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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.

ZECHARIAH FREEMAN,

Defendant - Appellant.

No. 22-2039

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:20-CR-00081-KWR-1)

Robert Spencer Jackson, Oklahoma City, Oklahoma, appearing for the Appellant.

Elias S. Kim, Attorney, United States Department of Justice, Washington, D.C. (Alexander M.M. Uballez, United States Attorney, and C. Paige Messec, Appellate Chief, Office of the United States Attorney for the District of New Mexico, Albuquerque, New Mexico, with him on the brief), appearing for the Appellee.

Before **MORITZ**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

BRISCOE, Circuit Judge.

Following a jury trial, Defendant Zechariah Freeman was convicted of one count of sexual abuse, in violation of 18 U.S.C. §§ 7, 2242, and 2246(2)(A). Freeman now challenges his conviction on appeal. Freeman argues that (1) the evidence presented at

trial was insufficient to sustain his conviction of sexual abuse; (2) the district court erred by refusing to instruct the jury on an essential element of the offense; and (3) the district court erred by denying his request to use his peremptory challenges allotted by Federal Rule of Criminal Procedure 24(b)(2) to strike prospective alternate jurors.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reject Freeman's arguments and affirm the district court's judgment.[1]

I

A. Factual Background

On June 15, 2019, Jane Doe, Moriah Smith, Catherine Sanders, and Mercedes Rodriguez gathered at Smith's house for a barbecue. Because they intended to drink alcohol at the gathering, Doe, Sanders, and Rodriguez planned to stay the night at Smith's house. Smith's house was located within the jurisdiction of the Kirtland Air Force Base in Albuquerque, New Mexico.

Doe arrived around 2:00 p.m. that afternoon, and she began drinking within thirty minutes of her arrival. She quickly consumed two alcohol-infused seltzers. Sanders went to a nearby store and returned with a bottle of liquor. Although Sanders stopped drinking in the early evening, Doe and Smith continued drinking. Collectively, the women finished the bottle of liquor. Doe drank about half the bottle herself.

[1] Because Judge Rossman concludes the instruction given on the § 2242(2) offense erroneously permitted the jury to assume without finding Doe's incapacity, she does not join Section II.B.3.a and would affirm only on the harmless error grounds, Section II.B.3.b.

Later that evening, Smith invited three additional guests to join the gathering. Two of these guests were Smith's neighbors. One of the neighbors dropped off a bottle of tequila, and he left shortly thereafter. The other neighbor, Veronica Forester, stayed for several hours. The third guest was Freeman, who knew Smith from a previous job. Freeman did not know any of the other women at the gathering.

Freeman arrived at Smith's house around 10:00 p.m. By that point in the evening, Doe had been drinking for at least six hours; she testified that she was "very, very inebriated." ROA, Vol. III at 495. The other women at the gathering also observed that Doe was visibly intoxicated. Forester, for example, testified that Doe was "wobbly on her feet, very clumsy, and laughing loudly[.]" *Id.* at 97.

Later that night, Freeman, Doe, and several other guests drank a round of tequila shots in the kitchen. After Doe finished her tequila shot, Freeman grabbed Doe's head and kissed her. Although Doe initially reciprocated, she became nauseous and pulled away. Doe walked towards the bathroom because she felt like she was going to vomit. She then went to an empty bedroom, "fell on the bed," and "passed out." *Id.* at 497.

At some point later that night, Freeman entered the bedroom where Doe was sleeping. The next thing that Doe remembers after falling asleep is "waking up with [Freeman] on top of [her]," penetrating her vagina with his penis. *Id.* at 502. When Doe opened her eyes, the first thing she saw was "the gap in his teeth, and him right there." *Id.* Doe's shorts and underwear had been removed. Doe's arms were down

at her side; she could not move them because Freeman's arms were pressed against the outside of her arms.

After Doe made a startled noise, Freeman jumped off Doe and apologized that "it wasn't that good." *Id.* at 505. According to Doe, she "started laughing hysterically." *Id.* At trial, Doe testified that her laughter was a coping mechanism in response to the "trauma" of the rape. *Id.* Smith overheard Doe's laughter; she described it as "[n]ervous, fearful, [and] anxious." *Id.* at 646. Freeman then got dressed and left the room. Smith was lying awake in her own room with the door open when she saw Freeman walk out of the bedroom where Doe had been sleeping.

The next morning, Doe woke up and found Smith in the kitchen. Smith asked what had happened between Doe and Freeman the night before. Doe answered that she woke up with Freeman on top of her, having sex with her.

Later that morning, Freeman called Smith and asked if he could come to her house. When Freeman arrived, Smith asked him what had happened the night before. Freeman admitted that he had sex with Doe, and Smith did not press for more details. The next morning, however, Smith sent Freeman the following text message:

> I'm disappointed. I thought I could trust you that's why I invited you over when my best friends and I were intoxicated. In the end you're still a man though. [Doe] said when she woke up you were already having sex with her she then became a willing participant.[2] But what were you doing? You should be more careful of your actions around intoxicated people. I can no longer trust you.

[2] At trial, Smith testified that Doe had never told her that she was a "willing participant." ROA, Vol. III at 658. Rather, Smith explained that she had used that phrase in her text to Freeman while "trying to make sense of the situation." *Id.*

Id. at 657.

Shortly after Freeman received Smith's message, he sent Doe the following text message:

> I'm really extremely sorry about having sex with you without waking you up and making sure you were into it. I'd like to talk and hear what you have on it—but if not I understand.

Id. at 513. Doe did not respond to Freeman's text message.

The next day, Doe filed a report with the Albuquerque Police Department. A detective with the Sex Crimes Unit interviewed her. The detective realized that the Albuquerque Police Department did not have jurisdiction over Kirtland Air Force Base, and she referred Doe to the Air Force's Office of Special Investigations.

B. Procedural Background

In January 2020, a grand jury in the District of New Mexico returned an indictment charging Freeman with sexual abuse, in violation of 18 U.S.C. §§ 7, 2242, and 2246(2)(A). The indictment alleged that Freeman "unlawfully and knowingly" engaged in a sexual act with Doe while she was "incapable of appraising the nature of the conduct, and physically incapable of declining participation in the sexual act, and physically incapable of communicating unwillingness to engage in the sexual act." ROA, Vol. I at 18.

In July 2021, the case proceeded to a five-day jury trial. The government called seven witnesses, including Doe, Smith, and Sanders. The defense called seven witnesses, including Forester, Rodriguez, and Freeman.

At trial, Freeman testified that Doe consented to having sex with him. Although Freeman acknowledged that Doe was asleep when he got into the bed with her, he claimed that she eventually woke up and they began kissing. Freeman testified that Doe removed her own pants and that he performed oral sex on her. According to Freeman, they then engaged in penetrative sex, which lasted for less than five minutes and ended when Freeman had an orgasm. Freeman claimed that Doe gave him her phone number after they had sex.

