UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 24-3313

UNITED STATES OF AMERICA

v.

DARNELL JACKSON
a/k/a Major Change,
Appellant

On Appeal from the U.S. District Court, E.D. Pa.
Judge Nitza I. Quinones Alejandro, No. 2:21-cr-00299-001

Before: RESTREPO, MONTGOMERY-REEVES, AND MCKEE, *Circuit Judges*
Submitted: Sept. 8, 2026; Filed: Oct. 14, 2026

NONPRECEDENTIAL OPINION*

RESTREPO, *Circuit Judge*. Appellant Darnell Jackson was convicted of possession of ammunition by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) and use of a facility of interstate commerce in the commission of murder-for-hire in violation of 18 U.S.C. § 1958(a). He appeals his judgment of conviction and sentence. We will affirm for the following reasons.

I.

This appeal arises from an attempted murder-for-hire initiated by Darnell Jackson in late July 2021. Jackson commissioned a longtime acquaintance and confidential FBI informant ("the informant") to kill Ernest Moss, with whom Jackson was feuding. The informant and Jackson grew up a few blocks apart, knew of each other since the 1990s,

*This is not an opinion of the full Court and, under 3d Cir. IOP 5.7, is not binding precedent.

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and occasionally conversed while serving in prison from 2005 to 2006. The two men exchanged phone numbers in May 2021 and made various gun and drug transactions the next month.

In early July 2021, Jackson began clashing with Moss on social media. On July 19, Jackson sent a photo of Moss to his contacts, including the informant. After the informant texted Jackson asking why he had sent the photo, Jackson called the informant and offered him $5,000 to find and kill Moss. At the FBI's behest, the informant pretended to cooperate with the murder plot and met with Jackson on July 21. That night, the informant called Jackson and falsely claimed that he had killed Moss. Jackson replied that he would "be right there with the money." App. 53. He was arrested in his vehicle shortly thereafter with a loaded semi-automatic gun and multiple phones in his possession. Jackson was ultimately charged with (1) possession of ammunition as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); and (2) use of a facility of interstate commerce in the commission of murder-for-hire in violation of 18 U.S.C. § 1958(a).

The Government moved *in limine* to admit evidence of Jackson's relationship with the informant, claiming that the informant's June 2021 gun and drug transactions with Jackson were pursuant to the informant's own criminal activity, not law enforcement's directives. Jackson argued that the evidence of his prior relationship with the informant should be excluded under Federal Rules of Evidence 403 and 404(b). The District Court granted the Government's motion.

At trial, the informant testified about his relationship with Jackson, including Jackson's sale of drugs and guns to the informant between June 4 and June 18, 2021. Though the informant initially testified that he exchanged drugs with Jackson in his capacity as an FBI informant, moments later he admitted that he purchased ecstasy from Jackson without law enforcement's knowledge. He then stated that he had purchased "fake opiate pills" from Jackson on June 8 and 9, tried to purchase a ghost gun from Jackson on June 12, and bought pills from Jackson's associate on June 15. App. 338. During cross-examination, he claimed that the gun purchase, but not the drug transactions, were police supervised.

Jackson also testified, asserting that the prosecutor acknowledged in the Government's motion *in limine* that Moss threatened and harassed Jackson and his family. During cross-examination, the prosecutor addressed Jackson's claim, stating: "I did not say those things. I said that you said those things. Right?" App. 657. Defense counsel objected. The two continued to disagree, leading the prosecutor to state, "I, Justin Ashenfelter, did not say anything about knowing your family was in danger." *Id*. After defense counsel objected, the Government left the matter alone and proceeded with its questions.

A jury convicted Jackson on both counts. At sentencing, the District Court asked Jackson whether he had reviewed the pre-sentence report ("PSR"), and he confirmed that he had. When asked if he had done so with counsel, Jackson responded, "No." App. 876. The Court then asked, "You did it on your own?", and Jackson replied, "Yes." *Id.*

Jackson's counsel raised no objection, and the Court resumed sentencing. Jackson and his counsel raised separate objections to the PSR and recommended sentence. The Court overruled the objections and imposed the statutory maximum of 240 months' imprisonment plus three years of supervised release.

This timely appeal followed.

II.[1]

On appeal, Jackson takes issue with the informant's testimony, the prosecutor's conduct during cross-examination, and the PSR colloquy during sentencing. We address each issue in turn.

A. Admissibility of Witness Testimony

First, Jackson argues that the District Court should have struck the informant's testimony regarding Jackson's prior bad acts under Rules 404 and 403 because it was irrelevant, unreliable, and false.

