

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL CAPEHART,

Defendant - Appellant.

No. 22-2076
(D.C. No. 1:18-CR-02426-WJ-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Twelve sworn, qualified, and instructed jurors convicted Daniel Capehart on three drug-distribution charges after deliberating for two-and-a-half hours. But neither the court nor the parties noticed that court staff had mistakenly switched the names of a juror and an alternate juror on the seating chart of jurors. That clerical error led the court to seat an alternate juror in place of an original juror for deliberations and then excuse that original juror. Though

* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1. After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

inadvertent, the court had not found that the original juror was disqualified or unable to serve. Because the court's voir dire process kept the jury from knowing which two jurors were alternates, the jury could not have known of the mistake to advise the court of it.

Both parties and the district court now agree that the district court erred. On appeal, then, we must decide whether Capehart is correct that the district court's error requires a new trial. We reject his argument that the court violated Federal Rule of Criminal Procedure 23, so we need not address his further claim of structural error. We review this conceded error for violating Federal Rule of Criminal Procedure 24(c) under the four-pronged plain-error standard of review. We hold that Capehart has failed to show that the error prejudiced him under the third prong or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings under the fourth prong. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

I. Factual Background

One night in June 2018, New Mexico State Police Officer Daniel Capehart stopped a car driven by a teenage girl for an alleged traffic violation. The driver was 17 years old, and her friend in the passenger seat was 16. Officer Capehart obtained both girls' identifying information and cell-phone numbers. He issued the driver three tickets, including two for marijuana possession.

An hour after the traffic stop, Officer Capehart texted the passenger, C.K., and began flirting with her, using sexual undertones. He promised to drop the charges against her friend if C.K. continued communicating with him. After several days of these sorts of texts from Officer Capehart, C.K. showed them to her father, and together they reported Officer Capehart's behavior to a New Mexico State Police detective. C.K. and her father allowed detectives to use her cell phone to communicate with Officer Capehart.

A police detective soon began texting Officer Capehart, posing as C.K. Officer Capehart texted "C.K." pictures of drugs and offered to drop them off where she could retrieve them. On two nights, detectives followed Officer Capehart and collected packages of marijuana at his described drop sites. Detectives also contacted the FBI to investigate Officer Capehart and obtained a warrant to attach a tracking device to his law-enforcement vehicle.

About 10 days after C.K. and her father visited the police, a confidential informant, J.S., reported a similar account of Officer Capehart's doings. Nine months earlier, Officer Capehart had stopped J.S. and found methamphetamine in her car. After J.S.'s release from jail, Officer Capehart began sending her sexual text messages. Like C.K., J.S. also allowed detectives to use her cell phone to communicate with Officer Capehart. Soon after, Officer Capehart asked "J.S." if she knew someone he could catch in a drug bust and offered to give her half of any seized drugs. The detectives went along with this, sending an undercover agent with methamphetamine to be "busted" by Officer

Capehart. Officer Capehart took methamphetamine from the undercover agent and left J.S.'s share at a described location. Detectives promptly arrested Officer Capehart. After waiving his *Miranda* rights, Officer Capehart admitted to the three drug deliveries that detectives had observed.

In July 2018, a federal grand jury indicted Officer Capehart with two counts of distributing marijuana and one count of distributing methamphetamine. By August 2018, Capehart's employment with the New Mexico State Police Department had ended.

II. Procedural Background

On July 19, 2021, Capehart's jury trial began. The court involved the entire jury pool in voir dire. After striking some jurors for cause and excusing others for hardship, the court permitted the parties to exercise their peremptory challenges, including those under Federal Rule of Criminal Procedure 24(c)(4). Ultimately, the court impaneled 12 jurors and two alternates. Outside the presence of the jury, the court identified the alternates to the parties. Juror No. 2 was the first alternate, and Juror No. 13 was the second alternate. The court then swore in the jury.

Twelve witnesses testified for the government. An adult by the time of trial, C.K. recounted Officer Capehart's traffic stop, and she read aloud for the jury the flirtatious texts he sent her. Police officers, detectives, and a deputy from the San Juan County Sheriff's Office described corresponding with Officer Capehart while using C.K.'s and J.S.'s cell phones, as well as their

witnessing Officer Capehart's associated drug drops of marijuana and methamphetamine. A narcotics agent described his role in Officer Capehart's methamphetamine "bust" set up by "J.S." An FBI agent testified about investigating Officer Capehart's offers of drugs to J.S. and surveilling Officer Capehart's associated methamphetamine drop to J.S. And two forensic chemists testified that the substances retrieved from Officer Capehart's drug drops were marijuana and methamphetamine.