Freeman also testified about why he sent a text message to Doe apologizing for having sex with her while she was asleep. According to Freeman, he "made a badly-worded text in order to encourage [Doe] to speak to [him]." ROA, Vol. III at 237. On cross-examination, the government asked Freeman why he had sent a text message "apologiz[ing] to Jane Doe for having sex with her when she was asleep," if she had woken up before they had sex. *Id.* at 227. Freeman responded that the "text is not the truth." *Id.* at 228.

Freeman also called three character witnesses, who each commented on Freeman's text message to Doe. These character witnesses testified that Freeman's text was consistent with his over-apologetic character. For example, one character witness claimed that, in her understanding of Freeman's way of speaking, the text message was not an admission of guilt; she explained that Freeman's "way of speaking in difficult conversations is to assume the other's position." *Id.* at 116.

The jury found Freeman guilty of sexual abuse, as charged in the indictment. He was sentenced to 121 months of imprisonment, to be followed by five years of supervised release. Freeman timely filed his notice of appeal.

II

On appeal, Freeman challenges his conviction on three grounds: (1) there was insufficient evidence presented at trial to sustain his conviction of sexual abuse; (2) the district court erred by refusing to instruct the jury on an essential element of sexual abuse; and (3) the district court erred by denying his request to use his peremptory challenges allotted by Federal Rule of Criminal Procedure 24(b)(2) to strike prospective alternate jurors. We conclude that none of these arguments support a basis for reversal of Freeman's conviction.

A. Sufficiency of the Evidence

In his first issue on appeal, Freeman argues that the government presented insufficient evidence to sustain his conviction of sexual abuse under § 2242(2). We disagree.

1. Background

At the end of the government's case, Freeman moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Freeman argued that the government failed to meet its burden of proof on the essential elements of the alleged crime. The district court concluded that the government established a prima facie case and denied Freeman's motion. Freeman did not renew his motion after the close of evidence.

2. Standard of Review

Generally, we review sufficiency of the evidence de novo. *United States v. Hoskins*, 654 F.3d 1086, 1090 (10th Cir. 2011). Here, however, because Freeman "fail[ed] to renew the motion [for judgment of acquittal] after introducing evidence in his own defense," his sufficiency challenge is "review[ed] only for plain error." *United States v. Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013). But a "conviction in the absence of sufficient evidence will almost always satisfy all four plain-error requirements," and "our review for plain error in this context differs little from our de novo review of a properly preserved sufficiency claim." *United States v. Gallegos*, 784 F.3d 1356, 1359 (10th Cir. 2015).

In both contexts, "we view the evidence in the light most favorable to the government and ask whether the evidence—and any reasonable inferences to be drawn from it—would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." *Id.* "Our review for sufficiency of the evidence will not weigh conflicting evidence or consider witness credibility." *United States v. Ramos-Arenas*, 596 F.3d 783, 786 (10th Cir. 2010) (internal quotation marks and citation omitted).

3. Analysis

Under 18 U.S.C. § 2242(2), a person commits sexual abuse if he "knowingly . . . engages in a sexual act with another person if that other person is . . . incapable of appraising the nature of the conduct" or "physically incapable of declining

participation in, or communicating unwillingness to engage in, that sexual act."[3] On appeal, Freeman asserts that the government failed to prove two of the requisite elements: (1) that "Doe was incapacitated or otherwise incapable of giving consent," and (2) that "Freeman knew [Doe] was incapacitated or otherwise incapable of giving consent."[4] Aplt. Br. at 25, 27. Contrary to Freeman's arguments, however, we conclude that there was sufficient evidence to support the jury's verdict.

a. Doe's Incapacity Under § 2242(2)

To begin, there was sufficient evidence presented to support the jury's determination that Doe was incapacitated under § 2242(2). We have held that a person who is asleep at the time of an assault—especially when that person was also

[3] We have "never addressed whether the 'knowingly' mens rea" in § 2242(2) "extends to knowledge of the victim's incapacity or only to knowledge that the defendant was engaging in a sexual act." *United States v. A.S.*, 939 F.3d 1063, 1079 n.6 (10th Cir. 2019). Here, however, the government has assumed throughout this case that "knowingly" applies to both elements. "Because the parties do not dispute that this is the correct interpretation of the statute, we assume without deciding that the government was required to establish [Freeman's] knowledge that [Doe] was incapable of appraising the nature of the sexual conduct." *Id.*

[4] Both parties use the phrase "capacity to consent" as a shorthand to refer to the requirement set forth in § 2242(2) that a victim be "incapable of appraising the nature of the [sexual act]," or "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 18 U.S.C. § 2242(2). We do not use the phrase "capacity to consent" in this Opinion, however, to avoid any confusion with another subsection of § 2242 that is not relevant here. Specifically, Section 2242(3) provides that a person commits sexual abuse if he "knowingly . . . engages in a sexual act with another person without that other person's *consent*, to include doing so through coercion." 18 U.S.C. § 2242(3) (emphasis added). Rather than use the term "capacity to consent," therefore, we use the term "incapacitated" throughout this Opinion to refer to the requirements set out in § 2242(2).

intoxicated from drinking alcohol—is incapable of appraising the nature of the sexual conduct, physically incapable of declining participation in the act, or physically incapable of communicating unwillingness to engage in the act, within the meaning of § 2242(2). *See United States v. A.S.*, 939 F.3d 1063, 1080–81 (10th Cir. 2019) (holding that a victim was incapacitated under § 2242(2) where the victim "was asleep when the assault began," and, earlier that night, she had consumed "four drinks containing eight percent alcohol"); *United States v. Smith*, 606 F.3d 1270, 1281–82 (10th Cir. 2010) (holding that a victim was incapacitated under § 2242(2) where she was "heavily intoxicated" when she fell asleep, and she "woke up to find [the defendant] on top of her and engaged in sex"); *see also United States v. Palillero*, 829 F. App'x 351, 357–58 (10th Cir. 2020) (upholding conviction of defendant who "knew [the victim] was asleep," where there was no evidence that the victim was intoxicated).[5]

Our precedent regarding incapacity under § 2242(2) is also consistent with that of our sister circuits. As other circuit courts have held, "the law is well established that a sexual act with one who is physically incapable due to sleep, intoxication, or drug use is punishable under § 2242(2)(B)." *United States v. James*, 810 F.3d 674, 681 n.7 (9th Cir. 2016); *see United States v. LaVictor*, 848 F.3d 428, 456 (6th Cir. 2017); *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007).

[5] Although unpublished decisions from this court are not precedential, we may rely on them to the extent their reasoning is persuasive. *United States v. Austin*, 426 F.3d 1266, 1274 (10th Cir. 2005).

