The Government was at most seeking to introduce these photos as evidence uploaded by a particular Facebook account that tended to show Farrad in possession of a real gun; the photos were not, however, offered as definitive and irrebuttable proof. *See, e.g.,* R. 60 (Pretrial Conf. Tr. at 16) (Page ID #461); *see also* Oral Arg. at 21:28-21:38, 22:10-22:24. No specific evidence was shown to suggest that the photographs were not "accurate representation[s] of the scene depicted." *United States v. Hobbs,* 403 F.2d 977, 979 (6th Cir. 1968). In short, while there were still questions about the photos that merited probing, those questions were not so glaring as to prevent the photos from clearing the relatively lower hurdle of authentication.[13] *See Thomas,* 701 F. App'x at 418; *Jones,* 107 F.3d at 1150 n.1. The district court was correct to admit them.

Whether the photos should have been admitted as self-authenticating under the business-records exception, on the other hand, is a different question. As the Third 879*879 Circuit recently observed in *United States v. Browne,* 834 F.3d 403 (3d Cir. 2016), *cert. denied,* ___ U.S. ___, 137 S.Ct. 695, 196 L.Ed.2d 572 (2017), a case involving Facebook "chats" admitted against a defendant, "Rule 803(6) is designed to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." *Id.* at 410 (citing FED. R. EVID. 803 advisory committee's note to 1972 proposed rules; *United States v. Gurr,* 471 F.3d 144, 152 (D.C. Cir. 2006); *E.C. Ernst, Inc. v. Koppers Co.,* 626 F.2d 324, 330-31 (3d Cir. 1980)). To the extent that the chats in *Browne* were records, however, Facebook had no oversight or particular interest in ensuring that they were trustworthy. As the Third Circuit reasoned:

Here, Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business. At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times. This is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter.

Id. at 410-11 (citing *United States v. Jackson,* 208 F.3d 633, 637-38 (7th Cir. 2000)); *accord United States v. Hillis,* 656 F. App'x 222, 229 (6th Cir. 2016) ("Nonetheless, if records contain information obtained from a customer, the information still falls within the business-records exception if the business's standard practice is to verify the information provided by

the customer." (citing cases)), *cert. denied,* ___ U.S. ___, 137 S.Ct. 1359, 197 L.Ed.2d 541 (2017). While allowing that a different question would be presented "[i]f the Government... had sought to authenticate only the timestamps on the Facebook chats, the fact that the chats took place between particular Facebook accounts, and similarly technical information," the Third Circuit concluded that, because "the Government's interest [lay] in establishing the admissibility of the chat logs in full, ... the Facebook records [were] not business records under Rule 803(6) and thus [could not] be authenticated by way of Rule 902(11)." *Browne,* 834 F.3d at 411.

The Third Circuit's approach accords with our approach in *Thomas, see* 701 F. App'x at 419 ("[W]e see no reason to depart from the ordinary rule that photographs, including social-media photographs, are authenticated by `evidence sufficient to support a finding that the [photograph] is what the proponent claims it is.'"), and it also accords with the approaches taken by the Second Circuit, *United States v. Vayner,* 769 F.3d 125, 131-33 (2d Cir. 2014), and Fifth Circuit, *United States v. Barnes,* 803 F.3d 209, 217 (5th Cir. 2015).[14] It also fits with common sense: it is not at all clear, nor has the Government been able to explain adequately, why our rules of evidence would 880*880 treat electronic photos that police stumble across on Facebook one way and physical photos that police stumble across lying on a sidewalk a different way.[15] We therefore conclude that while it was an error for the district court to deem the photographs self-authenticating business records, that error was harmless because admission was proper under Rule 901(a) regardless.

C. Expert Testimony from Officers Hinkle and Garrison

Farrad also argues that Officers Hinkle and Garrison "were permitted to improperly speculate and opine on matters relating to social media and give expansive testimony as to complete inferences from the photograph to fabricate Farrad's guilt, all without foundation as required by and in violation of" Federal Rules of Evidence 701, 702, and 703.[16] Appellant's Br. at 35. The Government counters that "the record demonstrates that both Officers Garrison and Hinkle were qualified to offer the expert testimony that they provided." Appellee's Br. at 34. We conclude that while Hinkle's testimony easily passes muster, Garrison's fails. Nevertheless, given that neither Farrad's trial counsel nor his appellate counsel argued the date issue (as discussed above), we conclude that the error was harmless.

"This Court reviews a district court's decision to admit proposed expert testimony for abuse of discretion."[17] *United States v. LaVictor,* 848 F.3d 428, 440 (6th Cir.), *cert. denied,* ___ U.S. ___, 137 S.Ct. 2231, 198 L.Ed.2d 671 (2017). "When a defendant fails to object to expert testimony at trial," however, "this court reviews for plain error the district court's admission of that testimony."[18] *United States v. Rodgers,* 85 F. App'x 483, 487 (6th Cir. 2004). Here, as the Government notes, Appellee's Br. at 34, Farrad's trial counsel objected only to Garrison's testimony. R. 71 (Trial Tr. Vol. I at 84-87) (Page ID #682-85). Accordingly, we review the district court's allowance of Garrison's testimony for an abuse of discretion and the district court's allowance of Hinkle's testimony for plain error.

"A witness who is qualified as an expert by knowledge, skill, experience, 881*881 training, or education may testify in the form of an opinion or otherwise if":

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. Accordingly, in addition to assessing a witness's qualifications, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[19] *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also, e.g., LaVictor,* 848 F.3d at 441 ("For expert testimony to be admissible, the court must find the expert to be: (1) qualified; (2) her testimony to be relevant; and (3) her testimony to be reliable.").

1. Officer Hinkle

Hinkle easily passes this test, particularly on plain-error review. As Hinkle testified, he served as his police department's armorer and had worked as a gunsmith "for over 30 years." R. 71 (Trial Tr. Vol. I at 124) (Page ID #722). He "started apprenticing" when he was thirteen years old, and at the time of his testimony he had "handled or worked on" "[t]housands" of firearms. *Id.* at 124-25 (Page ID #722-23). He had been through — and led — numerous trainings and had testified in court as a firearms expert "[o]ver a dozen" times. *Id.* at 125 (Page ID #723). His testimony, moreover, reads as cogent, meticulously informed, and relevant to the question at hand. *See id.* at 127-58 (Page ID #725-56). In short, because Hinkle was qualified, his testimony was relevant, and his testimony was reliable, the district court did not err, let alone plainly err, in allowing his testimony. *See, e.g., LaVictor,* 848 F.3d at 441.

2. Officer Garrison

Abuse of Discretion. — Garrison's testimony is a different story. First of all, it is important to be clear that Garrison was in fact offering expert testimony. *See, e.g., Berry v. City of Detroit,* 25 F.3d 1342, 1349-50 (6th Cir. 1994). *Compare* FED. R. EVID. 701, *with* FED. R. EVID. 702. Though Garrison likely offered *some* lay testimony about social-media usage — detailing, for example, the basics of when one can upload a picture onto Facebook and how becoming someone's "friend" allows a viewer to see more of their content, R. 71 (Trial Tr. Vol. I at 81, 83-84) (Page ID #679, 681-82) — the testimony of Garrison's that is at issue here was distinct from that. As we have explained, "the advisory 882*882 committee notes to [Rule 702] indicate that a wide array of expert testimony is contemplated by the Rule":

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training, or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and

architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Jones, 107 F.3d at 1159 (quoting FED. R. EVID. 702 advisory committee's note to 1972 proposed rules). Accordingly, a witness testifies as an expert when his "expertise is largely a product of his `knowledge, skill, experience, training, [and] education.'" *Id.* (quoting FED. R. EVID. 702).

That is clearly what happened in the testimony at issue here. Garrison was asked to testify based on his "training and experience," "drawing upon the hundreds of cases [he] said [he had] been involved in using social media." R. 71 (Trial Tr. Vol. I at 84) (Page ID #682). Moreover, he was not asked to testify simply about general social-media habits, but about a purportedly niche area of social-media activity: how criminals behave on social media. *See id.* ("[W]hen you come across people involved in criminal conduct who have uploaded photographs to their social media account, how quickly do they do that, relative to when that photograph is actually taken?"); *see also id.* ("And, again, in your training and experience, typically, why do people upload photographs of themselves involved in criminal activity to social media, such as Facebook?"); *id.* at 86 (Page ID #684) ("Mr. Garrison, in your training and experience why do people choose to post criminal conduct that they're involved in, to social media?"); *id.* ("[C]riminals specifically, they like to brag about their — their activities, they're proud of it, and just like anyone, they want to let their friends know what they're doing, let their friends know, you know, where they're at, what's going on."); *id.* at 87-88 ("In contrast, then, how many times relative to instances in which people have uploaded immediately, contrasted that to the number of times you've seen photographs depicting criminal conduct that have been held back for extended periods of time, weeks, months or years?"). The body of knowledge that Garrison was drawing on, in other words, was specifically presented by the Government as falling "beyond the ken of the average juror," *United States v. Rios,* 830 F.3d 403, 413 (6th Cir. 2016) (quoting *United States v. Amuso,* 21 F.3d 1251, 1263 (2d Cir.), *cert. denied,* 513 U.S. 932, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994)).

The next question is whether Garrison's expert testimony was scientific or nonscientific. In *Berry,* a case about a purported expert with police experience who sought to testify about the effect of departmental disciplinary failures, we drew a comparison between two witnesses called to testify about bumblebees to illustrate the difference. 25 F.3d at 1348-50. An aeronautical engineer, for example, could testify as a scientific expert, because "flight principles have some universality," and thus "the expert could apply general principles to the case of the bumblebee." *Id.* "On the other hand ... a beekeeper with no scientific training at all would [also] be an acceptable expert witness *if* a proper foundation were laid for his conclusions"; although he might "not know any more about flight principles than the jurors,... he has seen a lot more bumblebees 883*883 than they have." *Id.* Garrison, like the purported expert in *Berry,* was presented as the latter type: he did not claim to have done any scientific research on how people who commit crimes use social media, but he had supposedly seen a lot more criminals using social media. *See* R. 71 (Trial Tr. Vol. I at 84-87) (Page ID #682-85).

The ultimate set of questions is whether the district court abused its discretion in finding Garrison's nonscientific testimony, over Farrad's repeated objections, R. 71 (Trial Tr. Vol. I

at 84-88) (Page ID #682-85), to be qualified, relevant, and reliable. *LaVictor,* 848 F.3d at 441. Relevance is easy for the Government: one of the necessary questions for the jury was whether Farrad had possessed a firearm "on or about" the dates that he uploaded the Facebook photos, *see, e.g.,* R. 3 (Indictment) (Page ID #3), and to the extent Garrison could offer evidence based on his training and experience that it was indeed "more likely" that a criminal's Facebook upload follows hot on the heels of an actus reus, *see* R. 71 (Trial Tr. Vol. I at 86) (Page ID #684), then it was ostensibly more likely that Farrad had done what was charged in the indictment.

The stumbling block for the Government is whether Garrison was sufficiently qualified and, relatedly, whether his testimony was sufficiently reliable. Following our framing from *Berry,* because Garrison lacked "formal training that would allow [him] to testify from a scientific standpoint," in order for his "testimony to be admissible, a foundation would have to have been laid based upon [Garrison's] firsthand familiarity with" criminal social-media habits. 25 F.3d at 1350. Yet even assuming for the sake of argument that criminal social-media behavior is a real "field," and not "so broad as to be devoid of meaning" ("like declaring an attorney an expert in the `law'"), *see id.* at 1352, Garrison was repeatedly unable to establish the requisite familiarity.

The Government largely relies on Garrison's initial testimony about his training and experience. *See* Appellee's Br. at 34-36. If Garrison's initial testimony were all that we had to go on, such a foundation might well have been established. Garrison testified, after all, that he had used social media, as part of his job, "basically on a daily basis for several years," stating that he and his colleagues would "usually ... run somebody on Facebook or whatever," such that the number of cases that included some social-media investigation "could potentially be in the hundreds." R. 71 (Trial Tr. Vol. I at 80) (Page ID #678). He added that, "in attending different narcotics investigations, training, and in-services, there's been specific blocks on conducting investigations through and with social media." *Id.* Though vague, that account suggests a decent basis of knowledge.

We have, however, "counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him." *Berry,* 25 F.3d at 1351. "The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Id.* And the problem for the Government is that the wheels of Garrison's expertise came off the wagon upon basic probing. Consider, for example, this exchange on direct examination, which followed a prior objection along the same lines by Farrad:

GOVERNMENT: And, again, in your training and experience, typically, why do people upload photographs of themselves involved in criminal activity to social media, such as Facebook?
DEFENSE COUNSEL: Same objection, Your Honor, speculation.
884*884 GOVERNMENT: Again, Your Honor, the same explanation. Mr. Garrison has established himself as someone who's been involved in numerous investigations involving social media.
THE COURT: But I'm not sure he said how he is qualified to answer that additional question. You might need to lay additional foundation for him to answer that.

GOVERNMENT: Mr. Garrison, have you had an opportunity to discuss with targets of other investigations who have used social media about the reasons why they did that?
DEFENSE COUNSEL: Object to leading, Your Honor.
THE COURT: I'll overrule that objection. Go ahead.
WITNESS: I cannot — I can't think of a specific instance where I've talked to a target about specific things on Facebook.
GOVERNMENT: Has the reasonings [sic] for why people upload these photographs to social media, was that a part of your training that you went through, the bases for why people do that?
WITNESS: I know that has been discussed before. I can't remember specific instances of training but, you know, we've discussed it with other investigators or other law enforcement officers.

Id. at 84-85 (Page ID #682-83).

Farrad's counsel persisted in his objections. *See, e.g., id.* at 86-87 (Page ID #684-85). Nevertheless, the trial court allowed Garrison to continue testifying as an expert in criminal social-media behavior. And yet Garrison's inability to recall even one specific instance of training or experience relating to the question at hand persisted. *See id.* at 87-88 ("Q. In contrast, then, how many times relative to instances in which people have uploaded immediately, contrasted that to the number of times you've seen photographs depicting criminal conduct that have been held back for extended periods of time, weeks, months or years? A. I would — I would consider that more rare. I can't — I can't think of a specific number or a — or an instance just off the top of my head."). Garrison not only failed to offer methodology or data, *see* *Berry,* 25 F.3d at 1352, but he also failed to offer even an anecdote.

Allowing this testimony to continue was an abuse of discretion. Because Garrison could not remember even a single apposite experience or training that spoke to the immediacy of social-media posting by criminals, it is clear that Garrison was not qualified to testify as an expert about the immediacy of social-media posting by criminals (again assuming that criminal social-media behavior is even a cognizable field), *see, e.g.,* *LaVictor,* 848 F.3d at 441, and therefore should not have been held up to the jury as such an expert. Garrison's base of knowledge did not "provide a foundation for [him] to answer [the Government's] specific question[s]," *Berry,* 25 F.3d at 1351, and indeed his base of knowledge, as Farrad observes, Appellant's Br. at 36, appears to have been impermissibly close to "subjective belief or unsupported speculation," *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786. And for essentially the same reason, it is clear that Garrison's testimony was not reliable. *See, e.g.,* *LaVictor,* 848 F.3d at 441. While courts over the past half-century have understandably come to "rely on... the notion that trained, experienced officers develop rarefied and reliable insight into crime," *see generally* Anna Lvovsky, *The Judicial Presumption of Police Expertise,* 130 HARV. L. REV. 1995, 1999 (2017), there are limits to such reliance, *see, e.g.,* *Berry,* 25 F.3d at 1348-54. Garrison's testimony breaches those limits.

885*885 *Harmless Error.* — Farrad "is not entitled to a new trial," however, "unless it is more probable than not that the error materially affected the verdict," *LaVictor,* 848 F.3d at 448 (citation and internal quotation marks omitted) — that is, unless the error was not harmless. In theory, he has a colorable argument. As already discussed at length, the

prosecution was required to prove beyond a reasonable doubt that Farrad possessed a gun "on or about" October 11, 2013 — the date that most of the photos were uploaded. *See, e.g.,* R. 3 (Indictment) (Page ID #3); R. 71 (Trial Tr. Vol. I at 99-104) (Page ID #697-702). In the absence of metadata or any other evidence tying the charge against Farrad to that date, *id.* at 89 (Page ID #687), Garrison's testimony was potentially necessary, *see* R. 72 (Trial Tr. Vol. II at 9) (Page ID #797), and indeed the Government's only fallback to it was a speculative (and, by nature, nonevidentiary) statement at closing argument that immediate uploading was "in line with what we do on a daily basis," *id.* at 10 (Page ID #798).

The problem is, first, that it is harder to conclude that Garrison's testimony materially affected the verdict when Farrad's trial counsel did not argue the date theory. R. 71 (Trial Tr. Vol. I at 17-21) (Page ID #802-11); *cf.* *Rose v. Clark,* 478 U.S. 570, 582 n.11, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) ("Harmless-error analysis addresses [the] question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?"). And it is, in any event, impossible for us to deem the error harmful when Farrad's appellate counsel also declined to argue the date theory. Oral Arg. at 9:05-9:22, 11:56-12:14, 29:22-29:37, 31:39-32:17. Thus, while Farrad can, like any other petitioner, seek post-conviction relief for ineffective assistance of trial and appellate counsel under § 2255 (an issue, again, on which we express no ultimate opinion), we must deem the trial court's error harmless.

D. Motion for New Trial

Farrad also appeals the district court's denial of his motion for a new trial. "We review a district court's denial of a motion for a new trial for abuse of discretion." *United States v. Callahan,* 801 F.3d 606, 616 (6th Cir. 2015). "To prevail on a claim that the government presented perjured testimony, [Farrad] must show `(1) that the statements were actually false; (2) the statements made were material; and (3) [the] prosecution knew they were false.'" *United States v. Pierce,* 62 F.3d 818, 834 (6th Cir. 1995) (quoting *United States v. Farley,* 2 F.3d 645, 655 (6th Cir. 1993)); *accord* *Akrawi v. Booker,* 572 F.3d 252, 265 (6th Cir. 2009).

