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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 20-7008

HENRI MICHELLE PIETTE, a/k/a Henri
Michel Piette, a/k/a Henri Billy, a/k/a Dan
Reed, a/k/a Billy Ira Sloop, Jr., a/k/a
Michael Wayne Mansfield, a/k/a
Christopher Allen McAnear,

Defendant - Appellant.

**Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:17-CR-00079-RAW-1)**

Alan S. Mouritsen, Parsons Behle & Latimer, Salt Lake City, Utah, for Defendant-Appellant.

Linda A. Epperley, Assistant United States Attorney (Christopher J. Wilson, Acting United States Attorney, and Sarah McAmis, Assistant United States Attorney, with her on the brief), Office of the United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **McHUGH**, **EBEL**, and **EID**, Circuit Judges.

EID, Circuit Judge.

A jury in the Eastern District of Oklahoma convicted Henri Piette of kidnapping and traveling with intent to engage in sexual relations with a juvenile. The district court sentenced Piette to life imprisonment on the former conviction and 360 months' imprisonment on the latter. He seeks to have his convictions overturned or his sentence reversed. We hold that the district court did not err by admitting evidence of Piette's uncharged acts of molestation, and that statutes extending the unexpired charging period for the traveling-with-intent charge did not have an impermissible retroactive effect. However, we conclude that the district court plainly erred by misallocating the burden of proof once Piette disputed the timing of the kidnapping by arguing that the victim, Rosalynn McGinnis, consented. If she had consented, the kidnapping would have been over, and the statute of limitations would have begun to run, potentially rendering the indictment untimely. We reverse Piette's kidnapping conviction because there is a difference between what happened here—Piette failing to prove by a preponderance of the evidence that McGinnis ever consented—and what the Constitution requires: the government proving beyond a reasonable doubt that she never consented at a time that would cause a statute of limitations problem. Finally, we reject Piette's argument that he was denied his Sixth Amendment right to self-representation at sentencing. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand for further proceedings.

I.

a.

The following account is based on trial testimony. Rosalynn McGinnis was born in 1984. In the early 1990s, McGinnis lived in Springfield, Missouri, with her parents, Gayla and Michael, and several siblings. One day, while playing at the park, the McGinnis children met Henri Piette's children. The kids became close, bonding over sleepovers, movies, meals, and time spent on Piette's trampoline.

Piette first molested McGinnis at one of these sleepovers. She was nine. At first, she thought it was a "bad dream," but soon she realized that it was far too detailed to have been a dream. R. Vol. II at 188. Gayla had not believed McGinnis when she was previously molested by her half-brother, so McGinnis did not tell anyone about what Piette did.

McGinnis was not Piette's only victim in Springfield. One of Piette's sons, Tobias Piette, testified that he saw Piette molest several other children while they lived there. One day, he walked in on Piette giving an eight-year-old girl a shower and touching her vagina. Another time, he saw Piette giving a different young girl a driving lesson; he groped her butt while she sat on his lap.

As the McGinnis and Piette children got to know each other better, so did Gayla McGinnis and Henri Piette. They discussed Gayla's interest in religion and the Church of Jesus Christ of Latter-day Saints. Piette gradually drove Gayla away from her husband Michael, who did not share her interest in these topics and was often away from home. Soon, Michael left Gayla and the children entirely. "Almost

immediately,” McGinnis’s brother testified, it was as if Piette “had stepped into [Michael’s] shoes.” *Id.* at 489.

But Piette ran a very different kind of home. He read Bible passages to the children constantly. He encouraged Gayla to physically discipline the children. He started separating the children and imposed something “almost like a hierarchy system.” *Id.* He beat Gayla “countless” times. *Id.* at 634. He also beat the children. After one of Piette’s beatings drew the attention of authorities, Piette convinced Gayla that she would be blamed for it, and they took the family on the road. They moved on an almost daily basis, passing through Arizona, Oregon, Utah, California, Montana, Missouri, Texas, Oklahoma, and Guatemala. Piette forced the others to beg for money. They lived in a tent. Piette gave McGinnis beer and molested her daily.

Piette, Gayla, and the children settled in Wagoner, Oklahoma. There, Piette escalated his physical, sexual, and psychological abuse. He hit the children with two-by-fours when they said “hanged” instead of “hung.” *Id.* at 212. He punched Gayla in the face. He raped McGinnis. She was eleven. Finally, Gayla escaped to her mother’s home in Independence, Missouri, and took her children with her. A few weeks later, Piette went to Independence and took them back.

When they returned to Wagoner, Piette addressed his “sin” with McGinnis by marrying her in a secret ceremony officiated by Piette’s son Tobias. *Id.* at 219. Piette also married Gayla around this time. The sexual abuse of McGinnis continued unabated. Piette performed oral sex on McGinnis and penetrated her vagina daily

with his penis and fingers. She was twelve. After a run-in with Child Protective Services, McGinnis and her family landed in a domestic violence shelter in Poteau, Oklahoma, away from Piette. McGinnis briefly attended middle school in Poteau.

On January 31, 1997, McGinnis went to school in Poteau and did not come home. Piette visited her on the playground that day. He told McGinnis that he loved her and that he would reunite their family. He told her to look for “signs.” *Id.* at 234. Later that day, McGinnis noticed a sombrero and a poncho inside a school building; she recognized them from a trip to Mexico with Piette. She ran outside the school and saw Tobias Piette in a truck; he took her to Tulsa, where they met up with Piette and Piette’s other children. When McGinnis asked about the rest of her family, Piette told her there was not enough time to get her brothers and that Gayla “wasn’t coming back.” *Id.* at 240. He introduced McGinnis to his children as “their new mother.” *Id.* McGinnis was horrified.

McGinnis did not attend school after the sixth grade. Piette moved McGinnis and his children around the country several times, taking advantage of benefits provided by the Church of Jesus Christ of Latter-day Saints, and avoiding detection by using false names and changing McGinnis’s appearance.¹ Everyone was drilled on what to say if people started asking questions. Piette forced McGinnis to write letters to relatives, the media, and law enforcement, saying that she ran away from

¹ Eventually, McGinnis legally changed her name to Stephanie Reed, one of the aliases Piette forced her to adopt.

her “crazy” mother and “no good” family. *Id.* at 263. If she misspelled a word she was hit. In reality, Gayla diligently searched for McGinnis.

Piette continued subjecting McGinnis to constant physical and sexual violence. He raped her “[t]hree times a day, maybe more.” *Id.* at 249. Shortly before McGinnis turned thirteen, while living in Oklahoma City, she became pregnant for the first time. She had a miscarriage and Piette told her to flush it down the toilet. Piette started giving McGinnis crack cocaine and beat her more frequently. Then, while living in Idaho, McGinnis became pregnant again. This time, she was fourteen. Piette moved the family to Mexico to avoid questions about her pregnancy, but when Piette brought McGinnis to the hospital the doctors said it was too soon to deliver the baby. Piette disagreed. He used a pocketknife to deliver the baby on the floor of a van. At the time, they were “living in an abandoned trailer that was on a piece of land that had no electricity, no water, had holes in the floors and was infested with bed bugs.” *Id.* at 276.

