United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 2026 Decided September 18, 2026

No. 25-3104

UNITED STATES OF AMERICA,
APPELLEE

v.

ROBERT P. BURKE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:24-cr-00265-1)

Timothy Parlatore argued the cause for appellant. With him on the briefs was *Elizabeth M. Candelario*.

Thomas D. Hill, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jeanine Ferris Pirro*, U.S. Attorney, and *Chrisellen R. Kolb*, Assistant U.S. Attorney.

Before: HENDERSON, MILLETT, and GARCIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARCIA.

GARCIA, *Circuit Judge*: Robert P. Burke served for nearly four decades in the United States Navy, ascending to the rank of four-star Admiral and serving for a time as the Navy's second highest ranking officer. He now faces years in prison.

A jury convicted Burke of bribery and three related crimes based on evidence that he agreed to steer a Navy contract to a private company in exchange for a post-retirement job. He now appeals, raising a host of challenges to the proceedings below, primarily to the district court's evidentiary rulings and the jury instructions. We conclude that the challenged evidentiary rulings were either appropriate exercises of discretion or non-prejudicial given the overwhelming, properly admitted evidence of Burke's guilt. Burke does identify one legally erroneous jury instruction, but Burke's own counsel proposed the instruction, so we will not remedy the error.

We accordingly affirm Burke's convictions.

I

A

Next Jump, Inc. is a company that provides leadership training services. Burke first crossed paths with the company when the Navy contracted with it to conduct a pilot program with certain Navy units.[1] At the time, Burke was Chief of Naval Personnel and was involved in overseeing the pilot. After about a year of testing Next Jump's tool for giving and receiving workplace feedback, the Navy concluded that the product was not well suited to the Navy's needs and decided not to extend the partnership. *See, e.g.*, J.A. 111–12, 115.

[1] We accept the government's version of events and view "the evidence in the light most favorable to the jury verdict" for purposes of this appeal. *United States v. Clark*, 156 F.4th 664, 672 (D.C. Cir. 2025).

The Navy notified Next Jump in October 2019 that the pilot program would end.

In July 2020, Burke was promoted to lead U.S. Naval Forces Europe and Africa. Soon after, Next Jump's co-CEOs, Yongchul "Charlie" Kim and Meghan Messenger, reached out to Burke directly, touting various product improvements and angling for another partnership opportunity. S.A. 27. In April 2021, Kim and Messenger arranged a videoconference meeting with Burke and some of his staff for a sales presentation. A few weeks later, without his staff's knowledge, Burke held an hour-long private videoconference with Kim and Messenger on WhatsApp. Shortly after the meeting, Kim emailed Next Jump colleagues that Burke "wants to work for us, but we're asking for a deal first." S.A. 54. In early May, Burke forwarded to Juliette Beyler an email in which he assured Kim and Messenger that Beyler was "working options and angles hard" to accomplish "our project": a contract between Next Jump and Naval Forces Europe and Africa. J.A. 152. Beyler, the highest-ranking civilian in Burke's command and the official responsible for its budget, had been doing no such thing. In fact, Beyler was frustrated to learn that Burke was engaging directly with Next Jump at all. On multiple prior occasions, Beyler had asked Burke to allow staff to communicate regarding potential contracts.

In July 2021, Burke brought his then-girlfriend, Denese Canedo, to a lunch with Kim and Messenger at the Belga Café in Washington, D.C. There, Kim and Messenger again shared updates on Next Jump. But they also asked Burke about his own plans—after nearly forty years in the Navy, the Admiral would soon retire. At that point, according to emails and text messages introduced at trial, the conversation turned to the possibility that Burke might join Next Jump, and a plan emerged. Burke would use his position to help the company

secure a contract with his command. The two entrepreneurs could then leverage that success and Burke's endorsement to secure other, larger contracts with U.S. and allied forces. S.A. 55–57. And when Burke retired, he could join Next Jump as a full-time employee and a "junior" co-owner. *See* J.A. 690.