Capehart's counsel didn't present an opening statement and rested without presenting evidence or witnesses. After closing arguments and jury instructions, the court excused Juror No. 2 and Juror No. 12 as alternates. Though Juror No. 2 and Juror No. 13 were the true alternates, court staff had prepared a seating chart that mistakenly had Juror No. 12 seated as the second alternate instead of Juror No. 13. No one objected to the court's mistake.

After deliberating for two-and-a-half hours, the jury convicted Capehart on all three counts. Juror No. 13 served as the foreperson.

By the next day, the court had learned of the mistake. It convened a status conference and told the parties that it had excused the wrong juror as an alternate. After the conference, Capehart moved for a new trial, arguing that the court's error violated Federal Rule of Criminal Procedure 23 because "his case was submitted to a jury of only 11 properly selected jurors."

The government countered that Capehart's Rule 23 argument "misse[d] the mark" because "[a]lternate jurors have the same qualifications and are

sworn in the same manner as the other jurors.” The government contended that the court had complied with Rule 23 but had violated Rule 24(c). Further, the government preemptively argued that this error wasn’t structural, meaning that Capehart would need to show prejudice under the plain-error standard. The government contended that Capehart could not show prejudice, noting that he hadn’t exercised a peremptory challenge for Juror No. 13¹ and that he had offered nothing suggesting that the jury would have acquitted him if Juror No. 12 had been seated rather than Juror No. 13.

In reply, for the first time, Capehart argued that his asserted Rule 23 error was structural, still relying on the Rule 23 violation he alleged in his motion for a new trial. But he conceded that if the court ruled that his alleged Rule 23 error wasn’t structural, the plain-error standard would govern this claim. He acknowledged that he hadn’t timely objected to the court’s dismissing Juror No. 12 and seating Juror No. 13. For prejudice, Capehart merely noted that Juror No. 13 was “influential enough to be the foreperson.” And he argued that the error affected the integrity and public reputation of the court proceedings because “the right to be tried before a jury is a central pillar of our criminal justice system.”

The court denied Capehart’s motion for a new trial. *United States v. Capehart*, No. 1:18-CR-02426, 2021 WL 3772270, at *1 (D.N.M. Aug. 25,

¹ Capehart had already used his one peremptory strike for alternate jurors before Juror No. 13 was selected as an alternate.

2021) (unpublished). First, the court held that its error was neither a structural error nor a plain error reversible without a showing of prejudice. *Id.* at *2–3. The court observed that the cases Capehart cited involved either too many or too few jurors—not the proper number of 12 jurors of which one mistakenly was an alternate. *Id.* The court saw no Rule 23 violation, reasoning that “[t]welve jurors, all of whom went through *voir dire* and were found qualified to serve, deliberated in this case and returned a unanimous verdict.” *Id.* at *3. But the court acknowledged error under Rule 24(c) by its failing to abide by the procedure for replacing jurors with alternates (which is what in effect happened, though the court had not set out to do that). *Id.*

The court concluded that Capehart had met the first and second prongs of plain-error review by showing a Rule 24(c) error that was clear and obvious. *Id.* at *4. But the court concluded that Capehart had failed to show prejudice after viewing the evidence before the jury. *Id.* The court rejected as “unsupported speculation” Capehart’s argument that Juror No. 13 had an outsized influence as the foreperson. *Id.* at *5 (citations omitted). The court explained that “[a]s the foreperson, Juror Number 13 . . . contributed only one vote to the unanimous verdict, which was swiftly reached.” *Id.*

The court also considered the fourth prong of plain-error review and held that “its error did not seriously affect the fairness, integrity, or public reputation of these judicial proceedings.” *Id.* The court found that granting Capehart a new trial wouldn’t serve the interests of justice after noting “the

strength of the Government’s evidence, presented via the testimony of numerous lay and expert witnesses, and the fact that the jury deliberated for only a few hours before reaching a unanimous verdict of guilty on all counts.”

Id.

The court sentenced Capehart to a midrange guidelines sentence of 84 months’ imprisonment, and Capehart timely appealed.

DISCUSSION

We conclude that the district court complied with Rule 23 but violated Rule 24(c). Because Capehart didn’t argue structural error concerning Rule 24(c), we review the district court’s Rule 24(c) violation for plain error. We hold that Capehart has not met his burden under the third and fourth prongs of plain-error review.