Over the next sixteen years, Piette moved the family around Mexico and Guatemala, rarely spending more than a few months in any one location, though they would take occasional trips back to the United States. McGinnis delivered eight more of Piette’s children. These children did not go to school, socialize, or even learn how to read. They were isolated from others. Piette tried to prevent them from learning where they were living. The children were also neglected. One of the boys had a single pair of shorts that he kept on his body with a rope. One of the girls almost drowned in a bucket of water. Piette hung her upside down to shake the water

out and she recovered. The family's lifestyle consisted of "begging on the streets and living from place to place." *Id.* at 340. Sometimes, McGinnis sold ice cream and other foods. Other times, Piette would make racist comments to provoke the locals into fighting McGinnis for money. Whatever the source, all money went to Piette. He spent it on drugs and alcohol, which he also abused.

Years passed, and Piette's brutality continued. McGinnis testified that there was never a time that Piette was not beating her. He would sometimes tie McGinnis to a bed or chain her to a pole for days. She testified that she has scars all over her face, has had both her arms broken, has been stabbed and shot, suffers chronic pain, and needed throat surgery to be able to speak. Piette would also terrorize their children, hitting them with two-by-fours, bats, rocks, pans, pickaxes, glass bottles, fruit, and "[a]nything that was in reach." *Id.* at 119. He would beat the children to the point of unconsciousness and then tell them that he loved them. "[I]t just surprised me how close I can get to dying without dying," McGinnis's firstborn testified. *Id.* at 127.

Piette also started molesting the children McGinnis delivered. Ma.P., Piette's first daughter with McGinnis, testified at trial that when she was around five years old, Piette asked her to stand against the wall, pull down her underwear, and show him her vagina. Although McGinnis did not know exactly what was happening with her daughter, she was suspicious. Piette complimented and touched Ma.P.'s vagina more frequently as she got older. He made Ma.P. dance naked and gave her alcohol and drugs while he molested her. He put his mouth on her chest and her vagina. He

made her touch and put her mouth on his penis, and he ejaculated in her mouth. When she was seven or eight years old, Piette started putting objects in Ma.P.'s vagina, such as frozen hot dogs and drumsticks. He would punish her by cutting up chilis and rubbing chili juice on his fingers, then placing them in her vagina. Piette also started putting his penis in her vagina. When she resisted, Piette told her he would either molest her or one of her sisters. One time, Ma.P. saw Piette molesting her younger sister, A.P., who was crying; Ma.P. was forced to put her mouth on Piette's penis so he would leave A.P. alone.

A.P. also testified about Piette's sexual abuse. According to A.P., Piette started touching her vagina when she was around seven years old and continued to molest her every few days. She often woke up to Piette touching her vagina. Piette forced A.P. to masturbate his penis and ejaculated in her mouth. One time, A.P. and her younger brother saw Piette performing oral sex on Ma.P. A.P. and Ma.P. never talked about their shared experience of sexual trauma and abuse.

Sometimes, McGinnis would travel back into the United States by herself to beg for money. Other times, Piette was incarcerated, and McGinnis helped him get out of jail. McGinnis also purchased several guns and carried a gun at times, although she testified it belonged to Piette. But Piette told McGinnis that he would kill the children, and then her, if she ever left him. He also told her that, if she got the police involved, nobody would ever believe her. That he would kill her. That her family did not want her back. That "he was the only one that would ever care for" her. *Id.* at 298. And that she "was to do exactly what he told [her] to do or else." *Id.*

On direct examination, McGinnis defined “or else” as Piette killing her and her children. *Id.* McGinnis further testified that she did not take advantage of any potential opportunity to harm Piette because she “knew that if [she] didn’t kill him with the first shot or knife stab, if there was any way that he would survive, he would kill [her] and every one of [her] children.” *Id.* at 435–36. Even had she managed to kill him, she testified that she believed she would be imprisoned for life and her children all sold into slavery. On the other hand, Piette introduced testimony from his father that he and McGinnis appeared to have a “very happy family.” *Id.* at 985.

Notwithstanding the fear that Piette’s threats instilled in her, McGinnis made several attempts to escape. Once, alone with her children in an Arizona motel room, she called a women’s crisis shelter, but Piette returned before the shelter could assist her. Another time, McGinnis took her children to Piette’s son Mikey’s house. Piette quickly arrived, dragged McGinnis out by her hair, and beat her. One of Piette’s children with McGinnis managed to escape and, although a knife fight ensued, Piette did not kill him.

In 2016, McGinnis saved up \$150 over the course of several months—hiding it by a hill to avoid Piette’s detection—and waited until Piette, who had been in and out of rehab, was passed out drunk. Then she took her children, found a taxi, and hid in a nearby town. McGinnis and eight of her children—one of her sons had already escaped—made their way to an American Consulate. They returned to the United States and settled in Kansas City, Missouri.

b.

In 2017, Piette was indicted in the Eastern District of Oklahoma and charged with kidnapping under 18 U.S.C. §§ 1201(a)(1) and 1201(g), and traveling with intent to engage in sexual relations with a juvenile under 18 U.S.C. § 2423(b). A jury found Piette guilty of both counts. Four legal issues relevant to this appeal emerged in the proceedings before the district court.

First, the government sought to admit evidence that Piette molested his daughters with McGinnis as well as an unrelated girl in Springfield some years before meeting McGinnis (“the molestation evidence”). The government argued that the molestation evidence could be admitted as *res gestae*—meaning inextricably intertwined with the charged conduct—and, alternatively, under either Federal Rule of Evidence 404(b), covering other acts evidence, or Rule 414, covering child molestation evidence. Piette opposed. At a pretrial conference, the district court ruled that the molestation evidence came in (1) as *res gestae* “because it goes to the issue of consent, and it is inextricably intertwined with the charged crimes”; (2) under Rule 404(b) because it went “to the issues of both motive and plan”; and (3) under Rule 414 as permissible propensity evidence. *Id.* at 41–42. The district court then turned to whether the evidence was more prejudicial than probative, saying only: “I still have to do a balancing test under [Federal Rule of Evidence] 403. And I believe that the probative value of the evidence is certainly not substantially outweighed by the prejudicial effect.” *Id.* at 42. The district court memorialized these evidentiary rulings in a brief order. In that order, the court reiterated that the

molestation evidence could come in under Rule 404(b) “at least [to] show motive and plan.” R. Vol. I at 321 (parentheses omitted).² The order did not elaborate upon the court’s Rule 403 analysis. Halfway through trial, facing repeated objections, the district court restated its conclusory Rule 403 finding.

Second, Piette argued in pretrial briefing that the traveling-with-intent charge was untimely because any enactments purporting to extend the statute of limitations had an impermissible retroactive effect. The district court ruled that because the original statute of limitations had not already expired when Congress acted, the legislature validly extended a live charging period, rendering Piette’s 2017 indictment timely. The district court thus endorsed “the theory that such amendments may be applied retroactively to extend a filing period for charges that were still viable at the time of the amendment.” *Id.* at 151; *cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (“[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action.”). Piette renewed his retroactivity argument in an oral motion for acquittal at the conclusion of the government’s case-in-chief, which the district court denied.

