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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS August 25, 2026

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 25-7003

THOMAS RAYMOND PHILLIPS
III,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 6:21-CR-00197-JFH-1)

Neil D. Van Dalsem, Assistant Federal Public Defender (Scott A. Graham, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Muskogee, Oklahoma, on behalf of Defendant-Appellant.

Jarrold A. Leaman, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, and Linda A. Epperley, Assistant United States Attorney, with him on the brief), Muskogee, Oklahoma, on behalf of the Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **BACHARACH**, and **MORITZ**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of a fatal shooting and convictions for

- committing first-degree murder in Indian Country (18 U.S.C. §§ 1111(a), 1151, 1153) and
- using a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c)).

In appealing the conviction for first-degree murder, the defendant (Mr. Thomas Raymond Phillips III) challenges the instructions on *imperfect self-defense*. This defense exists when defendants

- believe that they need to use deadly force to prevent death or great bodily harm and
- this belief is objectively unreasonable.

United States v. Britt, 79 F.4th 1280, 1286–87 (10th Cir. 2023). The district court instructed on this defense, but didn’t tell the jury that disproving imperfect self-defense was an element of the government’s burden of proof. This omission constitutes *plain error* and requires reversal of Mr. Phillips’ conviction for first-degree murder.

Mr. Phillips also raises four other challenges to this conviction. We address these challenges because they may arise again in a retrial.¹

1. **Jury instruction on diminished capacity.** The district court also instructed the jury on diminished capacity, stating that Mr. Phillips’ mental condition wouldn’t constitute a defense to second-degree murder or manslaughter. Did that statement constitute a clear or obvious error? We answer *no*.

¹ In addition, Mr. Phillips raises a separate claim of cumulative error. But this claim rests on the assumption that none of the other challenges would alone require reversal of the murder conviction. Because we conclude that the instructional error on imperfect self-defense requires reversal of the conviction for first-degree murder, we need not address Mr. Phillips’ claim of cumulative error.

2. **Explanation of heat of passion.** In closing argument, the prosecutor illustrated heat of passion with an example of a husband killing an unfaithful spouse without thinking. If this example had been improper, would the prosecutor's illustration have been harmless beyond a reasonable doubt? We answer *yes*.
3. **Expressing a personal opinion about guilt.** A prosecutor can't express a personal opinion about the defendant's guilt. But here the prosecutor referred twice in a single sentence to a belief that Mr. Phillips was guilty. Were these references plainly improper? We answer *no*.
4. **Explanation of premeditation.** The prosecutor explained that premeditation can develop quickly, giving an example of someone deciding which ice cream to buy. Did this example affect a substantial right? We answer *no*.

The jury also found Mr. Phillips guilty of (1) using a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c) and (2) causing a person's death by using a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(j). The district court recognized that these two charges were multiplicitous and dismissed the charge for the greater-included offense (causing a person's death by using a firearm during and in relation to a crime of violence). Mr. Phillips argues that the court should instead have dismissed the charge for using a firearm during and in relation to a crime of violence. Does the district court's choice constitute an abuse of discretion? We answer *no*.

Background

On a cold evening, Mr. Phillips and his wife went to a bar. After hours of drinking, Mr. Phillips quarreled with patrons and was told to

leave. The quarrel morphed into a brawl: Three patrons jumped Mr. Phillips, put him in a chokehold, slammed his head into a surface, and threw him to a concrete floor. A fourth individual broke a bottle over Mr. Phillips' head. As Mr. Phillips was getting pummeled, he threatened to kill everyone. The patrons yelled at Mr. Phillips to leave and thrust him outside. His wife followed.

Mr. Phillips went to his truck, retrieved a gun, paced, and hit his wife. Scared, she returned hurriedly to the bar and told everyone that Mr. Phillips had a gun. One patron opened the door and saw Mr. Phillips with the gun. The patron rushed inside, and everyone sought cover as Mr. Phillips fired into the bar and killed a patron.

Issues Involving the Conviction for First-Degree Murder

The killing led to Mr. Phillips' conviction for first-degree murder, and he challenges the jury instructions and criticizes the prosecutor's closing arguments.

I. The district court erred in instructing on imperfect self-defense.

In district court, Mr. Phillips requested an instruction on imperfect self-defense. The court granted the request, but didn't tell the jury that the government needed to disprove this defense beyond a reasonable doubt to find Mr. Phillips guilty of first-degree murder.

A. We review for plain error.

Mr. Phillips argues that this omission constituted error because the jury needed to know that the burden fell on the government. But Mr. Phillips didn't make this objection in district court. So we review this argument under the plain-error standard. *United States v. Flechs*, 98 F.4th 1235, 1252 (10th Cir. 2024). Under this standard, Mr. Phillips needs to show that

- the omission in the instructions constituted an error,
- that error was clear or obvious,
- the error affected Mr. Phillips' substantial rights, and
- the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir. 2005). But we apply these requirements "less rigidly" when reviewing a possible instructional error on an element of the offense because the issue involves the Sixth Amendment. *United States v. Benford*, 875 F.3d 1007, 1016–17 (10th Cir. 2017). That right is violated when the trial court improperly instructs "on an element of the offense." *Neder v. United States*, 527 U.S. 1, 12 (1999).

