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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES CHRISTOPHER BENVIE,

Defendant - Appellant.

No. 20-2147

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:19-CR-01715-RB-1)

Josh Lee, Assistant Federal Public Defender (and Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

C. Paige Messec, Assistant United States Attorney (and Fred J. Federici, Acting United States Attorney, with her on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **HARTZ**, **KELLY**, and **CARSON**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant James Benvie was convicted of impersonating a government employee, 18 U.S.C. § 912, and sentenced to 21 months' imprisonment and a year of supervised release. On appeal, Mr. Benvie argues that the district court erred by (1) instructing the jury that "U.S. Border Patrol" and "Border Patrol" were

synonymous, (2) imposing five special conditions of supervised release without adequate explanation, and (3) imposing a mandatory condition of supervised release (drug testing) in the judgment and commitment order. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm the conviction but remand for reconsideration of the conditions of supervised release and removal of the mandatory condition of drug testing.

Background

In early 2019, a group of individuals called the United Constitutional Patriots (UCP) began camping along a 52-mile stretch of the U.S.-Mexico border along the eastern edge of New Mexico, near El Paso, Texas. 4 R. 28–32. Mr. Benvie met this group and subsequently began posting videos on Facebook of the group's attempts to capture aliens they contended were illegally crossing the border. 4 R. 199–200. While filming, Mr. Benvie was usually accompanied by members of the UCP who were often dressed in camouflage fatigues and carried firearms. 4 R. 227. In June 2019, Mr. Benvie was indicted based on two encounters with aliens that were captured on video. 1 R. 12–13.

The first incident (April 15, 2019) began with Mr. Benvie approaching a group of aliens and yelling "Alto" ("stop" in Spanish) and "U.S. Border Patrol." Gov. Ex. 1, at 0:00–0:05. He then proceeded to question the aliens through an interpreter. Id. at 0:05–5:45. Thereafter, a Border Patrol agent arrived on scene and took the aliens into custody. Id. at 6:18–7:10.

The second incident (April 17, 2019) began with Mr. Benvie driving along the border wall. Gov. Ex. 8, at 0:00–1:38. At the end of his drive, he found a group of aliens entering the country and exclaimed: "Alto, Alto," and "Siente," (an attempt to say "sit" in Spanish). Id. at 8:47–8:58. The aliens initially ignored him, and he then said, "Border Patrol." Id. at 9:01–9:02. Another member of the UCP drove up and Mr. Benvie told the aliens to walk toward the truck. Id. at 9:45–9:51. The driver of the truck told the aliens to sit and called Border Patrol. Id. at 10:07–10:39. A Border Patrol agent arrived shortly and took the aliens into custody. Id. at 11:17–13:45.

At trial, the government presented these videos as well as testimony from an FBI agent and two Border Patrol agents. 4 R. 28–157. The government also presented Rule 404(b) witnesses. 4 R. 158–92. Mr. Benvie testified that he said "Border Patrol" in the videos because he was trying to tell the aliens that he could connect them with Border Patrol — or as he described it, like a ticket scalper outside a stadium. 4 R. 209–12, 231–32.

During deliberations, the jury sent a note asking: "Is it the same, under the definition of the law, that 'U.S. Border Patrol' and 'Border Patrol' carry the same weight?" 1 R. 86. Over objection from defense counsel, the district court responded with the following instruction: "'U.S. Border Patrol' and 'Border Patrol' are synonymous, both referring to the same federal agency." 1 R. 86; 4 R. 319. Defense counsel questioned whether the terms carried the same weight and thought there was a difference. 4 R. 318–19. Defense counsel stated:

> I don't think it's the same—I don't think—I don't believe the "Border Patrol," by itself, is—carries the same weight as "U.S. Border Patrol" because you're identifying as a United States agent and "Border Patrol" doesn't have that connotation, and so I'd object on those grounds.

4 R. 320. The district court overruled the objection, and the jury returned a guilty verdict on both counts. 4 R. 320–21.