Here, the evidence was sufficient to establish Doe's incapacity on two independently sufficient, yet mutually reinforcing, grounds—namely, that Doe was (i) asleep and (ii) intoxicated from alcohol consumption.

i. Sleep

First, there is ample evidence that Doe was asleep at the time of the sexual assault. Doe testified that after the tequila shots, she made her way to an empty bedroom, "fell on the bed," and "passed out." ROA, Vol. III at 497. The next thing Doe remembers is "waking up with [Freeman] on top of [her]," with his "penis . . . in [her] vagina, penetrating it." *Id.* at 502, 504.

We have previously concluded that such testimony is, by itself, sufficient to establish that the victim was asleep. *See A.S.*, 939 F.3d at 1080 (affirming conviction based on victim's "testimony that she was asleep when the assault began"); *see also Smith*, 606 F.3d at 1281 (giving weight to victim's testimony that she "woke up to find [the defendant] on top of her and engaged in sex"). This precedent is also consistent with that of our sister circuits. *See United States v. Fasthorse*, 639 F.3d 1182, 1184 (9th Cir. 2001) ("If the victim testifies that she woke up while the sexual act was ongoing, this provides sufficient evidence for the jury to conclude that penetration occurred while she was asleep." (internal quotation marks and alterations omitted)); *Wilcox*, 487 F.3d at 1169 (same).

Although Doe's testimony alone is sufficient, her testimony was corroborated by additional evidence at trial. First, Smith testified that, the morning after the sexual assault, Doe told Smith: "When I woke up, he was having sex with me."

ROA, Vol. III at 651. Additionally, the government also presented the jury with Freeman's text to Doe, in which he explicitly apologized for "having sex with [her] without waking [her] up." *Id.* at 513. Considering this evidence, a reasonable jury could easily have concluded that Doe was asleep when the assault began.

We are unpersuaded by Freeman's arguments to the contrary. As an initial matter, Freeman does not dispute that a sleeping individual is incapacitated under § 2242(2). Rather, Freeman argues that Doe's "testimony as to her incapacity was at odds with itself," because "[i]t is not plausible that Jane Doe could sleep through all the events leading up to sex." Aplt. Br. at 26. Additionally, Freeman cites to his testimony that after he got into bed with Doe, she woke up, kissed him, removed her pants, and consented to having sex.

Freeman's arguments fail because he overlooks an indisputable procedural point: the jury was free to reject his testimony. "Where conflicting evidence exists, we do not question the jury's conclusions regarding the credibility of witnesses or the relative weight of evidence." *United States v. Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001). Here, a reasonable jury could credit Doe's version of events over Freeman's. *See A.S.*, 939 F.3d at 1080–81 (concluding that a reasonable factfinder could determine the victim was asleep when the assault began, based solely on her testimony, despite the defendant's conflicting testimony that he "entered her bedroom and woke her up," and then she "kissed him without resistance" and "had sex with him"). Although Freeman asserts that Doe's testimony is implausible, a reasonable

jury could disagree and find Doe's testimony more credible than Freeman's. This is especially true here because other evidence at trial corroborated Doe's testimony.

ii. Intoxication

There is also sufficient evidence to establish that Doe was intoxicated from alcohol consumption at the time of the sexual encounter. To begin, the record reflects that Doe consumed large quantities of alcohol prior to the assault. *See A.S.*, 939 F.3d at 1080–81 (concluding that a victim's intoxication contributed to her incapacity under § 2242(2), where the record reflected that she had consumed "four drinks containing eight percent alcohol the night of the encounter"). From approximately 2 p.m. until late in the evening on the date of the gathering, Doe testified that she drank at least two alcohol-infused seltzers, about half a bottle of liquor, and a shot of tequila. Similarly, Smith testified that the women collectively finished a bottle of liquor, and that Doe had consumed "a lot" of the bottle. ROA, Vol. III at 632. Although the exact size of the bottle is not readily determinable, Doe and Smith agree that it was at least a half-gallon or more, and that Doe consumed a lot of it.

Additionally, Doe's testimony and that of her witnesses describe Doe's state of intoxication during the gathering. Like the victim in *A.S.* who testified that she was "drunk" at the time of the encounter, 939 F.3d at 1080–81, Doe testified that she was "very, very inebriated," even before she drank the tequila shot. ROA, Vol. III at 495. Moreover, multiple witnesses corroborated Doe's recollection of her state of intoxication. Forester testified that Doe was "wobbly on her feet, very clumsy, and

laughing loudly," and that Doe continued drinking even after Forester had made that observation. *Id.* at 97. Sanders and Smith observed that, even before Doe drank the tequila shot, she was "[i]ntoxicated" and "loud." *Id.* at 404, 631. Rodriguez testified that Doe was "[d]efinitely not" able to drive a car. *Id.* at 158. Considering this evidence, a reasonable factfinder "could have determined that [Doe's] level of intoxication was sufficiently high that it materially contributed to her inability to appraise the nature of [Freeman's] conduct." *A.S.*, 939 F.3d at 1081.

Freeman's counterarguments lack merit. Freeman contends that "there was no testimony that others observed Jane Doe to black out, pass out, or otherwise be rendered unconscious as [a] result of an alcohol overdose." Aplt. Br. at 26. Additionally, Freeman argues that "Doe specifically denied even being 'that hung over' from her alcohol consumption." *Id.* (citing ROA, Vol. III at 580).

As an initial matter, Freeman's arguments fail because the government did not need to prove that Doe was asleep *and* intoxicated; the fact that Doe was asleep when the sexual assault began was sufficient to establish her lack of capacity. *See Palillero*, 829 F. App'x at 357–58. Moreover, even if the government had to prove that Doe was also intoxicated, the government was not required to prove that alcohol consumption caused Doe to pass out or rendered her unconscious. *See A.S.*, 939 F.3d at 1080; *James*, 810 F.3d at 681 (concluding that a person who is "physically hampered due to sleep, intoxication, or drug use" is incapacitated under § 2242(2), even if she "had some awareness of the situation").

b. Freeman's Knowledge of Doe's Incapacity

Contrary to Freeman's arguments, the evidence was also sufficient to prove that Freeman knew Doe was incapacitated within the meaning of § 2242(2). Specifically, the evidence was sufficient to prove that Freeman knew not only that Doe was asleep, but also that Doe was intoxicated.

First, there was ample evidence to prove that Freeman knew Doe was asleep when the sexual assault began. The same evidence that permits a reasonable jury to conclude that Doe was, in fact, asleep, also permits a reasonable jury to conclude that Freeman knew Doe was asleep. *See supra* Section II.A.3.a.i. We have observed that a reasonable jury can generally conclude that a defendant who engages in a sexual act with a sleeping victim also *knew* that the victim was asleep. *See A.S.*, 939 F.3d at 1080 (concluding that, because there was sufficient evidence that the victim was asleep at the time of the assault, "a reasonable factfinder could have inferred without difficulty that [the defendant] knew that, in her state of slumber, [the victim] was incapable of ascertaining the nature of his sexual conduct"). Here, too, a reasonable jury could reach this determination without difficulty. Moreover, Freeman's text message apologizing to Doe for "having sex with [her] without waking [her] up" is direct evidence of his knowledge. ROA, Vol. III at 513.