B. The district court committed a clear or obvious error.

The alleged error involves two aspects of the jury instructions. First, the court instructed the jury on the elements of first-degree murder. These

elements included malice, which could be negated by imperfect self-defense. *United States v. Maryboy*, 138 F.4th 1274, 1281 (10th Cir. 2025) (imperfect self-defense negates malice); *United States v. Kepler*, 74 F.4th 1292, 1298 (10th Cir. 2023) (malice is an element for first-degree murder). But the court didn't tell the jury that the government needed to disprove imperfect self-defense to find first-degree murder. Second, the court didn't tell the jury that this burden required the government to disprove imperfect self-defense beyond a reasonable doubt. In both respects, the court erred.

Imperfect self-defense would prevent a finding of first-degree murder. *United States v. Craine*, 995 F.3d 1139, 1156 (10th Cir. 2021). Although Mr. Phillips raised imperfect self-defense, the district court didn't instruct the jury on the government's burden to disprove the defense beyond a reasonable doubt. *United States v. Maryboy*, 138 F.4th 1274, 1292–93 (10th Cir. 2025). With that omission, the instructions allowed the jury to find malice even though it could be negated by imperfect self-defense.

Granted, the court told the jury that Mr. Phillips would be guilty of involuntary manslaughter if he had acted in imperfect self-defense. R. vol. 2, at 586. But the court told the jury not to consider involuntary manslaughter unless the jury had already found Mr. Phillips not guilty of first-degree murder, second-degree murder, and voluntary manslaughter:

- “If you unanimously find the Defendant not guilty of the offense charged (first degree murder), or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of a lesser included offense.”
- “If you unanimously find the Defendant not guilty of second degree murder or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of voluntary manslaughter.”
- “If you unanimously find the Defendant not guilty of voluntary manslaughter or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of involuntary manslaughter.”

Id. at 578, 580, 582. So the jury could have found malice without considering the possibility of imperfect self-defense.

We addressed a similar situation in *United States v. Lynn*, 180 F.4th 1208 (10th Cir. 2026). There too, the district court instructed on first-degree murder without telling the jury to consider imperfect self-defense. *Id.* at 1222–23. The court did tell the jury that it should consider imperfect self-defense to determine whether the defendant was guilty of involuntary manslaughter. *Id.* at 1223. But the court also instructed the jury to consider involuntary manslaughter only if the jury were to find the defendant not guilty of first-degree murder, second-degree murder, and voluntary manslaughter:

- “If you unanimously find the defendant not guilty of First Degree Murder in Indian Country, or if, after all

reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of Second Degree Murder in Indian Country.”

- “If (1) you unanimously find the defendant not guilty of First Degree Murder in Indian Country, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, and, (2) you unanimously find the defendant not guilty of Second Degree Murder in Indian Country, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of Voluntary Manslaughter in Indian Country.”
- “If (1) you unanimously find the defendant not guilty of First Degree Murder in Indian Country, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense; (2) you unanimously find the defendant not guilty of Second Degree Murder in Indian Country, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense; and (3) you unanimously find the defendant not guilty of Voluntary Manslaughter in Indian Country, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of Involuntary Manslaughter in Indian Country.”

Jury Instruction Nos. 25–27, *United States v. Lynn*, No. CR-24-76-GKR (N.D. Okla. Oct. 18, 2024) (Dkt. No. 98). We concluded that this sequence had effectively informed the jury that it should consider imperfect self-defense only in connection with involuntary manslaughter. *United States v. Lynn*, 180 F.4th at 1223–24. But we recognized that imperfect self-defense would negate an element of both first- and second-degree murder: malice. *Id.* at 1222 (stating that “imperfect self-defense negates first- and second-degree murder’s malice element”). As a result, we

concluded that a jury couldn't "have deduced that imperfect self-defense was a defense to murder based on the lesser-included offense instructions." *Id.* at 1224.

The instructions here are virtually identical, telling the jury

- to consider imperfect self-defense in connection with involuntary manslaughter and
- to consider involuntary manslaughter only if the jury had already found the defendant not guilty of first- and second-degree murder.

See pp. 7–8, above. Under *Lynn*, the instructions should have told the jury to consider imperfect self-defense in connection with the charge of first-degree murder.

The instructions failed to tell the jury not only that it needed to consider imperfect self-defense for the charge of first-degree murder, but also that the government needed to disprove imperfect self-defense beyond a reasonable doubt. We held in *Lynn* that the district court had erred by failing to explain the need to disprove this defense beyond a reasonable doubt. *United States v. Lynn*, 180 F.4th at 1224.