Jackson's response to the Government's motion *in limine* did not preserve this issue for appeal. To preserve the issue of whether evidence was properly admitted, a party must make a timely and specific objection. Fed. R. Evid. 103(a). Jackson's argument on appeal is that the informant's trial testimony should have been ruled

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C § 1291 and 18 U.S.C. § 3742.

inadmissible because it (1) deviated from what the Government promised it would entail in its motion *in limine*; and (2) proved "too flawed to be admitted." Appellant's Br. 26. To preserve this claim for appeal, Jackson thus needed to object to the informant's testimony at trial. *See Gov't of V.I. v. Joseph,* 964 F.2d 1380, 1385 (3d Cir. 1992).[2]

Because Jackson did not preserve this issue, we review for plain error. *See United States v. Olano*, 507 U.S. 725, 731 (1993). To demonstrate plain error, Jackson must show that the District Court (1) committed an error, which (2) is plain, (3) affects substantial rights, and (4) seriously impacts the judicial proceedings' fairness, integrity, or public reputation. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997). Jackson fails at the error prong.

The first prong of plain error review requires us to determine whether the District Court committed an error under the standard of review applicable to a preserved evidentiary issue, *United States v. Adair*, 38 F.4th 341, 355–56 (3d Cir. 2022), which is abuse of discretion. *United States v. Caldwell*, 760 F.3d 267, 274 (3d Cir. 2014). Under Rule 404(b), prior bad acts evidence is admissible only if it (1) has a proper evidentiary

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[2] While a party who raises an issue in a motion *in limine* or response thereto sometimes need not reraise that issue at trial to preserve the issue for appeal, this is not such a situation. Here, the issues regarding the informant's testimony only arose at trial; they were not encompassed in the District Court's *in limine* ruling. Thus, Jackson needed to raise a contemporaneous trial objection to preserve this issue. *See Joseph*, 964 F.2d at 1384–85 (concluding that a contemporaneous trial objection was not required because it "would not have aided the district court which had thoroughly considered the issue . . . before the evidence was offered.").

purpose; (2) is relevant; (3) satisfies Rule 403; and (4) is accompanied by a limiting instruction, when requested, regarding the purpose for which it may be considered. *United States v. Green*, 617 F.3d 233, 249 (3d Cir. 2010). The informant's testimony meets each of these prongs.

First, the informant's testimony served a valid Rule 404(b) purpose by providing necessary background information about his relationship with Jackson. *United States v. Simmons*, 679 F.2d 1042, 1050 (3d Cir. 1982) (holding that evidence of a prior relationship with a criminal associate is a valid evidentiary purpose under Rule 404(b)). Second, the informant's testimony was relevant because it demonstrated that Jackson had an existing relationship with the informant, making it more likely that he would hire the informant to kill Moss.[3] *See* Fed. R. Evid. 401. Third, the informant's testimony passes Rule 403's muster, which acts to exclude evidence only if its "probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. The

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[3] Jackson's invocation of *Huddleston v. United States*, 485 U.S. 681 (1988), is unavailing. There, the defendant argued that the Government could not use Rule 404(b) evidence of a prior television sale to prove he sold stolen video tapes unless it first proved by clear and convincing evidence that the televisions were stolen. *Id.* at 683–84, 686. The Court held that where the relevance of Rule 404(b) evidence depends on the fulfillment of a conditional fact, it must determine whether "there is sufficient evidence to support a finding by the jury [that the conditional fact is true]." *Id.* at 685–86, 690. Jackson does not identify a conditional fact on which the relevance of the informant's testimony relied, nor explain why the evidence was insufficient to support that fact. And *Huddleston* does not impose on district courts a broad duty to *sua sponte* "strike" Rule 404(b) evidence that turns out to be "flawed" or "lacking." Appellant's Br. 26, 30.

evidence of Jackson's prior bad acts was highly probative because it (1) demonstrated a trusting relationship between Jackson and the informant; and (2) concerned drug and gun transactions occurring mere weeks before the instant crimes, suggesting Jackson's familiarity with the informant's criminal activity during the relevant timeframe. And the informant's testimony regarding drug and gun transactions with Jackson, which the informant claimed were supervised by law enforcement, did not pose a substantial danger of unfair prejudice to Jackson because (1) whether the informant acted under FBI direction during his initial transactions with Jackson did not alter the undisputed fact that the informant was cooperating with law enforcement in the investigation of the instant crimes; (2) the misstatement regarding law enforcement's supervision of the drug transactions was clarified on cross examination; and (3) any confusion could not have substantially outweighed the probative value of this testimony. The District Court's Rule 403 ruling, to which we owe "great deference[,]" *United States v. Universal Rehab. Servs. (PA), Inc.*, 205 F.3d 657, 665 (3d Cir. 2000) (en banc), was not error. Finally, the Court properly instructed the jury on this evidence. At bottom, Jackson's claims go not to admissibility, but to weight and credibility—issues reserved for the jury. *United States v. Michener*, 152 F.2d 880, 885 (3d Cir. 1945). The District Court did not abuse its discretion in admitting the informant's testimony, so Jackson has not demonstrated plain error.