Burke and Canedo exchanged a series of text messages shortly after the lunch meeting. Burke explained that he had asked Kim "to write out a job description" because he had "essentially agreed to work for" Next Jump. J.A. 689. Canedo asked whether she had heard correctly that the compensation would be a "500k base salary" and "ten percent equity in [the] entire biz." *Id.* Burke confirmed: "10% in total co. I would be a junior coowner." J.A. 690. When Canedo then asked "[t]o what extent" the job was "tied" to Next Jump obtaining the initial Navy contract, Burke responded: "[T]echnically - zero." J.A. 694–95. Kim similarly reported to Next Jump colleagues that they had "talked salary, equity, et cetera." J.A. 279. Kim also stated that, although Burke "[w]anted to resign next week," Kim told him "to hold off" until Next Jump could obtain the first contract with Burke's command. *Id.*

By the end of the summer, Beyler and her staff had concluded that Naval Forces Europe and Africa should not pursue a contract with Next Jump, and she conveyed that recommendation to Burke. J.A. 172. Burke nevertheless continued to communicate with Kim and Messenger. In November, at Kim's invitation, Burke planned to send four Navy officers to a Next Jump leadership training in New York. J.A. 235–36; S.A. 77. Around the same time, Burke visited Next Jump's headquarters. After that visit, Kim reported to colleagues that Burke planned to propose that the Navy contract with Next Jump. S.A. 77–78.

In December 2021, Kim sent Burke a pricing proposal for the desired contract, a training in Naples, Italy, and Burke forwarded it to Beyler, stating: "Would like to get this in place to support kickoff events in early January, if possible." J.A. 228; *see* J.A. 359; S.A. 91–94. Beyler interpreted Burke's email as an "order" to finalize a contract with Next Jump. J.A. 228. Although meeting that deadline required deviations from normal due diligence and contracting processes, Beyler and other staff immediately moved to implement Burke's order, thus completing the first step in the plan discussed at the July 2021 Belga Café lunch. S.A. 44–45, 48–50. The training went forward in January 2022 as scheduled. But when the Navy collected participants' feedback after the training ended, the responses were abysmal. According to one witness who reviewed the feedback, it was "the worst [she had] ever seen," and revealed the contract to be an "embarrassing . . . waste of money." J.A. 239–40.

As these events unfolded, Burke continued to prepare for retirement. In March 2022, he consulted a Navy ethics counselor about post-government employment and assured the counselor that "to date I have had no conversations, have no intent to aim for a specific company, and most likely will not actively seek employment until after 1 July." S.A. 113–14, 116. In early May, Burke notified his ethics counselor that he "anticipated commencing discussions related to employment with" Next Jump. J.A. 450–51, 705. Just over two weeks later, on May 24, 2022, Next Jump sent Burke an offer letter proposing a $500,000 base salary and 100,000 stock options. J.A. 323–24. Burke accepted the offer two days later. S.A. 125. That same day—nearly a year after the Belga Café lunch—Burke informed the ethics counselor that he "began negotiations with Next Jump on 24 May 2022 concerning future employment." S.A. 118. He signed a memorandum attesting that he would not "substantially participate" in decisions "that would have a direct and predictable effect on

the financial interests of Next Jump" during the remainder of his employment with the Navy. S.A. 118-19; *see* J.A. 449–51.

B

Burke retired in the summer of 2022, began working at Next Jump that October, and resigned in January 2023. In October 2023, investigators from the Department of Defense Criminal Investigative Service and the Naval Criminal Investigative Service came to his home in Florida to interview him. J.A. 462–63. While discussing his dealings with Next Jump, Burke admitted he had "allow[ed] [him]self to be influenced in ways that were inappropriate" and "didn't fully disclose them to people that needed to be aware of them. It was wrong." J.A. 720–21.

In May 2024, Burke was indicted on four counts: conspiracy to accept a bribe in violation of 18 U.S.C. § 371; bribery in violation of 18 U.S.C. § 201(b)(2); conflict of interest in violation of 18 U.S.C. § 208(a); and concealment of a material fact in violation of 18 U.S.C. § 1001(a)(1). J.A. 1–16. At trial, the government argued that Burke, Kim and Messenger had illegally exchanged "a contract for a job," J.A. 530; *see also* J.A. 299–301, 79, and that Burke then concealed the nature and existence of his agreement with Next Jump because he knew it was wrong, J.A. 85.

A jury found Burke guilty on all four counts. The district court sentenced him to 60 months of incarceration for the conspiracy, conflict-of-interest, and concealment convictions, and 72 months for the bribery conviction, to be served concurrently.[2]

---

[2] Kim and Messenger were separately tried for conspiracy and bribery. J.A. 5, 12–13. Their initial trial ended in a hung jury and on retrial they were both acquitted. *See* Burke 28(j) Letter. Our review of Burke's convictions is limited to the record before us and,

II

In this appeal, Burke argues that the district court (A) improperly denied his pretrial motion to dismiss; (B) made various evidentiary errors; (C) delivered improper jury instructions; and (D) subjected him to a fundamentally unfair trial due to the cumulative effect of these errors. We disagree and affirm Burke's convictions.