The resulting issue is whether these omissions created *plain error*. An instructional error is *plain* if it didn't correctly state the applicable law and the error was "clear or obvious." *United States v. Kalu*, 791 F.3d 1194, 1210 (10th Cir. 2015) (quoting *United States v. Bader*, 678 F.3d 858, 868 (10th Cir. 2012)). In assessing the clarity or obviousness of an error, we

consider current case law even if it hadn't existed during the trial. *United States v. Koch*, 978 F.3d 719, 726 (10th Cir. 2020). And our recent opinion in *Lynn* characterized these two omissions as errors. *See* pp. 8–9; *see also* *United States v. Maryboy*, 138 F.4th 1274, 1293 (10th Cir. 2025) (concluding that the district court had committed plain error by failing to instruct the jury that it could find murder only if the government had disproved imperfect self-defense beyond a reasonable doubt). Under this holding, the district court clearly or obviously erred by failing to tell the jury

- to consider imperfect self-defense in connection with the elements of first-degree murder and
- to find first-degree murder only if the government were to disprove imperfect self-defense beyond a reasonable doubt.²

C. The error affected Mr. Phillips' substantial rights.

Given the presence of a clear or obvious error, we consider whether the error affected Mr. Phillips' substantial rights. "In the jury instruction

² In concluding that the district court clearly or obviously erred, we have the advantage of case law that didn't exist at the time of the trial. At that time, we hadn't held in a published opinion that the government needed to disprove imperfect self-defense beyond a reasonable doubt. Nor did that requirement exist in our pattern jury instructions for first-degree murder. Crim. Pattern Jury Instruction Comm. for the U.S. Court of Appeals for the Tenth Circuit, Crim. Pattern Jury Instructions § 2.52 (3d ed. July 14, 2023). With case law unavailable to the district court, our pattern jury instructions now require the government to disprove imperfect self-defense beyond a reasonable doubt. Crim. Pattern Jury Instructions § 1.28 (rev. Mar. 11, 2026). We do not fault the district court for applying the case law and pattern jury instructions that existed at the time of trial.

context, ‘an error affects substantial rights if it concerns a principal element of the defense or an element of the crime.’” *United States v. Brown*, 128 F.4th 1358, 1368–69 (10th Cir. 2025) (quoting *United States v. Piette*, 45 F.4th 1142, 1162 (10th Cir. 2022)); *see also United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998) (“A plainly erroneous jury instruction affects a defendant’s ‘substantial rights’ if the instruction concerns a principal element of the defense or an element of the crime, thus suggesting that the error affected the outcome of the case.”). So we have often found an effect on the defendant’s substantial rights when a district court errs in instructing on a principal element of an offense. *See United States v. Duran*, 133 F.3d 1324, 1333 (10th Cir. 1998) (“When a district court gives a legally incorrect jury instruction on the principal elements of the offense or a defense, we often have concluded that the legal error affected the outcome of the trial proceedings”), *quoted with approval in United States v. Benford*, 875 F.3d 1007, 1017 (10th Cir. 2017).

Here too, the error involves the failure to instruct on a principal element of first-degree murder: the absence of imperfect self-defense. *See pp. 5–9, above.* The government downplays Mr. Phillips’ evidence of imperfect self-defense. But the district court considered the evidence sufficient to justify an instruction on this defense. We agree because six

pieces of evidence suggested that Mr. Phillips had irrationally feared an imminent attack:

1. A neuropsychologist testified that Mr. Phillips had post-traumatic stress disorder, that the fight could have caused a traumatic brain injury, and that the fight could have exacerbated his condition, creating confusion, hyperarousal, inability to accurately assess dangers, and susceptibility to an inappropriate response to stimuli.
2. The government's expert witness acknowledged that post-traumatic stress disorder could have interfered with Mr. Phillips' ability to assess danger, that the fight could have caused a traumatic brain injury, and that some aspects of Mr. Phillips' behavior were consistent with a traumatic brain injury.
3. A pathologist testified that the fight could have killed Mr. Phillips.
4. The wife of Mr. Phillips testified that he was so disoriented that he appeared not to recognize her.
5. An officer testified that right after the shooting, Mr. Phillips couldn't remember details and said that he had been tackled in the parking lot (even though he hadn't).
6. A witness testified that Mr. Phillips had started shooting right after a bar patron opened the door, suggesting that Mr. Phillips could have thought that the patrons were going to attack him in the parking lot.

The government also argues that the instructional errors didn't matter because the jury had found premeditation. It's true that

- the jury found premeditation and
- judges in other jurisdictions have disagreed among themselves on whether premeditation and imperfect self-defense are consistent.

Compare People v. Schuller, 533 P.3d 908, 926–27 (Cal. 2023) (Liu, concurring) (concluding that a jury could have found both premeditation and imperfect self-defense), *with State v. Bell*, 121 P.3d 972, 979 (Kan. 2005) (stating that premeditation and imperfect self-defense are mutually exclusive). In our court, we’ve said only that the jury might have been less likely to find imperfect self-defense if the jury had found premeditation. *See United States v. Lynn*, 180 F.4th 1208, 1225 (10th Cir. 2026) (“Granted, the likelihood of a different outcome may be diminished when a jury finds premeditation beyond a reasonable doubt.”); *see also United States v. Beard*, No. 25–7031, slip op. at 11 (10th Cir. Aug. 3, 2026) (to be published) (stating that a finding of premeditation supports the jury’s conclusion that the defendant hadn’t acted in perfect or imperfect self-defense). For example, we have recognized that a finding of premeditation could affect the likelihood that a jury would find imperfect self-defense because

- “a rational jury that believed the defendant had formed a plan to kill with reflection and consideration amounting to deliberation, could not have also believed a mitigating defense” and
- given the jury’s finding of premeditation, the jury “was not likely to conclude that [the defendant had] actually killed only out of fear for his life.”