² At trial, the court gave a limiting instruction several times when it felt that Rule 404(b) evidence was being presented. Usually, the court told the jurors that they should consider the evidence not just for motive and plan, but also for intent and knowledge. Subsequently, preparation replaced knowledge. Later, all five purposes were in play. By the end of the trial, the court was communicating the limiting instruction only by alluding to its existence, leaving it unclear which Rule 404(b) purposes were being invoked.

Third, the district court noted before trial that the government would likely try to prove that McGinnis's "kidnapping continued uninterrupted" from 1997 through her 2016 escape. R. Vol. I at 147. That was because any "break" within that twenty-year span would start the kidnapping count's five-year statute of limitations. *Id.* If the statute of limitations expired before Piette's 2017 indictment, the charge would not be timely. As a result, the court anticipated sending a special interrogatory to the jury. At trial, the court did just that, denying a motion for acquittal on this basis and providing the jury the following instructions.

DURATION OF KIDNAPPING

The government contends that the kidnapping alleged in Count 1 extended from January 1997 until July 28, 2016.

Under the law, if the victim of a kidnapping is no longer held against her will, the kidnapping is over.

As one of the defenses, [Piette] contends Rosalyn McGinnis was (if at all), at a date earlier than July 28, 2016, no longer held against her will.

[Piette] must prove this contention by a preponderance of the evidence, which is defined as "more likely than not."

On the verdict form, only if you have found the defendant guilty as to Count 1, you will be asked to determine if Rosalyn McGinnis was no longer held against her will at an earlier date, and what that date was. This will aid the court in making a separate legal determination in regard to this case.

In determining if Rosalyn McGuinness [sic] was continually held against her will (physically and/or psychologically), you should consider all the testimony you have heard in the case.

Id. at 372. The verdict form reflected these instructions. It told the jury that, should it find Piette guilty of kidnapping, it must answer an additional yes/no question: "Do you find, by a preponderance of the evidence, that Rosalyn McGuinness [sic] was no longer held against her will on a date earlier than July 28, 2016?" *Id.* at 388. If the answer was yes, jurors were asked to specify the date and/or the year. The jury

ultimately found Piette guilty of kidnapping and did not find, pursuant to the district court's instructions, that Piette demonstrated by a preponderance of the evidence that McGinnis was no longer held against her will prior to July 28, 2016. Piette did not argue below that these jury instructions created a statute of limitations problem.

Finally, Piette claims that he sought to represent himself in a letter to the district court in November 2019, and then again at the start of sentencing in February 2020. In his letter, Piette asked the court to “terminate the services” of attorney Warren Gotcher and investigator Eric Cullen because of “Absolute ‘In[e]ffective Assist[a]nce of Counsel.’” *Id.* at 399 (emphasis omitted). On February 20, 2020, before proceeding to sentencing, the district court addressed Piette's pending motion to withdraw his trial counsel. Gotcher stated that he had no objection to Piette's motion. Gotcher next double-checked with Piette that Piette still wanted Gotcher to withdraw. Piette said “Yes.” R. Vol. II at 1107. Gotcher indicated that he had an “obligation to stay through sentencing” and assist Piette in filing a notice of appeal; he asked the district court to delay granting the motion until those tasks were complete. *Id.* Agreeing, the district court granted the motion “to be in effect subsequent to this sentencing hearing.” *Id.* at 1108. This exchange followed:

The Court: I think it is important that trial counsel, who has been with the case since—well, not day one because this is Mr. Piette's second appointed attorney, . . . be here through the sentencing hearing itself. So the Court directs that another attorney will be appointed by the Federal Public Defender's office to see Mr. Piette's case through appeal and that—and that is, unless, Mr. Piette wants to hire an attorney on his own.

The Defendant: Are you saying—

The Court: No, no, you tell Mr. Gotcher.

(OFF THE RECORD DISCUSSION BETWEEN MR. GOTCHER AND THE DEFENDANT)

Mr. Gotcher: We are ready to go on, Your Honor.

The Court: All right. Is that acceptable, Mr. Piette?

The Defendant: Yes, sir, yes.

Id. at 1108–09.

The district court entered hundreds of pages of Piette’s handwritten letters as an exhibit, noting that they contextualized Piette’s request to withdraw Gotcher. As the court put it: “At some points in time Mr. Piette expressed vast disagreement with counsel and at other times Mr. Piette thought Mr. Gotcher was the best thing since sliced bread.” *Id.* at 1109. The district court decided to “err on the side of giving Mr. Piette new counsel for appeal purposes.” *Id.* Sentencing ensued.

The district court ruled on Gotcher’s objections to the Presentence Report and Gotcher argued in support of his written motion for a downward variance, which the court denied. After hearing from the government, the court invited Piette to speak. He did so for “nearly thirty transcript pages.” *Aple. Br.* at 46; *see also R. Vol. II* at 1119–46. He maintained his innocence, touted a work ethic so strong that employers have called him a “human backhoe,” explained that badgers are “meaner than hell,” and bragged about how popular his family’s dairy products were in Mexico. *R. Vol. II* at 1141, 1144. The court sentenced Piette to life imprisonment on the kidnapping

conviction and 360 months' imprisonment on the traveling-with-intent conviction.

Piette appealed.

II.

We begin with whether the molestation evidence was properly admitted under any of the three theories accepted by the district court: *res gestae*, Rule 404(b), and Rule 414. The term “molestation evidence,” as used in Piette’s appeal, encompasses testimony that Piette sexually abused two of the daughters he had with McGinnis and an unrelated girl in Springfield before he met McGinnis. *See* Aplt. Br. at 14. Piette’s daughters, known as Ma.P. and A.P. at trial, testified at length about their own abuse, while Piette’s son Tobias testified briefly about the Springfield girl. On appeal, Piette argues that both his convictions should be reversed because the district court improperly admitted this highly prejudicial evidence. We disagree. The intrinsic molestation evidence about Piette’s daughters was admissible as *res gestae*, while the extrinsic molestation evidence concerning the Springfield girl, even if admitted in error, likely had no effect on the verdict. We do not reach Rule 404(b) or Rule 414. Although the district court’s conclusory, one-sentence Rule 403 prejudice inquiry was deficient, our review of the case suggests that it was not an abuse of discretion to admit the molestation evidence under Rule 403. *See United States v. Lazcano-Villalobos*, 175 F.3d 838, 846 (10th Cir. 1999) (“We have consistently upheld implicit Rule 403 determinations when the determinations are supported by the record.”). Piette’s convictions withstand his evidentiary arguments.

a.