We can leave aside the first two of these prongs, because the fatal prong for Farrad is the third. Here, Farrad's challenge is to Hinkle's testimony (1) that he had "not been able to locate, during any of [his] research, a toy, airsoft, BB firearm of the XD, XD series pistol in any caliber," and (2) when asked whether Springfield had "ever provided the licenses to manufacture an imitation of this firearm to another company," his response that "they ha[d] not." R. 71 (Trial Tr. Vol. I at 146) (Page ID #744); *see* Appellant's Br. at 43-44. But as the district court correctly noted, R. 89 (Mem. Op. & Order at 11) (Page ID #948), Farrad failed to provide, and still has not provided, any reason to conclude that either Hinkle or the prosecution knew that this was false testimony. Of course, in referencing the blue replicas, Farrad has pointed to evidence that could *conceivably* render Hinkle's testimony incorrect. R. 88-1 (Ex. 1, Def.'s Reply re Mot. for New Trial) (Page ID #936-37). 886*886 But aside from Hinkle's general knowledgeability (which, while impressive, is not tantamount to omniscience), the record offers no reason to conclude that the replicas even existed at the time of Hinkle's testimony, let alone that Hinkle in turn knew about them and chose not to disclose their existence during his testimony. Simply proving that a witness was mistaken, meanwhile, does not entitle a defendant to a new trial. *Pierce,* 62 F.3d at 834. Farrad may,

again, seek post-conviction relief under § 2255 based on any potential failure by trial counsel to discover the replicas and use them to impeach Hinkle's testimony at trial, but the district court did not abuse its discretion in denying Farrad's motion for a new trial.[20]

E. Farrad's ACCA Predicate Offenses

Farrad also challenges the district court's determination that he qualified as an armed career criminal under the ACCA, 18 U.S.C. § 924(e)(1). That provision applies, in relevant part, to any "person who violates section 922(g) ... and has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another," and it provides for a fifteen-year mandatory minimum. *Id.* Ordinarily, "[a] district court's interpretation and application of the ACCA is a question of law, reviewed de novo." *United States v. Stafford,* 721 F.3d 380, 395-96 (6th Cir. 2013). When a party fails to object at sentencing, however, review is for plain error only. *See, e.g., United States v. Southers,* 866 F.3d 364, 366 (6th Cir. 2017).

Farrad challenges both the designation of his Tennessee conviction for simple robbery and the designation of eight federal drug-trafficking convictions as ACCA predicates. Appellant's Br. at 52-60. But we need not focus on the Tennessee robbery conviction, because if even three of the federal drug-trafficking convictions qualify, the existence of an additional predicate is purely academic.[21] *See, e.g., United States v. Phillips,* 752 F.3d 1047, 1049 (6th Cir. 2014).

Farrad attacks the eight federal drug-trafficking convictions on three grounds: (1) that they included "aiding and abetting modifiers" and therefore potentially encompassed a broader swath of 887*887 wrongdoing than the ACCA, Appellant's Br. at 54-55; (2) that they should not have been counted as separate convictions, Appellant's Br. at 54-58; and (3) that they cannot be counted against him because he was found guilty "in absentia," Appellant's Br. at 58-60. None of these arguments is compelling.

With regard to the first, Farrad's characterization of his federal convictions is misleading. The eight convictions — on Counts 12, 14, 16-20, and 22 — were for violations of 21 U.S.C. § 841(a)(1), (b)(1)(B)-(C), which are valid ACCA predicates carrying a maximum punishment of more than ten years of imprisonment. *See* 18 U.S.C. § 924(e)(2)(A)(i); R. 51-2 (Federal Drug-Trafficking Indictment at 8-11) (Page ID #369-72). Furthermore, if we look to the relevant charging document, *see Shepard v. United States,* 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *see also Mathis v. United States,* U.S. , 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016), it is clear that Farrad was not charged with or convicted of a crime that categorically falls outside of the ACCA's sweep: although each of the relevant counts in the indictment makes reference to aiding and abetting, the aiding and abetting at issue is alleged to have been done by *others,* while Farrad is charged with having violated the statute, plain and simple. R. 51-2 (Federal Drug-Trafficking Indictment at 8-11) (Page ID #369-72). Farrad's first challenge fails.

Second, Farrad's argument that his drug-trafficking convictions should not be counted separately is also unavailing. "In this circuit, two offenses were committed on different occasions under the ACCA if 1) it is possible to discern when the first offense ended and the subsequent point at which the second offense began; 2) the offender could have

withdrawn from crime after the first offense ended and not committed the second offense; or 3) the offenses were committed at different residences or business locations." *United States v. Pham,* 872 F.3d 799, 802 (6th Cir. 2017), *cert. denied,* ___ U.S. ___, 138 S.Ct. 1018, 200 L.Ed.2d 279 (2018). This analysis necessarily entails the use of *Shepard* documents. *Id.* "The government prevails if it meets even one of the tests." *Id.*

It is clear from looking at the indictment that the Government meets two of these tests. Counts 12, 14, 16-20, and 22 charge that the relevant conduct occurred "on or about" different and specific dates, ranging from November 3, 1998, to January 7, 1999. R. 51-2 (Federal Drug-Trafficking Indictment at 8-11) (Page ID #369-72). The jury convicted Farrad on each of these separate counts. R. 51-3 (Federal Drug-Trafficking Verdict Form) (Page ID #374-78). It is clearly "possible to discern when [each] offense ended and the subsequent point at which the [next] offense began," just as it is clearly possible that Farrad "could have withdrawn from crime after [each] offense ended and not committed the [next] offense," despite the fact that each was in the context of an ongoing conspiracy. *Pham,* 872 F.3d at 802; *see also United States v. Brady,* 988 F.2d 664, 669 (6th Cir. 1993) (en banc); *United States v. Roach,* 958 F.2d 679, 684 (6th Cir. 1992). This challenge thus fails.

Third and finally, Farrad argues that his federal drug-trafficking convictions cannot count as ACCA predicates because he was convicted in absentia. This argument, Farrad concedes, Appellant's Br. at 58-59, is to be reviewed only for plain error in light of Farrad's failure to raise it in the district court. The problem for Farrad is that there is no evidence that Farrad was in fact impermissibly convicted in absentia. Federal Rule of Criminal Procedure 43(c) provides:

888*888 A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

FED. R. CRIM. P. 43(c). Here, the only indication that Farrad was convicted in absentia is the PSR's statement to that effect. R. 53 (Revised PSR at 9) (Page ID #414) ("Defendant Farrad was found guilty, in absentia, by jury trial of distribution of approximately one kilogram of `crack' cocaine."); *see also* Reply Br. at 24-25. But "the PSR itself is not evidence" in the classic, conclusive sense, *United States v. Traylor,* 511 F. App'x 449, 452 (6th Cir. 2013); *cf. United States v. Roark,* 403 F. App'x 1, 4 n.2 (6th Cir. 2010) (arguing that "[t]he information in the PSR *is* evidence, at least in the sense that it may be considered at sentencing"), and in any event, as Federal Rule of Criminal Procedure 43 makes clear, it is not necessarily impermissible for a defendant to be *found guilty* in absentia, so long as that defendant "was initially present at trial," FED. R. CRIM. P. 43(c). Moreover, as the Government notes, Farrad has twice appealed his prior convictions, and neither appeal noted any concern regarding an impermissible exclusion of Farrad from his own trial. *See United States v. Farrad,* 76 F. App'x 42 (6th Cir. 2003); *United States v. Farrad,* 41 F. App'x 707 (6th Cir. 2002). In short, the district court did not plainly err on this ground.

F. Fifth and Sixth Amendment Challenge to ACCA Sentencing

Farrad's challenge to his sentence also includes a broader constitutional attack on his having been deemed an armed career criminal under 18 U.S.C. § 924(e) without an indictment, information, or jury finding on the question. Appellant's Br. at 61-62 (alleging violations of the Fifth and Sixth Amendments). But, as Farrad concedes, Appellant's Br. at 12, 62, his argument is foreclosed by binding precedent. *United States v. Nagy,* 760 F.3d 485, 487-88 (6th Cir. 2014) (noting that *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), "which held that prior convictions that enhance a defendant's sentence are not elements of a crime that must be submitted to a jury," *Nagy,* 760 F.3d at 487, "is still good law and will remain so until the Supreme Court explicitly overrules it," *id.* at 488 (citation omitted)); *see also United States v. Pritchett,* 749 F.3d 417, 434 (6th Cir. 2014); *United States v. Mack,* 729 F.3d 594, 609 (6th Cir. 2013). Farrad understandably "makes this argument in order to preserve it for Supreme Court review," Appellant's Br. at 12, but we are not empowered to grant him relief on it. *See Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985).

G. Fourth Amendment Suppression

Farrad's final claim is that the Government's acquisition of Farrad's Facebook photos, and the introduction of those photos against him at trial, violated the 889*889 Fourth Amendment.[22] Appellant's Br. at 63-69. The parties disagree about the standard of review: Farrad argues that we should use the normal standard — de novo for law, clear error for facts, *see, e.g., United States v. Pacheco,* 841 F.3d 384, 389 (6th Cir. 2016) — while the Government argues that plain error applies. *Compare* Appellant's Br. at 63, *with* Appellee's Br. at 51-52. This disagreement stems from the procedural history. After Farrad moved for suppression pro se, R. 22 (Pro Se Mot. at 3-4) (Page ID #87-88), the magistrate judge denied Farrad's motion because he was already represented by counsel, R. 24 (Order at 1) (Page ID #93), and Farrad's trial counsel did not renew the motion. Farrad argues that because the magistrate judge nevertheless had discretion to consider Farrad's pro se motion, *see* E.D. Tenn. Local Rule 83.4(c), the district court's ruling amounted to a denial of his motion on the merits. Appellant's Br. at 63-64. The Government argues against such an inference and adds that plain-error review should apply regardless because Farrad's argument on appeal is different from the argument in his pro se motion. Appellee's Br. at 52 n.12.

The Government is correct: plain-error review applies. Its second rationale is true only in large part; Farrad makes several arguments against the warrant, and all but one went unmade below. *Compare* R. 22 (Pro Se Mot. at 3-4) (Page ID #87-88) (arguing that evidence relied on to secure search warrant was fruit of illegal search and seizure), *with* Appellant's Br. at 64-69 (arguing (1) that "affidavit was facially insufficient," (2) that "execution was facially flawed," and (3) that affidavit was "fruit of the poisonous tree"). Having not been raised in Farrad's pro se motion, Farrad's first two arguments clearly qualify only for plain-error review. *United States v. Lopez-Medina,* 461 F.3d 724, 739 (6th Cir. 2006). But more foundationally, the magistrate judge's very brief order denying Farrad's pro se motion was clearly based on the procedural problem of having a defendant with

counsel filing pro se motions, and nothing in that order discussed the merits or suggested that Farrad's trial counsel could not immediately file a comparable motion. *See* R. 24 (Order at 1-2) (Page ID #93-94). Although the magistrate judge's order does not use the words "without prejudice," any fair reading of it suggests as much. *Cf.* *Robert N. Clemens Tr. v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 845 (6th Cir. 2007) (presuming, based on different circumstances, that "the district court must have intended to dismiss the Plaintiffs' claims *with* prejudice" (emphasis added)). In short, if the district court was to review this motion on the merits, it was for Farrad's trial counsel to renew the motion. Because trial counsel did not, review here is entirely for plain error.

The district court did not, in turn, plainly err in failing to order suppression of its own accord. First, with regard to Farrad's argument that the warrant application was facially deficient, Appellant's Br. at 64-65, Farrad has not provided sufficient grounds to conclude that the issuing judge erred in granting the application, *see* *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) ("A magistrate's determination of probable cause should be paid great deference by reviewing courts." (citation and internal quotation marks omitted)), let alone that the executing officer's reliance on that decision was objectively unreasonable, *see* *United States v. Leon*, 468 U.S. 897, 923-24, 890*890 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The warrant application established not only that Farrad had been convicted of a felony and that various individuals had reported seeing him armed, but also that law enforcement had come across a photograph on what appeared to be Farrad's Facebook page showing what appeared to be three handguns. R. 5-1 (Warrant Application at 3-4) (Page ID #9-10). That was a colorable basis for the district court to assume good-faith reliance in the absence of a renewed motion. And while Farrad is correct that the application was inartfully worded with regard to the location of what was to be searched, *compare* R. 5-1 (Warrant Application at 1) (Page ID #7) (providing, in response to prompt for location of "person or property" to be searched, both that reviewer should "See Attachment A" and that it was "located in the Eastern District of Tennessee"), *with id.* at 11 (Page ID #17) (Attachment A, providing that "[t]his warrant applies to information... that is stored at premises owned, maintained, controlled, or operated by Facebook, a company headquartered in Menlo Park, California"), for the district judge *sua sponte* to have faulted the affidavit on that ground would have been the apotheosis of "interpreting [an affidavit] in a hypertechnical, rather than a commonsense, manner" — exactly what the Supreme Court has directed courts not to do. *See* *Gates*, 462 U.S. at 236, 103 S.Ct. 2317 (citation omitted). There was certainly no plain error.

There was also no plain error based on improper execution. Farrad seems to aim this challenge in part at the fact that the warrant provides for execution "on or before November 6, 2013," R. 5-4 (Search and Seizure Warrant at 1) (Page ID #25), whereas Facebook's certification is dated April 17, 2015, R. 26-1 (Facebook Certification) (Page ID #105). *See* Appellant's Br. at 66. But this argument appears to conflate the date of a private third party's evidentiary certification with the date of the Government's warrant execution. Indeed, the return form certified by the executing officer makes clear that the warrant was "served electronically" on Facebook on November 1, 2013, regardless of whether Facebook responded right away. R. 5-4 (Search and Seizure Warrant at 2) (Page ID #26). While a *search* made by a private entity "act[ing] at the direction of law enforcement agents ... must comport with the Fourth Amendment," *United States v. Boumelhem*, 339 F.3d 414, 425 (6th Cir. 2003), Farrad has pointed to no authority or rationale to suggest that a date of

execution similarly binds a third party's certification of its records for evidentiary purposes.[23] This argument lacks merit.

Farrad's improper-execution challenge seems to encompass the warrant's execution outside of the issuing district as well. *See* Appellant's Br. at 66-69. But Farrad again points to no authority to suggest that a federal magistrate judge in the Eastern District of Tennessee could not permissibly issue a warrant to search electronic records bearing on a suspected in-district crime that were located in another district, and indeed federal law appears to allow exactly that. *See* 18 U.S.C. § 2703(a) ("A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication ... pursuant to a warrant issued using the procedures 891*891 described in the Federal Rules of Criminal Procedure ... by a court of competent jurisdiction."); *id.* § 2711(3)(A)(i) (defining a "court of competent jurisdiction" as "any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals that ... has jurisdiction over the offense being investigated"). There was, accordingly, no plain error here either.[24]

Finally, Farrad argues that "[t]he search warrant was obtained with illegally obtained evidence and anything received as a result of that search warrant would be `fruit of the poisonous tree.'" Appellant's Br. at 67. But in addition to the fact (noted above) that Farrad has pointed to no record evidence to support his assertions regarding an illegal search, Farrad's claim also fails because there is no mention in the affidavit of the ostensibly illegal search to which Farrad alludes. *See* R. 5-1 (Warrant Application at 3-4) (Page ID #9-10). Thus, while the district court (if presented with the issue) could have conceivably "look[ed] beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing magistrate" to assess good-faith reliance, *United States v. Frazier,* 423 F.3d 526, 536 (6th Cir. 2005), and while Farrad could conceivably have had grounds to seek a hearing under *Franks v. Delaware,* 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), because no evidence was ever offered that the warrant or its issuance were based on any impermissible police activity, there was no plain error in the district court's failure to inquire into or order suppression on its own.

III. CONCLUSION

The bottom line in this case — that Farrad has been sentenced to serve 188 months in prison because the Government found Facebook photos of him with what appears to be a gun — may well raise a lay reader's hackles. There are likewise aspects of Farrad's trial and conviction — the date issue, Officer Garrison's testimony — that are at least debatably troubling from a legal perspective. Nevertheless, we are not empowered to grant relief based on arguments not made or where errors were harmless. With that observation, and for the foregoing reasons, we AFFIRM.

[1] Another photo appeared to show guns, money, and marijuana on top of a stove. R. 28-2 (Gov't Tr. Br., Ex. 2) (Page ID #115). This photo was never offered at trial. Appellee's Br. at 13 n.5.

[2] The parties did stipulate, however, that the photographs at issue "were taken and created after May 29th, 2012, and after [Farrad] was convicted of a crime punishable by imprisonment for more than one year." R. 71 (Trial Tr. Vol. I at 109-10) (Page ID #707-08).

[3] Real Springfield XD .45 caliber handguns are "manufactured in ... Croatia," Hinkle explained, R. 71 (Trial Tr. Vol. I at 127) (Page ID #725), thus putatively satisfying the interstate-commerce element of 18 U.S.C. § 922(g)(1).

[4] Hinkle did admit that he could not see every single requisite marking or a serial number in the photos. R. 71 (Trial Tr. Vol. I at 176-77) (Page ID #774-75).

[5] Farrad also briefly argues, as part of this final claim, that if the problem is that Farrad's trial counsel never renewed the motion that the magistrate judge denied, then Farrad has a viable claim for ineffective assistance of counsel. Appellant's Br. at 69. But as the Government points out, Appellee's Br. at 55-56, "[a]s a general rule, a defendant may not raise ineffective assistance of counsel claims for the first time on direct appeal, since there has not been an opportunity to develop and include in the record evidence bearing on the merits of the allegations." *United States v. Martinez,* 430 F.3d 317, 338 (6th Cir. 2005) (quoting *United States v. Wunder,* 919 F.2d 34, 37 (6th Cir. 1990)). Particularly given the scant briefing devoted to this question, we hew to that general rule here. *See, e.g., id.* Farrad may, of course, bring this claim in a 28 U.S.C. § 2255 motion for postconviction relief.