At sentencing, when discussing the mandatory conditions of supervised release, the district court suspended the mandatory drug testing condition given Mr. Benvie's low risk of substance abuse. 5 R. 43–44. However, the written judgment reflected that testing was required because the district court did not check the box that would have suspended the drug testing condition. 1 R. 120. The district court did not impose a fine but adopted five special conditions of supervised release and stated that it thought the combined punishment was "sufficiently punitive." 5 R. 44–45.

Discussion

A. The Jury Instruction

Mr. Benvie first contends that the district court erred when it instructed the jury that "U.S. Border Patrol" and "Border Patrol" are synonymous. Properly preserved claims of instructional error are reviewed for an abuse of discretion. United States v. Olea-Monarez, 908 F.3d 636, 639 (10th Cir. 2018). Instructions as a whole are reviewed de novo to determine whether they properly state the law and issues in a particular case. United States v. Cushing, 10 F.4th 1055, 1073 (10th Cir. 2021). A party may preserve an error by making an "objection to the court's action

and [stating] the grounds for that objection." Fed. R. Crim. P. 51(b). However, a party is not required "to use any particular language or even to wait until the court issues its ruling." Holguin-Hernandez v. United States, 140 S. Ct. 762, 766 (2020). The focus is on whether the party "alert[s] the court to the issue." Harris v. Sharp, 941 F.3d 962, 979 (10th Cir. 2019).

Mr. Benvie preserved his objection to the district court's response to the jury's inquiry. Defense counsel argued that the court should tell the jury to "just follow the instructions as given." 4 R. 317. According to defense counsel, "there [was] a difference" and "U.S. Border Patrol" and "Border Patrol" did not carry "the same weight." 4 R. 318–19. The objection was adequate to make the district court aware that Mr. Benvie opposed the instruction.

When a jury requests clarification of an issue, the "trial judge should clear [it] away with concrete accuracy." Olea-Monarez, 908 F.3d at 639 (quoting Bollenbach v. United States, 326 U.S. 607, 612 (1946)). Here, the jury sought clarification as to whether "under the definition of the law" the terms "U.S. Border Patrol" and "Border Patrol" were the same. 1 R. 86. Mr. Benvie contends that the district court impermissibly weighed in on the factual significance of each term. Aplt. Br. at 17. Yet there was no factual dispute at trial about the meaning of the two terms. The terms were used interchangeably to refer to the federal agency. See, e.g., 4 R. 206, 210–14, 218, 227, 232, 235–39, 246, 273–77, 282–83, 310–14, 330, 349. Mr. Benvie referred to either the federal agency or its agents as "Border Patrol" over 75 times. See 4 R. 197–272. He admitted that in the second video, when he said, "Border

Patrol," that he was referring to the federal agency. 4 R. 231. In fact, his defense, that his use of the term "Border Patrol" was a referral to the federal agency, would be undermined if there was a factual dispute about the definition of "Border Patrol."

The district court's response was appropriate. We note that the Supreme Court uses both terms interchangeably. See Hernandez v. Mesa, 137 S. Ct. 2003, 2004–05 (2017) (per curiam). Nor does the impersonation statute require that a defendant use the term "U.S." or "federal" to be convicted. See 18 U.S.C. § 912. The cases Mr. Benvie relies upon are not to the contrary. In both United States v. Nickl, 427 F.3d 1286 (10th Cir. 2005), and United States v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000), a district court weighed in on factual issues and made statements favoring the prosecution. For example, in Nickl, the district court had stated: "I would never have accepted her guilty plea unless she would have convinced me that's what she intended, and she did." 427 F.3d at 1292. Here, the district court recognized that the jury was concerned with "definitional work," a legal issue, and simply determined that there was not a meaningful distinction between the two terms. 4 R. 319.