Piette appeals the molestation evidence's admission on all three grounds relied upon by the district court, contending that his "trial was infected by repulsive other-act molestation evidence that created an unacceptable risk that the jury would convict based on emotion instead of dispassionate decision-making." Aplt. Br. at 25. Piette stresses that he mounted a "targeted" and "technical but effective" defense to each charge at trial, only disputing the consent element of the kidnapping charge and the intent element of the traveling-with-intent charge. Reply Br. at 14. Because this significantly reduced the number of disputed facts at trial, Piette suggests the molestation evidence "added no probative value to the government's case," Aplt. Br. at 4, and merely inflamed the jury.

On *res gestae*, Piette argues that the molestation evidence was irrelevant to proving his intent or McGinnis's lack of consent, thus falling short of the "inextricably intertwined" standard. *Id.* at 31. The government responds that the evidence was "part and parcel of his scheme to maintain control of his family and enforce his rules of begging, service and secrecy." Aple. Br. at 22. On Rule 404(b), Piette argues that the molestation evidence fails to show "motive" because the notion that Piette's motive in kidnapping McGinnis was to molest their future children is simply the "forbidden character-based propensity inference repackaged." Aplt. Br. at 33. Likewise, Piette argues that the molestation evidence fails to show any "plan" because it is unrelated to the charged offenses, leaving "no non-propensity purpose." *Id.* at 35. The government counters that Piette was "motivated to produce children

who he could control to meet his sexual desires,” and that kidnapping McGinnis “was preparation for his plan to create his own home where he could meet his perverse sexual needs” without drawing attention. Aple. Br. at 23–24. Finally, turning to Rule 414, Piette argues that the district court failed to conduct a non-conclusory prejudicial balancing analysis and that the molestation evidence was barely probative but highly prejudicial. The government replies that its admission was a reasonable application of Rule 414.

We review a district court’s evidentiary rulings for abuse of discretion. *United States v. Sturm*, 673 F.3d 1274, 1285 (10th Cir. 2012). We may uphold them “on any ground supported by the record.” *Id.* at 1286. Reversal requires “a distinct showing that [the ruling] was based on a clearly erroneous finding of fact, or an erroneous conclusion of law or manifests a clear error in judgment.” *United States v. Lozado*, 776 F.3d 1119, 1124 (10th Cir. 2015) (quoting *United States v. Smalls*, 605 F.3d 765, 773 (10th Cir. 2010)). “When a district court has improperly admitted or excluded evidence, we reverse ‘only if the error affects a substantial right of the party.’” *Burke v. Regalado*, 935 F.3d 960, 1011 (10th Cir. 2019) (quoting Fed. R. Evid. 103(a)). The question is whether the error was harmless. *See id.* Harmless error analysis looks at “the record as a whole.” *Id.* (quoting *Hill v. J.B. Hunt Transp., Inc.*, 815 F.3d 651, 659 (10th Cir. 2016)). It asks whether the “verdict more probably than not was unaffected by the error.” *Id.* (quoting *Abraham v. BP Am. Prod. Co.*, 685 F.3d 1196, 1202 (10th Cir. 2012)).

b.

Evidence of other bad acts may be extrinsic or intrinsic depending on its relationship to the charged offense. Intrinsic other acts evidence encompasses conduct “inextricably intertwined with the charged crime such that a witness’s testimony would have been confusing and incomplete without mention of the prior act.” *United States v. Ford*, 613 F.3d 1263, 1267 (10th Cir. 2010) (quoting *United States v. Johnson*, 42 F.3d 1312, 1316 (10th Cir. 1994)). This is known as *res gestae*, which the district court invoked to admit much of the molestation evidence. We have also described this kind of evidence as “part and parcel of the proof of the offense . . . charged in the indictment.” *United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (quoting *United States v. Gano*, 560 F.2d 990, 994 (10th Cir. 1977)). *Res gestae* evidence is not subject to Rule 404(b), but it remains subject to Rule 403 balancing and “will be inadmissible . . . if it has no proper probative value.” *United States v. Irving*, 665 F.3d 1184, 1215 (10th Cir. 2011) (Hartz, J., concurring). In this case, a *res gestae* theory can apply, at most, to the subset of the molestation evidence concerning Piette’s daughters. The Springfield girl incident took place before McGinnis entered the picture and cannot come in as “part and parcel” of her kidnapping. *See Kimball*, 73 F.3d at 272.

In *United States v. Ford*, the incarcerated defendant and another inmate escaped from a Kansas prison with the aid of the defendant’s romantic partner. 613 F.3d at 1266. The partner, a former corrections officer, stole several guns, cut through several prison fences, and rented a getaway car. *Id.* The trio drove the car to

New Mexico, where they sought a new vehicle to avoid detection. *Id.* They were arrested while scoping out a local apartment complex for a car to steal, and the defendant was charged as a felon in possession, a fugitive in possession, and for possession of stolen firearms. *Id.* at 1265–66. On appeal, the defendant challenged the trial judge’s admission of evidence concerning his prison escape as *res gestae*. *Id.* at 1267. We rejected the defendant’s arguments, concluding that the “Kansas escape could not be separated from the charged crimes.” *Id.* at 1268. We reasoned that his “flight began with the escape, which explained his need for weapons and the circumstances of his arrest just two and a half days later.” *Id.* The evidence was “undoubtedly *res gestae*—intrinsic evidence inextricably connected to the charged crimes.” *Id.*

Here, the district court properly invoked *res gestae* to permit the government to paint a complete picture of Piette’s other simultaneous domestic molestation conduct. Like in *Ford*, it is difficult to separate Piette’s treatment of his daughters from his treatment of McGinnis, especially when McGinnis’s consent was disputed at trial. The government used the molestation evidence to reveal the nature of Piette’s household and convince the jury that McGinnis never consented to Piette’s treatment. *See Johnson*, 42 F.3d at 1316 (“An uncharged act may not be extrinsic if . . . it was part of the scheme for which a defendant is being prosecuted.”). The evidence was properly admitted as *res gestae*, and it is relevant to the finding of fact required to rebut Piette’s statute of limitations argument on the kidnapping charge.

In his briefing, Piette deletes the references to the abuse of his daughters from the government's account of his behavior, suggesting that such a redlined version "would not have left analytical or temporal gaps in the government's case or left the jury confused," so the *res gestae* finding was improper. Reply Br. at 5.

Notwithstanding the logical consistency of Piette's redacted summary, *res gestae* was still a valid ground for admission because the resulting testimony would have been "incomplete" without the evidence of Piette's abuse of his daughters. *See Ford*, 613 F.3d at 1267. It was crucial for the jury to hear from Piette's daughters about the extent of his molestation so it could fully understand their living situation, his conduct, his intentions, and McGinnis's perspective, which they were required to evaluate.

Finding that the intrinsic molestation evidence could come in as *res gestae* still leaves Rule 403 balancing. Under Rule 403, a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Piette focuses his challenge on the "unfair prejudice" aspect of Rule 403. Typically, we review a district court's Rule 403 analysis to assess whether it constituted an abuse of discretion warranting reversal. *See, e.g., United States v. Merritt*, 961 F.3d 1105, 1115–16 (10th Cir. 2020). Here, however, the district court's Rule 403 analysis was wholly conclusory. Ruling on the molestation evidence orally, the district court stated just: "I believe that the probative value of the evidence is

certainly not substantially outweighed by the prejudicial effect.” R. Vol. II at 42.