[6] Farrad also gestures at another possible theory: that there is "no evidence of who made or uploaded the picture." Appellant's Br. at 40. Where the charge is one of possession, however, this question goes more to authenticity (and thus admissibility) than it does to sufficiency of the evidence, and we therefore discuss it below with reference to Farrad's evidentiary claims. With regard to sufficiency, meanwhile, this question is subsumed by the Photoshop theory; aside from potential alteration (which itself goes more to admissibility), we are aware of no reason why it would matter who took the photo, so long as a rational juror could conclude that Farrad was actually in the photo holding a real gun.

[7] Trial counsel did make one statement in closing argument that can theoretically be understood as having invoked the date theory. *See* R. 72 (Trial Tr. Vol. II at 17) (Page ID #805) ("The government's own witness, first witness again, when they take the photos, they're going to upload them really quick. Okay. If that's the case, where are they? If they were taken in that apartment in Tennessee, where are they?"). But we cannot say that this glancing reference qualified as having raised the issue.

[8] Appellate counsel also suggested at oral argument that trial counsel had "stipulated that the photos were made at or about the time set out in the indictment," *id.* at 9:05-9:22; *see also id.* at 31:47-31:59. As noted, the actual stipulation of the parties was that the "photographs seized from Facebook ... were taken and created after May 29, 2012" — "after the defendant was convicted of a crime punishable by imprisonment for more than one year." *See* R. 71 (Trial Tr. Vol. I at 109-10) (Page ID #707-08); *see also* Oral Arg. at 11:56-12:14 (Government reporting same).

[9] This standard converges with de novo review of legal questions and clear-error review of factual determinations, "because it is an abuse of discretion to make errors of law or clear errors of factual determination." *See United States v. McDaniel,* 398 F.3d 540, 544 (6th Cir. 2005).

[10] Farrad also briefly raises a challenge based on Federal Rules of Evidence 403 and 404 to a photo or photos showing guns, drugs, and U.S. currency. *See* Appellant's Br. at 37-38; *see also* R. 28-2 (Ex. 2, Gov't's Trial Br.) (Page ID #115). This challenge lacks merit, however, because, as the Government notes, the Government never introduced any such photos despite the district judge's having allowed such photos in. Appellee's Br. at 27 n.9; *accord* R. 71 (Trial Tr. Vol. I at 76-184) (Page ID #674-782) (Government's case in chief); Appellant's App'x at 5-26. Any error, in other words, was clearly harmless. *See, e.g., Marrero,* 651 F.3d at 471.

[11] Farrad also briefly suggests that there may have been a Confrontation Clause problem with authentication by remote affidavit. *See* Appellant's Br. at 31 (citing *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). Farrad did not raise this issue below, however, and it is made in such cursory fashion here as to be forfeited altogether. *See, e.g., Puckett v. Lexington-Fayette Urban Cty. Gov't,* 833 F.3d 590, 610-11 (6th Cir. 2016). Even if we did not deem it forfeited, it is unlikely that it would have been a winning argument on plain-error review in light of the Supreme Court's discussion of the "narrowly circumscribed" exception at common law that allowed a clerk to present a "certificate authenticating an official record." *Melendez-Diaz,* 557 U.S. at 322, 129 S.Ct. 2527; *see also id.* at 311 n.1, 129 S.Ct. 2527 ("Contrary to the dissent's suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." (citation omitted)). Other circuits, meanwhile, that have reached this question in the years following *Melendez-Diaz* have rejected Farrad's argument. *See United States v. Mallory,* 461 F. App'x 352, 356-57 (4th Cir. 2012); *United States v. Yeley-Davis,* 632

F.3d 673, 680-81 (10th Cir. 2011); *see also United States v. Anekwu,* 695 F.3d 967, 973-74 (9th Cir. 2012) (arriving at the same conclusion, but on plain-error review).

[12] The district court also, as noted above, determined that the photos were relevant. R. 73 (Pretrial Hr'g Tr. at 35-37) (Page ID #874-76).

[13] This case is thus different, for example, from the Seventh Circuit decision that Farrad cites, *Griffin v. Bell,* 694 F.3d 817 (7th Cir. 2012). In that § 1983 appeal, in dicta, Judge Rovner explained that even if Griffin's challenge to the exclusion of a video (and photographs distilled from it) that he claimed depicted a fight between him and a police officer had not been waived, there was still no abuse of discretion in the district court's having declined to admit the evidence. *Id.* at 819-20, 826-27. But that was in part because, in addition to the video's creator being unavailable and other open questions about the video, "the video portrayed only a small part of the incident" (and the photos "even less"), which naturally made the video a potentially unhelpful (or even misleading) account of how the very much disputed events at issue had unfolded. *See id.* Here, the district court knew more about the photos at issue and their authenticity as accurate depictions of the relevant scene, and there was significantly less reason to worry that they presented a one-sided or confusing view of a complex and fast-moving event.

[14] The only circuit that is potentially in conflict is the Fourth Circuit, but even that is not clearly the case. The Fourth Circuit, after all, affirmed on a similar question (1) after noting specific extrinsic evidence that seemed to authenticate the social-media evidence at issue, and (2) after explaining that the district court had determined that the prosecution had satisfied both Rule 902(11) *and* Rule 901(a). *See United States v. Hassan,* 742 F.3d 104, 133-34 (4th Cir. 2014).

[15] The Government attempted at oral argument to ground this distinction in an assertedly higher likelihood of contemporaneity ascribable to photos found on Facebook. *See* Oral Arg. 23:25-25:24. But as discussed above with reference to the replica theory, upload dates are not nearly as telling as the Government suggests. Moreover, their providing a particular cutoff time before which a photo must have been taken does not suitably distinguish electronic photos from physical photos, which also, by nature, must have been taken prior to whatever date they are discovered.

[16] There does not appear to have been a Rule 703 problem in this case, and for reasons discussed below, the crucial testimony here was not lay testimony under Rule 701. Accordingly, we focus on Rule 702, which is the most colorable part of Farrad's claim.

[17] As noted above, "[a] district court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *LaVictor,* 848 F.3d at 440 (quoting *Best v. Lowe's Home Cntrs., Inc.,* 563 F.3d 171, 176 (6th Cir. 2009)).

[18] "A `plain error' is an error that is clear or obvious, and if it affects substantial rights, it may be noticed by an appellate court." *United States v. Oliver,* 397 F.3d 369, 375-76 (6th Cir. 2005) (quoting *United States v. Barajas-Nunez,* 91 F.3d 826, 830 (6th Cir. 1996)). "We `should correct a plain forfeited error affecting substantial rights if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 376 (quoting *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (alteration in original) (internal quotation marks omitted)).

[19] Although *Daubert* mostly "limited" its "discussion... to the scientific context because that [was] the nature of the expertise offered" in that case, *Daubert,* 509 U.S. at 590 n.8, 113 S.Ct. 2786, the Court did make some statements that are understood as having broader applicability. We have made clear, for example, that despite *Daubert*'s focus on scientific experts, the above-quoted "language relative to the `gatekeeper' function of federal judges is applicable to all expert testimony offered under Rule 702." *Berry v. City of Detroit,* 25 F.3d 1342, 1350 (6th Cir. 1994). It may also be fair to rely on other generalized statements from *Daubert* — for instance, that "the word `knowledge' connotes more than subjective belief or unsupported speculation." *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786. Similarly, it seems reasonable to rely on its broader observation that while it is impermissible to require "certainty," even for scientific testimony, "[p]roposed testimony must be supported by appropriate validation — i.e., `good grounds,' based on what is known." *Id.*

[20] Farrad also gestures briefly at an additional asserted ground for a new trial, based on purported police misconduct in gaining access to Farrad's Facebook photos and the district court's asserted unwillingness to let him cross-examine Garrison on this issue at trial. Appellant's Br. at 49-50. But Farrad has offered no evidence suggesting police misconduct, Farrad's trial counsel laid no foundation for this line of inquiry at trial and then abandoned it almost

immediately after beginning it, *see* R. 71 (Trial Tr. Vol. I at 92-92) (Page ID #690-91), and, as discussed more below, Farrad never renewed his motion to suppress after it was dismissed on procedural grounds, R. 24 (Order at 1) (Page ID #93). In short, there was no abuse of discretion here either.

[21] For completeness, we note that Farrad also failed to raise to the district court the objections to the Tennessee robbery conviction that he raises here, *see* R. 47 (Def.'s Objections to PSR) (Page ID #311-28); R. 48 (Def.'s Supp. Objections to PSR) (Page ID #515-24), so he accordingly qualifies only for plain-error review. *Southers,* 866 F.3d at 366. To the extent that Farrad seeks to argue that Tennessee robbery is not a violent felony under the ACCA, Appellant's Br. at 53, his claim is doomed by binding circuit precedent regardless. *See Southers,* 866 F.3d at 366-69. To the extent he challenges the conviction based on the fact that he was only seventeen years old when he was arrested for that crime, Appellant's Br. at 52-53, that argument also fails under binding circuit precedent given that Farrad was evidently convicted and sentenced as an adult. *See United States v. Mitchell,* 743 F.3d 1054, 1067 (6th Cir. 2014); R. 53 (Revised PSR at 7) (Page ID #412). There was, in other words, no plain error on either of these grounds.

[22] As noted above, Farrad also discusses a potential ineffective-assistance-of-counsel claim here. We decline to review that claim at this stage, given that it is underdeveloped and Farrad is still on direct appeal. *See, e.g., Martinez,* 430 F.3d at 338.

[23] This logic holds even if we assume that what Farrad means to challenge is not the evidentiary certification, *see* Appellant's Br. at 66 ("The certification of Facebook was dated April 17, 2015, outside the scope of the November, 2013 deadline...."), but rather Facebook's production of the records themselves, which appears to have occurred sometime in 2014. *See* R. 26 (Gov't's Mot. in Limine at 1) (Page ID #100); Appellant's App'x at 4. In either case, the *warrant* was still executed on time.

[24] Farrad also very briefly seeks to raise an issue akin to an issue addressed in *Carpenter v. United States,* ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). *See* Appellant's Br. at 68-69. But his argumentation is too perfunctory for us to consider it on appeal. *Puckett,* 833 F.3d at 610-11. In any event, we cannot see how it could have been plain error for the district court to assume sufficient compliance with the traditional requirements of probable cause in this case in light of *Carpenter,* given that *Carpenter* concerns the permissibility of obtaining records under 18 U.S.C. § 2703 with *less than* probable cause. *See Carpenter,* 138 S.Ct. at 2212.

246 So.3d 400 (2018)

Arkheem J. LAMB, Appellant,
v.
STATE of Florida, Appellee.

No. 4D17-545.

District Court of Appeal of Florida, Fourth District.

May 2, 2018.

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502016CF004626A.

Carey Haughwout, Public Defender, and Siobhan Helene Shea, Special Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jessenia J. Concepcion, Assistant Attorney General, West Palm Beach, for appellee.

403*403 Gerber, C.J.

The defendant appeals from his convictions, arising from a carjacking, for grand theft of a vehicle and grand theft. The defendant primarily argues that the trial court erred in permitting the state to introduce into evidence a Facebook video showing the defendant sitting in the stolen car and wearing the victim's stolen watch just hours after the carjacking occurred. We find no error in any of the trial court's decisions arising from the Facebook video's use at trial. Therefore, we affirm the convictions.

We present this opinion in the following sections:

A. The trial:
1. The carjackings;
2. The investigation;
3. The Facebook video.
B. Our review of the defendant's arguments:
1. The discovery objection;
2. The authentication objection;
3. The best evidence objection; and
4. The motion for judgment of acquittal.

A. The Trial

The trial involved two separate carjackings, occurring just a few hours apart and about thirty miles apart. The jury convicted the defendant on the charges arising from the first

carjacking, but acquitted him of the charges arising from the second carjacking. We will describe both carjackings because the evidence was intertwined.

1. The Carjackings

Around 10:00 p.m., the first victim was sitting in his car near a hotel in Jupiter. A man opened the first victim's door, put a gun to the first victim's head, and told the first victim to get out. A second man approached, and a pickup truck pulled up. The two men pushed the first victim to the ground and drove off in the first victim's car. The pickup truck followed. The men, besides taking the first victim's car, also took the first victim's phone, watch, wallet, and cash, including Cuban money.

Sometime after 1:00 a.m. that night in Greenacres, located about thirty miles south of the Jupiter hotel, the second victim pulled his car into an apartment complex. Two men then approached, one with a silver gun. The men took the second victim's phone and other items, and drove away in the second victim's car. Then a car matching the description of the first victim's car drove past the second victim, 404*404 with the driver's side window partially rolled down. That car's driver said something to the second victim before driving away behind the second victim's car. The second victim could not see what that driver looked like or whether other people were in the car.

The following morning, both victims' cars were found in the same area in a city located between Jupiter and Greenacres. Both the first victim's phone and the second victim's phone were found in the first victim's car. The first victim's watch, wallet, and cash were missing.

2. The Investigation

A Jupiter police detective investigated the first carjacking at the Jupiter hotel. A Palm Beach County sheriff's detective investigated the second carjacking in Greenacres. The detectives came into contact with each other because the carjackings were similar.

The first victim identified two of the codefendants as the carjackers. However, the first victim did not identify the defendant as one of the carjackers or one of the persons inside the pick-up truck.

The second victim also identified one of the codefendants as the carjacker holding the gun. However, the second victim did not identify the defendant as the other carjacker or one of the persons inside the car matching the description of the first driver's car.

The detectives determined that the codefendants did not live in Jupiter, so the detectives pieced together the codefendants' connections to each other. During that investigation, the detectives found that the defendant and codefendants had connections to each other from being stopped by law enforcement on prior occasions. They all lived in the city where the cars were found.

The detectives obtained a search warrant for one of the codefendant's phones. On that phone, the detectives found pictures of that codefendant holding a silver gun matching the gun used in the carjackings. When one of the other codefendants was arrested, he possessed a silver gun matching the gun used in the carjackings.

3. The Facebook Video

The Jupiter police department also found on the codefendant's phone a Facebook video showing both stolen cars. The detectives showed the Facebook video to the first victim before trial.

At trial, the state, without having moved the Facebook video into evidence, asked the first victim if he recognized the defendant in the video he was shown. The defendant objected based on the best evidence rule. The trial court overruled the defendant's objection. The first victim testified that the defendant could be seen on the Facebook video driving the first victim's car and wearing the first victim's watch, while one of the codefendants was sitting in the front passenger seat counting the first victim's Cuban money.

After both the first victim and second victim testified, the Palm Beach County Sheriff's detective testified. The state, without having moved the Facebook video into evidence, asked the detective if he recognized anyone in the Facebook video. The defendant objected based on the best evidence rule. The trial court overruled the defendant's objection. The detective testified he recognized the defendant in the Facebook video. The detective also testified that the Facebook video had been posted approximately twenty-one minutes after the second carjacking.

The state then moved to enter the Facebook video into evidence. The defendant 405*405 objected, and the following exchange occurred at sidebar:

THE COURT: I don't think it's been authenticated yet, has it?
[DEFENSE COUNSEL]: That is our objection, Judge. We believe that this was extracted from the Jupiter Police Department, an agent from the Jupiter Police Department, and they have not yet testified. This witness [the Sheriff's detective] did not extract the video, just merely watched it.
[STATE]: It was just pulled off Facebook. This is a copy of what was pulled off Facebook. This didn't come off anybody's cellphone.
THE COURT: How are you going to authenticate it is the question.
. . . .
[STATE]: For one, it's self-authenticating. You have the Defendant himself saying that it's live, that he is doing it live. Number two, we know the cars were taken, the second car was taken after 1:30 in the morning, and we know the second car was found before 9:15 on the same day. So . . . we know it was taken between 1:30 and recovered between 9:15. This video is of both cars that were stolen—
THE COURT: But how was it downloaded, how was it extracted? You still have an authentication—
[STATE]: It's a copy of it off of Facebook.
THE COURT: Did he [the Sheriff's detective] or did somebody else [download the video]?

[STATE]: I don't think it matters who actually pulled it off. Anybody that viewed it can testify yes, that's the Facebook video I pulled off. And it authenticates itself that it occurred on that day and these are the individuals that are on the video.
THE COURT: I don't think you can authenticate it that way. I don't think you can just say I viewed the video and therefore it is authentic. Somebody needs to testify that they took the video off of Facebook . . . .

After the sidebar, the trial court sustained the defendant's objection to the introduction of the Facebook video based on lack of authentication.

Shortly thereafter, outside of the jury's presence, the state proffered testimony from a Jupiter police digital forensic examiner to authenticate the Facebook video. The digital forensic examiner testified that he had been performing that type of work for approximately six years. He had multiple certifications in computer forensics, and over six hundred hours of training in computer and cellphone forensics, which included a course in online social network investigations from websites like Facebook.

As part of the digital forensic examiner's investigation, he visited one codefendant's public Facebook page. He looked for videos posted within the carjackings' time frame. He found multiple videos on the codefendant's Facebook page, including a Facebook Live video showing people driving a car. He downloaded the video, and verified that the original and the downloaded videos were the same. He testified that at the time of trial, the video remained posted on the codefendant's Facebook page. He confirmed that the video which the state sought to introduce into evidence was the same video which he downloaded. He conceded that he was not sure whether the video's time stamp reflected the time it was recorded, or the time when it was posted on Facebook. He further testified that, aside from the video's time stamp indicating a time shortly after the second carjacking, he had no way of knowing when the video was created.

406*406 The defendant objected that a discovery violation occurred. The defendant argued that the digital forensic examiner was listed as a fact witness but should have been listed as an expert witness because he would be opining on the date and time that the video was created, and would be instructing the jury on how Facebook works, with which a layperson is not familiar. The defendant moved for a *Richardson* hearing.

