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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.

MARK E. LANTIS,

Defendant - Appellant.

No. 20-8031

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 5:18-PO-00666-SWS-1)

Grant R. Smith, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Christyne M. Martens, Assistant United States Attorney (L. Robert Murray, Acting United States Attorney, with her on the brief), Casper, Wyoming, for Plaintiff-Appellee.

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Embarking on a day hike in Yellowstone National Park, Mark Lantis set off to search for buried treasure. But after leaving the marked trail late in the day, he found himself lost in the wilderness and was rescued by helicopter late the next day. Based on these events, a magistrate judge found Lantis guilty of a misdemeanor—reckless

disorderly conduct under 36 C.F.R. § 2.34(a)(4). Lantis appeals, arguing that the magistrate judge applied an objective standard for reckless conduct, without also assuring that the subjective component of recklessness was met. We disagree. The magistrate judge did not apply only an objective standard; he simply relied on circumstantial evidence of Lantis's state of mind and the obviousness of the risk to conclude that Lantis behaved recklessly by consciously disregarding a risk that he was aware of. Accordingly, we affirm.

Background

On August 2, 2018, Lantis's mother dropped him off at a trailhead for a day hike in Yellowstone National Park. Lantis, who is in his 40s and works as an oil-field roustabout, planned to hike the Mount Holmes trail, search for buried treasure near the peak of the mountain, and then return to be picked up at the trailhead.[1] He was wearing a t-shirt, jeans, a light windbreaker, and tennis shoes, and he carried a small backpack and a shovel. Although he did not bring any food, he carried water, several cans of bear spray, his cellphone, a walkie-talkie, and a handheld Global Positioning System (GPS) unit.

A little way into his hike, Lantis decided to cache some of his water and one can of bear spray, leaving them at a campsite so he could pick them up on his hike

[1] Lantis was searching for what is known as the Forrest Fenn treasure, a chest of gold coins and other items allegedly hidden somewhere in the Rocky Mountains. The treasure was reportedly found in Wyoming in June 2020. *See* Daniel Barbarisi, *The Man Who Found Forrest Fenn's Treasure*, Outside Online (Dec. 7, 2020), https://www.outsideonline.com/outdoor-adventure/exploration-survival/forrest-fenn-treasure-jack-stuef/.

out. A bit further in, he noticed bear fur and scat on the trail. When he reached the base of Mount Holmes, he decided to leave the trail and head back via a different, unmarked route. According to Lantis, he "did not want to pass" the bear signs again, and he "thought [a] south-southwest route would be more downhill [and] faster." R. vol. 5, 2 (capitalization standardized). At some point after leaving the trail, Lantis called his sister to say that he was heading west and would not make it out of the park before nightfall. He spent the "night wet, cold, [and] scared." *Id.* (capitalization standardized).

The next day, a park ranger received a call from Lantis's mother, who was concerned about Lantis. As the day wore on, the ranger communicated by cellphone with Lantis several times. Because Lantis's cellphone battery was dying, the ranger first had Lantis call 911, which enabled her to obtain his location from his cellphone's GPS. Lantis "was in high elevation approximately [eight] miles from M[ount] Holmes in extremely rugged country seldom visited by [p]ark personnel," R. vol. 1, 29; the area was also heavily populated with mountain lions, bears, and wolves. The ranger told Lantis which direction to walk so that he would eventually intersect with a marked trail. About an hour later, the ranger spoke to Lantis again, encouraging him and trying to guide him out of the backcountry. But by 5:45 p.m., Lantis told the ranger that he was "unable to continue and needed help." *Id.* Because it was too late in the day for anyone to hike in and rescue Lantis before dark, the ranger organized a helicopter rescue.

Following the rescue, the ranger issued Lantis a citation for disorderly conduct in violation of § 2.34(a)(4), alleging that he "knowingly or recklessly creat[ed] a risk of public alarm, nuisance, [or] jeopardy." *Id.* at 10; *see also* § 2.34(a)(4) ("A person commits disorderly conduct when, with intent to cause public alarm, nuisance, jeopardy[,] or violence, or knowingly or recklessly creating a risk thereof, such person . . . [c]reates or maintains a hazardous or physically offensive condition."). After a bench trial, a magistrate judge found Lantis guilty of disorderly conduct.[2] *See* 18 U.S.C. § 3401(a) (providing magistrate judges with jurisdiction to try and sentence individuals accused and convicted of misdemeanors). The magistrate judge sentenced Lantis to five years of unsupervised probation, banned him from Yellowstone National Park for five years, and ordered him to pay $2,880 in restitution to the National Park Service for the cost of the helicopter rescue.