The district court’s written order had nothing more to say on the matter. That leaves little to review. However, we may supplement the district court’s Rule 403 determination on appeal to assess whether its conclusion was an abuse of discretion. *See United States v. Magnan*, 756 F. App’x 807, 821 (10th Cir. 2018) (unpublished); *see also Lazcano-Villalobos*, 175 F.3d at 846–47.³ Considering Piette’s arguments about minimal probative value due to limited areas of dispute at trial, and maximal prejudice because of the depravity of the molestation evidence, we conclude that Piette understates the evidence’s probative value and overstates its prejudicial effect.

First, jurors could reasonably find that the molestation evidence made a fact of consequence—either McGinnis’s consent, for the kidnapping charge, or Piette’s intent, for the traveling-with-intent charge—significantly more or less likely than it was without that evidence. *See Fed. R. Evid. 401* (relevant evidence has “any tendency” to make a “fact . . . of consequence in determining the action” “more or less probable”); *see also United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007) (the relevancy requirement sets a “very low” bar). For example, by raising McGinnis’s consent as a defense, Piette was asking the jury to understand her perspective. The molestation evidence helped the jury do so. Piette’s argument that McGinnis was unaware of her daughters’ molestation is irrelevant to whether the evidence, if believed, made the proposition that she consented less likely. It did, so it

³ Unpublished cases are not binding precedent, but we consider them for their persuasive value. *See Fed. R. App. P. 32.1*; *10th Cir. R. 32.1*.

was relevant. The same is true with respect to Piette's defense to the traveling-with-intent charge. Jurors may have viewed Piette's later abuse of McGinnis's daughters as making it more likely he had the requisite intent when he traveled with McGinnis.

Second, while graphic testimony that Piette molested the daughters he had with McGinnis may have affected the jury, we do not think that any resulting prejudice was particularly unfair or that it substantially outweighed the evidence's probative value with respect to Piette's principal defenses—or, at least, not so much as to render the district court's decision an abuse of discretion. Piette's argument that jurors may be unfairly inflamed by child sexual predators is somewhat self-defeating. Even before hearing from Ma.P. and A.P., the jurors were already dealing with an individual charged with kidnapping his preteen stepdaughter-wife, raping her three times a day for years, and forcing her to bear nine of his children. The district court could have reasonably concluded that any prejudicial effect probably would have already happened. Even defense counsel started his opening statement at trial by saying: "Ladies and gentlemen of the jury, [the government's] opening statement, it sounds real bad, it sounds awful." R. Vol. II at 98. In light of this, the district court could have also recognized, as a countervailing consideration, that it was important for the jury to hear the molestation evidence. As we have explained, the evidence served a critical purpose: it helped the jury contextualize McGinnis's situation and assess whether Piette's defenses were meritorious. Because the district court could have reasonably concluded that the danger of unfair prejudice did not outweigh the molestation evidence's probative value, it was not an abuse of

discretion to admit the subset of the molestation evidence concerning Piette's daughters, notwithstanding Rule 403.

c.

The government recognized at trial that Tobias's testimony about Piette molesting the Springfield girl was inadmissible as *res gestae* because it preceded Piette's time with McGinnis. In other words, it was extrinsic bad acts evidence. However, the government argued that Rules 404(b) and 414 were alternative bases for admission. We hold that even if the district court erred by admitting this subset of the molestation evidence under either rule, any error was harmless.

Evidence law generally abhors the propensity inference—the notion that a person did something just because he has a corresponding character or has done similar things before. *See* Fed. R. Evid. 404(b)(1) (“Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”); *see also Michelson v. United States*, 335 U.S. 469, 475–76 (1948). However, Rule 404(b) carves a purpose-based exception that allows evidence of other bad acts to be admitted for non-propensity purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). “We ‘consider four factors in weighing the admissibility of evidence under Rule 404(b): (1) whether the evidence is offered for a proper purpose, (2) its relevancy, (3) that the probative value of the evidence is not substantially outweighed by its prejudicial effect, and (4) [that] a limiting instruction is given if

the defendant so requests.” *United States v. Burgess*, 576 F.3d 1078, 1098 (10th Cir. 2009) (quoting *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006)). This inquiry incorporates the Rule 401 relevancy and Rule 403 balancing inquiries at steps two and three, respectively. *See United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001).

Another exception to the general inclination against propensity evidence is Rule 414, which embraces the propensity inference in a limited class of cases. It states that, “[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation . . . on any matter to which it is relevant.” Fed. R. Evid. 414(a). There are three “threshold requirements” for admitting evidence pursuant to Rule 414: “(1) the defendant is accused of a crime involving sexual assault or child molestation, (2) the evidence proffered is evidence of the defendant’s commission of another offense or offenses involving sexual assault or child molestation, and (3) the evidence is relevant.” *United States v. Benally*, 500 F.3d 1085, 1090 (10th Cir. 2007). But that is not the end of the road. We subject Rule 414 evidence to a particular breed of Rule 403 balancing and insist that “the district court has an obligation ‘to fully evaluate the proffered . . . evidence and make a clear record of the reasoning behind its findings.’” *Id.* at 1091 (omission in original) (quoting *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998)).⁴

⁴ This specialized Rule 403 inquiry has two stages. First, the district court must consider the four *Enjady* factors: “(1) how clearly the prior act has been proved;

Even if the district court erred by admitting the subset of the molestation evidence concerning the Springfield girl under Rules 404(b) or 414, we think that any such error was harmless. Reviewing the record in its entirety makes clear that testimony about the Springfield incident occupied only a few moments in a weeklong trial packed with graphic, disturbing evidence of Piette’s behavior, often in the form of lengthy firsthand accounts from survivors like McGinnis, Ma.P., and A.P. Tobias Piette’s testimony about encountering Piette and the Springfield girl in the shower before meeting McGinnis pales in comparison to the breadth, depth, and detail of the remaining sexual molestation evidence the jury heard in this case. It is also notable that the jury received evidence of inappropriate conduct with minors unrelated to McGinnis, her children, or the Springfield girl, which Piette does not challenge on appeal, such as the driving lesson Tobias testified about. Based on our review of the questions the jury was asked to decide, and the evidence the government presented to help it decide them, we think it is more likely than not the case, *see Burke*, 935 F.3d at 1011, that the subset of the molestation evidence involving the Springfield girl, even if admitted in error, had no effect on the jury’s verdict on either count. Because

(2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence.” *United States v. Perrault*, 995 F.3d 748, 765–66 (10th Cir. 2021) (footnotes omitted); *see also United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998). The district court must next weigh the *Enjady* factors against three additional factors: “(1) how likely [it is that] such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct.” *Perrault*, 995 F.3d at 766.

Piette fails to demonstrate that the admission of this subset of the molestation evidence affected the case, we need not consider whether the evidence was properly admitted under Rules 404(b) or 414.