A

We start with Burke's challenge to the district court's denial of his pre-trial motion to dismiss. We review such decisions de novo. *See United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005).

Under 18 U.S.C. § 201(b)(2), a public official commits bribery if he or she "corruptly" accepts or agrees to accept "anything of value . . . in return for . . . being influenced in the performance of any official act." An "official act," in turn, "means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.* § 201(a)(3). The indictment alleged that Burke's official act was "ordering a United States Government contract for [Next Jump]" in exchange for a job with the company. J.A. 13.

Burke argues that the allegation that he "ordered" a contract does not describe an official act because he lacked authority to directly enter into contracts on the Navy's behalf. The government does not dispute that Burke lacked that authority. It argues instead that Burke could nevertheless

---

as noted, we must view that record "in the light most favorable to the jury verdict." *Clark*, 156 F.4th at 672.

satisfy the statute's definition of an "official act" by ordering a subordinate to enter such a contract.

The government is correct. The Supreme Court has explained that a public official can commit an official act under the bribery statute not only by directly acting on a matter, but also "by using his official position to exert pressure on another official to perform an 'official act.'" *McDonnell v. United States*, 579 U.S. 550, 572 (2016) (emphasis omitted). Indeed, even using one's "official position to provide advice to another official . . . can qualify" in certain circumstances. *Id.* The indictment's allegation that a four-star Navy Admiral "ordered" a subordinate to enter into a contract thus easily qualifies.

Faced with *McDonnell*'s clear guidance, Burke retreats to the assertion that the indictment cannot be read to suggest that he pressured a subordinate to enter the contract. That is, he argues that the allegation that he "ordered a contract" can only have meant that he personally finalized a legally enforceable contract. We see no basis to inject that narrow interpretation into the indictment's plain language, particularly given how the indictment describes Burke's alleged actions elsewhere. For example, in an allegation specifically incorporated into the bribery count, J.A. 13, the indictment alleges that Burke "ordered [Beyler] to provide a contract to [Next Jump], to make sure the contract was in place by January 10, 2022, and for it to be valued at approximately $350,000," J.A. 9. Especially with that context, the allegation later in the indictment that Burke's official act was "ordering" a contract readily sufficed "to inform the defendant of the nature of the accusation against him." *United States v. Ballestas*, 795 F.3d 138, 148–49 (D.C. Cir. 2015) (quoting *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001)).

B

Next, Burke raises several challenges to the district court's evidentiary decisions, which we review for abuse of discretion. *See United States v. Whitmore*, 359 F.3d 609, 616 (D.C. Cir. 2004).

1

First, Burke argues that the district court erroneously excluded excerpts from his October 2023 interview with investigators that would have been helpful to his case. The government introduced several excerpts of the interview as statements of a party opponent under Federal Rule of Evidence 801(d)(2)(A). Burke then moved to admit additional excerpts under Rule 106, which permits a party to introduce any "statement . . . that in fairness ought to be considered at the same time" as other statements introduced by the opposing party. The district court did not abuse its discretion by denying Burke's request.

Rule 106 embodies the "common-law doctrine of completeness" and can, in certain circumstances, permit the admission of "otherwise inadmissible evidence." *United States v. Sutton*, 801 F.2d 1346, 1368 & n.17 (D.C. Cir. 1986). The Rule most often applies when the opposing party has "already introduced portions" of a statement that "might be misleading unless properly placed in context" by other portions of the same statement, document, or conversation. *Id.* at 1367. But it is "invoked rarely and for a limited purpose": to avoid "distort[ed]" and misleading evidence. *Id.* at 1369.

The government initially sought to introduce four excerpts from the interview transcript. In one excerpt, referencing the Belga Café meeting where Burke and Canedo met with Kim and Messenger, a Special Agent asked Burke, "what's the full story on the July 2021 meeting?" J.A. 735. Burke's answer

spanned six pages, but the government sought to introduce only a portion of the first two pages. J.A. 468. Burke objected, arguing that the remaining four pages must be admitted as well under Rule 106 to fairly present his answer. The district court agreed. J.A. 130–31. In response to that adverse ruling, the government pivoted and decided not to introduce this excerpt at all. It continued, however, to seek admission of the remaining three excerpts.[3]

The next relevant excerpt came from significantly earlier in the interview. There, the interviewer asked Burke, "So from July of 2021 through May of 2022, was there ever any discussions about working for Next Jump?" J.A. 716. Burke answered "No" and then said that Kim made some vague overtures but "I just tried to squash it as best I could." *Id.* At trial, Burke urged that admitting this excerpt also required admitting under Rule 106 his entire six-page response to the later interview question, "what's the full story on the July 2021 meeting?" J.A. 735. In that answer, Burke acknowledged that the July 2021 meeting included discussions of employment at Next Jump but insisted "there was no agreement" between him and Next Jump at that time. J.A. 735–37.