The trial court found that the digital forensic examiner's testimony was not a discovery violation because "he is simply testifying as to [his] familiar[ity] with Facebook, what he did in downloading it and the features of Facebook."

The defendant then argued that the Facebook video was not authenticated because no witness present during the recording had testified, and no witness had testified as to the reliability of the process which produced the recording.

The state responded that the video was authenticated by its content's distinctive characteristics. According to the state, evidence that the defendant and the codefendants could be seen in the video driving the stolen cars and possessing the stolen property was sufficient to authenticate the video.

The trial court overruled the defendant's authentication objection. The court found that the state had made a prima facie showing of the video's genuineness. The court further reasoned that the video's content established its connection to the case, and the digital forensic examiner testified as to the manner in which the video was produced. The court recognized that its finding of genuineness was merely a threshold finding, and the parties still could argue to the jury about the weight and credibility to be given to the video.

The digital forensic examiner then testified before the jury consistent with his proffered testimony. During his testimony before the jury, the trial court admitted the Facebook video into evidence over the defendant's objections. The trial court also admitted into evidence, over the defendant's objections, a screenshot of the codefendant's Facebook page with the video post as it appeared on the day when the digital forensic examiner downloaded the video. The digital forensic examiner testified that the video's time stamp showed the video was posted at 1:51 a.m.

The state next recalled the Jupiter police detective to testify about the Facebook video's contents. At the beginning of the detective's testimony, the state played the Facebook video for the jury. The state then had the detective testify about his observations from the video based on his knowledge of the defendant's and codefendant's identities. The detective testified that the defendant was driving the first victim's car with one of the codefendants sitting in the passenger seat. The detective testified that the other two other codefendants were driving the second victim's car. The detective identified the defendant's voice as stating "we live" on the video.

After the state rested, the defendant moved for a judgment of acquittal. The defendant argued that the state's proof of grand theft of a vehicle was circumstantial because the first victim had not identified the defendant as one of the carjackers, and the only proof was that the defendant was in the first victim's vehicle on the Facebook video posted after the carjacking. Additionally, the defendant argued that his mere possession of the first victim's car without any proof that he knew the car was stolen was insufficient to show guilty knowledge. The defendant also argued that his mere presence as an after-acquired passenger in the first victim's car was 407*407 insufficient to prove him guilty of grand theft of that car. As to the charge for grand theft of the first victim's watch, the defendant argued that his mere possession of the watch was insufficient to show guilty knowledge.

The trial court denied the defendant's motion for judgment of acquittal, and found sufficient circumstantial evidence existed for the jury to find the defendant guilty of the charges.

The jury ultimately found the defendant guilty of grand theft of a vehicle and grand theft of the watch in the first carjacking, but acquitted him of charges arising from the second carjacking.

B. Our Review of the Defendant's Arguments

This appeal followed. The defendant's arguments primarily relate to the evidence revealed by the Facebook video. According to the defendant, the trial court erred in four material respects:

1. ruling that the state had not committed a discovery violation by not identifying the Jupiter police digital forensic examiner as an expert and, as a result of that ruling, not holding a *Richardson* inquiry;
2. admitting the Facebook video into evidence over the defendant's objection that such evidence was not properly authenticated, because the Jupiter police digital forensic examiner and the Jupiter police detective did not record the video and were not shown in the recording of the video;
3. overruling the defendant's best evidence rule objections to allowing the first victim, the Sheriff's detective, and the Jupiter police detective to identify the defendant and the first victim's stolen property in the Facebook video when those witnesses were in the same position as the jury in reviewing the video; and
4. denying the defendant's motion for judgment of acquittal because the state did not prove the defendant intended to participate in the theft of the first victim's car and watch.

We address each argument in turn.

1. The Discovery Objection

"[W]here a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion." *Pender v. State,* 700 So.2d 664, 667 (Fla. 1997).

Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i) requires the state, as part of its discovery obligation, to disclose expert witnesses. Who constitutes an expert witness may be derived from section 90.702, Florida Statutes (2016):

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

Here, we agree with the trial court that the state had not committed a discovery violation by not identifying the Jupiter police digital forensic examiner as an expert. Although the digital forensic examiner testified based on his knowledge, skill, experience, training, and education, he did not testify in the form of an opinion. The 408*408 digital forensic examiner testified in the form of facts—the actions which he took to access one of the codefendant's public Facebook page, find on that Facebook page the live video featuring the defendant and the codefendants, and download that video for use as evidence at trial.

The fact that the digital forensic examiner, while describing his actions, also explained for the jury how Facebook videos are broadcast and then saved to a Facebook profile timeline, did not convert his factual testimony into expert testimony. As the trial court found, the digital forensic examiner "simply testif[ied] as to [his] familiar[ity] with Facebook, what he did in downloading it and the features of Facebook." Like the trial court, we do not consider the digital forensic examiner's familiarity with Facebook to have been sufficiently specialized to

fall within the scope of section 90.702. *See* *L.L. v. State,* 189 So.3d 252, 256-57 (Fla. 3d DCA 2016) ("Of course, all lay witnesses have some specialized knowledge—knowledge relevant to the case that is not common to everyone. . . . Indeed, that is why all witnesses—lay or expert—are called: to get what they know about the case that other people do not.") (alteration, quotation marks, and citation omitted).

Based on the foregoing, we conclude that the trial court did not abuse its discretion in finding the state had not committed a discovery violation by not identifying the digital forensic examiner as an expert and, as a result of that ruling, not holding a *Richardson* inquiry.

2. The Authentication Objection

A trial court's conclusion regarding authentication is reviewed for an abuse of discretion. *Mullens v. State,* 197 So.3d 16, 25 (Fla. 2016).

"Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." § 90.901, Fla. Stat. (2016).

The mere fact that an item appears online does not make it self-authenticating. Predicate testimony to establish its authenticity or to prove the truth of its content may be required. *See* *Dolan v. State,* 187 So.3d 262, 266 (Fla. 2d DCA 2016) ("Any argument that a copy of an online document . . . can be admitted . . . without any predicate testimony to establish its authenticity or to prove the truth of its content . . . borders on the frivolous.").

However, "authentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic; the ultimate determination of the authenticity of the evidence is a question for the fact-finder." *Mullens,* 197 So.3d at 25. "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication." *Symonette v. State,* 100 So.3d 180, 183 (Fla. 4th DCA 2012) (quotation marks and citation omitted).

Here, the state met the relatively low threshold required to authenticate the Facebook video. The digital forensic examiner visited one of the codefendants' public Facebook page. He looked for videos posted within the carjackings' time frame. He found a Facebook Live video showing the stolen vehicles being driven by the defendant and the codefendants. He downloaded the video, verified that the original and the downloaded videos were the same, confirmed 409*409 that the video which the state sought to introduce into evidence was the same video which he downloaded, and testified that the video remained posted on the codefendant's Facebook page at the time of trial. The first victim testified that the defendant could be seen on the Facebook video driving the first victim's car while wearing the first victim's watch while a codefendant counted the first victim's Cuban money. The Jupiter police detective also testified that the defendant could be seen on the Facebook video driving the first victim's car while stating "we live" on the video. Based on this evidence, we

conclude the state made a prima facie showing of the video's authenticity for the purpose of admission into evidence, thus allowing the jury to make the ultimate determination of the weight to be given to the video's contents.

The defendant cites *Santana v. State,* 191 So.3d 946 (Fla. 4th DCA 2016), for the proposition that "authentication should be made by the technician who operated the recording device or a person with knowledge of the conversation that was recorded." *Id.* at 948. However, *Santana* is distinguishable from the instant case. In *Santana,* the state entered into evidence an alleged *audio* recording of phone conversations between the defendant and a confidential informant. *Id.* at 947. At trial, the confidential informant did not testify, and the investigating agent could not testify that the recordings were true representations of the conversations because he did not monitor the conversations. *Id.* at 948. We found that although the state had introduced testimony supporting the speakers' identities on the recording, the state did not introduce evidence showing that the recording accurately represented the conversations. *Id.*

Santana is distinguishable because there, the issue was an audio recording which potentially could have been altered without detection. Here, however, the Facebook video provides an unbroken visual recording of the defendant for an extended period of time.

The defendant's argument that we should require the state to provide testimony from the defendant, codefendants, or other witnesses who appear in the video, or from someone who recorded the video, sets the authentication burden too high. *See U.S. v. Broomfield,* 591 Fed. Appx. 847, 852 (11th Cir. 2014) (*Biggins* factors usually applied to admitting government surveillance, such as how recording occurred, the recording equipment's condition, and how relevant speakers were identified, were unnecessary to authenticate a YouTube video, because "the prosecution could seldom, if ever, authenticate a video that it did not create."). Instead, as in *Broomfield,* if the video's distinctive characteristics and content, in conjunction with circumstantial evidence, are sufficient to authenticate the video, then the government has met its authentication burden. *Id.*

We choose to follow the Eleventh Circuit and other courts which have permitted the admission of social media videos in criminal cases based on sufficient evidence that the video depicts what the government claims, even though the government did not: (1) call the creator of the videos; (2) search the device which was used to create the videos; or (3) obtain information directly from the social media website. *See, e.g., U.S. v. Washington,* 2017 WL 3642112, *2 (N.D. Ill. Aug. 24, 2017) (YouTube video which the government contended showed the defendant and several other men pointing firearms at the camera was sufficiently authenticated where law enforcement witness would testify that he watched this video on YouTube, recognized the defendant, and downloaded the video); 410*410 *State v. Gray,* ___ So.3d ___, ___, 2017 WL 3426021, *16 (La. Ct. App. June 28, 2017) (YouTube videos were sufficiently authenticated where the investigating officer's testimony provided sufficient support that the videos were what the state claimed them to be, that is, videos depicting the defendant and other gang members in a park and surrounding area). As the *Washington* court stated, "[w]hile a witness with [knowledge of the video's creation] *could* authenticate [the] video, Rule 901 does not *require* it." 2017 WL 3642112 at *2.[1]

Here, as in the foregoing cases, the state met its authentication burden. The state presented the Jupiter Police digital forensic examiner's testimony regarding how the Facebook video was obtained and its distinctive characteristics, and the first victim's and the Jupiter police detective's testimony regarding the Facebook video's distinctive content. Therefore, the trial court did not abuse its discretion in admitting the Facebook video into evidence over the defendant's objection that such evidence was not properly authenticated.

3. The Best Evidence Objection

"A trial court's decision on the admissibility of evidence is reviewed under an abuse of discretion standard. That discretion, however, is limited by the rules of evidence." *Ayalavillamizar v. State,* 134 So.3d 492, 496 (Fla. 4th DCA 2014) (citation omitted).

The best evidence rule is codified in section 90.952, Florida Statutes (2016): "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." "This rule is predicated on the principle that if the original evidence is available, that evidence should be presented to ensure accurate transmittal of the critical facts contained within it." *T.D.W. v. State,* 137 So.3d 574, 576 (Fla. 4th DCA 2014) (citation omitted).

Here, the original evidence was available and presented. Thus, the best evidence rule was satisfied.

What the defendant appears to be arguing, instead of the best evidence rule, is an unpreserved "lay opinion" objection that the first victim, the Sheriff's detective, and the Jupiter police detective were permitted to identify the defendant and the first victim's stolen property in the Facebook video when those witnesses were in the same position as the jury in reviewing the video. Even though this apparent "lay opinion" objection was not specified as such, we will address it on the merits.

Section 90.701, Florida Statutes (2016), states:

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
411*411 (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

We recently examined section 90.701 to determine the circumstances when a court may allow a lay person to identify persons in recordings. As we stated in *Alvarez v. State,* 147 So.3d 537 (Fla. 4th DCA 2014):

Even non-eyewitnesses may testify as to the identification of persons depicted or heard on a recording so long as it is clear the witness is in a better position than the jurors to make those determinations. *See* *Johnson v. State,* 93 So.3d 1066, 1069 (Fla. 4th DCA 2012) (holding no error in admission of detective's identification of defendant as individual in surveillance video where defendant changed his appearance after the event recorded in the video, and the detective had a personal encounter with the defendant shortly after the event and before he changed his appearance); *State v. Cordia,* 564 So.2d 601, 601-02 (Fla. 2d DCA 1990) (finding that officers' identification of defendant's voice on a recording was admissible where officers had worked with defendant in the past and were familiar with his voice).
However, "[w]hen factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury." *Ruffin v. State,* 549 So.2d 250, 251 (Fla. 5th DCA 1989) (finding the court erred in allowing three officers to identify defendant as the man in the videotape, where the officers were not eyewitnesses to the crime, did not have familiarity with Ruffin, and were not qualified as experts in identification); *see also* *Proctor v. State,* 97 So.3d 313, 315 (Fla. 5th DCA 2012) (finding court erred in allowing officer to identify defendant as the perpetrator in a surveillance video where the officer was in no better position than the jury to make that determination); *Charles v. State,* 79 So.3d 233, 235 (Fla. 4th DCA 2012) (finding court erred in allowing detective to testify that he could not identify the defendant as the person on the surveillance video the first time he watched it, but "he was later able to piece things together and identify the person in the video" as the defendant).

Alvarez, 147 So.3d at 542-43.

Here, the two investigating detectives were in a better position than the jury to identify the defendant and codefendants in the Facebook video, because the detectives were familiar with the defendant and codefendants through their investigation and interviews, and because the codefendants were not jointly tried with the defendant and did not testify before the jury.

Additionally, the first victim was in a better position than the jury to identify his stolen car, stolen watch, and stolen Cuban money in the Facebook video because he was familiar with those items. Although the first victim identified the defendant in the Facebook video in the context of identifying the stolen property, we consider the first victim's identification of the defendant to be harmless given that the two investigating detectives identified the defendant in the Facebook video, and the state played the Facebook video for the jury.

412*412 In sum, because the two investigating detectives and the first victim were in a better position than the jury to identify the persons and stolen property in the Facebook video, the trial court did not abuse its discretion in overruling the defendant's best evidence/lay opinion objection to the investigating detectives and the first victim describing the Facebook video's contents.

4. The Motion for Judgment of Acquittal

The standard of review for denial of a motion for judgment of acquittal was stated in *Pagan v. State,* 830 So.2d 792 (Fla. 2002):

In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Id. at 803 (internal citations omitted). Nevertheless, "[t]he State is not required to rebut a hypothesis of innocence that is unreasonable." *Westbrooks v. State,* 145 So.3d 874, 878 (Fla. 2d DCA 2014).

In the instant case, the defendant's hypothesis of innocence was that he was not present when the carjackings occurred and was not involved in the carjackings. Rather, he argued, he made a poor decision by being in the first victim's car and hanging out with the codefendants after the carjackings occurred. Thus, the defendant argued, he lacked the intent to participate in the crimes.

The state's evidence rebutted the defendant's hypothesis of innocence. The defendant appeared in the Facebook video just a few hours after the first carjacking, and less than an hour after the second carjacking, driving the first victim's car, wearing the first victim's watch, and stating "we live" when the video was recording, while a codefendant counted the first victim's Cuban money. Both victims identified from the crime scenes two codefendants who appeared in the video with the defendant. Viewing this evidence in the light most favorable to the state, a rational trier of fact could find beyond a reasonable doubt that the defendant was part of the scheme to steal the first victim's property, and not merely in the wrong place at the wrong time with the wrong crowd after the fact. *See* § 812.022(2), Fla. Stat. (2016) ("[P]roof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen."); *T.S.R. v. State,* 596 So.2d 766, 767 (Fla. 5th DCA 1992) ("Although there is no direct physical evidence linking the defendant to the crimes[,] the finder of fact has the right to infer guilt of theft from the unexplained possession of recently stolen goods.").

To the extent the defendant's intent was in question, the evidence presented was sufficient to send that question to the jury. *See* *Salter v. State,* 77 So.3d 760, 763 (Fla. 4th DCA 2011) (the "intent to participate in a crime is a question for the jury and a trial court properly denies a motion for judgment of acquittal where an issue remains for the jury to decide.").

413*413 Based on the foregoing, the trial court did not err in denying the defendant's motion for judgment of acquittal.

Conclusion

But for the defendant's participation in the Facebook video showing off the bounty from that night's criminal escapade, the state may not have had sufficient evidence to convict the defendant as a participant in these crimes. However, the Facebook video existed, and

made the state's case. The trial court: (1) properly ruled that the state had not committed a discovery violation in its disclosure of the digital forensic examiner who obtained the Facebook video; (2) properly overruled the defendant's authentication objection to the Facebook video's admission based on the state's witnesses' testimony; (3) properly overruled the defendant's best evidence/lay opinion objection to allowing the state's witnesses to identify the defendant and the first victim's stolen property in the Facebook video; and (4) properly denied the defendant's motion for judgment of acquittal. We find no merit in the defendant's other arguments not discussed in this opinion. We affirm the defendant's convictions.

Affirmed.

Gross and Kuntz, JJ., concur.

[1] *But see, e.g., U.S. v. Hassan,* 742 F.3d 104 (4th Cir. 2014) (trial court did not abuse its discretion in admissions of Facebook pages and YouTube videos where the government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities, and by tracking the Facebook pages and Facebook accounts to the defendant's mailing and e-mail addresses via internet protocol addresses); *People v. Franzese,* 154 A.D.3d 706, 61 N.Y.S.3d 661 (Sup. Ct. 2017) (YouTube video was properly authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, by the defendant's own admissions about the video made in a jail phone call, and by the video's distinctive characteristics).

United States v. Hunt

United States District Court for the Eastern District of New York

April 15, 2021, Decided; April 15, 2021, Filed

21-CR-86 (PKC)

Reporter
2021 U.S. Dist. LEXIS 72712 *; 115 Fed. R. Evid. Serv. (Callaghan) 283; __ F. Supp. 3d __; 2021 WL 1428579

UNITED STATES OF AMERICA, - against - BRENDAN HUNT, Defendant.