United States v. Maryboy, 138 F.4th 1274, 1294 (10th Cir. 2025) (cleaned up). At the same time, however, we’ve not regarded premeditation and

imperfect self-defense as inherently inconsistent. For example, we regarded the same instructional errors as reversible in *United States v. Lynn* even though the jury had found premeditation. 180 F.4th at 1223–25.

The error here requires reversal too, because we have no way of knowing whether a properly instructed jury would have found first-degree murder. The jury found first-degree murder, but we don’t know whether the jury considered the possibility of imperfect self-defense when finding malice. And the jury had no way of knowing that the government needed to disprove imperfect self-defense beyond a reasonable doubt.

Granted, Mr. Phillips didn’t testify. But his statements came into evidence through a law-enforcement officer, who testified that Mr. Phillips had said that he had been tackled in the parking lot. R. vol. 5, at 359–61. Similarly, the *Lynn* defendant didn’t testify and his out-of-court statements had come into evidence through other witnesses; and we held there that the instructional error required reversal. *Lynn*, 180 F.4th at 1223–25; *see also United States v. Brown*, 128 F.4th 1358, 1368 (10th Cir. 2025) (concluding that the district court had plainly erred by failing to instruct on imperfect defense of another when the defendant hadn’t testified); *accord United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997) (stating that “[t]he defendant does not have to testify” to trigger a need to instruct on self-defense (quoting *Closs v. Leapley*, 18 F.3d 574, 580 (8th Cir. 1994))).

Even without Mr. Phillips' testimony, a properly instructed jury could have found an inability to rationally assess the situation because someone had just bashed Mr. Phillips' head, he might have sustained a traumatic brain injury, and his post-traumatic stress disorder could have interfered with his ability to process what was happening. This possibility was supported by Mr. Phillips' behavior: He said that he had been tackled in the parking lot, and his wife testified that Mr. Phillips had looked like he didn't even know who she was. In these circumstances, the failure to properly instruct on an element of the government's burden affected Mr. Phillips' substantial rights.

D. The instructional error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

The remaining issue is whether the instructional error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See* p. 5, above. The government doesn't contest satisfaction of this requirement.

We conclude that this requirement is satisfied. When a failure to properly instruct on murder affects the defendant's substantial rights, we ordinarily conclude that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Maryboy*, 138 F.4th 1274, 1295 (10th Cir. 2025). Moreover, the fairness or integrity of the proceedings is seriously affected when an instructional error is

coupled with substantial evidence supporting a defense. *See United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998) (stating that “the fairness or integrity of a defendant’s trial is ‘seriously affected’ when the defendant has presented substantial evidence in support of an affirmative defense which has been undermined by an erroneous instruction”).

We assess the fairness of the proceedings based on the instructions and the evidence. The jury was instructed on imperfect self-defense, which indicated that the court thought there was enough evidence to justify the instruction. We agree.³ Though Mr. Phillips didn’t testify, he presented substantial evidence of his inability to rationally assess the possible danger. He had post-traumatic stress disorder, which could affect his thinking; and the fight could have caused a traumatic brain injury, further affecting his mental processes. And he appeared disoriented according to his wife. Given this evidence, a properly instructed jury could have found imperfect self-defense. *See* pp. 11–12, 14–15, above. Coupled with the evidence of Mr. Phillips’ mental disturbance, the instructional errors on

³ To raise imperfect self-defense, Mr. Phillips bore the burden of production; but that burden was not onerous. *United States v. Britt*, 79 F.4th 1280, 1286 (10th Cir. 2023). That burden required the instruction if imperfect self-defense was “supported by some evidence and the law.” *Id.* (quoting *United States v. Beckstrom*, 647 F.3d 1012, 1016 (10th Cir. 2011)). In determining whether some evidence existed, we view the testimony and exhibits in a light “most favorable to the defendant.” *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014).

imperfect self-defense seriously affected the fairness or integrity of the proceedings.

We thus conclude that the district court committed plain error in its instructions on imperfect self-defense.

II. The district court didn't otherwise commit reversible error as to the charge of first-degree murder.

Given the possibility of a retrial, we consider Mr. Phillips' other challenges to his conviction for first-degree murder.

A. The district court didn't plainly err in instructing on diminished capacity.

These challenges include the jury instruction on diminished capacity. Defense counsel did not object to the instruction, so we apply the plain-error standard. *See* p. 5, above. Under this standard, Mr. Phillips needed to show an error that was clear or obvious. *See* pp. 5, 9–10, above.

The district court instructed the jury on diminished capacity, allowing consideration of Mr. Phillips' possible post-traumatic stress disorder and traumatic brain injury. In instructing the jury, however, the court explained that these conditions wouldn't provide a defense to second-degree murder or manslaughter. This explanation was right: Second-degree murder and manslaughter are general-intent crimes, which aren't subject to defenses involving mental defects. *See United States v. Brown*, 326 F.3d 1143, 1147 n.2 (10th Cir. 2003) ("The use of psychological or psychiatric evidence to negate an element of the

government's case is limited to offenses requiring proof of a specific intent.").