Burke argues that the later question-and-answer is so closely related to the earlier exchange that both were required to avoid misleading the jury. To be sure, the two questions overlap in subject matter, which makes the Rule 106 question

[3] Burke argues in part that the government's change of course after the district court's adverse ruling was itself improper. *See* Appellant's Brief 18–20. He casts the government's decision not to introduce this excerpt as a "strategic withdrawal" that violated the government's "duty to conduct a fair trial." *Id.* at 18–19. The government's decision was surely strategic, but Burke offers no caselaw or principle that suggests it was improper. Nothing forbids the government—or any party—from changing tack in response to an unfavorable evidentiary ruling.

close. But in the interview transcript, these two questions are separated by approximately forty-five pages representing many minutes of discussion on various topics. *Compare* J.A. 716–18 (pages 48–50 of the interview transcript), *with* J.A. 735–741 (pages 94–100). This gap between the two exchanges is not dispositive, but it is a factor courts appropriately consider when assessing whether one statement "provide[s] necessary context" for another. *United States v. Martinez,* 156 F.4th 1185, 1204 (11th Cir. 2025). As the district court put it, because Burke's preferred version of the conversation occurred "significantly after" the initial question, it did not constitute necessary context for a fair presentation of the initial answer but rather Burke's attempt at "additional explanation . . . after he's had additional time to think about it." J.A. 476.

That rationale accords with decisions from other circuits finding that district courts are not required to admit exculpatory statements every time the government has moved to admit an inculpatory statement from the same interview. As the Second Circuit put the point, it "is not uncommon for a suspect, upon interrogation by police, to first claim in a self-serving manner that he did not commit a crime, only thereafter to confess that he did," but Rule 106 "does not *require* the admission of [such] self-serving exculpatory statements in all circumstances." *United States v. Williams*, 930 F.3d 44, 61 (2d Cir. 2019); *see also* Fed. R. Evid. 106 advisory committee's note to 2023 amendment (endorsing *Williams* and the proposition that "[t]he mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106"). At least where, as here, the two arguably contradictory statements are made in "stand-alone portions" of an interview that are materially separated in time and answer different questions, a district court has discretion to admit one and not the other. *Martinez*, 156 F.4th at 1204 (affirming district court's exclusion of "stand-alone portions" from an interview that

arguably contradicted earlier statements introduced by the government).[4]

Separately, Burke argues that the district court erred in refusing to admit another portion of the interview under Rule 106. The district court admitted a government excerpt in which the investigator asked Burke "why" he had said he would do certain "things differently." J.A. 742. Burke said: "I was allowing myself to be influenced in ways that were inappropriate. I put myself in positions that allowed them to influence me, and I didn't fully disclose them to people that needed to be aware of them. It was wrong." *Id.* at 742–43. Burke sought to admit his statement, beginning on the next page of the transcript, in which he said "[c]an I tell you one other thing that just . . . came to mind," and proceeded to explain, in essence, that he was "infuriated" to learn after joining Next Jump that Kim had told others he had hired Burke before Burke had actually agreed to take the job. J.A. 744–45. Excluding that later statement did not "distort[]" the first. *Sutton*, 801 F.2d at 1369. As Burke's interjection—"Can I tell you one other thing"—suggested, Burke's attempt to cast doubt on Kim's account of the timeline bore little if any relation to Burke's admission that he wished he had behaved differently. As the district court noted, the later statement was not "qualifying or otherwise explaining his response to, 'Why would you do those things differently?'" but rather giving "a separate explanation" of how Kim's statements were "wrong."

[4] All that said, Burke is right that the district court could not exclude evidence proffered under Rule 106 simply because it was "self-serving." J.A. 476. No party would bother raising Rule 106 to introduce evidence that did not serve its interests. But although the district court referred to the evidence as "self-serving," that characterization was not, as just explained, the primary basis for its ruling.

J.A. 124. Burke's briefing does not provide any basis for us to question that explanation.