There was also sufficient evidence to support the jury's verdict that Freeman knew Doe was incapacitated due to intoxication. Four witnesses who attended Smith's gathering testified that Doe was visibly intoxicated—she was "wobbly on her feet," "very clumsy," and "laughing loudly." *Id.* at 97. Although Freeman testified

that he did not know how much Doe had to drink before he arrived at the gathering, he testified that "[e]verybody [was] drinking" and that they had been drinking a bottle of liquor. *Id.* at 203. Later in the night, Freeman also witnessed Doe drink a tequila shot. And, when Freeman kissed Doe in the kitchen after that tequila shot, Doe became nauseous, pulled away, and walked towards the bathroom to vomit. In light of this evidence, a reasonable jury could have determined that, at the time of the sexual assault, Freeman knew that Doe's "level of intoxication was sufficiently high that it materially contributed to her inability to appraise the nature of [his] conduct." *A.S.*, 939 F.3d at 1081.

Freeman's counterarguments regarding his knowledge are unconvincing. Freeman contends that the jury should not have given weight to his text message to Doe apologizing for "having sex with [her] without waking [her] up." ROA, Vol. III at 513. In support of this argument, Freeman points to his testimony that he "made a badly-worded text in order to encourage [Doe] to speak to [him]." *Id.* at 237. Additionally, Freeman notes that his three character witnesses "did not consider [the] text to be an admission of guilt." Aplt. Br. at 29. Finally, Freeman points to a series of later texts that he sent to Doe on June 25, 2019, in which he stated that he did not "know" that he was "hurting" Doe. *Id.* at 30–31.

Contrary to Freeman's assertions, however, a reasonable jury could have given more weight to Freeman's initial text message than any of the evidence that he presented to negate the element of his knowledge. *See Ramos-Arenas*, 596 F.3d at 786 ("Our review for sufficiency of the evidence will not weigh conflicting evidence

or consider witness credibility." (internal quotation marks and citation omitted)). The jury was free to discredit Freeman's testimony that his initial text did not reflect the truth, and his character witnesses' testimony that his initial text was not an admission of guilt. Similarly, the jury was free to conclude that Freeman's initial text message more accurately described the assault than his later text messages.[6]

B. Jury Instructions

In his second issue on appeal, Freeman argues that the district court committed reversible error by refusing to include an essential element of the offense in Instruction No. 6, which outlined the elements of sexual abuse under § 2242(2).[7] For the reasons outlined below, we conclude that Freeman's argument lacks merit.[8]

1. Background

Section 2242 provides, in relevant part:

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[6] Freeman also argues that the evidence was insufficient because he never directly "admitted" to having sex with Doe while she was asleep. Aplt. Br. at 21. In support of this argument, he cites to *Smith*, in which we upheld a § 2242(2) conviction where the defendant "admitted having sex with [the victim] while she was asleep" and "never stated that [the victim] agreed to have sex with him." 606 F.3d at 1281. This argument is unavailing. Freeman cites to no authority for the proposition that the government had to present direct evidence of his knowledge through the form of an admission. *See A.S.*, 939 F.3d at 1080–81. Moreover, here the jury was entitled to treat Freeman's initial text message apologizing to Doe as an admission that he had the requisite knowledge.

[7] We note here that neither the indictment nor the jury instructions and the related verdict form specifically identifies 18 U.S.C. § 2242(2) as the crime charged. All include only a general reference to § 2242. However, the case was clearly tried under § 2242(2) as the applicable charge.

[8] As previously noted, Judge Rossman does not join Section II.B.3.a and would affirm only on harmless error grounds, Section II.B.3.b.

> Whoever, in the special maritime and territorial jurisdiction of the United States[,] . . . knowingly—
>
> > (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
> >
> > (2) engages in a sexual act with another person if that other person is—
> >
> > > (A) incapable of appraising the nature of the conduct; or
> > >
> > > (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
>
> or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

18 U.S.C. § 2242 (2007) (amended 2022).[9]

This court has not issued a pattern instruction for sexual abuse under § 2242(2). Accordingly, both parties proposed that the district court look to the Fifth Circuit's model pattern instruction for this offense. The government suggested wholesale adoption of the Fifth Circuit's instruction, but Freeman proposed an instruction that significantly modified the Fifth Circuit's instruction. Looking to the Fifth Circuit's model pattern instruction as a guide, the district court proposed an

[9] This is the version of the statute that existed on June 15, 2019, the date of the crime charged. The statute was amended in 2022 to add a third subsection that is not relevant here. Specifically, Section 2242(3) now provides that a person commits sexual abuse if he "knowingly . . . engages in a sexual act with another person without that other person's consent, to include doing so through coercion." 18 U.S.C. § 2242(3) (2022). "We do not consider the effects, if any, of the new language of § [2242(3)] because it did not become law until after [Freeman] committed the crimes with which he is charged." *United States v. McKissick*, 204 F.3d 1282, 1292 n.2 (10th Cir. 2000).

instruction stating that, to convict Freeman under § 2242(2), the government had to prove the following elements beyond a reasonable doubt:

> ***First***: the defendant knowingly engaged in a sexual act with Jane Doe;
>
> ***Second***: the defendant knew that Jane Doe was incapable of appraising the nature of the conduct, or physically incapable of declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act; and
>
> ***Third***: the offense was committed within the special maritime and territorial jurisdiction of the United States.

ROA, Vol. I at 242.

Freeman objected to this proposed instruction, and he argued that the second element should be broken into two separate elements. When compared to the instruction given, and as relevant here, Freeman proposed that to convict Freeman under § 2242(2) the government had to prove the following elements beyond a reasonable doubt:

> ***First***: that on or between June 15, 2019 and June 16, 2019, the defendant knowingly engaged in a sexual act with [Jane Doe];
>
> ***Second***: that [Jane Doe] was incapable of appraising the nature of the conduct, or physically incapable of declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act;
>
> ***Third***: that the defendant knew that [Jane Doe] was incapable of appraising the nature of the conduct, or physically incapable of declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act; [and]
>
> ***Fourth***: the offense was committed within the special maritime and territorial jurisdiction of the United States[.]

Id. at 244. The district court overruled Freeman's objection and adopted its proposed instruction.