* * *

The molestation evidence concerning Piette’s daughters was properly admitted as *res gestae*, and any error in admitting the remaining molestation evidence involving the Springfield girl was harmless. The district court’s conclusory Rule 403 assessment does not require reversal because, on this record, it was not an abuse of discretion to find that the evidence’s probative value was not outweighed by its prejudicial effect. *See Lazcano-Villalobos*, 175 F.3d at 846–47.

III.

Next, we consider Piette’s argument that the traveling-with-intent charge was brought outside the statute of limitations because the enactments purporting to extend the then-unexpired charging period had an impermissible retroactive effect. We review the district court’s “interpretation and application” of statutes of limitations *de novo*. *Barnes v. United States*, 776 F.3d 1134, 1139 (10th Cir. 2015). We likewise review the retroactivity of a statute *de novo*. *See Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1088 (10th Cir. 2007). For the following reasons, we reject Piette’s argument and affirm his traveling-with-intent conviction.

The general federal statute of limitations for noncapital offenses is five years. *See* 18 U.S.C. § 3282(a). But Congress has made several modifications to that charging period for sexual offenses against minors. As a result, the statutes of

limitations that apply to Piette’s traveling-with-intent charge have gone through a series of changes in the past few decades, as summarized below.

Act	Year	Code	Charging Period
Victims of Child Abuse Act	1990	§ 3509(k)	Until the child turned twenty-five.
Violent Crime Control and Law Enforcement Act	1994	§ 3283	Until the child turned twenty-five (recodification).
Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act	2003	§ 3283	The life of the child.
Violence Against Women and Department of Justice Reauthorization Act	2006	§ 3283	The life of the child or ten years after the offense (whichever is longer).
Adam Walsh Child Protection and Safety Act	2006	§ 3299	Any time.

Today, both §§ 3283 and 3299 cover Piette’s traveling-with-intent charge. Piette argues that the statute of limitations on that charge began to run, at the latest, on May 14, 2000, when McGinnis turned sixteen. *See id.* § 2243(a) (criminalizing sexual acts with minors between twelve and sixteen by persons at least four years older). At that point, the statute of limitations in effect—§ 3283 (1994)—would expire on McGinnis’s twenty-fifth birthday, which was May 14, 2009. Piette was ultimately charged in December 2017. Before the limitations period expired, however, Congress made the 2003 and 2006 changes outlined above, which would render Piette’s indictment timely if applied to him.

The issue is whether the new statutes of limitations validly extended the charging period for Piette’s pre-enactment conduct—that is, whether they apply

retroactively. Piette argues that the test outlined by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), and *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006), for assessing a statute’s retroactivity requires reversal and renders his indictment untimely. Piette is not the first defendant to encounter this problem or make this argument. Several courts have discussed this exact question either on the merits or in the context of an ineffective assistance of counsel claim. *See Weingarten v. United States*, 865 F.3d 48, 54–58 (2d Cir. 2017) (ineffective assistance); *United States v. Miller*, 911 F.3d 638, 642–46 (1st Cir. 2018) (ineffective assistance); *United States v. Nader*, 425 F. Supp. 3d 619, 624–32 (E.D. Va. 2019) (merits); *United States v. Maxwell*, 534 F. Supp. 3d 299, 314–16 (S.D.N.Y. 2021) (merits). These cases inform our determination whether the relevant statutes of limitations apply retroactively, which appears to be a question of first impression in this circuit.

At the outset, it is important to clarify the *Landgraf* framework that guides our review. Different circuits divide on the proper number of steps and their contents, but we tend to view *Landgraf* as a two-step process. *See Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1282–83 (10th Cir. 2010). First, we ask “whether Congress has expressly prescribed the proper reach” of the statute. *Id.* at 1282. If so, we follow Congress’s lead. If not, we proceed to the second step, asking “whether applying the statute to the events at issue would have retroactive effects.” *Id.* The Supreme Court instructs that “[s]tatutes are disfavored as retroactive when their application ‘would impair rights a party possessed when he acted, increase a

party's liability for past conduct, or impose new duties with respect to transactions already completed.” *Fernandez-Vargas*, 548 U.S. at 37 (quoting *Landgraf*, 511 U.S. at 280). If we find a retroactive effect, “our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.” *Landgraf*, 511 U.S. at 280.

Before proceeding, we note that Piette is not making an Ex Post Facto Clause argument. *See* U.S. Const. art. I, § 3, cl. 9. Several circuits have analyzed this exact issue under that rubric, as opposed to *Landgraf* retroactivity, and declined to find a violation of the Ex Post Facto Clause where the amended statute of limitations merely extended, as opposed to revived, a charging period. *See United States v. Chief*, 438 F.3d 920, 924–25 (9th Cir. 2006); *United States v. Jeffries*, 405 F.3d 682, 685 (8th Cir. 2005).

At *Landgraf*'s first step, we look for an express indication of the statutes' temporal reach. The argument on the government's side is that the statutes' introductory clauses—“[n]o statute of limitations that would otherwise preclude,” for § 3283, and “[n]otwithstanding any other law,” for § 3299—supply a “clear statement as to . . . retroactive effect.” *Weingarten*, 865 F.3d at 55. A district court accepting this argument with respect to § 3283 reasoned that “[t]he statute's plain language unambiguously requires that it apply to prosecutions for offenses committed before the date of enactment . . . [because] it prevents the application of any statute of limitations that would otherwise apply to past conduct.” *Maxwell*, 534 F. Supp. 3d at

315. The same reasoning would apply to § 3299’s “[n]otwithstanding any other law” language, which casts an even wider net.

The counterargument is that this introductory language refers not to retrospective application, but only to 18 U.S.C. § 3282(a), the general federal statute of limitations. On this reading, the statutes are merely supplanting the typical five-year charging period. The First Circuit has observed that when this introductory language was first deployed in § 3283 in 1990, “the only existing limitations period to which the language could have referred was the default limit set forth in section 3282.” *Miller*, 911 F.3d at 644. Moreover, other statutes with the same kind of introductory language contain explicit retroactivity provisions, so the government’s interpretation would render them redundant.

Piette’s position points to the “express” requirement in *Landgraf*’s first step and argues that it creates a high bar §§ 3283 and 3299 cannot meet. *See Nader*, 425 F. Supp. 3d at 626 (referencing “the demanding standard for express prescription” in the Fourth Circuit, which requires “language unequivocally delineating the time period to which [statutes] apply”). It is indisputable that these statutes say nothing express about retroactive application, so Piette has the stronger argument on this point. Although the introductory words of both statutes are not inconsistent with the government’s reading, they hardly constitute Congress expressly announcing a retroactive effect. A provision literally stating that a statute applies retroactively is more so the kind of provision that *Landgraf* contemplates. Congress can enact, and

has enacted, such provisions in the past. But it did not do so in either § 3283 or § 3299. We proceed to *Landgraf*'s second step.