2

Next, Burke challenges the district court's exclusion of an email he offered to impeach Kim's credibility. We again conclude that the district court did not abuse its discretion.

Kim sent the email at issue to Burke on September 9, 2022, just before Burke started working at Next Jump. The primary subject of the email was whether Burke could appropriately participate in certain conversations with Department of Defense personnel so soon after retiring. *See* J.A. 754–57. After Burke expressed hesitation, Kim assured him that "there is nothing unethical we would ask of you." J.A. 754. Kim added that Burke "be[ing] a token or entree into DoD business" was "[n]ot the driver of our hiring decision." *Id.* Instead, "the majority reason for our interest and our actions to hire" was that Burke was the "sharpest and most experienced leader we've met in all of DoD." *Id.*

Earlier in the trial, the government had introduced several hearsay statements by Kim suggesting that Next Jump had hired Burke in exchange for Burke's efforts to secure a contract for the company. *See, e.g.*, S.A. 54, 76–79 (discussing April and November 2021 emails to that effect). Burke sought to introduce Kim's September 2022 email under Federal Rule of Evidence 806. "When a hearsay statement . . . has been admitted," Rule 806 allows a party to attack the declarant's credibility with "any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. That category includes a declarant's "inconsistent statement . . . regardless of when it occurred." *Id.* Burke argued that Kim's September 2022 assertion that Next Jump hired Burke because of his leadership skills was inconsistent with Kim's earlier representations that Burke's job

offer was contingent on his success in securing Next Jump a Navy contract. The district court disagreed, explaining that the September 2022 email "is not inconsistent with the other evidence" and was not from "the relevant timeframe" because "[t]he bargain ha[d] already been made." J.A. 414.

The district court did not abuse its discretion. Put together, Kim's statements effectively said, "We want to hire you because you're a great leader, but we'll only hire you if you get us a contract." That is an entirely coherent—not contradictory—explanation. Nor does the district court's observation that the statement was from a different "timeframe" suggest that the court erred. True, Rule 806 permits the admission of an inconsistent statement "regardless of when it occurred." Fed. R. Evid. 806. But the district court did not suggest that it viewed the timing of the statements as a categorical bar. Instead, given the circumstances, the timing of the statements provided relevant context that further illustrates why the statements are not inconsistent. Kim's earlier statements were made to colleagues explaining the reasons for hiring Burke; his later statement was made directly to Burke in an effort to keep Burke on board. The district court's determination that the two statements were not inconsistent fell well within its discretion.

3

Burke's final evidentiary challenge concerns the admission of two text messages, one from Messenger to Kim and the other from Canedo to Burke. Burke argues that the district court improperly admitted the former under Federal Rule of Evidence 801(d)(2)(E) as a statement of a coconspirator and improperly admitted the latter as an adopted statement under Federal Rule of Evidence 801(d)(2)(B). Whether these messages were properly admitted presents close questions. But the improper admission of evidence would be

grounds for reversal only if the evidence were sufficiently prejudicial, and this evidence was not.

The first text is from Messenger to Kim dated October 5, 2022. S.A. 14. In it, Messenger expressed anger at Burke and frustration that Next Jump still had not secured a significant Navy contract. She then stated that she had "been shoving down [her] anger except 1 outburst saying no contract no job." *Id.* The government introduced the text and referenced the "no contract no job" statement in closing. J.A. 513.

The second text is from Canedo to Burke. The district court admitted the following July 23, 2021 exchange from shortly after their Belga Café meeting with Kim and Messenger:

> Canedo (continued): Was it 10 percent equity in entire biz or just whatever projects you'd work on? It was hard to hear with 500K base salary ringing in my ears. LOL.
>
> . . .
>
> Burke: 10 percent in total co. I would be a junior co-owner, third behind Meghan.

J.A. 285–94; J.A. 689–90. The government used Canedo's text to prove the truth of the matter asserted: Kim and Messenger offered Burke a $500,000 salary that day. *See* J.A. 517 ("Kim and Messenger sent the Defendant an offer letter and, sure enough, just as they had discussed back at the Belga Café in July of 2021, *as Canedo confirmed* . . . that offer letter had the $500,000 salary and the stock options." (emphasis added)).[5]

[5] Many of Canedo's other texts were admitted not to prove the truth of the matters asserted, but rather as necessary context to

Even if the district court abused its discretion in applying the relevant rules of evidence, we would reverse Burke's conviction only if the errors "had a 'substantial and injurious effect on the jury's verdict.'" *United States v. McGill*, 815 F.3d 846, 880 (D.C. Cir. 2016) (quoting *United States v. Clark*, 747 F.3d 890, 896 (D.C. Cir. 2014)); *see* Fed. R. Crim. P. 52(a). Under that standard, reversal is warranted only if we are left "in grave doubt as to the harmlessness of an error." *McGill*, 815 F.3d at 886 (quoting *United States v. Smart*, 98 F.3d 1379, 1392 (D.C. Cir. 1996)).