Counsel: [*1] For Brendan Hunt also known as, X-Ray Ultra, Defendant: Leticia Maria Olivera, LEAD ATTORNEY, Jan Alison Rostal, Federal Defenders of New York, Inc., Brooklyn, NY.

For USA, Plaintiff: David K. Kessler, LEAD ATTORNEY, United States Attorney's Office, Brooklyn, NY; Francisco J Navarro, LEAD ATTORNEY, United States Attorney's Office, Brooklyn, NY; Ian C. Richardson, LEAD ATTORNEY, U.S. Attorney's Office, Eastern District of New York, Brooklyn, NY.

Judges: Pamela K. Chen, United States District Judge.

Opinion by: Pamela K. Chen

Opinion

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

On February 16, 2021, Defendant Brendan Hunt was indicted on one count of threatening to assault and murder members of the United States Congress in violation of 18 U.S.C. § 115(a)(1)(B). (Indictment, Dkt. 6.) The Complaint, dated January 18, 2021, alleges that Defendant made four statements on social media websites between December 6, 2020, and January 12, 2021, that "threatened, or incited others, to murder members of Congress who were engaged in the performance of their official duties and in retaliation for such officials' performance of their official duties."[1] (Complaint and Affidavit in Support of Application for Arrest Warrant ("Compl."), Dkt. [*2] 1, ¶ 3.) Before the Court are the parties' motions *in limine*, filed on April 7, 2021, in anticipation of trial, which is scheduled to begin on April 19, 2021. (Defendant's Motions *in Limine* ("Def.'s MIL"), Dkt. 46; Government's Motions *in Limine* ("Gov.'s MIL"), Dkt. 47.)

In his motion, Defendant seeks: (1) an *in camera* inspection of the grand jury minutes to ensure that the grand jury did not indict Defendant on a theory of incitement; (2) a determination that three of the four statements underlying the charge amount to incitement and cannot, as a matter of law, constitute a "true threat"; (3) to preclude the Government from introducing expert testimony on white supremacist beliefs and anti-Semitic propaganda; (4) to preclude the Government from introducing, pursuant to Federal Rule of Evidence ("Rule") 404(b), (i) Defendant's statements relating to the 2020 presidential election and the January 6, 2021 riot at the U.S. Capitol, (ii) Defendant's knowledge of white supremacist and anti-Semitic propaganda, symbols, and beliefs, and (iii) evidence of Defendant's "violent tendencies and incarceration"; (5) to preclude the Government, as a sanction for alleged spoliation, from introducing the video entitled "Kill Your Senators" that [*3] Defendant made and posted to the platform BitChute, which is

[1] Though the Indictment contains only a single count alleging a violation of 18 U.S.C. § 115(a)(1)(B), the Government has confirmed that it will seek to prove at trial that each of the four statements set forth in the Complaint constitutes a threat that violates the statute.

one of the four charged threats; and (6) justification by the Government of the redactions contained in the discovery and materials provided pursuant to 18 U.S.C. § 3500. (Def.'s MIL, Dkt. 46, at 6-17.)

In its motion, the Government seeks: (1) an instruction to the jury in advance of opening statements about what constitutes a "true threat" and the distinction between "true threats" and political speech; (2) to introduce evidence of (i) Defendant's statements about the 2020 presidential election and the U.S. Congress, (ii) Defendant's knowledge of white supremacist and anti-Semitic propaganda, symbols, and beliefs, and (iii) evidence of Defendant's incarceration, if Defendant argues that responses to the alleged threats by law enforcement, victims, or other individuals were deficient or delayed; (3) to introduce evidence regarding the 2020 presidential election and January 6, 2021 attack on the U.S. Capitol as background information; (4) to introduce evidence to explain how "collective threats," *i.e.*, threats against members of Congress collectively, may constitute "true threats" that impede, intimidate, and interfere with the official duties [*4] of members of Congress; (5) to introduce evidence regarding Defendant's social media accounts pursuant to business-records certifications and foreign-records certifications; (6) to preclude cross-examination of law enforcement witnesses about specific methods or procedures they use to carry out their protective functions; (7) to preclude Defendant from arguing (i) that he did not intend to carry out his alleged threats, or (ii) that he is a peaceful person or lacks violent tendencies; and (8) to preclude any evidence of threats or inflammatory statements made by uncharged individuals. (Gov.'s MIL, Dkt. 47, at 7-38.)

The Court held oral argument on the motions on April 12 and 13, 2021. (4/12/2021 Minute Entry; 4/13/2021 Minute Entry.) At oral argument, the Court directed the parties to submit marked exhibits of all statements going to Defendant's state of mind and/or intent that they respectively intended to introduce at trial. (4/12/2021 Minute Entry; 4/13/2021 Minute Entry.) The parties submitted these exhibits on April 14, 2021.[2] (*See* Dkts. 63, 64.) The Court assumes the parties' familiarity with the relevant facts.

DISCUSSION

18 U.S.C. § 115(a)(1)(B) provides that

> [w]hoever . . . threatens to assault, kidnap, [*5] or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished[.]

18 U.S.C. § 115(a)(1)(B). "Although the statute criminalizes certain speech, the Supreme Court has held that the First Amendment does not afford protection to speech that constitutes a 'true threat.'" *United States v. Santos*, 801 F. App'x 814, 816 (2d Cir. 2020) (summary order) (quoting *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). "This Circuit's test for whether conduct amounts to a true threat 'is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.'"[3],[4] *United States v. Turner*,

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[2] Appendix 1 summarizes the exhibits submitted by the parties and the Court's rulings on whether each may be introduced at trial, assuming proper foundation is established.

[3] The parties disagree over whether the "true threat" inquiry also contains a subjective component requiring the speaker to intend to make a threat. (*Compare* Def.'s MIL, Dkt. 46, at 4-5, *with* Gov.'s MIL, Dkt. 47, at 4 n.1, *and* Government's Opposition to Defendants' Motions *in Limine* ("Gov.'s Opp."), Dkt. 48, at 13 n.2.) In *Virginia v. Black*, the Supreme Court invalidated a conviction under a state cross-burning statute where the jury was instructed that the cross-burning, "by itself, [wa]s sufficient evidence from which [it] may

infer the required intent" to intimidate. 538 U.S. 343, 363-64, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). "True threats" that are outside the protections of the First Amendment, the Court explained, "encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359 (emphasis added) (citing *Watts*, 394 U.S. at 708; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). Similarly, in *Elonis v. United States*, the Court held that 18 U.S.C. § 875(c), which "makes it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another,'" contains an implicit mens rea requirement that the defendant know "that the communication contains a threat." 575 U.S. 723, 726, 734-37, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (quoting 18 U.S.C. § 875(c)).

The Second Circuit "has yet to address whether the objective test for a true threat has been supplemented with a subjective test by [*Black* and *Elonis*], both of which might be read . . . to require that the speaker subjectively intend to communicate a threat or intimidate the threat's recipient." *United States v. Wright-Darrisaw*, 617 F. App'x 107, 108 n.2 (2d Cir. 2015) (summary order) (citing, *inter alia*, *Black*, 538 U.S. at 359; *Elonis*, 135 S. Ct. at 2012); *see also Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-CV-8668 (VM), 512 F. Supp. 3d500, 2021 U.S. Dist. LEXIS 27059, 2021 WL 480818, at *9 (S.D.N.Y. Jan. 12, 2021) (noting that "it remains unresolved whether 'true threats' must be *intended* as such" by the defendant). In *Turner*, the Second Circuit acknowledged the "disagreement . . . among [the] circuits regarding whether *Black* altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat," but declined to resolve the issue, noting that the outcome in that case "would be the same" because 18 U.S.C. § 115(a)(1)(B) already contains a subjective intent element, and the evidence sufficiently established a true threat "pursuant to both the objective and subjective tests." 720 F.3d at 420 n.4 (citing *United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005); *United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012); *United States v. White*, 670 F.3d 498, 508-09 (4th Cir. 2012)).

Defendant argues that though § 115(a)(1)(B) contains a subjective element requiring an intent to impede, intimidate, interfere with, or retaliate against an official with respect to the official's official duties, it is silent, like § 875(c), "on the required mental state for the *threat*," and thus a conviction requires a showing that the defendant intended to make the threat. (Def.'s MIL, Dkt. 46, at 5 (emphasis added) (citing *Elonis*, 575 U.S. at 736).) The Government, on the other hand, points out that "[c]ourts have not applied the *Elonis* subjective-intent standard to [§] 115." (Gov.'s MIL, Dkt. 47, at 4 n.1 (citing, *inter alia*, *United States v. Segui*, No 19-CR-188 (KAM), 2019 U.S. Dist. LEXIS 230551, 2019 WL 8587291, at *12 (E.D.N.Y. Dec. 2, 2019)).) Because, as discussed below, the Court is not going to instruct the jury on what constitutes a "true threat" prior to opening statements, it does not resolve this dispute at this juncture.

[4] The parties also disagree over whether, in assessing whether a statement constitutes a true threat, the court must ask "whether the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution[.]" (Def.'s MIL, Dkt. 46, at 4 (internal quotation marks omitted) (quoting *N.Y. ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 196 (2d Cir. 2001)); *cf.* Gov.'s MIL, Dkt. 47, at 6 n.3 ("The Second Circuit has subsequently made clear that [the 'unequivocal, unconditional, immediate and specific' definition] is not the exclusive definition of 'true threat' and that 'we have still found threats that were both conditional and inexplicit.'" (quoting *New York v. Griepp*, 991 F.3d 81, 113 (2d Cir. 2021))).) The Court does not resolve this issue at this time.

720 F.3d 411, 420 (2d Cir. 2013) (alteration in original) (quoting *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006)). "In general, 'whether a given writing constitutes a threat is an issue of fact for the trial jury.'" *Davila*, 461 F.3d at 304 (quoting *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994)); *see also United States v. Amor*, 24 F.3d 432, 436 (2d Cir. 1994) ("[W]hether [the] words used are a true threat is generally best left to the triers of fact." (internal quotation marks and citation omitted)). [*6]

In addition to its "true threat" component, § 115(a)(1)(B) also contains a subjective element, under which the Defendant must have made the threat "with [the] intent to impede, intimidate, or interfere with [the federal official] while engaged in the performance of official duties, or with intent to retaliate against [the official] on account of the performance of official duties." 18 U.S.C. § 115(a)(1)(B).

The Complaint alleges that Defendant violated § 115(a)(1)(B) by making the following four statements on various social media platforms:

- Posting on his Facebook account on December 6, 2020, the following message:

> Trump, we want actual revenge on democrats. Meaning, we want you to hold a public execution of pelosi aoc schumer[5]]

[5] The Complaint alleges that "'pelosi' is a reference to the Honorable Nancy Pelosi, Speaker of the House of Representatives; the reference to 'aoc' is a reference to Representative Alexandria Ocasio-Cortez, who represents New York's 14th Congressional District in the House of Representatives; and the reference to 'schumer' is a reference to [then-]Senate Minority Leader and New York Senator Charles E.

> etc. And if you dont do it, the citizenry will. We're not voting in another rigged election. Start up the firing squads, mow down these commies, and lets take america back!

(Compl., Dkt. 1, ¶ 4.)

• Responding from his Facebook account on December 6, 2020, to a *New York Daily News* article "about a Staten Island resident who allegedly used his vehicle to run over a law enforcement [*7] officer who had come to arrest the resident for violating" COVID-19-related regulations, with the following comment:

> Fuck the lockdown po-lice! Yeah booiii run those pigs over! Anyone enforcing this lockdown mask vaccine bullshit deserves nothing less than a bullet in their fucking head! Including cops! If you're going to shoot someone tho, go after a high value target like pelosi schumer or AOC. They really need to be put down. These commies will see death before they see us surrender! USA!!

(*Id.* ¶ 5.)

• Posting on the video-sharing platform BitChute on January 8, 2021 (two days after the January 6, 2021 riot at the U.S. Capitol), an 88-second video entitled "KILL YOUR SENATORS" with the summary "Slaughter them all," wherein Defendant stated, in relevant part:

> We need to go back to the U.S. Capitol when all of the Senators and a lot of the Representatives are back there, and this time we have to show up with our guns. And we need to slaughter these motherfuckers . . . [O]ur government at this point is basically a handful of traitors . . . so what you need to do is take up arms, get to D.C., probably the inauguration . . . so called inauguration of this motherfucking communist Joe Biden [*8] . . . [T]hat's probably the best time to do this, get your guns, show up to D.C., and literally just spray these motherfuckers . . . like, that's the only option . . . [T]hey're gonna come after us, they're gonna kill us, so we have to kill them first . . . [S]o get your guns, show up to D.C., put some bullets in their fucking heads. If anybody has a gun, give me it, I'll go there myself and shoot them and kill them . . . [W]e have to take out these Senators and then replace them with actual patriots . . . [T]his is a ZOG[6]] government . . . [T]hat's basically all I have to say, but take up arms against them.

(*Id.* ¶ 7.)

• Responding, on January 12, 2021, to two messages on the social media website Parler, the first of which stated, "America fought a good fight. Our great Country is resilient & we will get thru this difficult time. Acting responsibly at this moment is what all Americans must do. During the past 4 tough years, I found faith, family and true friends,"[7] and the second of which stated, "I am tired of this ambiguous bullshit. Our feet are in the fire. If there is a plan tell us it. If not get the hell out of our way. The Republic will not survive lukewarm platitudes and half [*9] hearted action," with the following comment:

> exactly, enough with the "trust the plan" bullshit. lets go, jan 20,[8]] bring your guns #millionmilitiamarch[.]

Schumer." (Compl., Dkt. 1, ¶ 4.)

[6] The Complaint alleges that "ZOG" refers to "Zionist occupied government," an acronym used by white supremacists. (Compl., Dkt. 1, ¶ 7 n.2.)

[7] The Complaint alleges that this first message, posted under the username @GenFlynn, was written by "former National Security Advisor Michael Flynn, who called on supporters of President Trump to protest [at the U.S. Capitol] on January 6, 2021." (Compl., Dkt. 1, ¶ 10.)

[8] The Complaint alleges "that 'jan 20' refers to January 20, 2021, the date of the inauguration of President-elect Joseph R. Biden Jr. as President of the United States." (Compl., Dkt. 1, ¶ 10.)

(*Id.* ¶ 10.)

I. Defendant's Private Text Messages

The Government's request to introduce Defendant's text messages is granted to the extent those messages relate to Defendant's intent when he made the alleged threats. Section 115(a)(1)(B) requires a showing that Defendant intended "to impede, intimidate, or interfere with [the federal officials] while engaged in the performance of official duties," or "to retaliate against such official[s] . . . on account of the performance of official duties." 18 U.S.C. § 115(a)(1)(B). Because "criminal intent may be prove[n] by circumstantial evidence alone," *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) (collecting cases), "prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged," *United States v. Brand*, 467 F.3d 179, 197 (2d Cir. 2006) (citation omitted).

The alleged threats reference, for example, "want[ing] actual revenge on democrats" (Compl., Dkt. 1, ¶ 4), a "rigged election" (*id.*), "go[ing] back to the U.S. Capitol when all of the Senators and a lot of Representatives are back there" (*id.* ¶ 7), and the "so called inauguration" of President Biden (*id.*). [*10] In seeking to prove Defendant's intent to impede, intimidate, interfere with, or retaliate against federal officials when he made these statements, the Government offers the following text message exchange between Defendant and his father:

- 11/5/2020 2:16:47 a.m. - Defendant:
  Trump should just declare martial law, cancel the transfer of power, and round up the domestic enemies of our republic. The military and the american people would back him. During hitlers first term in office, circumstances were such that it was necessary for him to override the democratic process and become the absolute leader of his country. Trump should prob do the same if necessary or they will throw his family in jail and destroy the country.
- 11/5/2020 2:30:19 a.m. - Defendant's father:
  All of these election issues have to and will be resolved through a legal process. This will play out over the coming days and weeks - right now, Trump campaign's argument about outstanding votes in Arizona is already showing merit. Trump's lawsuits already in progress.
- 11/5/2020 2:38:48 a.m. - Defendant:

  As trump said: "The damage has already been done to the integrity of our system, and to the Presidential Election itself" [*11] - all these corrupt journos pols and disinfo traitors will still be in place to sabotage the country even if he wins. They have to be removed somehow or this will all happen again in 4 years only worse
- 11/5/2020 2:43:01 a.m. - Defendant's father:
  No need to panic. I trust Trump to handle this through legal means and he will. PS Keep your eye on Arizona - vote count has moved in his direction as his team said it would.
- 11/5/2020 2:47:13 a.m. - Defendant:
  Yeah ive been keeping track of AZ. I am confident Trump and his team can secure the presidency (hopefully thru the courts if needed) but thats just the first step. We would still have a major corruption problem in the country with these whacked out mobs and a corrupt ruling elite.
- 11/5/2020 2:50:06 a.m. - Defendant's father:
  The corrupt elite has unfortunately been around forever.
- 11/5/2020 2:53:12 a.m. - Defendant:
  I suppose but they've gotten completely out of control and need to be reigned in before our great nation is brought to ruin
- 11/5/2020 2:54:34 a.m. - Defendant's father:
  Half the country voted for Trump - people have gotten it.
- 11/5/2020 2:58:27 a.m. - Defendant:

> Id say much more than half, but our voices have been stifled [*12] or silenced by this communist-marxist bloc of elites and their useful idiots. It is a mind virus that they have infected our friends and families with. It needs to be eliminated the same way theyve done with the fake covid virus used to destroy trump. We need to lock down the super spreaders

- 11/5/2020 3:12:59 a.m. - Defendant:

> The media is prob going to claim that biden is pres elect, so the important thing for trump to do is establish this is totally illegitimate before that announcement is made. Otherwise it will just make it harder to fight.

- 11/5/2020 4:23 a.m. - Defendant's father:

> Trump's got a smart campaign team - I trust they will do everything necessary. He's no pushover. One key is count in Arizona - if that gets turned around, as Trump team predicts, it changes everything.