B. Prosecutorial Misconduct

Jackson next contends that the prosecutor, by stating that he did not "say anything about knowing [Jackson's] family was in danger," improperly attested to his version of the facts on the record and allowed the informant's false testimony to go uncorrected. App. 657. Jackson argues that these actions by the prosecutor deprived him of due process. Though we agree that it was error to overrule defense counsel's objection to the prosecutor's statement and allow this statement to stand, this error was harmless.

1. The Prosecutor's Quasi-Oath

We first assess whether the prosecutor's statement was improper. Jackson raised a contemporaneous objection to the comment at trial, so we review for abuse of discretion. *See United States v. Brennan*, 326 F.3d 176, 182 (3d Cir. 2003). Rule 3.4(c) of the Pennsylvania Rules of Professional Conduct provides that "[a] lawyer shall not . . . when appearing before a tribunal, assert the lawyer's personal opinion . . . as to the credibility of a witness." Pa.R.P.C. 3.4(c). The invited response doctrine is an exception to this rule: improper comments by counsel are protected if they are "reasonable response[s] to improper attacks by defense counsel." *United States v. Wood*, 486 F.3d 781, 788 (3d Cir. 2007) (citation omitted). We apply the doctrine where the prosecutor's statement balances out the prejudice of opposing counsel's statement by defending against and neutralizing such prejudice. *See id.* at 788–89; *compare United States v. Pungitore*, 910 F.2d 1084, 1126–27 (3d Cir. 1990) (applying doctrine when prosecutor invoked oath of office following defense counsel's comparison of prosecution to historical persecutions),

with United States v. Young, 470 U.S. 1, 13–14 (1985) (holding doctrine inapplicable when prosecutor's comments exceeded what was necessary to "right the scale in the wake of defense counsel's misconduct" (citation modified)), *and United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 284–86 (3d Cir. 1999) (holding doctrine inapplicable when prosecutor vouched for witness after defense counsel contested witness's credibility). Though it is unclear whether the invited response doctrine applies to exchanges between a prosecutor and a defendant, we need not and will not decide this question today because although the prosecutor's statements were improper, the error caused by their admission was harmless.

By invoking his own name and attesting to his interpretation of the facts over Jackson's, the prosecutor affirmatively denigrated Jackson's trustworthiness. His affirmative remarks do not fall within the neutral and defensive responses that the invited response doctrine (if it applies) protects. These comments were improper.

But Jackson has not demonstrated that the prosecutor's improper comments harmed him. *See Brennan*, 326 F.3d at 182 (stating that a finding of prosecutorial misconduct is subject to harmless error analysis); *Wood*, 486 F.3d at 789 (same). Where, as here, the prosecutor "attack[ed] the credibility of a witness with evidence not in the record,"[4] the alleged error is non-constitutional and is harmless if "it is highly probable

[4] The prosecutor's statements regarded his representations contained in the Government's motion *in limine*, which was not entered into evidence.

that the error did not contribute to the judgment." *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (citation modified). When assessing whether a prosecutor's comments were harmless, we examine (1) the scope of the comments and their relationship to the whole proceeding; (2) the ameliorative effect of curative instructions provided; and (3) the strength of the evidence supporting the conviction. *Id.* Isolated comments or exchanges involving misconduct typically do not warrant a new trial. *Cf. Wood*, 486 F.3d at 789. Here, the exchange was a minor occurrence in the span of a five-day trial. It pertained to the content of the Government's motion *in limine*, not to evidence or crucial facts of the case. The evidence supporting Jackson's conviction was strong. And while the District Court gave no curative instruction specific to this exchange, it repeatedly reminded the jury that counsel's arguments and statements were not evidence. The prosecutor's comments thus could not have affected the verdict, meaning that any error arising from those comments was harmless.

The remarks likewise pose no due process issue. "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Liburd*, 607 F.3d 339, 344 (3d Cir. 2010) (citation omitted). Given the isolated nature of these comments, the strong body of evidence against Jackson, and the Court's instructions that counsels' statements are not evidence, we conclude that the misconduct here was not enough to render Jackson's trial unfair. The District Court did not abuse its discretion by overruling Jackson's objection and proceeding with trial despite these comments.