2. Standard of Review

"We review the jury instructions de novo and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Thomas*, 749 F.3d 1302, 1312 (10th Cir. 2014) (internal quotation marks omitted). "In doing so, we consider whether the district court abused its discretion in 'shaping or phrasing . . . a particular jury instruction' and deciding to give or refuse a particular instruction." *Id.* at 1312–13 (alteration in original) (quoting *United States v. Bedford*, 536 F.3d 1148, 1152 (10th Cir. 2008)).

3. Analysis

Freeman argues that the instruction given "failed to include as an element [of § 2242(2)] that Jane Doe was incapable of appraising the nature of the [sexual act], or physically incapable of declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act." Aplt. Br. at 32. Freeman contends that the district court committed reversible error by omitting this essential element from its instruction to the jury. As we read the instruction given, the district court did not omit the contested element. And, even if the district court erred, we conclude that such error was harmless in light of the overwhelming evidence of Doe's incapacity in this case.

a. The District Court's Instruction Was Not Erroneous

Contrary to Freeman's assertions, the district court's instruction required the government to prove that Doe was incapacitated under § 2242(2). Specifically, the instruction stated that the government was required to prove beyond a reasonable doubt that "the defendant knew that Jane Doe was incapable of appraising the nature of the conduct, or physically incapable of declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act." ROA, Vol. I at 344. We fail to see how a jury could find beyond a reasonable doubt that Freeman *knew* that Doe was incapacitated, without also finding that Doe was, *in fact*, incapacitated.

As the district court correctly noted, this element "cannot be established unless the victim was incapable of declining *and* [the] [d]efendant knew that the victim was incapable." *Id.* at 245. We agree with the district court that this element "*does* require two separate findings, albeit within one element." *Id.* The instruction required the government to prove that Freeman "knew" that Doe was incapacitated—and it is difficult to perceive how a person can "know" something that is factually incorrect.[10] Notably, the instruction did not use more equivocal language such as

[10] In support of his position, Freeman cites to *United States v. Peters*, 277 F.3d 963 (7th Cir. 2002), in which the district court provided separate instructions on knowledge and incapacity. *Id.* at 966–67. We are unpersuaded. As an initial matter, the validity of the jury instructions in *Peters* was not at issue on appeal. *Id.* at 967–68 (reversing sexual abuse conviction on insufficient evidence grounds). Moreover, even if the Seventh Circuit's silence could be interpreted as an unspoken endorsement of the jury instructions, the *Peters* opinion does not suggest that

(cont'd . . .)

"thought" or "believed" when describing Freeman's mental state; instead, the instruction required the jury to find beyond a reasonable doubt that Freeman "knew" that Doe was incapacitated. We conclude that the instruction "accurately state[d] the governing law and provide[d] the jury with an accurate understanding of the relevant legal standards and factual issues in the case."[11] *Thomas*, 749 F.3d at 1312 (internal quotation marks and citation omitted).

On appeal, Freeman contends that the district court "abused its discretion in unreasonably omitting this element [regarding Doe's incapacity] in reliance upon a Fifth Circuit Pattern Instruction." Aplt. Br. at 38. However, the fact that the district court's instruction mirrored the Fifth Circuit's model pattern instruction undermines, rather than supports, Freeman's argument. This circuit has not issued a pattern instruction for § 2242(2), and the Fifth Circuit appears to be the only circuit that has issued a model instruction based on the assumption that § 2242(2) requires the defendant to have knowledge that the victim was incapacitated.[12] *See United States*

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separate knowledge and incapacity instructions are required, rather than merely permissible.

[11] Our reading of the district court's § 2242(2) jury instruction is further supported by the context of the entire trial. *See Thomas*, 749 F.3d at 1312. We note that, in their closing arguments, both parties emphasized that the government needed to prove, beyond a reasonable doubt, that (1) Doe was incapacitated, and (2) that Freeman knew that Doe was incapacitated. *See* ROA, Vol. III at 28, 48–49.

[12] Although the Ninth and Seventh Circuits have issued model instructions for § 2242(2), these instructions do not extend the "knowingly" mens rea to the defendant's knowledge of the victim's incapacity. Instead, these instructions only apply the "knowingly" mens rea to the defendant's knowledge that he was engaging

(cont'd . . .)

v. Brown, 774 F. App'x 837, 840 (5th Cir. 2019). Under the circumstances of this case, where the parties do not dispute that § 2242(2) requires the defendant to have knowledge that the victim was incapacitated, the district court reasonably looked to the Fifth Circuit's model instructions for guidance.[13]

b. Any Error in the Instruction Was Harmless

Even assuming that the district court's instruction did not require the jury to find that Doe was incapacitated within the meaning of § 2242(2), we conclude that any error was harmless in light of the overwhelming evidence of Doe's incapacity.

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in a sexual act. *See* Manual of Model Criminal Jury Instructions of the District Courts of the Ninth Circuit, § 8.172 (2010); Pattern Jury Instructions of the Seventh Circuit 625 (2012). Here, however, the government has assumed throughout this case that the "knowingly" mens rea applies to both elements. *See supra* note 3.

Because we have not explicitly addressed whether § 2242(2) requires the government to prove that a defendant knew that the victim was incapacitated, the jury instructions in Freeman's case arguably required the government to prove more than what otherwise might have been required to support a conviction under § 2242(2). We need not resolve this issue here, however, and we leave for another day the question of whether the "knowingly" mens rea in § 2242(2) applies to the defendant's knowledge of the victim's incapacity. *See A.S.*, 939 F.3d at 1079 ("The government does not dispute that it was required to prove this element, and we thus assume in resolving this case that it was obliged to carry this burden.").

[13] Although model pattern instructions may offer valuable guidance on how to articulate the elements of an offense, we note that they are not binding. Model pattern instructions are merely intended to serve as a guide to assist judges and counsel. For example, the Fifth Circuit pattern jury instructions state that "[t]hese pattern charges should be used for what they are[:] an aid to guide you [when] instructing the jury on each individual case." Comm. on Pattern Jury Instructions, Dist. Judges Ass'n 5th Cir., *Pattern Jury Instructions (Criminal Cases)*, at 0 (2019) (Introduction). In future cases, therefore, parties may appropriately decide to select alternate formulations of the § 2242(2) elements in their jury instructions to avoid any chance of confusion or to accommodate for any changes in the law.

i. Harmless-Error Review

"The purpose of jury instructions is to give jurors the correct principles of law applicable to the facts so that they can reach a correct conclusion as to each element of an offense according to the law and the evidence." *United States v. Kahn*, 58 F.4th 1308, 1317 (10th Cir. 2023). However, "[e]ven when the district court fails to include an element of the crime in the instruction (including a mens rea element), we still apply the harmless error rule, asking 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)). The harmless error standard also applies to "[a] jury instruction that improperly describes an element of the charged crime."[14] *United States v. Luke-Sanchez*, 483 F.3d 703, 705 (10th Cir. 2007).