- 11/5/2020 8:38:37 p.m. - Defendant:

> Its ludicrous that AZ is taking until friday night to release their vote count. And the media are sticking by their call for Biden even tho it was way premature. The FOX decision desk was being run by a dem who donated thousands of dollars to that party, and FOX was the first to call that race. . . The only reason they are delaying the vote counts in these states is [*13] bc they're trying to find some way to get Biden ahead with fake ballots or throwing out enough trump ballots. These democrat a-holes are out for blood. Trump should invoke the insurrection act. This is a fake election bc of the dems and their mail in plot to seize the country and destroy us.

- 11/6/2020 2:13:58 a.m. - Defendant's father:

> Latest count in Arizona has Trump closing and picking up steam.

- 11/6/2020 2:29:04 a.m. - Defendant:

> The damage is done. Our election has already been contaminated. These treasonous democrats and their media/antifa cohorts need to be arrested and utterly destroyed. We also need to start rounding up illegals and just shipping them out of the US. They are domestic enemies to the republic, they are trying to kill our nation and they will not stop until someone makes them.

(Gov. Exs. 40A—C.)

These statements shed light on whether Defendant intended his alleged threats to "retaliate against" members of Congress "on account of the performance of [their] duties," as well as whether he intended "to impede, intimidate, or interfere with [them] while engaged in the performance of official duties." *See* 18 U.S.C. § 115(a)(1)(B). These text messages are therefore relevant to the subjective-intent [*14] element of § 115(a)(1)(B).[9]

Although Defendant does not "disput[e] the relevance of [his] public statements or political beliefs," he argues his private text messages are "merely shorter versions of the statements he has made online," and are therefore "irrelevant and needlessly cumulative." (Def.'s MIL, Dkt. 46 at 12.) But Defendant fails to explain why his private statements relating to intent are any less relevant than his public statements. Nor are his private text messages needlessly cumulative of his public statements; because the private statements may

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[9] This evidence is admissible as direct evidence of Defendant's intent under the subjective element of § 115(a)(1)(B), or as evidence of intent under Rule 404(b). Under Rule 404(b), "[e]vidence of any other crime, wrong, or act . . . may be admissible for [a] purpose[] such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Courts in the Second Circuit "follow an inclusionary rule, allowing the admission of such evidence for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403[.]" *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (citation omitted). Further, "Rule 404(b) is not limited to evidence of crimes or wrongs. By its very terms, Rule 404(b) addresses 'other crimes, wrongs, *or acts*,'" including sending text messages. *See United States v. Scott*, 677 F.3d 72, 78 (2d Cir. 2012) (emphasis in original).

reflect Defendant's views unfiltered for publication, they provide a different perspective on his state of mind than those he made publicly. The Government may therefore introduce Government Exhibits 40A, 40B, and 40C.[10]

II. White-Supremacist and Anti-Semitic Propaganda, Beliefs, and Symbols

The Government seeks to introduce evidence that Defendant held white-supremacist and anti-Semitic views, and to contextualize the white-supremacist and anti-Semitic propaganda, beliefs, and symbols referenced in Defendant's communications and statements through the testimony of Mr. Oren Segal, an expert on that topic. (Gov.'s MIL, [*15] Dkt. 47, at 15-22.) It argues that at least one of Defendant's alleged threats was motivated by such views. (*See* Gov.'s MIL, Dkt. 47, at 18.) In the 88-second BitChute video entitled "Kill Your Senators," Defendant referenced "a ZOG government," allegedly referring to the anti-Semitic term "Zionist occupied government." (Compl., Dkt. 1, ¶ 7.) In that video, Defendant stated, "they're gonna come after us, they're gonna kill us, so we have to kill them first," and "[i]f anybody has a gun, give me it, I'll go there myself and shoot them and kill them." (*Id.*)

Because the Government must prove that Defendant made his statements with the "intent to impede, intimidate, or interfere with [the officials] while engaged in the performance of official duties," or "to retaliate against such official[s] . . . on account of the performance of official duties," the bases for his word-choices are relevant. 18 U.S.C. § 115(a)(1)(B). Further, Defendant's alleged white-supremacist and anti-Semitic views help contextualize the purportedly white-supremacist and anti-Semitic rhetoric in his alleged threats. *See United States v. Viefhaus*, 168 F.3d 392, 398 (10th Cir. 1999) (affirming admission of "racist and inflammatory literature and materials found in [defendant's] house" to contextualize [*16] his alleged bomb threat, which included racist remarks).

The Government is also permitted to introduce expert testimony to explain the alleged coded references in Defendant's purported threats. "Generally, expert testimony may be admissible if it is helpful to the trier of fact. Expert witnesses are often uniquely qualified in guiding the trier of fact through a complicated morass of obscure terms and concepts." *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (citing Fed. R. Evid. 702). Although "an expert witness [in a criminal case] must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," Fed. R. Evid. 704, an expert witness may explain relevant "code words" for the jury, *see United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003).

The Government argues that testimony by Mr. Segal will help explain such symbols to the extent they appeared in Defendant's alleged threats. (*See* Gov.'s MIL, Dkt. 47, at 17-18.) According to the Government, Mr. Segal will explain that "ZOG," which Defendant references in his BitChute video, means "Zionist Occupied Government," and that

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[10] Defendant may offer rebuttal evidence that he lacked the requisite intent, including all the proposed statements contained in Defense Exhibits A and B. (*See* Dkts. 63-1, 63-2.) These exhibits are relevant to Defendant's intent in making the alleged threats insofar as they reveal the views that may have motivated his statements. *See* 18 U.S.C. § 115(a)(1)(B). The Court notes that the remarks from September 26, 2020, listed in BH-0000008 (Def.'s Ex. B, Dkt. 63-2, at 3), are admissible only to show Defendant's state of mind in making the alleged threats and not for the truth of whether Defendant is "not a liberal or an anarchist," *see* Fed. R. Evid. 801(d)(2); the Court will instruct the jury accordingly if necessary. The Court further notes that Defendant's comment from November 16, 2020, listed in BH-00000009 (Def.'s Ex. B, Dkt. 63-2, at 1), may be relevant to show Defendant's beliefs as to the breadth of his audience and the likelihood that his alleged threats would reach public officials, not for the truth of the matters asserted. *See Turner*, 720 F.3d at 427 ("The degree to which [the defendant]'s statements were widely read and noted publicly was relevant to whether [he] intended for his threats to reach—and thus to intimidate—[the targets]."). Again, it is not being admitted for its truth, *i.e.*, that Defendant, in fact, had few followers, and the Court will give a limiting instruction as necessary.

because the number 88 signifies "Heil Hitler" to the white supremacist community, the 88-second length of the video could be a reference to that [*17] phrase. (*Id.* at 18.) As noted, these references are relevant to Defendant's intent and the context of his words. The Government is therefore permitted to ask Mr. Segal to explain these alleged "code[s]" because they bear on the elements of the charge, and the jury would be unlikely to understand them otherwise. *See Dukagjini*, 326 F.3d at 53.

Defendant argues his alleged white-supremacist and anti-Semitic views are irrelevant because "[t]he [G]overnment does not allege that [his] statements were motivated by bigotry" or "directed . . . to bigoted individuals." (Def.'s MIL, Dkt. 46, at 10.) But, as the Government contends, the testimony may "provide[] necessary context that establishes the meaning that [Defendant] ascribed to the statements" (Gov.'s MIL, Dkt. 47, at 20), and may be potentially relevant to the seriousness and genuineness of Defendant's intent. The Government is permitted to argue at trial that Defendant's views provide such context and suggest he intended to impede, intimidate, interfere with, or retaliate against the officials referenced in the alleged threats. *See* 18 U.S.C. § 115(a)(1)(B).

Even so, Defendant is correct that evidence that he holds white-supremacist and anti-Semitic views is likely to be unduly prejudicial if [*18] it extends beyond explaining the references in his alleged threats. Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Given the likelihood of undue prejudice, the Government may introduce such evidence only to the extent necessary to explain the meaning of the references in Defendant's alleged threats and Defendant's knowledge of those meanings.

The Court thus allows:

- Government Exhibits 40D[11] and 40E,[12] which reflect text messages Defendant allegedly sent near the time of the 2020 presidential election, and which may bear on whether he wished to retaliate against public officials—based on white supremacist and anti-Semitic beliefs—for their performance of official duties.

- Government Exhibits 30 and 30T, which are a video and transcript in which Defendant explains his use of coded messages on his YouTube channel. This evidence is relevant to show Defendant's intent in using coded language in his alleged threats and to show Defendant's beliefs as to the breadth of his audience. *[*19] See Turner*, 720 F.3d at 427 (noting that "[t]he degree to which [the defendant]'s statements were widely read and noted publicly was relevant to whether [he] intended for his threats to reach—and thus to intimidate—[the targets]").

- Government Exhibits 41A, 41B, and 41C, in which Defendant references, *inter alia*, "a big zionist" who "only funds repubs who will work on israels interests," and notes that "Trump is very pro Israel" but that "you cant really talk about this stuff too openly in america bc once you start mentionibg israel everyones ears perk

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[11] A text message Defendant sent his father on 11/6/2020, at 2:56:35 a.m., stating:

> Previous generations were right to be suspicious of immigrants. Look at the mafias that were set up by the jews, italians, and even the irish. New York has been completely taken over by zionist jews who have loyalty to israel not america.

(Gov. Ex. 40D.)

[12] A text message Defendant sent his father on 11/6/2020, at 2:43:58 a.m., stating:

> The crime rate soar among second-generation immigrants. They are taking our jobs, our benefits, our birthright, and our culture. They refuse to assimilate, they join gangs and terrorize our citizens, they have no accountability and many if not most of them are actively supporting the overthrow of our president. I don't care if they are "hard-working" they are low IQ mongoloids and they need to go.

(Gov. Ex. 40E.)

up like ur about to say some hitler type stuff lol." (Gov. Ex. 41A.) This evidence is also relevant insofar as Defendant discusses his interest in the writings of Adolph Hitler (Gov. Exs. 41A—C), which the Government intends to connect to his 88-second BitChute video.

• To a limited extent, Government Exhibit 50, which is Defendant's digital copy of convicted murderer Dylann Roof's manifesto. The Government may introduce only those pages that contain "88," "14," and/or anti-Semitic symbology (*e.g.*, a swastika) it seeks to associate with Defendant's alleged threats. Further, the Government may not introduce evidence of the authorship of the manifesto, as the [*20] probative value of that evidence would be substantially outweighed by the prejudice stemming from Roof's notoriety as a convicted hate crimes murderer, and the lack of evidence indicating that Defendant approved of Roof's conduct or views. Again, the Government will be permitted to introduce excerpts from Roof's manifesto for the limited purpose of showing that Defendant knew the significance of the "88" symbol. Finally, the Court will instruct the jury that Defendant did not author the document containing the symbol and that there is no evidence that Defendant himself drew that symbol.

• Government Exhibit 51, which the Government claims reflects Defendant's visit history to "a website used to spread and discuss white supremacist and anti-Semitic propaganda, beliefs, and symbols." (Dkt. 64, at 4 (citation omitted).) Evidence that Defendant visited such websites may be probative of his intent and knowledge in referencing anti-Semitic and white supremacist terms in his alleged threats. To the extent Defendant contests his reasons for visiting the website, he may present that argument to the jury.

• Government Exhibit 52, which consists of a record of a file with the name "Protocols of [*21] Learned Elders of Zion Part 01 of 01. pdf" that was deleted from Defendant's cellphone. (Gov. Ex. 52.) As with Exhibit 51, this is potentially probative of Defendant's intent and knowledge, and Defendant is free to argue to the jury regarding the inference to be drawn, if any, from his possession of the document.

The Court will not allow the following to be introduced:

• Government Exhibit 40F, which includes an additional text message Defendant sent to his father. Exhibit 40F is more inflammatory than Exhibits 40D and 40E, and it sheds no more light on Defendant's [*22] motives than those two exhibits. It is thus unduly prejudicial and needlessly cumulative.

• Government Exhibits 150H, 150I, and 150J, which contain anti-Semitic remarks. To the extent these records suggest that Defendant was serious about the anti-Semitic remarks in his alleged threats, they are more prejudicial than, needlessly cumulative of, and less probative than the Government's other evidence on the topic.

III. Evidence of Law Enforcement Reaction

The Court notes that the parties intend to introduce evidence of law enforcement's response to Defendant's statements to show whether officers took those statements as serious threats. (Transcript of Oral Argument, 4/12/2021, at 78:24-79:14; Transcript of Oral Argument, 4/13/2021, at 220:13-22, 225:9-226:7; Gov. MIL, Dkt. 47, at 22-23.) Although "proof of the effect of the alleged threat upon the addressee is highly relevant," *Malik*, 16 F.3d at 49, and "the reaction of the victim and other listeners" may be probative in some cases, *see People ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360, 373 (N.D.N.Y. 2001), the relevant inquiry is "whether an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as a threat of injury," *Turner*, 720 F.3d at 420 (alteration, quotation marks, and

citation omitted).

The [*23] Government alleges that Defendant threatened public officials, not law enforcement officers. The law enforcement officers who were alerted to his statements were agents with specialized training in responding to potential danger, not "ordinary, reasonable recipient[s]." *Id.* (citation omitted). Thus, how these agents interpreted Defendant's statements bears little relevance to the objective inquiry in assessing whether "conduct amounts to a true threat." *See id.* As the Ninth Circuit noted in *United States v. Hanna* for example, "law enforcement officers [a]re particularly unqualified to comment on what the 'reasonable person' would have foreseen" given "their extensive training, experience and expertise." 293 F.3d 1080, 1086 (9th Cir. 2002). As in *Hanna*, evidence of the law enforcement response to Defendant's statements might "create[] a significant danger that the jurors would conclude erroneously that they were not the best qualified to assess the foreseeable reaction to" the statements in question, and "that they [w]ould second guess their own judgment." *Id.* at 1087.

However, the parties appear to agree that law enforcement's reaction to Defendant's alleged threats may be relevant to the context of Defendant's statements and the [*24] jury's determination of whether his statements constituted threats in that context. (Defendant's Response in Opposition to Government's Motions *in Limine* ("Def.'s Opp."), Dkt. 49, at 5 (arguing that "no one at the Capitol responded" urgently after being alerted to Defendant's statements, and that law enforcement's allegedly delayed response is relevant to whether those statements were threats); (Gov.'s Opp., Dkt. 49, at 17 ("conced[ing]" that Defendant can "highlight the timing of a response by law enforcement as a fact for the jury to consider in applying the 'reasonable person' test," and seeking to rebut that evidence).) The Court has the discretion to, and therefore will, permit the parties to introduce such evidence, but will instruct the jury, in substance, that it is ultimately for them—and not any witnesses, law enforcement or otherwise—to determine "whether an *ordinary, reasonable* recipient who is familiar with the context of the communication would interpret it as a threat of injury." *Turner*, 720 F.3d at 421 (emphasis added) (citation omitted).[13]

IV. Evidence of "Collective Threats" Against Congressmembers

The Government also "seeks to introduce the testimony of an official in the Office of the [*25] Sergeant-at-Arms of the House of Representatives," Sean Keating, to explain how "collective threats [*i.e.*, those made against members of Congress as a class], even those made on the internet, are perceived by recipients of the threats, and how such threats can impede, intimidate and interfere with the official duties of Members of Congress." (Gov.'s MIL, Dkt. 47, at 26-27.) The Government proffers Mr. Keating's anticipated testimony about (1) "[t]he high volume of threats directed at Members of Congress since January 1, 2021"; (2) "[t]he ways in which Representatives become aware of collective threats publicly posted on the Internet"; (3) "[t]he fact that Representatives regularly attend public events and frequently do so in groups as part of their official duties"; (4) "[t]he limited means that the House Sergeant-at-Arms and law enforcement have to mitigate such collective threats"; (5) "[t]he fact that, after the January 6, 2021 assault on the U.S. Capitol, the House Sergeant-at-Arms became aware of collective threats against Democratic Representatives and that some Representatives chose not to attend the inauguration of President Biden on January 20, 2021 after expressing safety [*26] concerns"; (6) "[i]n broad and nonspecific terms, some of the programs that have been implemented to protect Representatives from such threats of collective

[13] The Government shall be permitted to introduce evidence of Defendant's incarceration only if Defendant suggests law enforcement took minimal protective measures *after* he became incarcerated.

violence"; and (7) "the ways in which some Representatives have responded to similar collective threats." (*Id.* at 27.)

The Court denies the Government's motion to introduce this evidence at trial. First, as explained, the Government alleges that Defendant threatened public officials, not law enforcement officers, let alone Mr. Keating. The Government fails to explain how the protective measures Mr. Keating describes reflect "an ordinary, reasonable recipient['s]" view of Defendant's statements. *See Turner*, 720 F.3d at 420 (citation omitted).

Second, and more importantly, Mr. Keating's testimony would not address any law enforcement reaction to, or perception of, Defendant's statements. The Government admits that it "does not expect to elicit testimony that the general security measures and responses by some Representatives to collective threats around the inauguration were taken specifically in response to [Defendant's] threats." (Gov.'s MIL, Dkt. 47 at 28.) Instead, the Government argues Mr. Keating would explain general law enforcement reactions to "such threats" [*27] and "similar collective threats." (*Id.* at 27.) The Government does not specify, however, what "such threats" or "similar collective threats" include. Nor does it explain how law enforcement responses to unspecified "collective threats" are relevant to whether Defendant's statements were threats in the first place. Finally, it would be impossible for the jury to assess whether these other threats are, in fact, "similar" to the threats alleged here, given the context and fact-specific nature of that determination.

Third, even if Mr. Keating's testimony were relevant to "the *capacity* of the defendant's threats to achieve their intended purpose of impeding, intimidating and interfering with Members of Congress in the performance of their official duties" (*id.* at 28 (emphasis added)), such testimony would have, at most, marginal bearing on whether Defendant *intended* his statements to have such effects. Section 115(a)(1)(B) concerns the defendant's intent to impede, intimidate, interfere with, or retaliate against, not whether the statements might *actually* have those effects. *See* 18 U.S.C. § 115(a)(1)(B). The Government therefore may not call Mr. Keating to testify about the proposed topics.