Lantis appealed to the district court. *See* 18 U.S.C. § 3402 (providing right to appeal conviction by magistrate judge "to a judge of the district court of the district in which the offense was committed"); *United States v. Paup*, 933 F.3d 1226, 1230 (10th Cir. 2019) (explaining that first level of "[a]ppeal from a judgment in a criminal case entered by a magistrate judge is to the district court"). Among other things, he argued that "the magistrate judge failed to apply the proper mens rea

[2] The ranger had also cited Lantis for camping outside of a designated area under 36 C.F.R. § 2.10(b)(10), but the magistrate judge found Lantis not guilty on that charge.

element." R. vol. 1, 119. After briefing and without oral argument, the district court affirmed.

Lantis now appeals to this court.[3] We "exercise[] a 'second tier of appellate review,'" applying "'the same standard'" of review "to the magistrate judge's order . . . that the district court . . . use[d] in its own review." *Paup*, 933 F.3d at 1230 (quoting *United States v. Pilati*, 627 F.3d 1360, 1364 (11th Cir. 2010)). Thus, like the district court, we review the magistrate judge's legal conclusions de novo and its factual findings for clear error. *See id.* ("[W]e review the magistrate judge's order just as we would a judgment first entered by the district court and then appealed to us."); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 683 (10th Cir. 2010) (noting that in appeal from bench trial, this court reviews application of law de novo and factual findings for clear error).

[3] Lantis filed his notice of appeal 15 days late, outside the 14-day deadline for appealing in a criminal case. *See* Fed. R. App. P. 4(b)(1)(A). But unlike the deadline for filing an appeal in a civil case, the deadline for appealing in a criminal case is not jurisdictional; instead, it is "an 'inflexible claim-processing rule.'" *United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011) (quoting *United States v. Garduño*, 506 F.3d 1287, 1291 (10th Cir. 2007)). Accordingly, we must enforce the rule only when the government "properly invoke[s]" it. *Id.* (quoting *United States v. Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008)). The government does not do so here. And although we "may raise Rule 4(b)'s time bar sua sponte," this authority "'is limited and should not be invoked when judicial resources and administration are not implicated and the delay has not been inordinate.'" *Id.* (italics omitted) (quoting *Mitchell*, 518 F.3d at 750). This case involves no inordinate delay or problems of judicial resources or administration. *See id.* We therefore overlook the untimeliness of Lantis's notice of appeal.

Analysis

Lantis argues that the magistrate judge erred by applying the incorrect legal standard for recklessness. Recklessness is the only element of disorderly conduct at issue in this appeal. *See* § 2.34(a)(4) (defining disorderly conduct in part as (1) knowingly or recklessly (2) creating a risk of public alarm, nuisance, jeopardy, or violence (3) by creating or maintaining a hazardous condition). The term "recklessly" is not defined in the relevant regulations or statutes, so the magistrate judge turned to the Model Penal Code, which provides that an individual acts recklessly when he or she "consciously disregards a substantial and unjustifiable risk." R. vol. 1, 31 (quoting Model Penal Code § 2.02(2)(c)). Criminal recklessness, in other words, requires a subjective showing that an individual "disregard[ed] a risk of harm *of which he* [*or she*] [*wa*]*s aware*." *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (emphasis added); *see also United States v. Albers*, 226 F.3d 989, 994–95 (9th Cir. 2000) (holding that for conviction under § 2.34(a)(4), "the relevant inquiry in finding recklessness . . . is whether the defendants deliberately disregarded a substantial and unjustifiable risk of creating a hazardous or physically offensive condition of which they were aware").