"When applying the harmless error rule, we must determine whether the guilty verdict actually rendered in *this* trial was surely unattributable to the alleged error—

[14] For the purposes of our harmless error analysis, we need not decide whether the element of Doe's capacity was omitted or rather misstated in the jury instructions. Whether we label the purported error as a misstatement or omission of an element, the error is still subject to harmless error review. *See Neder*, 527 U.S. at 2 ("Omitting an element can easily be analogized to improperly instructing the jury on the element, an error that is subject to harmless-error analysis."); *United States v. Zar*, 790 F.3d 1036, 1049 (10th Cir. 2015) ("An instruction that erroneously omits an element of the offense is subject to review for harmless error."); *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam) ("The specific error at issue here—an error in the instruction that defined the crime—is . . . as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission'"). Here, however, we have assumed that the purported error is an omission, as this is the error that Freeman raises on appeal.

not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Kahn*, 58 F.4th at 1318 (internal quotation marks, citations, and brackets omitted). "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

"It is well-established that the burden of proving harmless error is on the government." *United States v. Holly*, 488 F.3d 1298, 1307 (10th Cir. 2007). As we noted above, the general test for harmless error requires that the government prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quoting *Neder*, 527 U.S. at 15). In assessing whether the government has met this burden, we ask whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18; *see id.* at 19 (noting that we consider an erroneous jury instruction harmless only if the record contains no "evidence that could rationally lead to a contrary finding with respect to the omitted element"). In other words, if it is "clear beyond a reasonable doubt that a rational jury would have" rendered the same verdict "absent the error," then the error did not contribute to the verdict, and, therefore, the error is harmless. *Id.* at 18.

Freeman contends that the applicable standard for determining harmless error when the jury was not instructed on an element of the offense is whether the "reviewing court concludes beyond a reasonable doubt that the omitted element was

uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17. Indeed, we have sometimes invoked this standard verbatim while reviewing such instructional error for harmlessness on direct appeal from a conviction. *See, e.g.*, *United States v. Sierra–Ledesma*, 645 F.3d 1213, 1224 (10th Cir. 2011); *United States v. Serawop*, 410 F.3d 656, 669 (10th Cir. 2005). On other occasions, however, we have "invoked another passage from *Neder* that does not refer to whether the omitted element was uncontested or supported by overwhelming evidence, but simply asks more generally 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Schneider*, 665 F. App'x 668, 672 (10th Cir. 2016) (quoting *Neder*, 527 U.S. at 15); *see, e.g.*, *United States v. Alexander*, 817 F.3d 1205, 1214 (10th Cir. 2016); *Luke-Sanchez*, 483 F.3d at 705.

We have previously declined to "parse out the proper formulation of the harmless-error standard for direct review under *Neder*." *Schneider*, 665 F. App'x at 672; *see also Kahn*, 58 F.4th at 1318 (declining to parse out the proper formulation of the harmless-error standard for direct review under *Neder* because the government had not proven harmless error under either test). Here, however, we must grapple with this question because the element at issue—Doe's incapacity—was contested by Freeman at trial. For the reasons outlined below, we conclude that the general harmless error standard articulated in *Neder*, which looks only to "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," is more appropriate for our analysis, considering the specific facts

of Freeman's case. *Neder*, 527 U.S. at 15 (internal quotation marks and citation omitted).

To begin, we reject Freeman's assertion that, pursuant to *Neder*, the omission of an element in the jury instructions cannot be harmless if the element was contested at trial. In *Neder*, the Supreme Court began by identifying the general test for harmless constitutional error that we have outlined above. After applying that standard to the specific facts of the case, however, the Supreme Court then articulated the language that Freeman proposes here. In particular, the Supreme Court explained that "*[i]n this situation*, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17 (emphasis added). Similarly, the Supreme Court observed that, if, after a reviewing court conducts a thorough examination of the record, "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—*for example*, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Id.* at 19 (emphasis added).

In light of this language, we do not view Freeman's proposed standard—where "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error"—as the sole, exclusive way in which to establish harmless error. *Id.* at 17. Rather, we

conclude that this standard simply provides one way in which the government may establish harmless error—as the government successfully did in *Neder*—when the omitted element was uncontested at trial. *See id.* at 16–17 (noting that "[t]he evidence supporting" the omitted element "was so overwhelming, in fact, that Neder did not argue" to the jury that this element had not been met). Accordingly, we conclude that harmless error may still be established where the broader harmless error standard articulated in *Neder* is satisfied, *i.e.*, "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Further, the argument that the omission of an element must be uncontested to be harmless is plainly inconsistent with *Neder* itself and the caselaw interpreting it. After *Neder*'s remand from the Supreme Court, for example, the Eleventh Circuit considered and rejected the requirement that underlying evidence must be uncontested and overwhelming, explaining "the Supreme Court did not hold that omission of an element can never be harmless error unless uncontested." *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999); *see also id.* at 1129 n.6 ("Considered in context, the Supreme Court's statement clearly does not mean that omission of an element of an offense can never be harmless error unless uncontested. The statement means only that the fact materiality was not contested supports the conclusion that the jury's verdict would have been the same absent the error."). This view is consistent, too, with the Third and Ninth Circuits' recent treatments of the issue. *See United States v. Boyd*, 999 F.3d 171, 179 (3d Cir. 2021) ("We do not read

'uncontested' literally to restrict harmless error to cases where the defendant made no attempt whatsoever to dispute the element, but rather more generally to mean the missing piece 'is supported by uncontroverted evidence.'" (quoting *Neder*, 527 U.S. at 18)); *United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022) ("[W]hether Saini contested the omitted element is not determinative. Our harmless error inquiry instead focuses on what the evidence showed regarding Saini's intent to defraud and whether we can conclude beyond a reasonable doubt 'that the jury verdict would have been the same absent the error.'" (quoting *Neder*, 527 U.S. at 17)).

Moreover, Freeman's proposed standard fails to account for cases where, although an omitted element was contested at trial, other circumstances assure us beyond a reasonable doubt that the instructional error did not contribute to the guilty verdict. As we will explain in more detail below, even though Freeman contested Doe's capacity at trial, he failed to "raise[] evidence sufficient to support a contrary finding." *Neder*, 527 U.S. at 19. Considering the overwhelming evidence of Doe's incapacity, therefore, a reasonable jury would be compelled to conclude that Doe was incapacitated within the meaning of § 2242(2). In fact, here the jury clearly rejected Freeman's defense, established in his own testimony and his cross-examination of Doe, that Doe was not incapacitated and that she freely consented to the sexual encounter. Based on the instructions given at trial, the jury necessarily found beyond a reasonable doubt that Freeman *knew* that Doe was incapacitated within the meaning of § 2242(2). The jury's finding, therefore, provides additional assurance that any alleged instructional error did not contribute to the guilty verdict.