V. Defendant's Preparation and Intent to Carry Out Alleged [*28] Threats

Defendant argues that "[e]vidence of his intent or lack of intent to carry out the threat is relevant to proving [his] motive, purpose, or intent in making his social media posts." (Def.'s Opp., Dkt. 49, at 8.) The Second Circuit has recognized that evidence of intent to carry out a threat may bear on whether the defendant intended the recipient to take the threat seriously. *See United States v. Bayon*, 838 F. App'x 618, 620 (2d Cir. 2021) (summary order) ("[T]he jury could have reasonably inferred from [the defendant]'s possession of [bomb-making and related] books that he intended to make a genuine threat because he had collected the means and know-how to follow through on that threat. The books were also relevant to disproving [the defendant]'s contention that he did not intend to make a threat but merely chose his words poorly while attempting to convey his political views."); *accord United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008) (noting that a person making a threat "is more likely to give the impression he is serious if he actually is serious—if he actually plans to carry out his threat and is able to do so" (citation omitted)). As the Honorable Kiyo A. Matsumoto explained in *United States v. Segui*,

> [e]vidence that one who conveys a threatening communication and takes actions [*29] from which a jury could infer that he actually intends to carry out a threat of injury, or considered doing so, is relevant to whether the individual intended to convey a real threat, rather than a hyperbolic or comical statement.

No. 19-CR-188 (KAM), 2019 U.S. Dist. LEXIS 230551, 2019 WL 8587291, at *10 (E.D.N.Y. Dec.

2, 2019). Because evidence of steps toward carrying out an alleged threat may be probative for this limited purpose, Defendant may argue the lack of such evidence suggests he *did not* "intend[] to convey a real threat." *See id.*

But, although Defendant may make this argument, he may not suggest to the jury that an intent to carry out his alleged threats is necessary for a conviction. The Court will specifically instruct the jury that this is not required. As the Second Circuit has cautioned, "[w]hether a threat is ultimately carried out is, at best, of marginal relevance to whether the threat was made in the first place; indeed, the speaker need not even have intended or been able to carry out the threat for § 115(a)(1)(B) to apply." *Turner*, 720 F.3d at 429. To the extent necessary, therefore, the Court will instruct the jury to consider this absence of evidence only insofar as it suggests that Defendant did not intend his statements to impede, intimidate, interfere with, or retaliate against the officials [*30] named in the alleged threats. *See* 18 U.S.C. § 115(a)(1)(B).[14]

VI. Defendant's Violent and Non-Violent Tendencies

The Government asks the Court to preclude the defense from offering evidence or argument about whether Defendant is a peaceful person or lacks violent tendencies, such as, for example, witness testimony and videos or statements by Defendant espousing non-violence. (Gov.'s MIL, Dkt. 47, at 35-36.) Defendant meanwhile asks the Court to exclude evidence suggesting he has "violent tendencies," including his "text exchanges with his cousin and father, and police reports from 2007 and 2014." (Def.'s MIL, Dkt. 46, at 13.) The Court finds that evidence of Defendant's violent or non-violent tendencies that has no relationship, temporally or substantively, to the statements and events at issue in this case is of little to no relevance, *see* Fed. R. Evid. 401, and any probative value is substantially outweighed by the danger of unfair prejudice and confusing the issues, *see* Fed. R. Evid. 403.

Further, although 18 U.S.C. § 115(a)(1)(B) requires the Government to prove that Defendant threatened to assault, kidnap, or murder, the Court does not view Defendant's general tendency toward non-violence as "pertinent" to the offense, *see* Fed. R. Evid. 404(a)(2)(A), which focuses on particular statements [*31] by the Defendant and his intent in making those statements, including the context in which the statements were made. In foreclosing the introduction of evidence of Defendant's non-violent tendencies, the Court likewise precludes the introduction of evidence intended to prove Defendant's tendency toward violence, as identified in the Government's Rule 404(b) Notice, including private text messages with family members, Facebook statements that are unrelated to the alleged threats or events at issue here, and law enforcement records related to domestic violence incidents that are unrelated to the alleged threats or events at issue here. (*See* Attachment C, Dkt. 44-3.) Not only is this evidence of limited relevance given the passage of time and the lack of connection or similarity between these statements and/or incidents and the statements at issue in this case, but any marginal probative value is substantially outweighed by the risk of unfair prejudice. *See United States v. Mundle*, No. 15-CR-315 (NSR), 2016 U.S. Dist. LEXIS 34736, 2016 WL 1071035, at *4-5 (S.D.N.Y. Mar. 17, 2016) (precluding evidence of past threats the defendant made because there was "no evidence that the threats all stem[med] from the same dispute or related disputes"). Accordingly, the Court will not permit the introduction of evidence of Defendant's [*32] violent or non-violent tendencies.[15]

[14] Because the Court will give any necessary limiting instruction, it rejects the Government's contention that "any possible probative value of evidence about whether [Defendant] intended to carry out his threats would be far outweighed by the risk that such evidence would confuse or mislead the jury[.]" (*See* Gov.'s MIL, Dkt. 47, at 35.)

[15] For the reasons stated, to the extent the Government seeks to introduce evidence of Defendant's incarceration as evidence of his violent tendencies, the Court precludes such evidence as irrelevant,

VII. Evidence of Inflammatory Statements Made by Others

The Government moves to preclude evidence and argument regarding threats or inflammatory statements made by other, uncharged individuals as being irrelevant. (*See* Gov.'s MIL, Dkt. 47, at 38.) At oral argument, however, the Government stated that this request was not based on anything specific that the defense was going to offer, and in response to the Court's order, the defense has not proffered any particular statements made by others that it intends to introduce. (*See generally* Dkt. 63.) Therefore, the Court finds that there is no current dispute on this issue; no threats or inflammatory statements by uncharged others will be introduced at trial.

VIII. Authentication and Rule 902 Certification

The Government has "obtained certified records of the contents of certain of [Defendant]'s accounts from Facebook, Google, Twitter, Parler, and BitChute" (Gov.'s MIL, Dkt. 47, at 29), and requests that it "be permitted to authenticate and admit the records of [Defendant]'s social media and video sharing accounts using certifications" (*id.* at 31). The defense has indicated that it does not intend to stipulate to the authenticity [*33] or admissibility of any of these records, and insists that a custodian of records or other representative from each of these companies be called to testify at trial. (*See id.* at 29; *see also* Def.'s Opp., Dkt. 49, at 8.)

Rule 902 of the Federal Rules of Evidence provides that certain items of evidence are "self-authenticating," meaning that "they require no extrinsic evidence of authenticity" to be admitted. Fed. R. Evid. 902. These include "domestic record[s] that meet[] the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court." Fed. R. Evid. 902(11). Rule 803(6), in turn, allows business records to be admissible if they are accompanied by a certification of a custodian or other qualified person showing that: (A) "the record was made at or near the time by—or from information transmitted by—someone with knowledge;" (B) "the record was kept in the course of a regularly conducted activity" of the business; and (C) "making the record was a regular practice of that activity." Fed. R. Evid. 803(6). Similarly, 18 U.S.C. § 3505 provides for authentication by certification and admissibility of foreign business records in criminal proceedings. *See* 18 U.S.C. § 3505(a).

The Government has not made clear the "records" it intends to [*34] authenticate and admit via certifications. But to the extent the Government seeks to authenticate and admit the content of messages or videos on Defendant's social media accounts via certifications, such items are not self-authenticating business records that require no extrinsic evidence of authenticity other than a certification from a custodian to be admitted. *See United States v. Farrad*, 895 F.3d 859, 879-80 (6th Cir. 2018) (concluding that Facebook photographs were not self-authenticating business records); *United States v. Browne*, 834 F.3d 403, 409-11, 65 V.I. 425 (3d Cir. 2016) (holding that Facebook "chats" were not self-authenticating business records). As the Third Circuit explained in Browne, the business-records exception under Rule 803(6) "is designed to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." 834 F.3d at 410 (collecting cases). Yet, with regard to social media communications, a company such as Facebook

> does not purport to verify or rely on the substantive contents of the communications in the course of its business. At most, the records

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likely to confuse the issues, and highly prejudicial. *See* Fed. R. Evid. 401, 403.

> custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications [*35] exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times.

Id. at 410-11 (citing *United States v. Jackson*, 208 F.3d 633, 637-38 (7th Cir. 2000)); *accord Farrad*, 895 F.3d at 879 (quoting *Browne*, 834 F.3d at 410-11). Thus, to construe the substance of social media content as a business record would be to misunderstand the business-records exception under Rule 803(6). *See Browne*, 834 F.3d at 410.

Additionally, "[a]uthentication is essentially a question of conditional relevancy[.]" *United States v. El Gammal*, 831 F. App'x 539, 542 (2d Cir. 2020) (summary order) (citing, *inter alia*, Fed. R. Evid. 901(a) Advisory Committee Notes); *see also United States v. Almonte*, 956 F.2d 27, 29-30 (2d Cir. 1992). "The type and quantum of evidence necessary for authentication is thus related to the purpose for which the evidence is offered." *United States v. Sliker*, 751 F.2d 477, 488 (2d Cir. 1984). Where, as here, social media content is offered for the purpose of establishing that a person made particular statements—that is, the relevance of the proffered evidence "hinges on the fact of authorship"—a certification by a custodian in itself cannot be sufficient for purposes of authentication because, as already described, such a certification serves a limited role: it simply shows that a record was made at or near a certain time, that the record was kept in the course of a regularly conducted business activity, and that the making of the record [*36] was a regular practice of that activity. *See* Fed. R. Evid. 803(6); *Browne*, 834 F.3d at 410; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (observing that the scope of a certificate of authenticity traditionally was "narrowly circumscribed" to certifying "the correctness of a copy of a record," and did not extend to furnishing an "interpretation of what the record contains or shows" or certifying the record's "substance or effect" (citation omitted)). Indeed, in *United States v. Vayner*, the Second Circuit held that a social media profile page was not properly authenticated because the profile page's relevance turned on whether it was created by the defendant, yet the Government offered evidence only that the page existed and not that it belonged to the defendant. 769 F.3d 125, 132-33 (2d Cir. 2014). Like the Government's evidence in *Vayner*, a business-records certification shows nothing more than that a record existed or was created at a particular time and that it was regularly kept in the course of a regularly conducted business activity. *See Farrad*, 895 F.3d at 879 (noting that the Sixth Circuit's approach of requiring more than simply a certification to authenticate social media photographs "accords with" the approach of the Second Circuit in *Vayner*); *Browne*, 834 F.3d at 410 (concluding that allowing Facebook chats to be authenticated [*37] merely with a certification by a custodian would be inconsistent with *Vayner*); *see also United States v. Hassan*, 742 F.3d 104, 132-34 (4th Cir. 2014) (concluding that the district court did not abuse its discretion in admitting Facebook pages and YouTube videos because even though the district court concluded that the pages and videos were self-authenticating business records, it also required the Government to link the materials to the defendants).

This is not to say that a certification is irrelevant for purposes of authenticating social media content. Under Rule 901, there is a wide variety of extrinsic and circumstantial proof that may be used to authenticate evidence, *see* Fed. R. Evid. 901(b); *Vayner*, 769 F.3d at 130-31, and there need only be sufficient proof "so that a reasonable juror could find in favor of authenticity or identification," *Vayner*, 769 F.3d at 129-30 (quoting *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999)). In fact, even though the Third Circuit in *Browne* concluded that Facebook chats were not self-authenticating records, it nevertheless found that the fact that the Government had obtained certified chat logs directly from Facebook "constitute[d] yet more

circumstantial evidence that the records [we]re what the Government claim[ed]." 834 F.3d at 414-15. Accordingly, the Court concludes that the Government may not rely *solely* on certifications to authenticate and [*38] admit the *content* of messages or videos on Defendant's social media accounts; such certifications remain one of the many ways the Government may demonstrate authenticity under Rule 901(a).

Moreover, to the extent that the Government simply seeks to admit records *about* Defendant's social media content—such as metadata showing times or dates of posting or transmission, or IP addresses—those sorts of records would be self-authenticating. *See Browne*, 834 F.3d at 411 ("If the Government . . . had sought to authenticate only the timestamps on the Facebook chats, the fact that the chats took place between particular Facebook accounts, and similarly technical information verified by Facebook 'in the course of a regularly conducted activity,' the records might be more readily analogized to bank records or phone records conventionally authenticated and admitted under Rules 902(11) and 803(6).").

Defendant argues that authenticating records through a certification, instead of live witness testimony, violates his right under the Confrontation Clause of the Sixth Amendment "to confront those who bear testimony against him." (Def.'s Opp., Dkt. 49, at 6-8 (quoting *Melendez-Diaz*, 557 U.S. at 309).) This argument is unavailing. As one court in this district has already held, "the authentication of foreign business records pursuant [*39] to [18 U.S.C.] § 3505 does not violate the Confrontation Clause." *United States v. Qualls*, 553 F. Supp. 2d 241, 245-46 (E.D.N.Y. 2008), *aff'd on other grounds*, 613 F. App'x 25, 28-29 (2d Cir. 2015) (summary order). And though the Second Circuit has not squarely addressed the issue, *see Qualls*, 613 F. App'x at 29 n.1 (stating that the panel "need not reach the issue of whether the Confrontation Clause would be implicated by admitting certifications prepared by records custodians solely to authenticate or lay the foundation for otherwise admissible business records"), the other circuits that have addressed the issue have agreed that certifications used purely for purposes of authenticating business records are not testimonial and do not implicate the Confrontation Clause. As the Tenth Circuit explained, a certification "[is] 'nothing more than the custodian of records . . . attesting that the submitted documents are actually records kept in the ordinary course of business' and [] the statements in the certification 'merely establish the existence of the procedures necessary to create a business record.'" *United States v. Yeley-Davis*, 632 F.3d 673, 680 (10th Cir. 2011) (quoting *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006)). In short, the purpose of a certification is "merely to authenticate [business] records—and not to establish or prove some fact at trial"—and thus, a certification is "too far removed from the 'principal evil at which the Confrontation Clause was directed' to be considered testimonial." *Id.* (quoting [*40] *Ellis*, 460 F.3d at 927). Other circuits have agreed. *See United States v. Denton*, 944 F.3d 170, 183-84 (4th Cir. 2019); *United States v. Anekwu*, 695 F.3d 967, 976-77 (9th Cir. 2012); *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007); *see also Farrad*, 895 F.3d at 876 n.11 (noting, but not deciding, that a similar Confrontation Clause argument to the one Defendant here is making was "unlikely" to "have been a winning argument on plain-error review"). Based on this weight of authority, the Court concludes that using certifications prepared by records custodians purely for authentication purposes presents no Confrontation Clause issue.

Defendant contends that the Supreme Court's decision in *Melendez-Diaz* compels the opposite conclusion, but like the circuits that have decided the issue following *Melendez-Diaz*, the Court finds that Defendant's contention is misplaced. In *Melendez-Diaz*, the Supreme Court held that affidavits sworn to before a notary public and attesting to the results of forensic analysis on materials seized from the defendant by the police were testimonial and implicated the defendant's right to confrontation under the Confrontation

Clause. 557 U.S. at 307-08, 310-11. The majority in *Melendez-Diaz*, however, expressly distinguished between the affidavits at issue in that case and "narrowly circumscribed" certifications used for purposes of authentication: "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the [*41] analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Id.* at 322-23 (emphasis in original); *see also id.* at 311 n.1 ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."). Indeed, while Defendant views the certifications in this case to be like the affidavits in *Melendez-Diaz*, the Court's view is that they are more akin to the notary stamps on the affidavits—which, of course, presented no Confrontation Clause issue.[16] *Cf. Denton*, 944 F.3d at 184 ("*Melendez-Diaz* . . . 'makes clear that the Sixth Amendment right to confront witnesses does not include the right to confront a records custodian who submits a Rule 902(11) certification of a record that was created in the course of a regularly conducted business activity.'" (quoting *United States v. Mallory*, 461 F. App'x 352, 357 (4th Cir. 2012) (per curiam))); *Yeley-Davis*, 632 F.3d at 681 ("The [Supreme] Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.").

In reality, as became clearer at oral argument, Defendant true contention is that the use of written certifications deprives them of the ability to examine [*42] live custodian witnesses on issues such as whether there exist other records that the Government might not have requested and/or that were not produced in response to government subpoenas. But the defense misconstrues the scope of authentication and mistakenly believes that they will be able to examine a live custodian witness on issues that have nothing to do with authentication, which is simply incorrect. As already explained, under Rule 803(6) and *Melendez-Diaz*, the issue of authentication of a business record is narrow in scope. *See* Fed. R. Evid. 803(6)(A)-(C); *Melendez-Diaz*, 557 U.S. at 322 (observing that the scope of a certificate of authenticity traditionally was "narrowly circumscribed" and did not extend to certifying or interpreting the substance of the record). As the Court reiterated several times at oral argument, the issues that Defendant seemingly wishes to raise and explore are, in fact, discovery issues properly raised in pretrial discovery motions well in advance of trial, not in a motion *in limine* on the eve of trial or through a custodial witness at trial.[17]

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[16] The Court rejects Defendant's argument that the Facebook certification is akin to a report or analysis prepared for litigation and thus testimonial. (*See* Def.'s Opp., Dkt. 49, at 8.) That the Facebook certification specifies the particular materials to which it applies does not mean that it is interpreting or even certifying the substance or effect of the records. *See Melendez-Diaz*, 557 U.S. at 322. Moreover, although Defendant is correct that the Government may not use a certification to establish chain of custody, "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." *See id.* at 311 n.1 (alteration in original) (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)). "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence[.]" *Id.*

[17] Defendant argues that the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, limits his ability to subpoena and obtain content from service providers such as Facebook and Google.