Granted, Mr. Phillips' mental condition could support heat of passion and imperfect self-defense, which served as defenses to the charge of first-degree murder. We assume for the sake of argument that the instructions could have more clearly explained the effect of Mr. Phillips' mental condition on heat of passion or imperfect self-defense. But the instructions didn't expressly bar the jury from considering the evidence of Mr. Phillips' mental condition or its impact on his defenses. So Mr. Phillips hasn't shown a clear or obvious error in the instructions on diminished capacity.

B. The prosecutor's closing argument doesn't require reversal of the conviction for first-degree murder.

Mr. Phillips also challenges the prosecutor's closing argument, asserting that it

- included improper examples of heat of passion and premeditation and
- asserted a personal opinion on guilt.

The statements in closing argument don't require reversal.

1. The prosecutor's examples of heat of passion and premeditation don't require reversal.

The government alleged premeditation, and Mr. Phillips attributed the shooting to heat of passion. The prosecutor gave examples of heat of

passion and premeditation, and Mr. Phillips argues on appeal that these examples were improper.

Heat of Passion

The prosecutor illustrated heat of passion with a scenario involving a husband killing his wife's lover. R. vol. 5, at 588. Defense counsel objected, and the district court overruled the objection.

Because the issue was preserved, we conduct de novo review. *United States v. Anaya*, 727 F.3d 1043, 1052 (10th Cir. 2013). Through such review, we consider whether the prosecutor's statement was improper; if it was, the government needed to prove that the improper statement was harmless beyond a reasonable doubt. *Id.*

Heat of passion is "a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force." *United States v. Currie*, 911 F.3d 1047, 1054 (10th Cir. 2018) (quoting *United States v. Serawop*, 410 F.3d 656, 664–65 (10th Cir. 2005)). Given this definition, Mr. Phillips argues that the prosecutor's statement was improper because people can act in the heat of passion even when they don't react immediately to a triggering event. For the sake of argument, we can assume that the prosecutor's statement was improper. With that assumption, we must consider whether the statement would be harmless.

The government needed to prove harmlessness beyond a reasonable doubt. *United States v. Farmer*, 770 F.3d 1363, 1365 (10th Cir. 2014). In assessing the government’s proof of harmlessness, we look “to the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole.” *United States v. Sierra-Ledesma*, 645 F.3d 1213, 1227 (10th Cir. 2011) (cleaned up). Applying these factors, we consider two factors in concluding that the prosecutor’s statement was harmless beyond a reasonable doubt.

First, the district court gave its own definition when instructing on heat of passion: “The term ‘heat of passion’ means a passion, fear, or rage in which the Defendant loses his normal self-control, as a result of circumstances that provoke such a passion in an ordinary person, but which did not justify the use of deadly force.” R. vol. 2, at 457–58, 462. We assume that the jury followed the court’s definition even if the prosecutor’s statement had been misleading. *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006).

Second, the disputed aspect of the prosecutor’s statement involved an ambiguity. The prosecutor illustrated heat of passion with an example of an angry spouse who acts immediately. But was the prosecutor also saying that heat of passion exists *only* when someone acts immediately? It’s impossible to say. *See Dodd v. Trammell*, 753 F.3d 971, 992 (10th Cir. 2013) (declining to interpret a prosecutor’s ambiguous remark to have its

“most damaging meaning” (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974))).

Given these two factors, we conclude that if the prosecutor’s statement had been improper, the impropriety would have been harmless beyond a reasonable doubt.

Premeditation

Mr. Phillips also challenges the prosecutor’s discussion of premeditation. In closing argument, the prosecutor illustrated premeditation with a last-minute decision about what kind of ice cream to buy. R. vol. 5, at 563–64. For the sake of argument, we may assume that this illustration was plainly improper. But Mr. Phillips didn’t object at trial. So even if the illustration were plainly improper, it wouldn’t require reversal unless it affected a substantial right. *See United States v. Fleming*, 667 F.3d 1098, 1103 (10th Cir. 2011).

To assess the possible effect on a substantial right, we consider the prosecutor’s statements in the context of the entire trial. *United States v. Lopez-Medina*, 596 F.3d 716, 738 (10th Cir. 2010). The context here includes the district court’s instructions and defense counsel’s own arguments about premeditation.

First, we consider the district court’s instructions. When the instructions are proper and tell the jury to rely on its understanding of the evidence rather than what the attorneys say, we ordinarily reject claims of

plain error in the closing arguments. *United States v. Vann*, 776 F.3d 746, 760 (10th Cir. 2015). These circumstances exist here because the district court correctly instructed the jury on the meaning of *premeditation*⁴ and explained that the prosecutor’s statements didn’t constitute *evidence*.⁵ We assume that the jury followed these instructions by applying the district court’s explanation for premeditation rather than drawing contrary meaning from the prosecutor’s example. *United States v. Gordon*, 173 F.3d 761, 769 (10th Cir. 1999).