The government used both texts to demonstrate the presence of an agreement between Burke, Kim, and Messenger focused on the exchange of a job for a contract. But Burke himself stated in his text messages to Canedo about the Belga Café meeting that he "essentially agreed" to accept a job offer in July 2021, J.A. 689, that had "technically - zero" connection to him securing Next Jump a contract, J.A. 694–95. It is this fact—the existence of an agreement to exchange a job for the Navy contract, not the dollar amounts or Messenger's snappy summation 15 months later—that mattered for the charged crimes. Further, as recounted above, the record also included: several statements by Kim describing the agreement with Burke essentially in real-time, J.A. 278–79; S.A. 54–57; testimony about the unusual way Burke secretly met with Next Jump and pushed through the contract, S.A. 46–50, 52, 91–93; and evidence showing Burke misled his ethics counselor about his contacts with Next Jump before later admitting he acted inappropriately, S.A. 71–77, 113–14; J.A. 720–21. Given that record, we have no "grave doubt" about whether the two messages in question affected the jury's verdict. *McGill*, 815 F.3d at 886.

---

understand Burke's own messages, which in turn were admissible as opposing party statements. *See* Fed. R. Evid. 801(d)(2)(A).

C

Burke also challenges the jury instructions in three respects. But the one error he identifies, though serious, was invited by defense counsel.

1

Burke first argues that the district court should have given a so-called "missing witness instruction" for Canedo, which would have told the jurors they could infer that, if Canedo had testified, her testimony would have been damaging to the government. *See United States v. Glenn*, 64 F.3d 706, 709 (D.C. Cir. 1995). Burke requested the instruction because the government opted not to call Canedo as a witness even though it had subpoenaed her and her communications with Burke had contributed to the government's case.

A district court may issue a missing witness instruction if (1) the missing witness was "peculiarly" within the control of the party who did not produce the witness, and (2) under "all the circumstances[,] an inference of unfavorable testimony from an absent witness is a natural and reasonable one." *Burgess v. United States*, 440 F.2d 226, 231, 234 (D.C. Cir. 1970). Whether to provide such an instruction is "within the discretion of the trial court." *United States v. Tarantino*, 846 F.2d 1384, 1404 (D.C. Cir. 1988).

The district court denied Burke's request based on the first prong. The court explained that although Canedo had been "connected" with both the government and Burke at different times, there had been "a rupture" in both relationships. J.A. 488. Importantly, Burke "could have subpoenaed her, was well aware of her, and saw her as an important witness, but chose not to." *Id.* The court also explained that it appeared Canedo's testimony could have been damaging to both parties. J.A. 489. At bottom, the court concluded that Canedo "was

available to both parties," both had "strategic reasons not to call her," and a missing witness instruction was therefore inappropriate. J.A. 489–90.

That determination was sound. A missing witness instruction is "generally permissible only when it is within the government's exclusive power to call the witness to testify." *Tarantino*, 846 F.2d at 1404. So the fact that a defendant "had every opportunity to call" the witness who was not "in fact unavailable to the defense" counsels against giving such an instruction. *Id.*; *see also United States v. Lawson*, 494 F.3d 1046, 1053 (D.C. Cir. 2007) (explaining that a missing witness instruction was properly denied when the defendant "could just as easily have called" the witness).

On appeal, Burke offers nothing to call into question the district court's factual determination that he could readily have secured Canedo's attendance at trial. Instead, Burke emphasizes the various ways in which Canedo assisted the government. For example, Canedo filed a complaint against Burke with the Department of Defense, J.A. 370; the government interviewed her multiple times during the investigation, J.A. 381–82; she voluntarily provided critical evidence by turning over her cell phone, J.A. 380, 587, 674, 686; and she was subpoenaed by the government and listed as its witness, J.A. 488–89. But we have held that "no automatic inference of exclusive government control arises" even where a witness is acting as a government informant or has been granted immunity from prosecution. *Tarantino*, 846 F.2d at 1404. Burke shows no error, much less an abuse of discretion, in the district court's determination that there was no meaningful obstacle to his calling Canedo to the stand if he had wished. The court thus reasonably concluded that it was "most appropriate" to say nothing at all to the jury regarding "why Ms. Canedo is not here." J.A. 486–87; *see* 2A *Wright & Miller's Federal Practice and Procedure* § 489 (4th ed. 2009)

(noting that "[w]here an absent witness is readily available to both sides" a reasonable approach is "for the court to say nothing whatsoever on the subject").