Lantis concedes that the magistrate judge *recited* the correct standard for recklessness. But he nevertheless contends that "a review of the record reveals . . . the magistrate judge misapplied" such standard by holding Lantis to only an objective standard of behavior, rather than also finding that Lantis disregarded a risk of which he was subjectively aware. Rep. Br. 1. In other words, Lantis argues, "[t]he

magistrate [judge] judged the folly of [Lantis's] choices from the judge's own perspective; that is to say, the perspective of a person with special knowledge of backcountry hiking." Aplt. Br. 13. And he further contends that the magistrate judge's written order "is completely devoid of any finding that [he] subjectively knew the risk he was creating."[4] *Id.*

But the magistrate judge's order does not demonstrate an erroneous application of a correctly stated recklessness standard. On questions of an individual's state of mind, courts often turn to "circumstantial evidence and surrounding circumstances." *United States v. Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001). And on questions of recklessness in particular, courts often rely on the obviousness of the risk to infer an individual's subjective knowledge of the risk. *See Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

Here, the magistrate judge detailed the facts set forth above, emphasizing that Lantis had set out on "one of Yellowstone's most formidable day hikes" and then "le[ft] the designated trail and travel[ed] into remote mountainous terrain." R. vol. 1, 31. And he did so, the magistrate judge noted, "late in the day, . . . ensur[ing] he

[4] Lantis is careful to note what he does not argue. First, he acknowledges that for preservation reasons, "he is legally prohibited from challenging the sufficiency of the evidence in this appeal." Rep. Br. 2. Second, he emphasizes—in response to the government's invocation of Federal Rule of Criminal Procedure 23(c), which governs bench trials and provides that a court need not issue written findings unless the parties request them—that he does not challenge the adequacy of the magistrate judge's findings. Instead, he contends, the findings simply demonstrate the magistrate judge's legal error in misapplying the recklessness standard.

would be lost in the dark in an area of the [p]ark with a substantial grizzly bear population without adequate clothing, food[,] or water in wet and cold conditions." *Id.* at 32. Based on these details, the magistrate judge concluded that Lantis's conduct, particularly in choosing to leave the trail, amounted to "recklessness of the highest magnitude." *Id.* The magistrate judge additionally noted that "the risks and dangers were so obvious that his conduct rises to the knowing[] creation of the risk." *Id.*

In so doing, the magistrate judge inferred Lantis's subjective state of mind—his knowledge of the risk that he consciously disregarded—from the surrounding circumstances and from the obviousness of the risk. *See Magleby*, 241 F.3d at 1312; *Farmer*, 511 U.S. at 842. Indeed, Lantis's preparations for his day hike reveal his subjective awareness of the general risks of hiking in the wilderness: He brought bear spray to protect himself from bears, water to stay hydrated, a GPS device to avoid getting lost, and a cellphone to call for help. The GPS device in particular demonstrates a subjective awareness of the specific risk of getting lost in the wilderness—a risk that obviously dramatically increases when one leaves a marked trail. And although Lantis suggested that he left the trail to avoid bears and because he thought hiking off trail would be easier, the magistrate judge was free to discount those statements in favor of the circumstantial evidence suggesting that Lantis was subjectively aware of the obvious risks of hiking in the wilderness and of leaving the trail. *See Magleby*, 241 F.3d at 1312 (noting that factfinder may disbelieve

defendant's denial of requisite intent in favor of other circumstantial evidence of intent).

We see no error in the magistrate judge's reasoning, and we reject Lantis's argument that by setting out these objective facts, the magistrate judge failed to apply the subjective portion of the recklessness standard. Indeed, contrary to Lantis's argument, nothing in the magistrate judge's order indicates that the decision was based only on an objective standard. The magistrate judge did not improperly compare Lantis to an individual with backcountry hiking experience, consider what risk the magistrate judge himself would have been aware of, or find that Lantis should have been aware of the risk. Instead, the magistrate judge emphasized the obviousness of the risk of leaving a marked trail in rugged wilderness late in the day, without food or shelter, and with the knowledge that the area is populated by bears. The magistrate judge further inferred that Lantis himself—who began this day hike with water, bear spray, a cellphone, and a GPS device—was likewise aware of this risk and consciously disregarded it.

Conclusion

Because the magistrate judge recited and applied the correct standard, relying on circumstantial evidence and the obviousness of the risk to conclude that Lantis consciously disregarded a known risk, we affirm his misdemeanor conviction for disorderly conduct under § 2.34(a)(4).