At this step, we look for an impermissible retroactive effect, defined as an effect that “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280. If we find such an effect, we presume the statute does not apply retroactively unless there is “clear congressional intent favoring such a result.” *Id.*

On Piette’s side, the Second Circuit has acknowledged “colorable arguments” that extending a live charging period would increase a defendant’s liability for past conduct under *Landgraf*. See *Weingarten*, 865 F.3d at 57. But the court also acknowledged that the “vast weight of retroactivity decisions” support a distinction “between revoking a vested statute of limitations defense and extending a filing period for live claims.” *Id.* The former would be a problem. The latter would not. The First Circuit notes that the question’s difficulty is compounded by the criminal context. See *Miller*, 911 F.3d at 645. After all, the Supreme Court has held that statutes of limitations should be “liberally interpreted in favor of repose.” *Toussie v. United States*, 397 U.S. 112, 115 (1970). Accordingly, Piette relies heavily on *United States v. Gentile*, which held that a different statute of limitations extension was impermissibly retroactive under *Landgraf* because of that very principle. 235 F. Supp. 3d 649, 654 (D.N.J. 2017). But other courts have distinguished *Gentile*, concluding that “the case law strongly supports the proposition that the distinction

between applying a statute that extends or eliminates a statute of limitations period to claims that were expired at the time of its enactment, and applying it to claims that were unexpired at the time of its enactment, is applicable to both civil and criminal statutes of limitations.” *Nader*, 425 F. Supp. 3d at 630.

We agree. In 2003 and 2006, when these statutes of limitations were enacted, the original statute of limitations had not yet expired and Piette remained subject to prosecution for his past conduct insofar as he was susceptible to being charged for it. By extending the unexpired statute of limitations, Congress did not increase Piette’s exposure to prosecution retroactively. It did not raise the penalty for the charged offense. It did not redefine the offense to make it easier to establish. It did not expose Piette to criminal prosecution anew. It merely altered the ongoing charging period for the conduct that had already exposed him to criminal prosecution. Piette was subject to indictment in 2002, before the statutes of limitations were extended, and he remained subject to indictment in 2007, once the changes were made. A dead charge was not resurrected, and the underlying nature of Piette’s potential criminal liability remained the same. Ex Post Facto Clause cases echo both this conclusion and the import of this distinction in the broader retroactivity context. *See, e.g., Jeffries*, 405 F.3d at 685. Piette’s argument that he had the “statutory right,” Aplt. Br. at 51 (quoting *Gentile*, 235 F. Supp. 3d at 654), to be free from prosecution after the original statute of limitations would have expired is misguided. Rather, it is Congress that had the right to modify a pending statute of limitations. Doing so does not violate retroactivity principles with respect to unexpired charging periods. We

conclude that neither statute of limitations had an impermissible retroactive effect because the relevant charging period had not yet expired. Extending an unexpired statute of limitations does not increase a defendant's exposure to prosecution. As a result, we need not consider Congressional intent. *Landgraf* is no basis for finding Piette's traveling-with-intent charge untimely, so we affirm the conviction.

IV.

Finally, we consider Piette's argument that his kidnapping conviction should be reversed. We agree and reverse Piette's kidnapping conviction because the district court plainly erred by misallocating the burden of proof in its jury instructions and verdict form. We review the kidnapping jury instruction for plain error because Piette failed to object to it below. *See United States v. Antonio*, 936 F.3d 1117, 1126 (10th Cir. 2019). To prevail on plain error review, Piette must show that "(1) the district court erred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Muñoz*, 812 F.3d 809, 813 (10th Cir. 2016).

Our precedent clarifies how plain error analysis should be approached when a jury instruction is under review. First, an instruction amounts to error where, "considering the instructions as a whole, the jury has been misled." *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998). Second, an error is plain where it is "clear or obvious." *Muñoz*, 812 F.3d at 813 (quoting *Morales-Fernandez v. INS*, 418 F.3d 1116, 1124 (10th Cir. 2005)). Third, an instruction affects substantial rights if it

“concerns a principal element of the defense or an element of the crime.” *Duran*, 133 F.3d at 1330. Finally, “the fairness or integrity of a defendant’s trial is seriously affected when the defendant has presented substantial evidence in support of an affirmative defense which has been undermined by an erroneous instruction.” *Id.* (internal quotation marks omitted).

A criminal defendant generally bears the burden of proof on affirmative defenses, but Piette relies upon Supreme Court authority suggesting a consensus around the proposition that when a defendant contests whether the statute of limitations has run, the burden of proof on that issue shifts to the government. Piette argues that the district court plainly erred by instructing the jury that he bore the burden to prove that McGinnis was no longer held against her will at a certain date, an argument that would have started the statute of limitations on the kidnapping charge. To surmount the “extremely high hurdle” set by plain error review, *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001), Piette cites to *United States v. Duran*, a case involving the entrapment defense, which is subject to a similar burden-shifting treatment. In *Duran*, we found reversible plain error under nearly identical procedural circumstances. 133 F.3d at 1329–34.

Starting with Supreme Court precedent, in *Musacchio v. United States* the Court held that the general federal criminal statute of limitations, 18 U.S.C. § 3282(a), cannot be raised on appeal unless it was argued below. 577 U.S. 237, 248 (2016). The Court explained:

[A] statute-of-limitations defense becomes part of a case only if the defendant puts the defense in issue. When a defendant presses a limitations defense, the Government then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period.

Id. (emphasis added) (citing *United States v. Cook*, 17 Wall. 168, 179 (1872)). We have previously relied upon this aspect of *Musacchio*. See *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (when defendant “affirmatively and timely” raises statute-of-limitations defense, burden shifts to government to establish compliance). Other circuits agree. See *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. Ferris*, 807 F.2d 269, 272 (1st Cir. 1986).

The government relies upon *Smith v. United States*, 568 U.S. 106 (2013), which held that assigning the burden of proving withdrawal from a conspiracy to a defendant does not violate the Due Process Clause, to argue that it does not need to prove the nonexistence of affirmative defenses. The district court also cited *Smith* in a pretrial order on this issue. See R. Vol. I at 152 (“Commission of a federal crime within the statute-of-limitations period is not an element of the offense, and it is up to the defendant to raise the limitations defense.”). But, as Piette points out, the Court in *Smith* expressly stated “that the Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised.” 568 U.S. at 113. *Smith* is consistent with both *Musacchio* and Piette’s theory of plain error.

It is therefore settled that if a defendant invokes the statute of limitations as a defense, the burden shifts to the government to establish the timing of the offense

beyond a reasonable doubt. Here, by instructing the jury to the contrary, the district court misled the jury and committed plain error. Significant daylight divides the jury's finding that Piette failed to show, by a preponderance of the evidence, that McGinnis was no longer held against her will at any point between 1997 and 2016, from the hypothetical finding Piette requests, and which we hold the Constitution requires: that the government proved, beyond a reasonable doubt, that McGinnis was continuously held against her will long enough to avoid any statute of limitations problem.