Second, we consider defense counsel’s rejoinder to the prosecutor’s explanation. *See United States v. Gallagher*, 735 F.2d 641, 644 (1st Cir. 1984) (stating that defense counsel’s closing argument tended to neutralize the harm from the prosecutor’s remarks). Defense counsel responded to the prosecutor’s example, arguing to the jury that changing an ice cream order wouldn’t constitute *premeditation*. R. vol. 5, at 582.

⁴ The court properly instructed the jury that a killing is premeditated

- “when it is the result of planning or deliberation” and
- the “amount of time needed for premeditation of a killing depends on the person and the circumstances.”

R. vol. 2, at 577.

⁵ The district court instructed the jury to decide “based only on the evidence,” adding that “[t]he lawyers’ statements and arguments are not evidence.” R. vol. 2, at 565.

Given the district court’s instructions and defense counsel’s rejoinder, Mr. Phillips didn’t show an effect on his substantial rights from the prosecutor’s example of premeditation.

2. The prosecutor didn’t plainly express an opinion that Mr. Phillips was guilty of first-degree murder.

Mr. Phillips also alleges improper expression of a personal opinion about guilt on the charge of first-degree murder. During closing argument, the prosecutor said: “[W]e believe, and I believe and I submit to you, that these actions were premeditated, that they were intentional, that they were willful, and they were with malice aforethought.” R. vol. 5, at 564.

Mr. Phillips didn’t object, so we address these allegations under the plain-error standard. *United States v. Fleming*, 667 F.3d 1098, 1103 (10th Cir. 2011). Under this standard, Mr. Phillips must show that the statements were “plainly improper” and “affected his . . . substantial rights.” *Id.*; see p. 21, above.

A prosecutor can’t express a personal opinion that the defendant is guilty. *United States v. Little*, 119 F.4th 750, 785 (10th Cir. 2024). But people often preface remarks by using phrases like *I believe* or *We believe*. These prefatory remarks may simply suggest improvisation. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 646–47 (1974) (stating that “improvisation frequently results in syntax left imperfect and meaning less than crystal clear”). So we don’t rigidly characterize every statement like *I believe* or

We believe as an expression of a personal opinion. *See, e.g., United States v. Gabriel*, 715 F.2d 1447, 1451–52 (10th Cir. 1983) (stating that a prosecutor’s use of *I think* constituted a mannerism rather than an opinion about guilt); *United States v. Carleo*, 576 F.2d 846, 851–52 & n.1 (10th Cir. 1978) (characterizing a prosecutor’s use of the phrase *I think* as a mannerism).

Mr. Phillips urges a more rigid approach given the prosecutor’s use of *I* and *We*, relying primarily on five cases:

1. *United States v. Rios*, 611 F.2d 1335 (10th Cir. 1979)
2. *United States v. Ludwig*, 508 F.2d 140 (10th Cir. 1974)
3. *United States v. Latimer*, 511 F.2d 498 (10th Cir. 1975)
4. *United States v. Gonzalez Vargas*, 558 F.2d 631 (1st Cir. 1977)
5. *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979)

Appellant’s Opening Br. at 37–38.⁶

Rios did not address an opinion about guilt. There the prosecutor argued in closing that the defense attorney and his investigator had contrived testimony. 611 F.2d at 1342.

In *Ludwig*, the prosecutor relied in closing argument on his personal experience with the police officers as proof of their credibility:

⁶ Mr. Phillips also cites *United States v. Meinenberg*, 263 F.3d 1177 (10th Cir. 2001). Appellant’s Opening Br. at 37. In *Meinenberg*, the prosecutor conceded that he had asserted a personal opinion about guilt;

I'll conclude on this one note, ladies and gentlemen. I have seen police activity in New York; I've seen it in the Midwest and I've lived here the majority of my life and if there is one thing you can be proud of, ladies and gentlemen, it's the New Mexico State Police. I know that Mr. Martinez disagrees with me violently on that, but I know that there is one thing you can be proud of. It's the New Mexico State Police. It's the finest state police that I have personally seen. Those people do their job unswayed by any person who would like to sway them. That can't be said, I know personally, that can't be said of New York's police. I know personally that can't be said of a lot of the police forces in the Midwest. But I know personally that those police officers in the New Mexico State Police are people that you can be proud of and they do their job, no matter what the consequences to them, no matter the fact that they have to sit around for five days to be asked a question, like [one of the officers] was asked at the end of this trial.

508 F.2d at 142–43. Though the closing argument included references to the prosecutor's beliefs, we regarded the statements as improper only because the prosecutor had personally vouched for the state police. *Id.* at 143.

Latimer similarly rested on the prosecutor's argument about his personal knowledge of information outside the record. There the defendant contested a bank-robbery charge, arguing that the government had failed to present video evidence because it wouldn't have shown the robbery. 511 F.2d at 502–03. No one had presented any evidence about the content of the video. *Id.* But the prosecutor said in closing argument that he hadn't presented the video at trial because the camera malfunctioned and didn't

but we affirmed the conviction anyway, regarding the improper statement as “negligible.” *Meinenberg*, 263 F.3d at 1179–80.

capture the robbery, showing only an FBI agent's later arrival to investigate. *Id.* at 502. We concluded that this argument was “clearly improper” because it went “outside the record” with “statements as to facts not proven as to the malfunctioning of the camera” and depiction of “the FBI agent after the incident.” *Id.* at 503.