Having determined that the general harmless error standard is the appropriate framework for our analysis here, we next turn to the question of whether the alleged instructional error—namely, the omission of the element of Doe's incapacity—was harmless. For the reasons outlined below, we conclude that the government has met its burden in showing that any error in the jury instructions played no part in the jury's verdict.

ii. Application of Harmless-Error Review

After thoroughly reviewing the record, we are satisfied that the government has proven "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15. In light of the overwhelming evidence of Doe's incapacity, and Freeman's failure to raise evidence sufficient to support a contrary finding, a reasonable jury would be compelled to conclude that Doe was incapacitated within the meaning of § 2242(2).

First, the record contains overwhelming evidence that Doe was asleep at the time that Freeman penetrated her. *See supra* Section II.A.3.a.i. Although Freeman testified to the contrary, his testimony was directly contradicted by a direct admission—namely, his text message apologizing to Doe for "having sex with [her] without waking [her] up." ROA, Vol. III at 513. Freeman does not dispute that he made this admission freely, outside the environment of any coercive police interrogation; instead, he testified that the "text is not the truth." *Id.* at 228. Moreover, the government presented more than just Freeman's text message at trial. The government also presented Doe's testimony that she woke up to find Freeman

penetrating her, and Smith's corroborating testimony that, the next morning, Doe told Smith the same.

In addition to the overwhelming evidence that Doe was asleep at the time of the assault, the record also contains overwhelming evidence that Doe was intoxicated from alcohol consumption. *See supra* Section II.A.3.a.ii. The government presented unrebutted testimony that Doe consumed large quantities of alcohol prior to the assault. From approximately 2 p.m. until late in the evening on the date of the gathering, the record reflects that Doe drank at least two alcohol-infused seltzers, about half a bottle of liquor, and a shot of tequila. Additionally, several witnesses corroborated Doe's state of intoxication. These witnesses observed that Doe was "wobbly on her feet, very clumsy, and laughing loudly," ROA, Vol. III at 97; "[i]ntoxicated" and "loud," *id.* at 404, 631; and "[d]efinitely not" able to drive a car, *id.* at 158.

Given the particular facts of this case, we conclude that Doe's incapacity was supported by overwhelming evidence, and that the record contains no "evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. Even if the jury instruction did not require the jury to find that Doe was incapacitated, therefore, we conclude that any instructional error could not have contributed to the verdict obtained, as it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the instructional error." *Id.* at 18.

Freeman's arguments to the contrary are unavailing. First, Freeman contends that "different witnesses gave differing accounts of when Jane Doe went to sleep and whether she was awake at the time" of the assault. Reply Br. at 12. In support of this assertion, Freeman points to Smith's testimony that Doe was still awake when Smith went to bed after the tequila shots, and Freeman's testimony that Doe consented to the sexual encounter. Additionally, Freeman asserts that "the evidence was far from overwhelming as to Jane Doe's level of intoxication." *Id.* Specifically, Freeman points to (1) Doe's testimony that she "wasn't that hung over" the day after the assault, ROA, Vol. III at 580; (2) Smith's testimony that, although Doe was "[i]ntoxicated" and could not safely operate a vehicle, she was not "falling-down drunk" or "slurring her words," *id.* at 631, 633; and (3) Smith's testimony that, during her conversation with Doe the morning after the assault, Doe did not specifically mention whether she had "blacked out," *id.* at 681.

Considering the overwhelming evidence that Doe was incapacitated at the time of the assault—either from being asleep or from intoxication (or both)—we are unpersuaded that the testimony Freeman points to, without more, could rationally lead a jury to a contrary finding with respect to the element of Doe's capacity. Even though Freeman testified at trial that Doe was not incapacitated and that she freely consented to the sexual encounter, here the jury clearly rejected Freeman's defense. As noted earlier, the jury instructions given in Freeman's trial required the jury to find, beyond a reasonable doubt, that "the defendant knew that Jane Doe was incapable of appraising the nature of the conduct, or physically incapable of

declining participation in that sexual act, or physically incapable of communicating unwillingness to engage in that sexual act." ROA, Vol. I at 344. Based on the instructions given at trial, therefore, the jury necessarily found beyond a reasonable doubt that Freeman knew that Doe was incapacitated within the meaning of § 2242(2). Given the overwhelming evidence regarding Doe's incapacity, we fail to see how a rational jury could have concluded that Freeman *knew* that Doe was incapacitated, as this jury necessarily did, without also concluding that Doe was, *in fact*, incapacitated. Even if the jury convicted Freeman based on a legally erroneous instruction, the jury "clearly rejected [Freeman's] defense, implied in the cross-examination of [Doe] and established clearly by his own testimony," that Doe was not incapacitated, and that she freely consented to the sexual encounter. *Holly*, 488 F.3d at 1309–10 (concluding that district court's omission of an element in the jury instructions—that the victim of aggravated sexual abuse feared serious bodily harm—was harmless error, where the victim provided "express testimony on the requisite degree of fear" that she felt when the sexual abuse occurred, even though the defendant testified "that the incident did not occur" at all). The jury's finding regarding Freeman's knowledge of Doe's incapacity, therefore, provides additional assurance that any alleged instructional error did not contribute to the guilty verdict here. "[G]iven what the jury necessarily did find based on the instructions it was provided," we conclude that "the guilty verdict actually rendered in *this* trial was surely unattributable to the alleged error." *Kahn*, 58 F.4th at 1320 (internal quotation marks, citations, and brackets omitted).

C. Peremptory Challenges

In his third issue on appeal, Freeman asserts that the district court deprived him of some of his peremptory challenges in connection with the selection of alternate jurors. Federal Rule of Criminal Procedure 24 provides the number of peremptory challenges that may be exercised in a felony case such as Freeman's. Rule 24 provides, in pertinent part,

> **(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below.
>
> * * *
>
> **(2) Other Felony Case.** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.
>
> * * *
>
> **(c) Alternate Jurors.**
>
> **(1) In General.** The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.
>
> * * *
>
> **(4) Peremptory Challenges.** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.
>
> **(A) One or Two Alternates.** One additional peremptory challenge is permitted when one or two alternates are impaneled.

Fed. R. Crim. P. 24.

According to Freeman's reading of Rule 24, he was free to use his ten peremptory challenges to strike both regular jurors and alternate jurors. In other words, Freeman contends he could "save up" some of the ten peremptory challenges allotted to strike regular jurors for later use to strike alternate jurors. For the reasons explained below, we disagree.

1. Background

After voir dire, the district court allowed the parties to challenge prospective jurors for cause. Following the challenges for cause, the district court selected twelve jurors. As part of that process, the defense used seven of its ten peremptory challenges, and the government used five of its six peremptory challenges.