Turning to the remaining elements of plain error review, we observed in *Duran* that a jury instruction affects a defendant's substantial rights where it involves a "principal element[]" of a defense. 133 F.3d at 1333. Here, Piette predicated his entire defense to the kidnapping charge upon McGinnis's consent. Shifting the burden of proof to the government was a crucial aspect of the defense's efficacy. Also, the district court seemed to understand that whether McGinnis consented affected the viability of the kidnapping charge on the very statute of limitations grounds urged by Piette on appeal. *See* R. Vol. I at 372 ("This will aid the court in making a separate legal determination in regard to this case."). The district court's plain error regarding the burden of proof affected Piette's substantial rights because it involved a principal element of Piette's principal defense. *See Duran*, 133 F.3d at 1333.

Finally, we held in *Duran* that "[i]n light of the revered status of the beyond-a-reasonable-doubt standard in our criminal jurisprudence, a jury instruction that

allows a conviction where one important element may not have been found against the defendant by such a standard cannot be overlooked.” *Id.* at 1334. That is exactly what happened here. The timing issue created by Piette’s defense was not resolved beyond a reasonable doubt, as the Constitution requires. The district court plainly erred, so Piette’s kidnapping conviction must be reversed.⁵

V.

Last, because we affirm the traveling-with-intent conviction, we reach and reject Piette’s constitutional challenge to his sentence for that conviction. Piette argues that, even if any of his convictions are not overturned, his sentence should be reversed because he was denied his Sixth Amendment right to represent himself at sentencing. A defendant seeking to represent himself must (1) “clearly and unequivocally” inform the court; (2) do so “timely and not for the purpose of delay”; (3) assure the court that he is waiving the right to counsel “knowingly and intelligently”; and (4) be “able and willing to abide by rules of procedure and courtroom protocol.” *United States v. Simpson*, 845 F.3d 1039, 1046 (10th Cir. 2017) (quoting *United States v. Tucker*, 451 F.3d 1176, 1180 (10th Cir. 2006)). We

⁵ In the closing moments of his rebuttal at oral argument, Piette’s counsel suggested that “the fundamental nature of the burden of proof” requires reversing Piette’s traveling-with-intent conviction because of the error that requires overturning his kidnapping conviction. Oral Arg. at 32:28–32:37. We do not consider issues that are first presented at oral argument. *See Denver Homeless Out Loud v. Denver*, 32 F.4th 1259, 1269 n.9 (10th Cir. 2022).

review the district court’s failure to allow Piette to represent himself at sentencing for abuse of discretion.⁶

Piette argues that the district court should have conducted a *Faretta* hearing and allowed him to represent himself at sentencing. *See Faretta v. California*, 422 U.S. 806, 834–36 (1975); *see also United States v. Hansen*, 929 F.3d 1238, 1249 (10th Cir. 2019) (district courts often assess whether waivers of counsel are made knowingly and intelligently by conducting *Faretta* hearings). The government responds that Piette failed to make a clear and unequivocal request to proceed pro se because of his “prolific and varied correspondence with the district court,” which alternated between praising and lambasting his attorney, Warren Gotcher. Aple. Br. at 46. The government also observes that, at sentencing, Piette agreed to Gotcher representing him through filing an appeal, and that Piette spoke extensively on his own behalf. We agree with the government. Piette’s theory fails on the clear-and-unequivocal prong for two principal reasons, and therefore the district court did not abuse its discretion.

⁶ Both parties misstate the standard of review as de novo, which ignores the distinction we draw between requests for self-representation made before trial, reviewed de novo, and requests made after trial, reviewed for abuse of discretion. *See United States v. Beers*, 189 F.3d 1297, 1303 (10th Cir. 1999); *see also United States v. Estrada*, 25 F. App’x 814, 819–20 (10th Cir. 2002) (unpublished). Piette focuses on demands for counsel’s withdrawal made in November 2019 and renewed at sentencing in February 2020. The jury reached its verdict on June 6, 2019, ending the trial months before Piette’s first supposed request to proceed pro se. Because any invocation of the right to self-representation would have occurred post-trial, we review for abuse of discretion.

First, it is neither clear nor unequivocal that Piette ever sought to represent himself—as opposed to merely requesting to withdraw Gotcher and receive new appointed counsel. Only the former endeavor would implicate Piette’s constitutional right to self-representation. On appeal, Piette argues that his November 2019 letter did not request a replacement attorney, so we should view it as a request for self-representation. But, by the same reasoning, the letter said nothing about self-representation or proceeding pro se. Although it was preceded by a handwritten pleading, Piette submitted numerous such documents while represented by counsel. Similarly, Piette’s request for case materials could have been an attempt to recover personal documents for his own records or for use by his next attorney, and not an implicit request for self-representation. Moreover, Piette based his request on Gotcher’s ineffective assistance and not on any constitutional right to self-representation. In his response to Piette’s motion, Gotcher requested that Piette “be appointed new counsel for appeal unless the defendant employs his own counsel, which Counsel advised the defendant is his right.” R. Vol. I at 407. Gotcher, who had contemporaneous personal access to Piette, did not even address the possibility that Piette contemplated proceeding pro se at sentencing.

Second, even if Piette was attempting to invoke his right to self-representation for purposes of sentencing, he verbally assented to the district court’s contrary determination. Specifically, the district court asked Piette whether withdrawing counsel post-sentencing was “acceptable.” R. Vol. II at 1108. Piette’s “[y]es, sir, yes” response is as notable for what it says as what it does not say. *Id.* at 1109.

Between hundreds of pages of letters to the district court and a lengthy statement at sentencing, Piette did not hesitate to share his perspective with the court. The absence of any statement by Piette about self-representation undercuts his claim to clarity on appeal. If Piette wanted to represent himself, he probably would have said something to that effect, especially when given the opportunity.

The district court granted Piette’s motion without a *Faretta* hearing not because the court thought it was allowing Piette to proceed pro se, but because it did not view the circumstances as implicating *Faretta*. It reasonably thought Piette wanted new counsel, not self-representation, and Piette said nothing to suggest otherwise. We do not know the contents of the off-the-record conversation between Piette and Gotcher alluded to in the hearing transcript, but if Piette wanted to proceed pro se—a different request from just withdrawing Gotcher—it likely would have come before the court. Piette may be correct that no magic words are required to invoke the right to self-representation, but courts cannot read minds. The clear-and-unequivocal requirement exists in part to “protect . . . the trial court” from a reversal “dilemma” where a defendant granted counsel can assert a violation of the right to proceed pro se, while a defendant granted self-representation can assert a violation of the right to counsel. *Simpson*, 845 F.3d at 1046–47. Here, Piette clearly and unequivocally requested only that his counsel be withdrawn, and the district court granted that request. Because there was no clear and unequivocal request that Gotcher withdraw so that Piette could represent himself at sentencing, and because

Piette assented to the district court's contrary ruling, the court did not abuse its discretion.

VI.

We AFFIRM Piette's traveling-with-intent conviction, REVERSE Piette's kidnapping conviction, reject Piette's constitutional attack on his sentencing, and REMAND for further proceedings consistent with this opinion.