The closing argument in *Gonzalez Vargas* contained five references to the prosecutor's personal belief that he had proven an assault on two U.S. Marshals:

1. “I don't believe that there is any doubt that the Defendant did strike at these two persons.”
2. “I believe this also proved the caliber of the law enforcement officers that were there that day.”
3. “I personally believe that I have proven the case of the United States much more beyond a reasonable doubt as the law requires but beyond any doubt.”
4. “I personally believe that the United States has proven to you that the Defendant did strike these 2 people without just provocation.”
5. “What happened was, and I believe the testimony there in Court to prove it, that there was a demonstration and these 2 Marshals were hit by the Defendant.”

558 F.2d at 632–33.

The closing argument in *Garza* was also “grossly improper.” 608 F.2d at 661. That case involved drug charges, and the defendant claimed an alibi. *Id.* Given the claim of an alibi, the defendant's guilt hinged largely on the credibility of two government agents. *Id.* The prosecutor tried in

closing to bolster the agents' credibility, referring repeatedly to their innocent motives without pointing to any evidence about the agents' motives. *Id.* at 664. In addition, the prosecutor insisted that he wouldn't have participated in the case if the defendant's guilt hadn't been established. *Id.* at 664–65.

The closing argument here was far different from the arguments in these cases. Mr. Phillips' prosecutor didn't refer to anything outside the record; he simply said *I believe* and *We believe* in a single sentence when arguing that the shooting was premeditated and malicious. Despite these two references, the prosecutor didn't suggest that he was basing his argument on anything outside the evidence. *See United States v. Carleo*, 576 F.2d 846, 852 & n.1 (10th Cir. 1978) (rejecting a challenge to a prosecutor's use of *I think* because he wasn't trying to suggest access to information about the witnesses' credibility apart from what the jury had heard).

Mr. Phillips must show not only that the prosecutor had acted improperly, but also that the impropriety had been *plain*. *See* p. 23, above. The prosecutor did use two first-person pronouns (*I* and *We*), but the use of these pronouns didn't resemble the improprieties in the five cited cases, where we and other circuits had addressed repeated reliance on personal knowledge outside the record (*Latimer*), comments about the defendant's guilt (*Gonzalez Vargas* and *Garza*), vouching for the integrity of the

government's witnesses (*Gonzalez Vargas, Garza, and Ludwig*), and the creation of contrived facts (*Rios*). See *United States v. Harenberg*, 732 F.2d 1507, 1516 (10th Cir. 1984) (distinguishing *Rios* and *Ludwig* when the prosecutor's statements didn't involve emphatic vouching for witnesses or a contrived statement of facts); *United States v. Shelton*, 736 F.2d 1397, 1406–07 (10th Cir. 1984) (same).

Given the context of the prosecutor's two statements (*I believe* and *We believe*), we conclude that Mr. Phillips hasn't shown a plainly improper expression of personal opinion about guilt.

**Challenge to the Conviction for Using a Firearm
During and in Relation to a Crime of Violence**

The jury found Mr. Phillips guilty not only of first-degree murder, but also of both

- a lesser-included offense (using a firearm during and in relation to a crime of violence) under 18 U.S.C. § 924(c) and
- a greater-included offense (causing a person's death by using a firearm during and in relation to a crime of violence) under 18 U.S.C. § 924(j).

The parties agreed that these charges were multiplicitous, requiring dismissal of one of them.⁷ But the parties disagreed in district court on which charge to dismiss.

⁷ On appeal, the government argues for the first time that the charges weren't multiplicitous, relying on *United States v. Barrett*, 102 F.4th 60 (2d Cir. 2024). But the Supreme Court reversed *Barrett*, holding that Congress had not authorized a conviction for a single act when the

The government moved to dismiss the charge for the greater-included offense: causing a person's death by using a firearm during and in relation to a crime of violence (18 U.S.C. § 924(j)). Mr. Phillips didn't object; but he moved to dismiss the charge for the lesser-included offense, using a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c)). The court granted the government's motion and dismissed the charge for the greater-included offense, causing a person's death by using a firearm during and in relation to the course of a crime of violence. Mr. Phillips argues that the district court should instead have vacated the charge for the lesser-included offense. For this argument, we apply the abuse-of-discretion standard. *United States v. Lopez-Avila*, 665 F.3d 1216, 1218–19 (10th Cir. 2011).