2. Eliciting False Testimony

Jackson also argues that the prosecutor committed misconduct by allowing the informant to testify falsely without correcting him. Jackson did not raise a contemporaneous objection at trial, so we review for plain error. *Olano*, 507 U.S. at 731. Jackson must show that (1) the informant committed perjury; (2) the Government knew or should have known that he was committing perjury but did not correct his testimony; and (3) there is a reasonable likelihood that the false testimony could have affected the verdict. *United States v. Stadtmauer*, 620 F.3d 238, 267 (3d Cir. 2010).

We need not address the Government's knowledge or conduct because Jackson has failed to show that the informant committed perjury. A witness perjures himself when he "gives false testimony concerning a material matter with the willful intent to provide false testimony," but not when such false testimony results from "confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). Contradictions in a witness statement do not necessarily constitute perjury. *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991) ("Contradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony."); *see also Stadtmauer*, 620 F.3d at 268–69 (citing *Tapia* to hold no prosecutorial misconduct occurred when prosecutor remained silent during witness's allegedly contradictory testimony). Here, the informant repeatedly stated that he was unsure of the timeline of his involvement with the FBI. Jackson has not shown that the informant's misstatements resulted from anything

other than confusion, mistake, or faulty memory. The prosecutor thus did not commit misconduct on this basis, so the plain error standard is not met and a new trial is not warranted on this issue.

C. Sentencing

Finally, Jackson seeks resentencing because the District Court failed to verify that he had "read and discussed" the PSR with counsel in compliance with Federal Rule of Criminal Procedure 32(i)(1)(A). After verifying that Jackson and his counsel *had not* read and discussed the PSR together, the District Court proceeded with sentencing without objection from Jackson. Because Jackson did not object to the Court's non-compliance with Rule 32(i)(1)(A) at sentencing, we review this issue for plain error. *Olano*, 507 U.S. at 731; *United States v. Adams*, 252 F.3d 276, 278–79 (3d Cir. 2001). Though the trial court erred in continuing with sentencing despite this non-compliance, its decision to do so was not plain error because it did not affect the proceedings' outcome. *Olano*, 507 U.S. at 734; *Adams*, 252 F.3d at 285–86.

Rule 32 mandates that the Court "verify that the defendant and the defendant's attorney have read and discussed the presentence report." Fed. R. Crim P. 32(i)(1)(A). The District Court thus erred in proceeding with sentencing despite Jackson's statement that he had not discussed the PSR with counsel. But this error does not warrant resentencing because it did not prejudice Jackson. *United States v. Stevens*, 223 F.3d 239, 246 (3d Cir. 2000) (joining five other circuits in imposing prejudice requirement for Rule 32(i)(1)(A) predecessor). Jackson and his counsel each objected to the sentencing

recommendations, and the District Court overruled them. The fact that both Jackson and defense counsel reviewed the PSR and raised their respective objections significantly reduces the likelihood of prejudice from this error. And Jackson has not convinced us that a meeting between Jackson and his counsel to review the PSR would have yielded a different result. At sentencing, the District Court appropriately applied a base level offense of 33 pursuant to U.S.S.G. §§ 2E1.4 and 2A1.5, plus a four-level increase under U.S.S.G. § 2A1.5(b)(1), for a total offense level of 37. *See, e.g.*, *United States v. Dotson*, 570 F.3d 1067, 1069–70 (8th Cir. 2009) (affirming application of § 2E1.4 cross reference to § 2A1.5); *United States v. Lisyansky*, 806 F.3d 706, 709–10 (2d Cir. 2015) (same); *United States v. Temkin*, 797 F.3d 682, 694–95 (9th Cir. 2015) (reversing due to failure to apply § 2E1.4 cross reference).

Jackson's *Kimbrough* argument also fails to persuade. *Kimbrough v. United States*, 552 U.S. 85 (2007). *Kimbrough* gives the sentencing court discretion to vary the Guidelines range based on its assessment of the case *vis-à-vis* the 18 U.S.C. § 3553 sentencing factors; there, the sentencing court concluded that the Guidelines range at issue yielded disproportionate sentences. *Id.* at 109–10. But Jackson does not explain how the District Court could have found that the application of the § 2E1.4 cross reference to § 2A1.5 imposed a disproportionate sentence or otherwise conflicted with § 3553's sentencing objectives—let alone how a meeting between him and his counsel would have led them to raise this argument. Jackson does not demonstrate prejudice

arising from his lack of opportunity to discuss the PSR with counsel, so resentencing is not warranted.

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The District Court did not err in admitting the informant's testimony, and Jackson was not prejudiced by any later error at cross-examination or sentencing. Thus, we will AFFIRM.