2

Second, Burke argues that the instructions may have confused the jury by listing certain actions as "overt acts" for the conspiracy charge that would not qualify as "official acts" for purposes of the bribery charge. We review this challenge to the "choice of language to be used in a particular instruction" for abuse of discretion. *United States v. Vega*, 826 F.3d 514, 524 (D.C. Cir. 2016) (quoting *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 556 (D.C. Cir. 1993)).

The conspiracy count required the jury to find that at least one member of the conspiracy committed an "overt act" in furtherance of that conspiracy. The jury instructions listed the "overt acts" the government alleged and explained that the jurors "must all agree on at least one . . . that was done." Jury Instructions 26–32, Dkt. No. 160 (Jury Instructions). Burke does not argue that any of the listed overt acts is not properly regarded as an overt act for purposes of the conspiracy charge. Nor could he—as a legal matter, *any* act can constitute an "overt act" so long as it is "in furtherance of the conspiracy." *United States v. Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001); *see* 18 U.S.C. § 371 (imposing criminal liability when "two or more persons conspire . . . to commit any offense against the United States" and "one or more of such persons do any act to effect the object of the conspiracy").

Burke's concern is instead that some of the identified "overt acts" would not also qualify as "official acts" under 18 U.S.C. § 201(a)(3)'s definition for bribery. For instance, the instruction would permit the jury to find the "overt act" element of the conspiracy charge satisfied if it found Burke had "promoted Next Jump to senior Navy officers," Jury

Instructions 29, even though merely "talking to another official" would not typically meet the "official act" element of bribery, *McDonnell*, 579 U.S. at 574. Burke asserts that the jury may have been confused and believed that it could convict Burke of conspiracy to commit bribery merely by finding that he and Kim or Messenger made an agreement regarding an *overt act*, not an *official act*. But he provides no concrete basis for that concern, and we cannot perceive one.

The instructions separately defined "overt" and "official" acts. *See* Jury Instructions 26–32 (overt act); *id.* at 35–36 (official act). They specified that an "official act" is an element of the crime of bribery and that the only official act alleged here relates to "Next Jump's January 2022 contract with the United States Government." *Id.* at 35. The instructions were similarly clear that the conspiracy charge required an agreement "to commit the crime of bribery." *Id.* at 25. "A jury is presumed to follow its instructions" and we have no cause for concern that the jury did not do so here. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

3

Burke's last challenge to the jury instructions raises a more significant concern. On appeal he has identified a potentially prejudicial error in the instruction describing the mens rea requirement for bribery. We will not remedy the error, however, because the defense invited it.

Section 201(b)(2) prohibits public officials from "corruptly" accepting or agreeing to accept "anything of value" "in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2). The Supreme Court and this court have squarely held that "corruptly" in this statute requires that the public official "accept (or agree to accept) the payment intending to be influenced in the official act." *United States v. Paitsel*, 147 F.4th 1010, 1016–17 (D.C. Cir. 2025)

(quoting *Snyder v. United States*, 603 U.S. 1, 11 (2024)), *cert. denied*, 146 S. Ct. 998 (2025); *see also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999). That is, "corruptly" requires "intent to be influenced." *Snyder*, 603 U.S. at 11–12. The distinction between an official's intent to be influenced and less culpable states of mind—such as merely knowing or understanding that another hopes the official will be influenced—is crucial. If the latter sufficed, bribery could arise in all sorts of circumstances. For example, a legislator who votes in favor of a bill could be found guilty of bribery if she knew a distant relative had given her a birthday gift in hopes of influencing her vote, even if the legislator's vote was guided purely by an honest assessment of the bill's merits. The Supreme Court has therefore noted that intent to be influenced is one of the key distinctions between bribery and lesser crimes. *See Snyder*, 603 U.S. at 12; *Sun-Diamond Growers of Cal.*, 526 U.S. at 404–05.