Even assuming the district court erred, the error was harmless. "[T]he conclusion that a jury instruction was erroneous does not necessarily end the inquiry," because instructional errors are subject to harmless error review. United States v. Holly, 488 F.3d 1298, 1304 (10th Cir. 2007). Harmless errors are not reversible. See Neder v. United States, 527 U.S. 1, 7 (1999). "[T]he burden of proving harmless error is on the government," however, this court has discretion to initiate harmless error review. Holly, 488 F.3d at 1307. "[W]here a defendant did

not, and apparently could not, bring forth facts contesting the omitted element," the error is harmless. Neder, 527 U.S. at 19.

B. The Special Conditions of Supervised Release

Mr. Benvie also argues that various special conditions of supervised release were imposed without adequate explanation at sentencing. Mr. Benvie failed to object. 5 R. 44–45. Therefore, this court reviews their imposition for plain error. United States v. Malone, 937 F.3d 1325, 1327 (10th Cir. 2019). An error is plain "if there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Koch, 978 F.3d 719, 724 (10th Cir. 2020) (quoting id.).

To impose a special condition of supervised release, a district court "must analyze and generally explain how, with regard to the specific defendant being sentenced, the special condition furthers the three statutory requirements set out in 18 U.S.C. §3583(d)." Id. at 725. While we need not be "hyper technical in requiring the court to explain why it imposed a special condition of release," the district court's "explanation must be sufficient for this court to conduct a proper review." United States v. Martinez-Torres, 795 F.3d 1233, 1238 (10th Cir. 2015). Specifically, retributive considerations may not be reasons for a special condition of supervised release. See Tapia v. United States, 564 U.S. 319, 326 (2011); 18 U.S.C. § 3583(c).

After release from prison, Mr. Benvie is required to: (1) "complete 50 hours of community service"; (2) "submit to a search of [his] person, property, automobile,

[and] computers"; (3) "not to incur new credit charges, negotiate or consummate any financial contracts, or open additional lines of credit without prior approval of the Probation Office"; (4) "provide the Probation Office access to requested financial information and authorize the release of financial information"; and (5) "reside at a residential reentry center for a term of up to three months." 5 R. 44–45. On appeal, the government concedes that a remand is appropriate for the first four special conditions; Mr. Benvie withdrew his challenge to the fifth condition. Aplee. Br. at 19; Aplt. Reply Br. at 15. Therefore, we consider whether the first four conditions require remand. We agree that they do.

The district court simply stated as justification for all five special conditions "that the total combined sanction, without a fine, is sufficiently punitive." 5 R. 45. This statement does not sufficiently explain, even in generalized terms, how the special conditions further the requirements of § 3583(d), and may justify the conditions using an impermissible rationale. See Tapia, 564 U.S. at 326. Accordingly, given our developing caselaw in this area, it constitutes clear error. It is reasonably probable that if the district court had explained its reasoning for the conditions and ensured that its reasoning was supported by the record, then the court may have refrained from imposing some, if not all, of the conditions. See United States v. Burns, 775 F.3d 1221, 1225 (10th Cir. 2014). Thus, this omission affects substantial rights. For the same reasons the first three elements of plain error are met, so is the fourth. See id. Therefore, we remand for reconsideration of the first four supervised-release conditions. See id.

C. The Mandatory Drug Testing Condition

Finally, Mr. Benvie challenges the mandatory drug testing condition appearing in the judgment and commitment order. Where "oral and written orders conflict, . . . we look to the oral pronouncement." United States v. Martinez, 812 F.3d 1200, 1203 (10th Cir. 2015). The oral pronouncement controls because a "defendant has the right to be present at sentencing." United States v. Barwig, 568 F.3d 852, 857–58 (10th Cir. 2009). This is because "[t]he imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty." United States v. Villano, 816 F.2d 1448, 1452 (10th Cir. 1987).

The district court stated that it would "suspend the mandatory drug testing condition." 5 R. 44. However, the written judgment and commitment order requires that Mr. Benvie "submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court." 1 R. 120. As noted, the district court did not check the box which would have suspended that condition. Given the conflict, we will remand so the district court can conform the judgment and commitment order to the oral sentence on this point.

The conviction is AFFIRMED and the case is REMANDED for resentencing in accordance with this opinion.