> [T]he SCA provides that '[a] governmental entity may require' electronic communication service and remote computing service providers to disclose the contents of wire and electronic [*43] communication, and records and other information pertaining to a subscriber or customer. . . . The SCA does not, on its face, permit a defendant to obtain such information.

United States v. Pierce, 785 F.3d 832, 842 (2d Cir. 2015) (second alteration in original) (citing 18 U.S.C. § 2703). Defendant's argument, however, is misplaced and elides the more fundamental issue. If Defendant believes he is missing materials to which he is entitled, he could and should have filed a discovery motion well in advance of trial, rather than attempting to shoehorn the issue into a motion *in limine* on the unrelated issue of authentication of evidence or Rule 902 certifications. In fact, as the Court expressed several times at oral argument, and has expressed throughout this case, though trial was scheduled within 70 days of indictment based on both parties' expressed readiness and desire to go to trial as soon as possible and Defendant not having filed any pretrial motions, the

In short, to the extent that the Government seeks to authenticate and admit the *content* of Defendant's social media accounts, it may not do so solely through certifications, although it may rely on such certifications in establishing authenticity under Rule 901(a). To the extent the Government seeks to authenticate and admit records *about* the content of Defendant's social media accounts, it may do so through Rule 902(11) and 18 U.S.C. § 3505. Further, the Court is persuaded by and follows the overwhelming weight of authority to conclude that certifications under Rule 902(11) and 18 U.S.C. § 3505 used purely for purposes of authentication do not present a Confrontation Clause problem. Lastly, for the reasons discussed at oral argument and again here, the Court denies Defendant's request to call custodial witnesses to testify about the service provider records produced to the Government.

IX. Additional Evidence of Threats, Context, or Authentication

In addition to the specific exhibits discussed above, the Government offers various exhibits in its April 14, 2021 submission that do not [*44] fall into the categories of evidence the parties reference in their motions *in limine*. Government Exhibits 3-6, 20, 20P, 21, 21P, 21T, 22, 22T, 23, 23T, 24, 24T, 25, 25T, 26, 26T, 27, 27T, 28, 28T, 109, 109B—K, 110, 110A—C, 150B—G, and 151A—B may be introduced because they are the alleged threats, complete or provide important context to the alleged threats, relate to Defendant's state of mind, or may be used for authentication and identification purposes.[18]

X. Court's Prior Rulings at Oral Argument

Although the Court ruled on the following issues during oral argument (*see* 4/12/2021 Minute Entry; 4/13/2021 Minute Entry), to avoid any possible confusion and for completeness of the record, the Court provides the following written explanation for its rulings.

A. *In Camera* Inspection of Grand Jury Minutes

The Court denied Defendant's request to have the Court inspect the Grand Jury minutes *in camera* to ensure that the Grand Jury did not indict on an incitement theory (Def.'s MIL, Dkt. 46, at 6). (*See* 4/12/2021 Minute Entry.) Defendant argues that the Government's theory of guilt, as articulated in the Complaint and described in its bail opposition letter, conflates "threat" and "incitement," thereby [*45] suggesting that the Government "potentially gave misleading instructions to the Grand Jury." (Def.'s MIL, Dkt. 46, at 6.)

"The court may authorize disclosure . . . of a grand-jury matter . . . at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]" Fed. R. Crim. P. 6(e). However, "[i]t is well-settled that a defendant seeking disclosure of grand jury minutes has the burden of showing a 'particularized need' that outweighs the default 'need for secrecy' in grand jury deliberations." *United States v. Forde*, 740 F. Supp. 2d 406, 413 (S.D.N.Y. 2010) (quoting *United*

Court is willing to continue the trial if Defendant believes there are discovery issues that need to be resolved. The Court, however, will not allow discovery issues to be played out or litigated before the jury, or allow the defense to suggest to the jury through purported custodial witnesses that the Government failed to obtain evidence that the *defense* believes may be material. As stated at oral argument, the Court finds no basis to conclude that the Government has acted improperly in this case, nor is there any basis for an adverse-inference instruction to the jury based on speculation that there exist other materials that the Government should have requested from service providers. *Cf. Pierce*, 785 F.3d at 842 (rejecting the defendant's "purely speculative" argument that, because of the SCA, he "had no way of knowing whether or not the Facebook records that [he] had . . . were complete" and that "there could have been additional relevant exculpatory material" with respect to the Facebook records). Again, however, if Defendant feels that he has been deprived of relevant or material evidence, the Court will adjourn the trial so that he can properly raise this issue through a pretrial motion.

[18] Government Exhibits 22, 22T, 24, 24T, 25, 25T, 26, 26T, 27, 27T, 28, and 28T reflect Defendant's public statements that are also included in Defendant's submission. (Dkt. 63.)

States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978)). Accordingly, the inspection of grand jury minutes may be appropriate where a defendant has offered specific factual allegations of government misconduct. *See United States v. Terry*, No. 18-CR-560 (DRH), 2020 U.S. Dist. LEXIS 243974, 2020 WL 7711863, at *1 (E.D.N.Y. Dec. 29, 2020); *United States v. Bergstein*, No. 16-CR-746 (PKC), 2017 U.S. Dist. LEXIS 67582, 2017 WL 1750392, at *3 (S.D.N.Y. May 3, 2017). But "[m]ere speculation that . . . the Government may have improperly instructed the grand jury . . . falls far short of the showing to overcome the presumption of secrecy." *Forde*, 740 F. Supp. 2d at 414 (citations omitted).

Here, Defendant has not alleged, much less specifically alleged, that the Government engaged in misconduct with respect to grand jury proceedings. The Court finds that Defendant's argument—citing a one-off statement in the Complaint and a statement in a footnote in the Government's [*46] bail opposition letter[19]—without more, does not demonstrate that the Government's theory of guilt conflates "incitement" with "threat." These allegations ultimately amount to mere speculation that the Government "potentially" gave a misleading instruction to the grand jury. Thus, the Court concludes that Defendant has failed to demonstrate a particularized need for *in camera* inspection of the grand jury minutes and denies the request.

B. Excluding "Inciting" Statements

Defendant requested a determination that three of the four allegedly threatening statements amount only to incitement, and therefore cannot constitute a "true threat" in violation of § 115(a)(1)(B), as a matter of law. The only statement Defendant made that could possibly be interpreted as a true threat, he argues, is the first-person statement he made in his BitChute video on January 8, 2021: "If anybody has a gun, give me it, I'll go there myself and shoot them and kill them." (Compl., Dkt. 1, ¶ 7.) The three other statements, according to Defendant, "merely called on unidentified third persons to commit acts of violence," which may be considered incitement, but not threats. (Def.'s MIL, Dkt. 46, at 7.) At oral argument, the Court denied [*47] Defendant's request, declining to make this determination as a matter of law, given the central role of the jury in determining whether statements, made in their factual context, constitute a threat. *See Davila*, 461 F.3d at 304-05; *see also Turner*, 720 F.3d at 419 ("Most cases [involving alleged threats] are within a broad expanse of varying fact patterns which may not be resolved as a matter of law, but should be left to a jury" (alteration in original) (quoting *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982))). Indeed, as the Government noted at oral argument, Defendant's other statements all similarly included himself—saying "we" or "lets [sic]"—as someone who should or would take action against the targets of the alleged threats. (*See* Compl., Dkt. 1, ¶¶ 4 ("lets take america back!"), 5 ("The commies will see death before they see us surrender!"), 7 ("[W]e have to take out these Senators and then replace them with actual patriots."), 10 ("lets go, jan 20, bring your guns").)

[19] In support of his argument, Defendant cites the sole reference to "incite" found in the Complaint: "between on or about December 6, 2020, and January 12, 2021, HUNT made a series of posts on various social media websites in which he threatened, or incited others, to murder members of Congress who were engaged in the performance of their official duties and in retaliation for such officials' performance of their official duties." (Compl., Dkt. 1, ¶ 3.) However, the Complaint plainly charged Defendant with making threats, not incitement, in violation of 18 U.S.C. § 115(a)(1)(B): "On or about and between December 6, 2020, and January 12, 2021, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant BRENDAN HUNT, also known as 'X-Ray Ultra,' did knowingly and intentionally threaten to murder a United States official, with intent to impede, intimidate, and interfere with such official while engaged in the performance of official duties, and with intent to retaliate against such official on account of the performance of official duties." (*Id.* at 1.) Defendant also cites the bail opposition letter, in which the Government explained, in a footnote, that "the extent to which [Defendant]'s statements may have tended to incite others to violence is relevant in considering the nature of the threats themselves and the danger posed by [Defendant]'s release." (Government's Opposition, Dkt. 31, at 7 n.4.)

In *Turner*, for example, the Second Circuit held that there was sufficient evidence for the jury to find that the defendant's statements constituted a true threat even though the "language, on its face, purported to be directed at third parties, rather than the [alleged victims] themselves." *Turner*, 720 F.3d at 424. It is proper [*48] here, too, for the jury to be presented with evidence and decide whether Defendant's statements, in their factual context, are objectively threatening.[20]

C. Instructing Jury on "True Threats" In Advance of Opening Statements

The parties requested that the jury be instructed prior to opening statements on the difference between "true threats" and First-Amendment-protected speech, although they disagree on what constitutes a true threat. (*See* Gov.'s MIL, Dkt. 47, at 7-8; Def.'s Opp., Dkt. 49, at 2-3.) The Court declined to deviate from its standard procedure and give the jury a preliminary instruction on a key, but disputed, element in the case. In some cases, particularly where trial is expected to be lengthy and complex, courts have found it appropriate to give substantive preliminary jury instructions. *See, e.g.*, *United States v. Stein*, 429 F. Supp. 2d 648, 649, 651 (S.D.N.Y. 2006) (noting, in a case that was "said to be the largest criminal tax case in history," that "[i]t is only common sense to think that it would be helpful to the jurors to know at the outset of a long trial what they are going to be asked to decide at the end"). Trial in this case is not going to be long or particularly complex. And though the parties disagree on the contours of a [*49] true threat, that is not a compelling reason to instruct the jury twice, before and after the presentation of evidence. If anything, it is a reason for the Court to forbear on giving an instruction until after it has had sufficient time to consider the parties' significantly opposing views on this issue.

[20] At oral argument, the Court discussed with the parties the possibility of a special verdict form for the jury to indicate which of Defendant's four statements, if any, it finds to be in violation of § 115(a)(1)(B).

D. Preclusion of BitChute "Kill Your Senators" Video Because of Alleged Spoliation

Defendant argues that the Government should be precluded from introducing a copy of the BitChute "Kill Your Senators" video because the copy does not include all of the comments that were made in response to the video, thus "depriving the defense, the Court, and the jury of the opportunity to consider the context of the statements and listener's reactions." (Def.'s MIL, Dkt. 46, at 14.) Defendant contends that the Government's failure to preserve all of the comments amounts to spoliation of evidence, and that the proper sanction is preclusion of the video. (*Id.* at 14-17.)

Spoliation is "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *United States v. Walker*, 974 F.3d 193, 208 (2d Cir. 2020) (quoting *United States v. Odeh* (*In re Terrorist Bombings of U.S. Embassies in E. Africa*), 552 F.3d 93, 148 (2d Cir. 2008)). Although the issue of spoliation often arises in the [*50] context of a motion to dismiss the indictment, even in other contexts, the defendant must show that (1) there was an obligation to preserve the evidence; (2) the evidence was intentionally destroyed; and (3) the evidence would have played a significant role in the defense. *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d at 148-49; *United States v. Barnes*, 411 F. App'x 365, 368-69 (2d Cir. 2011) (summary order); *see also Walker*, 974 F.3d at 208 (holding in the context of a motion to dismiss for spoliation that failure to show "bad faith" by the Government "is fatal to a defendant's spoliation motion" (citation omitted)). The threshold inquiry, though, is whether the loss of evidence "is 'chargeable to the State.'" *Barnes*, 411 F. App'x at 369 (quoting *Colon v. Kuhlmann*, 865 F.2d 29, 30 (2d Cir. 1988)).

Here, at a minimum, Defendant has failed to show that the failure to preserve comments to the

BitChute "Kill Your Senators" video is "chargeable" to the Government or that such failure was intentional. Rather, the record indicates that on January 8, 2021, the FBI sent a letter to the legal department at BitChute, which is based in the United Kingdom, requesting

> the preservation of any and all records and other evidence in its possession, to include but not limited to: all graphic and text profile content, emails, text messages, archived chats or chat logs, messages, images, blogs, videos, subscriber [*51] information, account history, address book, buddy or friends lists, sign-up IP address and associated time stamp, associated IP addresses, and passwords pertaining to the use of or communications via the account associated with **xrayultra** or **https://www.bitchute.com/channel/wsxbjWgbAzYY** from the time period of January 8, 2019 through January 8, 2021.

(Ex. A to Gov.'s Opp., Dkt. 48-1, at ECF[21] 1 (emphases in original).) On or about January 9, 2021, Defendant changed the "Kill Your Senators" video to "Hidden (Unpublished)" mode. (Gov.'s Opp., Dkt. 48, at 21 (citing BH-00002495).) Eventually, the Government obtained evidence from Defendant's BitChute Account—including the video at issue and comments made by Defendant on the video, but not comments made by other users—through a United Kingdom court order via a Mutual Legal Assistance Treaty request. (*Id.* at 22.) The United Kingdom court order specifically directed BitChute to produce "[a]ll records related to the post titled 'Kill Your Senators,' posted on or about January 8, 2021, including the video file itself, the number of views and any comments made." (*Id.* (quoting BH-00002499).) Defendant speculates that the government agent who viewed the video [*52] in the first instance, following a tip from a BitChute user who called the FBI, "surely took note of the responses and would have paid attention to any that indicated that any 'followers' or 'co-conspirators' were willing to heed the call to take up arms." (Def.'s MIL, Dkt. 46, at 16.) But Defendant presents no evidence that any government agent "took note" of any comments, and even if that were the case, there is nothing to show that the failure to preserve the comments was intentional or done in bad faith. In any event, following Defendant's motion, the Government produced to Defendant additional records the Government thereafter received from BitChute, including what appears to be all of the comments on the "Kill Your Senators" video. (*See* Dkts. 50, 59.)

Accordingly, there is no basis to conclude that the Government spoliated evidence, and the BitChute "Kill Your Senators" video is not precluded.

E. Background Evidence Regarding 2020 Presidential Election and Events at the United States Capitol on January 6, 2021

The Court granted the Government's request to introduce evidence regarding the 2020 presidential election and the January 6, 2021 events at the U.S. Capitol as background [*53] information that is necessary for the jury to understand the context for Defendant's alleged threats. (*See* 4/12/2021 Minute Entry.) Defendant does not object to the introduction of such evidence. (Def.'s Opp., Dkt. 49, at 5.) However, the Court cautioned the Government that in introducing this background evidence, it should not elicit unduly inflammatory or graphic testimony regarding what happened at the Capitol that day. *See* Fed. R. Evid. 403. The Government should limit its presentation of background evidence to what is factual and necessary for the jury's understanding of the alleged threats.

F. Cross-Examination of Law Enforcement About Specific Protective Procedures

The Court granted the Government's request to

[21] Citations to "ECF" refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

preclude defense counsel from cross-examining any law enforcement witnesses, to the extent they are called, about specific methods or procedures used to carry out protective functions, *i.e.*, use of "surveillance camera deployments, manpower deployments, weapons utilized, evacuation routes, shelters, or other covert items" (Gov.'s MIL, Dkt. 47, at 32-33). (*See* 4/12/2021 Minute Entry.) The Court finds that such testimony is irrelevant in that it would not tend to make a fact of consequence [*54] in determining this action "more or less probable." *See* Fed. R. Evid. 401. Even if testimony regarding specific protective procedures were relevant, though the Court finds it is not, such testimony raises substantial concerns about prejudice to the government's interest in avoiding disclosure of—and therefore compromising—law enforcement techniques and procedures used to carry out their protective functions. *See* Fed. R. Evid. 403. For these reasons, the Court granted the Government's request.[22]

G. Redactions in 3500 Material

Defense counsel requested that the Government justify the "heavy redactions in the 3500 material[23] and discovery," but did not identify specific redactions to which they objected. (*See* Def.'s MIL, Dkt. 46, at 17.) The Government responded that it was "not clear to what redactions [Defendant] is referring," but would confer with defense counsel regarding this issue. (Gov.'s Opp., Dkt. 48, at n.1.) During the April 12, 2021 oral argument, the 3500 material issue was discussed, though defense counsel still did not identify specific redactions to which they have objections, and the Court directed the parties to confer regarding this issue. (*See* 4/12/2021 Minute Entry.) When oral argument continued on April [*55] 13, 2021, the parties did not raise the issue of the 3500 materials and discovery, and the Court therefore assumes that the issue has been resolved. Furthermore, based on the parties' motions and argument during oral argument on April 12, 2021, the Court has no basis to believe that the Government made redactions that are improper under 18 U.S.C. § 3500.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the parties' motions *in limine*. (Dkts. 46, 47.)

SO ORDERED.

/s/ Pamela K. Chen

Pamela K. Chen

United States District Judge

Dated: April 15, 2021

Brooklyn, New York

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[22] Defendant did not raise specific objections to this request, arguing only that the Government did "not adequately describe this category of evidence," or explain why such evidence might confuse the jury or how it would aid individuals plotting attacks against Congress. (Def.'s Opp., Dkt. 49, at 8.) The Court disagrees that the Government failed to adequately describe this category of evidence given the list of "protection specifics" identified in the Government's motion. (Gov.'s MIL, Dkt. 47, at 33.) Ultimately, the Court considers this request largely unopposed in light of Defendant's statement that it "only seeks to cross-examine the government's witnesses on issues relevant to this matter" (Def.'s Opp., Dkt. 49, at 8), and the Court's finding that questions about specific protective procedures are decidedly not relevant.

[23] "3500 material" refers to "statement[s]" by "any witness called by the United States." 18 U.S.C. § 3500(e). Such a "statement" includes

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Id.

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