The jury instructions in this case repeatedly (and correctly) stated that bribery requires specific intent. *See* Jury Instructions 34 ("the Government must prove . . . [that] [t]he Defendant acted corruptly, that is, he intended that, in exchange for the thing of value, he would be influenced in the performance of an official act."); *id.* at 35 ("The Government must prove beyond a reasonable doubt that the Defendant intended to be influenced in the performance of a specific official act or acts"); *id.* at 36 ("The Defendant's intent to engage in the exchange of a bribe for an official act need not be explicit.").

But then, in the most important place, they deviated. The specific instruction defining the term "corruptly" for purposes of "these instructions" stated, in relevant part: "A public official acts corruptly if the public official … agrees to accept something of value with the *understanding*, at least in part, that, in exchange, the public official *is expected to be influenced* in

the performance of an official act." *Id.* at 34 (emphasis added). As the discussion above shows, that instruction misstated the law. A public official's mere knowledge that another person expects him to be influenced is insufficient; the public official himself must *intend* to be influenced.[6]

We are also skeptical that the other portions of the jury instructions referring to "intent" could have cured this problem. The erroneous description appears in the one portion of the instructions purporting to define the "corruptly" mental state; the accurate "intent" language appears in portions that describe bribery more generally.

The obstacle for Burke is that his own lawyers invited this error. The problematic definition of "corruptly" was jointly proposed by both parties. *See* Dkt. 102–1 at 13. "A party who challenges a jury instruction on appeal after having proposed the instruction's language commits 'a textbook case of invited error.'" *United States v. Benton*, 98 F.4th 1119, 1130 (D.C. Cir. 2024) (quoting *United States v. Maradiaga*, 987 F.3d 1315, 1322 (11th Cir. 2021)). That fact "precludes

[6] The fact this language is, apparently, drawn from language in *McDonnell* does not change our analysis. 579 U.S. at 572; *see also* O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, Criminal Companion Handbook § 8:5 (6th ed.) (model jury instruction for "bribing a federal official"). That portion of the *McDonnell* opinion addressed the kinds of facts that could support an inference that there was an "agreement" to perform an official act, not the test for establishing a corrupt state of mind. *McDonnell*, 579 U.S. at 572 ("A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return."). *McDonnell* does not purport to replace bribery's longstanding intent requirement with a lower knowledge-like mens rea.

an appellate court from reviewing [the claimed error] on appeal." *Id.*

It is true that Burke later proposed an *addition* to the joint instruction that incorrectly defined the term "corruptly." Specifically, he asked the court to add the following sentence to the definition: "The prosecution must prove beyond a reasonable doubt that the defendant had a specific intent to engage in a quid pro quo arrangement where the benefit received was intended to influence an official act." J.A. 423. At best, adding this language would have compounded jurors' confusion by inserting into the "corruptly" definition the "intent" language already included elsewhere in the instructions. But Burke's proposal would not have removed the erroneous language he now identifies on appeal. Burke never alerted the district court that the jointly proposed language incorrectly stated that "understanding" another's "expectations" could satisfy the statute's mens rea requirement. That misstatement is the core of the error, and it was invited by the defense.

D

In a last-ditch effort, Burke asks us to conclude that, even if no single error warrants reversal, "the total effect of numerous small missteps" has "deprive[d] [him] of a fair trial." *McGill*, 815 F.3d at 947 (quoting *United States v. Celis*, 608 F.3d 818, 847 (D.C. Cir. 2010)). Although vacating a conviction can be warranted in such circumstances, *id.*, they are not present here.

Most of the issues Burke raises do not amount to "errors" at all. *See United States v. Rivera*, 900 F.2d 1462, 1470–71 (10th Cir. 1990) (en banc) ("[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect . . . not the cumulative effect of non-errors."). Nor can we credit the various concerns Burke acknowledges in passing

but never develops. *See, e.g.*, Appellant's Brief 26, 36 (gesturing at Confrontation Clause issues but applying no case law or legal test); *id.* at 53–56 (mentioning in a few sentences that Burke may have been entitled to a *Franks* hearing based on the government's failure to disclose the past misconduct of a special agent who participated in the investigation of Burke). "A party forfeits an argument by mentioning it only in the most skeletal way, leaving the court to do counsel's work . . . ." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) (cleaned up). Burke has identified only two potential errors that are cognizable on appeal—the potentially erroneous introduction of Messenger's and Canedo's texts. But these errors, as explained, did not have a "substantial and injurious effect on the jury's verdict." *McGill*, 815 F.3d at 880 (quoting *Clark*, 747 F.3d at 896). So this argument too must fail.

III

For these reasons, we affirm Burke's convictions.

So ordered.