I. Did the district court violate Rule 23?

As in the district court, Capehart argues on appeal that the district court committed a structural error under Rule 23, and he argues for *de novo* review of the district court’s error. Opening Br. 5 (citing *United States v. Merrill*, 513 F.3d 1293, 1308 (11th Cir. 2008), *abrogated on other grounds by Ruan v. United States*, 142 S. Ct. 2370 (2022)).² A structural error is a “defect affecting

² Capehart points out that the Eleventh Circuit in *Merrill* “employed a *de novo* standard of review” to evaluate a similar error of sending an alternate to deliberate in place of a juror without finding the original juror disqualified or unable to serve. But unlike Capehart, the defendant in *Merrill* objected to the error during jury deliberations. *Merrill*, 513 F.3d at 1308. We also note that the
(footnote continued)

the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *United States v. Gonzalez–Huerta*, 403 F.3d 727, 733 (10th Cir. 2005) (en banc) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

But even reviewing de novo, we reject Capehart’s argument that the district court violated Rule 23. Without a stipulation by the parties or a court order, Rule 23(b) requires a jury to consist of 12 persons. Fed. R. Crim. P. 23(b)(1). We agree with the district court and the government that the court complied with Rule 23(b) here: 12 persons decided Capehart’s case. Rule 23(b) governs jury size, not the replacement of jurors with alternates. Because the district court didn’t violate Rule 23, we need not address Capehart’s structural-error argument.

II. Can Capehart meet the plain-error standard for a Rule 24(c) violation?

That leaves Capehart with his argument under Rule 24(c). Neither in the district court nor on appeal has he argued that the Rule 24(c) error was structural. *United States v. Abdenbi*, 361 F.3d 1282, 1289 (10th Cir. 2004) (“The failure to raise an issue in an opening brief waives that issue.” (citing *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994))).

Rather, he has conceded that if the district court didn’t commit a structural

Eleventh Circuit didn’t hold that the Rule 24(c) error was structural. *See id.* at 1308–09. Rather, it applied the harmless-error framework and found that the defendant had failed to show prejudice to merit reversal. *Id.*

error under Rule 23, then plain error would be the correct standard to review the court's Rule 24(c) error in sending the alternate juror to deliberate.

So under plain-error review, Capehart must show (1) error (2) that was clear and obvious and (3) that prejudiced him by affecting his substantial rights. *See United States v. Turrietta*, 696 F.3d 972, 976, 981, 983 (10th Cir. 2012) (citation omitted). If he satisfies the first three prongs, then “we may exercise discretion to correct the error if it (4) ‘seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 976 (quoting *United States v. Cordery*, 656 F.3d 1103, 1105 (10th Cir. 2011)).

A. Clear & Obvious Error

Under Rule 24(c), 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.” Fed. R. Crim. P. 24(c)(1). The court must replace jurors with alternates “in the same sequence in which the alternates were selected.” Fed. R. Crim. P. 24(c)(2)(B). Here, the district court violated Rule 24(c) in two ways: (1) by replacing a juror with an alternate without first finding the original juror disqualified or unable to serve and (2) by replacing the original juror with the second alternate rather than the first.

The government concedes that the district court's Rule 24(c) error satisfies the first two prongs of plain-error review: an error that is clear and obvious. And we agree—the court plainly erred by inadvertently substituting an

alternate juror for an original juror without inquiring into the original juror's disqualification or inability to perform.

B. Prejudice

To show prejudice, Capehart “must show ‘a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.’” *Gonzalez–Huerta*, 403 F.3d at 733 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)). An “unsubstantiated allegation” of how the presence of an alternate juror may have affected jury deliberations isn't enough to show actual prejudice for a Rule 24(c) violation. *Merrill*, 513 F.3d at 1309 (evaluating a Rule 24(c) violation under the harmless-error framework).³ Capehart argues that the court's mistake prejudiced him because Juror No. 13 “was apparently influential enough to be the foreperson of [the jury] deliberation.” In Capehart's view, “without the apparently powerful influence of that unauthorized person in the jury room,” a reasonable probability exists of his not being found guilty.

Under Rule 24(c), an alternate juror “must have the same qualifications and be selected and sworn in the same manner as any other juror.” Fed. R. Crim. P. 24(c)(2)(A). Here, Juror No. 13 was qualified, instructed, and sworn

³ The prejudice inquiries for plain error and harmless error are nearly the same, “with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice [for plain error].” *United States v. Olano*, 507 U.S. 725, 734 (1993).

like all the other jurors who deliberated. Capehart’s argument is too generalized and speculative to show that replacing Juror No. 12 with alternate Juror No. 13 prejudiced him. That Juror No. 13 served as foreperson doesn’t demonstrate that she swayed the jury to convict rather than acquit. Capehart hasn’t shown a reasonable probability that the jury would have acquitted him but for the district court’s error. *Gonzalez–Huerta*, 403 F.3d at 733 (quoting *Dominguez Benitez*, 542 U.S. at 82).