When convictions are multiplicitous, the district court must generally vacate the charge or conviction for the lesser-included offense. *United States v. Morehead*, 959 F.2d 1489, 1507 (10th Cir. 1992). This general preference exists because the lesser-included offense ordinarily carries a lesser penalty. *See United States v. Peel*, 595 F.3d 763, 768 (7th Cir. 2010) (stating that “usually it’s the conviction carrying the lesser penalty that is vacated”). After all, “it would be paradoxical to give the defendant a

defendant (1) used a firearm during and in relation to a crime of violence and (2) caused a person's death by using a firearm during and in relation to a crime of violence. *Barrett v. United States*, 607 U.S. 128, 149 (2026).

shorter sentence than he would have received had the government not also charged him with the less serious offense.” *Id.*

But Mr. Phillips argues that he would have benefited from a sentence for the greater-included offense because of an anomaly in the statutory provisions: Concurrent terms were available only for the greater-included offense, not the lesser-included offense. *See* 18 U.S.C. § 924(c) (stating that a sentence must run consecutively when the defendant is convicted of using a firearm during and in relation to a crime of violence); *Lora v. United States*, 599 U.S. 453, 455 (2023) (holding that federal law doesn’t bar concurrent sentences for causing a person’s death by using a firearm during and in relation to a crime of violence). So Mr. Phillips argues that the district court should have kept the charge for the greater offense, with the more severe prison term, because the prison terms might have run concurrently.

When federal law anomalously produces a stiffer sentence on a lesser-included offense, the district court bears discretion on which charge to dismiss. *See United States v. Brown*, 151 F.4th 647, 655–56 (5th Cir. 2025) (stating that the trial court has discretion on which charge to vacate when an anomaly in the guidelines “produces a longer sentence on a duplicative lesser-included offense than the greater offense”). To assess that exercise of discretion, we consider the arguments presented to the district court. *See United States v. Faunce*, 66 F.4th 1244, 1258 (10th Cir.

2023) (“In determining whether the district court abused its discretion, we focus on what the parties had presented; after all, the court couldn’t abuse its discretion ‘by failing to consider facts not presented.’” (quoting *United States v. Rodriguez*, 858 F.3d 960, 963 (5th Cir. 2017))).

Mr. Phillips said nothing when the government moved to vacate the charge for the greater-included offense. And we have recently held that the district court didn’t err in dismissing a charge under § 924(j) (causing a person’s death by using a firearm during and in relation to a crime of violence) when the defendant would prefer to dismiss the multiplicitous charge under § 924(c) (using a firearm during and in relation to a crime of violence). *United States v. Beard*, No. 25-7031, slip op. at 24–27 (10th Cir. Aug. 3, 2026) (to be published). We reasoned that the government may “choose” to keep the conviction under § 924(c) rather than § 924(j). *Id.* at 27 (quoting *Barrett v. United States*, 607 U.S. 128, 145 (2026)). This reasoning is equally applicable here, and the district court didn’t abuse its discretion in dismissing the charge under § 924(j) rather than § 924(c).

Impact of Reversal on the Remaining Conviction

As discussed above, we’re reversing Mr. Phillips’ conviction for first-degree murder based on plain error in instructing the jury on imperfect self-defense. *See* Issues Involving the Conviction for First-Degree Murder: Part I, above. As noted, however, Mr. Phillips was also convicted and sentenced for using a firearm during and in relation to a

crime of violence. 18 U.S.C. § 924(c); *see* pp. 1–2, above. The parties haven’t briefed the impact of this instructional error on the conviction for using a firearm during and in relation to a crime of violence.⁸ Given the absence of briefing, the district court should address the issue on remand by determining whether the instructional error on imperfect self-defense taints Mr. Phillips’ conviction for using a firearm during and in relation to a crime of violence.

Conclusion

The district court committed plain error when instructing on first-degree murder by failing to tell the jury that the government needed to disprove imperfect self-defense beyond a reasonable doubt. The instructional error affected substantial rights because

- the issue involved an element of the government’s burden and
- the jury could have credited Mr. Phillips’ evidence of a mental disturbance and inability to rationally assess the possible danger.

⁸ Mr. Phillips treats his arguments on the jury instructions and closing arguments as challenges to his “conviction.” Appellant’s Opening Br. at 18, 43, 49; Appellant’s Reply Br. at 25. But the convictions involve not only first-degree murder, but also using a firearm during and in relation to a crime of violence. And Mr. Phillips frames his argument about imperfect self-defense as a challenge addressing only the conviction for first-degree murder. Given this framing, we have no briefing on whether reversal of the conviction for first-degree murder would affect the conviction for using a firearm during and in relation to a crime of violence.

But we reject his challenge to the instruction on diminished capacity. In our view, this instruction didn't expressly restrict consideration of Mr. Phillips' mental condition in relation to heat of passion or imperfect self-defense.

In addition, Mr. Phillips presents three challenges to statements in the prosecutor's closing argument. We reject these challenges. First, the prosecutor's example of heat of passion was brief and mitigated by the court's own definition. Second, the prosecutor's example of premeditation was brief and had little effect on the outcome. Third, the prosecutor's use of two personal pronouns didn't plainly express an improper personal opinion about guilt.

Finally, we reject Mr. Phillips' challenge to the choice of a remedy to cure the multiplicity in his charges. The district court dismissed the charge for the greater of the multiplicitous charges, and this choice was reasonable based on the arguments presented.

We therefore

- reverse the conviction for first-degree murder and
- remand for further proceedings consistent with this opinion.