The district court then determined that it would select two alternate jurors, and it provided each party with one peremptory challenge for the selection of those alternates. The defense and the government each struck one prospective alternate juror. The district court then selected Jurors 33 and 34 as alternate jurors.

The defense subsequently objected to the process for selecting alternate jurors. Specifically, the defense asserted that, since it had not used all ten of the peremptory challenges allotted for the initial jury selection, it should have been allowed to use its leftover challenges to strike prospective alternate jurors. The defense also claimed that the alternate jurors, Jurors 33 and 34, were "the two jurors that [Freeman] [was] most strongly going to strike out of the entire venire." ROA, Vol. V at 144. The district court overruled the defense's objection.

Juror 33 ultimately ended up serving on Freeman's jury. During the first day of trial, Juror 11 became sick over the lunch hour. The district court excused Juror 11, and, as a result, Juror 33 became one of Freeman's jurors.

2. Standard of Review

"Interpretation of the Federal Rules of Criminal Procedure is a legal issue subject to de novo review." *United States v. Davis*, 339 F.3d 1223, 1229 (10th Cir. 2003) (internal quotation marks and citation omitted).

3. Analysis

As set forth above, Federal Rule of Criminal Procedure 24 governs the parties' rights to exercise peremptory challenges at each stage of jury selection. Rule 24(b) specifies the "number of peremptory challenges to *prospective jurors*." Fed. R. Crim P. 24(b) (emphasis added). For non-capital felony cases such as Freeman's case, the "government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges." Fed. R. Crim. P. 24(b)(2). Additionally, Rule 24(c) specifies the "number of additional peremptory challenges to *prospective alternate jurors*." Fed. R. Crim. P. 24(c)(4) (emphasis added). If one or two alternates will be impaneled, each side is entitled to "[o]ne additional peremptory challenge." Fed. R. Crim. P. 24(c)(4)(A).

Here, Freeman contends that the district court erred by refusing to allow him to use the peremptory challenges allotted by Rule 24(b)(2) to strike prospective alternate jurors. We conclude that even if the district court erred, any error was

harmless because the district court's ruling did not result in the seating of a biased juror.

Any Error in the Denial of Freeman's Request to Use Additional Peremptory Challenges Was Harmless

Assuming, *arguendo*, that the district court erred in denying Freeman's request to use his remaining peremptory challenges to strike alternate jurors, that would not end our inquiry. We still need to determine whether this error warrants review under the harmless-error standard, and, if so, whether the error was harmless. For the reasons explained below, we conclude that (1) such an error would be subject to harmless-error review, and (2) any error would be harmless because Freeman was not prejudiced by the district court's decision.

a. Harmless-Error Review vs. Automatic Reversal

Under Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). To affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993).

The Supreme Court, however, has recognized "a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards." *Neder*, 527 U.S. at 7 (internal quotation marks and citations omitted). "Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* For all other constitutional errors,

we apply Rule 52(a)'s harmless-error analysis and disregard errors that are harmless beyond a reasonable doubt. *Id.*

The Supreme Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Id.* at 8 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). The Supreme Court has observed that these errors deprive the defendant of "basic protections," and generally "infect the entire trial process." *Id.* (internal quotation marks omitted). For example, structural errors include racial discrimination in the selection of the grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); denial of a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); complete denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and seating a biased juror who should have been dismissed for cause, *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

We conclude that the erroneous denial of peremptory challenges does not constitute a structural error, and, therefore, such error is subject to harmless-error review. Freeman appears to concede this view by citing Rule 52(a) and arguing the error affected his substantial rights. Aplt. Br. at 42–43. Unlike the errors described above, the erroneous denial of peremptory challenges "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. This is because, unlike the erroneous seating of a biased juror, the mere loss of a peremptory challenge does not inherently deprive the defendant of an impartial jury. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("reject[ing] the notion that the loss of a peremptory challenge constitutes a violation

of the constitutional right to an impartial jury," where, although the defendant had to use a peremptory challenge to strike a juror who should have been removed for cause, the final jury was impartial).

In *Rivera v. Illinois*, the Supreme Court considered whether a state court committed a structural error, therefore requiring automatic reversal, when it prohibited the defendant from using a peremptory challenge based on a mistaken determination that the challenge was motivated by racial bias. 556 U.S. 148, 161 (2009). The Supreme Court concluded that the "mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character." *Id.* In the aftermath of *Rivera*, several of our sister circuits have also held that the erroneous denial of a peremptory challenge is generally subject to harmless-error review, rather than an automatic reversal rule. *See, e.g.*, *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33 (1st Cir. 2010); *United States v. Lindsey*, 634 F.3d 541, 549 (9th Cir. 2011); *United States v. Williams*, 731 F.3d 1222, 1236 (11th Cir. 2013).

b. Application of the Harmless-Error Standard

In light of the standards outlined above, we review the district court's decision to deny Freeman additional peremptory challenges under harmless-error review. Even if we were to assume that it was error to deny Freeman the additional peremptory challenges, we conclude that any such error was harmless because it did not result in the seating of a biased juror who should have been struck for cause.

The Supreme Court has observed that the fundamental purpose of peremptory challenges is to allow parties to "secur[e] a fair and impartial jury." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.8 (1994); *see Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact"). Therefore, as the Supreme Court has explained in the civil context, the impairment of the right to exercise peremptory challenges does not warrant reversal unless it results in the seating of a biased juror who should have been struck for cause. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553–56 (1984) (holding that, to obtain a new trial because of a juror's alleged untruthfulness during voir dire, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.").

Here, Freeman did not challenge Juror 33 for cause in the proceedings below. Similarly, Freeman does not argue on appeal that Juror 33 should have been struck for cause. Rather, Freeman asserts that he wanted to use a peremptory challenge to strike Juror 33 because that juror's "personal experience[]" was "close to the facts at issue." Aplt. Br. at 44. Specifically, Freeman notes that during voir dire, Juror 33 discussed having delayed reactions to trauma, and Juror 33 explained that it sometimes takes days to process the trauma. According to Freeman, Juror 33's reaction to trauma is similar to Doe's reaction in this case, as Doe did not report the incident for a couple of days.

Contrary to Freeman's arguments, however, we conclude that these circumstances do not warrant reversal under the harmless-error standard. Freeman does not contend that Juror 33's impartiality was in question, or that Juror 33 was removable for cause. Rather, Freeman appears to assert that he missed the opportunity to exclude Juror 33, whom, he believes, may have been less favorable to him than another juror might have been. Although Freeman may have wished to exclude Juror 33 for strategic reasons, this missed opportunity, without more, does not warrant reversal. There is no basis in the record to conclude that Juror 33 was removable for cause or unqualified for jury service. We therefore conclude that any possible error in the district court's denial of Freeman's request constitutes harmless error and does not warrant reversal.

III

For the foregoing reasons, we AFFIRM the district court's judgment.