The Second Circuit has addressed a similar Rule 24(c) error and found no prejudice. *United States v. Hamed*, 259 F. App’x 377, 378–79 (2d Cir. 2008) (unsigned & unpublished). In *Hamed*, the district court mistakenly excused a juror and sent an alternate juror to deliberate after failing to notice that the juror and the alternate had swapped seats. *Id.* at 378. But the Second Circuit held that the error was harmless because “there is no evidence that this decision was the result of . . . anything other than the District Court’s reliance upon a clerical error.” *Id.*

Other courts take a similar approach. The First Circuit has found no prejudice for a Rule 24(c)(2) violation when “the person who served as twelfth juror had fully qualified to serve as a juror and would have been expected to do so had vacancies occurred in the regular panel.” *United States v. Levesque*, 681 F.2d 75, 80–81 (1st Cir. 1982). And the Ninth Circuit has found that a district court’s Rule 24(c) error in replacing a juror with an alternate didn’t prejudice the defendant even though “[b]efore [the alternate’s] arrival, the jury was

deadlocked; once she was seated, the jury reached a verdict in under two hours.” *United States v. McFarland*, 34 F.3d 1508, 1514–15 (9th Cir. 1994).

The Ninth Circuit explained that the defendant’s argument about the alternate’s influence on the jury “ignores the multitude of other factors which might have influenced the verdict.” *Id.* at 1514. The same is true of Capehart’s prejudice argument.

Though Juror No. 13 served as foreperson, she cast only one vote—11 other jurors also agreed that Capehart was guilty. The deliberations were short, and the evidence against Capehart was overwhelming. Capehart has failed to satisfy his burden on the prejudice prong of plain error.

C. Fairness, Integrity, or Public Reputation of Judicial Proceedings

Even if Capehart could satisfy the prejudice prong, he would still fail to meet the fourth prong of plain error: that the district court’s error “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” *Turrietta*, 696 F.3d at 976 (citation omitted). Because Capehart has argued only a nonconstitutional, procedural error, he must meet a “demanding standard” on the fourth prong of plain error. *Gonzalez–Huerta*, 403 F.3d at 736–37 (citations omitted). We will reverse a nonconstitutional error on plain-error review only if the error “is both ‘particularly egregious’ and our failure to notice the error would result in a ‘miscarriage of justice.’” *Id.* at 736 (citations omitted).

On appeal, Capehart confines his argument on the fourth prong to one sentence: “As the right to be tried before a jury is a central pillar of our criminal justice system, the violation of this right can only be said to affect the ‘integrity and public reputation’ of the proceedings in this case.” Opening Br. 11. Such a “conclusory statement” isn’t enough to satisfy our demanding standard. *Gonzalez–Huerta*, 403 F.3d at 737.

And what’s more, the overwhelming evidence of Capehart’s guilt weighs against finding that the error threatened the integrity and reputation of judicial proceedings. *Turrietta*, 696 F.3d at 985 (“[The] record . . . leaves no doubt the defendant was guilty of the charged offense.”). In *Turrietta*, we explained that the overwhelming evidence against the defendant, the short duration of the trial, and the fact that “the defense rested without putting a dent in the testimony of the only two eye witnesses” weighed against the defendant on the fourth prong of plain error. *Id.* (“Seldom does a jury enter deliberations with issues so sharply defined and evidence so clearly stacked against the defendant.”). Here, 12 witnesses testified for the government, accounting for every stage of the investigation from Capehart’s initial contacts with C.K. and J.S. to the identification of the drugs in a lab.

Last, other safeguards ensured that Capehart received a “fair and procedurally rigorous trial.” *Id.* Capehart was tried by a jury that “was fairly selected and clearly instructed, and the trial was open to the public and administered by an unbiased judge.” *Id.* And Capehart “availed himself of his

right to counsel and received an unfettered opportunity to put on evidence and make arguments in defense of his innocence.” *Id.* Given these procedural safeguards, leaving the district court’s error uncorrected won’t “result in a ‘miscarriage of justice.’” *Gonzalez–Huerta*, 403 F.3d at 736 (citations omitted).

Capehart has failed to meet his burden on the fourth prong of plain error.

CONCLUSION

We conclude that the district court did not err under Rule 23. And though the district court inadvertently violated the operational conditions of Rule 24(c), Capehart didn’t object to the district court’s error at trial, nor did he preserve an argument at the trial court or on appeal that the Rule 24(c) error is structural. Under plain-error review, we hold that Capehart has failed to show that the district court’s error prejudiced him or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. Thus, he can’t satisfy the plain-error standard. We affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge