2023 WL 4933971 (C.A.10) (Appellate Brief)
United States Court of Appeals, Tenth Circuit.

UNITED STATES OF AMERICA, Plaintiff/Appellee,
v.
Elijah Dewayne HICKS, Defendant/Appellant.

No. 23-7017.
July 26, 2023.

Appeal from the United States District Court for the Eastern District of Oklahoma,
The Honorable Bernard M. Jones, U.S. District Judge, Presiding
District Court Case No. CR-21-379-BMJ
Oral Argument is Requested

Opening Brief of Defendant/Appellant

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1** ***PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

Elijah Hicks, the Defendant/Appellant, was charged in a three-count indictment with multiple criminal violations of United States law, over which the district court had jurisdiction pursuant to 18 U.S.C. § 3231 and § 3242. After a jury trial resulted in a guilty verdict on each of three counts, the court entered judgment on March 2, 2023. (ROA Vol. 1 at 663) (Attachment 1). Mr. Hicks filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 15, 2023. *Id.* at 670. This Court has jurisdiction over this direct appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion by refusing to instruct that Mr. Hicks did not have to attempt retreat before he could successfully claim self-defense, and whether this omission was harmful given the prosecutor's emphasis at trial on Mr. Hicks' failure to retreat as evidence of guilt;

2. Whether the district court abused its discretion by refusing to instruct on the proper use of evidence of the alleged victim's prior violent acts to show Elijah Hicks' state of mind and reasonable fear of death or great bodily harm in support of his self-defense claim;

***2** 3. Whether the submission of a proposed jury instruction on the proper use of "prior violent act" evidence preserves the error for appeal, or whether the failure to raise an oral objection in court prior to instructing the jury limits this Court to plain error analysis. If this Court is limited to plain error review, whether the failure to instruct on the proper use of "prior violent act" evidence" constitutes plain error;

4. Whether instructing the jury that it can consider flight as "consciousness of guilt" constitutes an impermissible comment on the evidence that requires a new trial;

5. Whether the district court erred in finding second degree murder to be a crime of violence, requiring the reversal of Mr. Hicks' convictions for violating 18 U.S.C. § 924(c) in Count Two and 18 U.S.C. § 924(f) in Count Three;

6. Whether Elijah Hicks' convictions under 18 U.S.C. § 924(c) in Count Two and § 924(j) in Count Three violate the Fifth Amendment's Double Jeopardy Clause, requiring the reversal of Count Two as a lesser-included offense of Count Three;

7. Whether Elijah Hicks' failure to lodge a multiplicity or double jeopardy objection at sentencing limits this Court to plain error analysis, and if so, whether his convictions for both 18 U.S.C. § 924(c) in Count Two and § 924(j) constitute plain error.

STATEMENT OF THE CASE

a. The Indictment

The Government filed a three-count indictment on December 9, 2021 alleging that Elijah Hicks committed the following offenses: Count One, [second degree] ***3** murder in Indian country in violation of 18 U.S.C. § 1111(a); Count Two, use, carry, brandish, and discharge of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(i), (ii), and (iii); and Count Three, causing the death of a person in the course of a violation of Title 18 U.S.C. § 924(c). (ROA Vol. 1 at 12)

b. The district court determined that Second Degree Murder as alleged in Count One was a "crime of violence" and overruled Elijah Hicks' motion to dismiss the 18 U.S.C. § 924(c) charge in Count Two and the § 924(j) charge in Count Three.

Mr. Hicks' trial began on February 15, 2021, and lasted three days. (*See* trial transcript, *Id*. at 195-607. The Government presented evidence that on XX/XX/2021, Elijah Hicks intentionally shot and killed Timothy Buckley. Mr. Hicks did not dispute this at trial. His defense was that he knew Mr. Buckley to be a dangerous and violent person, particularly when intoxicated. Mr. Hicks asserted that he shot Mr. Buckley in self-defense to avoid serious injury to himself or Mr. Buckley's girlfriend, Jessica Harjo. Mr. Buckley had just assaulted Ms. Harjo on XX/XX and was about to attack Mr. Hicks when he was shot.

Prior to trial, Mr. Hicks filed a motion to dismiss Counts Two and Three pursuant to Fed. R. Crim. P. 12(b)(3)(B)(v) for failure to state an offense. *Id*. at 20. Both counts rely on 18 U.S.C. § 924(c)'s "crime of violence" element, which required the district court to find that second degree murder qualified as a crime of violence, and the jury was so instructed. *Id.* at 161. In light of *Borden v. United States,* 141 S.Ct. 1817 (2021), Mr. Hicks argued that under the categorical approach, second degree ***4** murder lacked the necessary culpability to constitute a "crime of violence" under 18 U.SC. 924(c). Second degree murder can be committed recklessly, and the *Borden* plurality determined that a crime permitting a conviction based on recklessness would not qualify as a crime of violence under the Armed Career Criminal Act. *Borden,* 141 S.Ct. at 1834. The same rationale applies to § 924(c). *See United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) ("Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause..."). The district court overruled Mr. Hicks' motion to dismiss and allowed both counts to proceed to trial. (ROA Vol. 1 at 62)

c. Facts leading to the shooting

On the evening of XX/XX/2021, Elijah Hicks and his cousin Jaylon Heneha were out celebrating Mr. Hicks' twenty-second birthday. It was near midnight when they walked past Elizabeth Buckley's house, which was located west of Okemah, Oklahoma, in Indian country. *Id*. at 227, 272, 331. Elizabeth's brother, Timothy Buckley, and his girlfriend, Jessica Harjo, were standing in the driveway. Mr. Buckley saw Mr. Hicks, who was his cousin, and yelled at him to "come here." *Id*. at 332. Mr. Hicks walked up to the driveway and the two men started "talking and laughing." *Id*. at 228, 332, 333. Jaylon Heneha soon left, leaving Mr. Hicks alone with Timothy Buckley and Jessica Harjo. *Id*. at 229, 335.

After a short time, Elizabeth saw Mr. Buckley and Mr. Hicks walk towards the road. It was then that the tone of the conversation changed. *Id*. at 337. According to ***5** Jessica Harjo, Mr. Buckley started an argument with Mr. Hicks. (ROA Vol. 1 at 453) Jessica Harjo testified that "[Timothy Buckley] was always wanting to fight." *Id*. at 453. He was a large and imposing six-foot-two, 281-pound man who angered easily. *Id*. at 363, 400.

Elizabeth heard Mr. Buckley bark at Mr. Hicks: "Was you talking shit about me?" *Id*. at 231, 337. Mr. Buckley was getting angry and was no longer speaking in a peaceful tone. *Id*. at 262. Elijah Hicks testified that Timothy Buckley warned him that

if he heard about Elijah Hicks talking about him again, he would kill Mr. Hicks. *Id*. at 495. Mr. Buckley then gulped down the beer he had been holding in his hand and threw it aside, freeing his hands as he moved towards Mr. Hicks. *Id.*

Elijah Hicks walked backwards as Timothy Buckley approached him. (ROA Vol. 1 at 338) Elizabeth Buckley sensed trouble and decided to "get [Timothy] and tell him to get in the car." *Id*. at 339, 356. She knew that her brother had been prone to violence in the past and thought it best to get him under control. *Id*. at 357. Mr. Buckley had a reputation as a violent drunk, and he was intoxicated on the evening of XX/XX/2021. Jessica Harjo testified that she and Mr. Buckley were "drinking a lot that night." *Id*. at 451. Mr. Buckley's blood alcohol level was later measured at over .13mg/dl. *Id.* at 388, 399; Defendant's Exhibit 12.

Jessica Harjo could also see that Mr. Buckley was losing control, and she tried to intercede and stop her boyfriend. *Id*. at 453. Elizabeth saw Mr. Buckley push Ms. ***6** Harjo away as Mr. Buckley continued to approach Mr. Hicks. (ROA Vol. 1 at 339) Ms. Harjo testified that Mr. Buckley hit her hard enough that she lost her balance and fell to the ground. *Id*. at 453. Mr. Hicks saw Mr. Buckley punch Ms. Harjo and kick her in the head after she fell, and Ms. Harjo testified that she blacked out after being hit. *Id*. at 454, 496.

Elizabeth Buckley was about five feet away from her brother when she saw Elijah Hicks take out a gun. (ROA Vol. 1 at 339) Mr. Buckley continued to move toward Mr. Hicks, who described Mr. Buckley as "running at me like a linebacker." *Id*. at 497-98. Thinking he was about to be attacked, Mr. Hicks shot Mr. Buckley in the chest and ran away. *Id.* Elizabeth Buckley thought she heard three or four shots. *Id*. at 342. Emergency personnel arrived and took Timothy Buckley to the hospital, but he never regained consciousness and died later that night. *Id*. at 345.

Dr. Jared Ahrendsen performed an autopsy on Timothy Buckley on August 9, 2021. (ROA Vol. 1 at 373, 377) He testified that Mr. Buckley had been shot at least four, and possibly five times. *Id*. at 390-96, 406. Mr. Buckley's cause of death was officially described as "acute multiple gunshot wounds to the torso." *Id*. at 387. His blood/alcohol level was measured at .13 ethyl level, and .14 vitreous fluid. *Id*. at 388, 399; Defendant's Exhibit 12. The medical examiner confirmed that at least one wound - to Mr. Buckley's kidney - likely occurred while he was leaning forward in the shooter's direction. *Id*. at 410.

***7** *d. Extensive evidence revealed that Timothy Buckley was violent and dangerous when he was drunk, and he was intoxicated when Elijah Hicks shot him.*

Elijah Hicks defended the charges against him by claiming self-defense. (ROA Vol. 1 at 160) Given that Timothy Buckley was unarmed, it was important for Mr. Hicks to explain to the jury why he reasonably believed that shooting Mr. Buckley was necessary to prevent death or great bodily harm to himself or Jessica Harjo. Mr. Hicks presented evidence of Buckley's violent reputation and evidence of numerous previous violent acts to assist the jury in determining who the aggressor was in the confrontation and the reasonableness of Elijah Hicks' actions.

Almost every witness agreed that Timothy Buckley had a reputation for violence, particularly when he was intoxicated. His blood alcohol level on the evening of the shooting was over .13 mg/dl. (ROA Vol. 1 at 225, 328, 452; Defendant's Exhibit 12) Even Mr. Buckley's mother, Eugenia Holahta, agreed that her son had a reputation as a violent and dangerous drunk. *Id*. at 260. She testified that it was so bad that Mr. Buckley "didn't hardly go to town." *Id.* However, when he wasn't drinking, "he wasn't mean at all." *Id.* Elizabeth Buckley agreed that her brother would anger easily when he was drunk. *Id*. at 363. He had been violent in the past and was a mean drunk. *Id.* She also admitted that Mr. Buckley would not listen to anyone when he was drunk. *Id.* at 364. However, she defended her brother by claiming that Mr. Buckley had not gotten violently drunk "recently." *Id.* at 363.

***8** Jessica Harjo testified that Timothy Buckley had beat her in the past and the beatings caused bruising. (ROA Vol. 1 at 454) He had kicked her in the head while he was wearing boots. *Id.* She admitted that there were two sides to Mr. Buckley and he was different when he was drunk. *Id.* at 455. A previous girlfriend, Manahwee [Alicia] Deere, testified that she had been in a

relationship with Mr. Buckley for "almost five years," until 2019, and she agreed with Ms. Harjo's description of Mr. Buckley. *Id*. at 464, 472. Mr. Buckley was mean when he was drunk and was a bully towards family members. *Id.* at 465. "It was always family." *Id.* at 469. Mr. Hicks was Mr. Buckley's cousin. *Id.* at 219.

Gabriel Ramirez had known Timothy Buckley for more than seven years. *Id*. at 476. Mr. Ramirez was aware of Mr. Buckley's reputation as "a violent drunk." *Id.* Mr. Ramirez explained that Mr. Buckley was known to always carry a knife or some type of weapon on his person. *Id*. at 477. He believed Mr. Buckley's reputation to be "very widely known." *Id.* Mr. Buckley also bragged to Mr. Ramirez about hurting people when he was in prison. *Id.* at 478.

e. Mr. Hicks testified about his extensive knowledge of Timothy Buckley's dangerous and threatening behavior.

Mr. Hicks testified extensively about what he had heard about Mr. Buckley and what he had seen him do. He was familiar with Mr. Buckley's violent behavior when he was intoxicated. *Id*. at 488. Timothy Buckley bragged to Elijah Hicks that he shot Alicia Deere in the face because "he pissed her off." [sic] *Id.* at 489. Mr. Hicks knew ***9** that Mr. Buckley had served time in prison, and he believed it was due to that shooting. (ROA Vol. 1 at 490) Mr. Buckley would tell Mr. Hicks about how tough he was in prison and how he "beat several people up" and stomped someone's face in. *Id.* at 494. Mr. Buckley "never knew if they survived." *Id*. Mr. Hicks knew that Mr. Buckley carried weapons because he saw the weapons and he saw Mr. Buckley use them. *Id.* at 491-92. Once, Elijah Hicks saw Mr. Buckley stab Dylan Coon, one of Elijah's friends, "but it didn't puncture him." *Id.* at 492. He saw Mr. Buckley hold a knife up to Gabriel Ramirez's neck. *Id.*

Elijah Hicks had his own problems with Timothy Buckley and his violent nature. On two prior occasions, Mr. Buckley personally assaulted Elijah Hicks by punching him multiple times. *Id.* at 493. He beat Elijah Hicks once as he lay sleeping. *Id.* Another time, Mr. Buckley hit Mr. Hicks and took money from him. *Id.* All of these things ran though Mr. Hicks' mind on XX/XX/2021, as he saw the large, drunk, and angry man lunge towards him. *Id.* at 496.

f. The district court failed to provide the jury with the instructions Elijah Hicks requested in support of his theory of self-defense.

Mr. Hicks presented three jury instructions that were vital to his defense. The first was an instruction on self-defense or defense of another, the second was an instruction on Mr. Buckley's reputation for violence, and the last was an instruction on Mr. Buckley's prior violent acts. *Id*. at 91, 94, 95; Defendant's Proposed Jury Instructions 3, 5, and 6) (Attachment 2) None of the instructions were given as ***10** offered, and the district court provided no jury instruction whatsoever addressing the jury's consideration of Mr. Buckley's prior violent acts and how this affected Mr. Hicks' state of mind and fear of Mr. Buckley at the time of the shooting.

The court gave a self-defense instruction, but failed to include requested language that would have informed the jury Mr. Hicks had no legal duty to retreat. (ROA Vol. 1 at 160) The court's violent reputation instruction failed to include requested language explaining that "the law recognizes that one with a reputation for violent behavior may be more likely to provoke or assume the character of the aggressor in an encounter." *Id.* at 153. Finally, the court failed to give a proffered instruction to the jury explaining how Mr. Buckley's prior acts of violence were relevant to Mr. Hicks' state of mind and how it was reasonable for him to believe that the amount of force used was necessary to prevent death or great bodily harm to himself or another. The proffered instruction would have also advised the jury that it did not matter if the violent acts happened, as long as Elijah Hicks *believed* that they happened.

g. The district court emphasized Elijah Hicks' failure to remain at the scene of the shooting with a jury instruction that advised the jury that it could consider flight as consciousness of guilt.

After shooting Timothy Buckley, Elijah Hicks fled the scene, and he remained at large for over three months, until December 4, 2021. *Id*. at 505. Mr. Hicks testified that he ran because he was afraid and did not think that anyone would believe him. ***11** *Id.* at 505-506. He stopped using his cell phone and social media accounts during this period. (ROA Vol. 1. at 505)

The district court submitted a flight instruction to the jury over defense counsel's objection. (ROA Vol. 1 at 537-38) In part, the instruction advised the jury: "Evidence that a defendant fled is a circumstance that, if proven beyond a reasonable doubt, can be considered by the jury as a showing of consciousness of guilt on the part of the Defendant." *Id.* at 154.

h. The district court instructed the jury on both 18 U.S.C. § 924(c) and § 924(j) and Elijah Hicks was convicted and sentenced for both counts.

18 U.S.C. § 924(j) relies upon § 924(c), which prohibits using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence. *See* 18 U.S.C. § 924(c)(1)(A). 18 U.S.C. § 924(j) adds an element: that the 924(c) actions "caused the death of a person through the use of a firearm." In Mr. Hicks' case, prior to trial, defense counsel filed a motion to dismiss Count Two as multiplicitous pursuant to Fed. R. Crim. P. 12(b)(3)(B)(ii). *Id*. at 26. Although the district court refused to grant the motion, the court and the prosecution agreed that given Count Two's status as a lesser-included offense of Count Three, Count Two should be dismissed prior to sentencing. *Id.* at 26, 43, 64. Unfortunately, at sentencing, neither party reminded the court of its pretrial resolution of the motion and Elijah Hicks was convicted and sentenced in both Counts Two and Three. *Id*. at 663; Vol. 3 at 56.

***12** *i. The district court imposed a guideline sentence of 360 months in prison*.

There were no objections by either party to the presentence investigation report. (ROA Vol. 3 at 36-37) The district court adopted the PSR findings, resulting in an offense level of 38, a criminal history category of I, and a guideline range of 235 to 293 months "as to Counts 1 and 3 and ten years as to Count 2, which is to run consecutively to terms imposed for Counts 1 and 3." *Id.* at 36. Elijah Hicks filed a motion for a non-guideline sentence. (ROA Vol. 1 at 609) In particular, he asked the court to consider Timothy Buckley's violent history (and Elijah Hicks' knowledge of that history) as a factor for a non-guideline sentence pursuant to U.S.S.G. § 5K2.10. *Id.* at 619. The district court failed to consider any of Timothy Buckley's prior conduct, focusing exclusively on what happened during the altercation. The court questioned whether "[Mr. Buckley's] words alone [were] a sufficient basis to kill someone" and "struggled to identify mitigating factors" in this case. (ROA Vol. 3 at 48.55) The court ultimately concluded after hearing argument that "I have yet to identify anything that would suggest to me that any sentence below the guidelines is appropriate in this circumstance. I just don't see it at all." *Id.* at 51.

The district court sentenced Elijah Hicks to a term of 240 months in the Bureau of Prisons on each of Counts Two and Three and ordered the two sentences to run concurrently. The court imposed a consecutive sentence of 120 months in Count Two for an aggregate term of 360 months. *Id*. at 56.

13** ***SUMMARY OF THE ARGUMENT

Elijah Hicks' right to argue self-defense was significantly impaired by instructional errors. The district court refused to instruct the jury that Mr. Hicks did not have to attempt retreat before he could lawfully defend himself. During the presentation of evidence and closing argument, the Government emphasized Mr. Hicks' failure to retreat as evidence that he was *not* acting in self-defense when he shot Timothy Buckley. Although the court instructed the jury on the relevancy of Timothy Buckley's violent reputation to determine who the aggressor was in the confrontation, the court refused to instruct the jury that Mr. Buckley's prior acts of violence were relevant to show Mr. Hicks' state of mind at the time of the shooting. Mr. Hicks was aware of these violent acts, and for that reason, he feared for his safety and the safety of Mr. Buckley's girlfriend, Jessica Harjo. This was

essential for the jury to understand that Mr. Hicks reasonably believed that the force used was necessary to prevent great bodily harm to himself or another.

By instructing on flight as "consciousness of guilt," the district court improperly commented on the evidence. There is simply no reason for the court to emphasize that any evidence presented by the Government permits the jury to infer a defendant's guilt. While the prosecutor is certainly free to make the argument, it is not the court's job to point out evidence of a defendant's guilt. It is the jury's ***14** responsibility to determine whether a defendant is guilty or not guilty, and the jury did not require the judge's help in identifying incriminating evidence.

Elijah Hicks should not have been convicted in Counts Two and Three because second degree murder is not a "crime of violence" as contemplated by 18 U.S.C. § 924(c). At the very least, Mr. Hicks should not have been convicted in *both* Counts Two and Three, as 18 U.S.C. § 924(c) is a lesser-included offense of § 924(f). Prior to trial, defense counsel argued that a conviction and sentence for both counts would violate the Fifth Amendment, and the Government did not dispute this. The court agreed to dismiss Count Two prior to sentencing but failed to do so.

ARGUMENTS

1. It was reversible error for the district court to refuse to instruct the jury that Elijah Hicks did not have to attempt retreat before lawfully acting in self-defense. The instruction given inadequately described Mr. Hicks' theory of defense and denied him the right to a fair trial. [1]

A. Standard of Review

This Court reviews a district court's refusal to give a jury instruction for an abuse of discretion, and in reviewing that discretion, it examines all the jury instructions *de novo* to determine whether they accurately state the law. ***15** *United States v. Cushing,* 10 F.4th 1055, 1073 (10th Cir. 2021), citing to *United States v. Moran,* 503 F.3d 1135, 1146 (10th Cir. 2007).

The failure to properly instruct on a theory of defense has constitutional implications. *California v. Trombetta,* 467 U.S. 479, 485 (1984) (Due process affords a defendant the meaningful opportunity to present a complete defense.). A constitutional error is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24 (1967).

B. Elijah Hicks' failure to retreat was an integral part of the Government's case. The district court's refusal to properly instruct the jury that Mr. Hicks did not have to prove he attempted to retreat before he acted in self-defense was prejudicial error.

The district court instructed the jury on self-defense pursuant to Tenth Circuit Pattern Instruction 1.28. (ROA Vol. 1 at 160) There was critical language missing from the pattern instruction. *Id*. at 160. Mr. Hicks asked for the self-defense instruction to include the following language:

> The law does not impose a duty to retreat, to determine if retreat is a reasonably available option, or to determine whether other alternatives are reasonably available, before using force which is intended or likely to cause death or bodily harm.

Id. at 91; 538-39.

Although this language is not contained in the pattern instruction, it is the law: "Self-defense only requires the defendant's reasonable belief that deadly force was ***16** necessary, not that he exercised a duty to retreat or recognize the unavailability of reasonable alternatives." *United States v. Toledo,* 739 F.3d 562 (10th Cir. 2010). Under the facts of Mr. Hicks' case, the language contained in the pattern instruction was deficient. Just because there is a self-defense pattern instruction does not require that it be given as written in every self-defense case. The Introductory Note to the Tenth Circuit Pattern Instructions provides: "The Committee notes that ...[the pattern instructions] *never* need to be given verbatim..." (emphasis added). [2]

This Court has recognized that district judges may not doggedly rely upon pattern instructions, regardless of the evidence presented during trial. Jury instructions must be tailored to the peculiar facts of each case. "While pattern instructions provide valuable guidance to the trial courts, over-reliance may produce instructions unsuited to the particular case." *United States v. Lofton,* 776 F.2d 918, 922 (10th Cir. 1985) (Although heat of passion was addressed in the lesser-included manslaughter instruction, the jury was not instructed as to the requirement to prove the absence of heat of passion in the murder instruction. This Court found plain error.). "Standard form instructions should 'not be swallowed whole'; they are designed 'as an aid to the preparation of an appropriate instruction in the particular case ...Each case has its own peculiar facts and formalized instructions must be tailored to the requirements of the facts and issues.'" *United States v. Steele*, 685 F.2d 793, 809 (3d Cir. 1982).

***17** In *United States v. Pedigo,* 12 F.3d 618 (7th Cir. 1993), the defendant was charged with conspiracy to distribute marijuana. At trial, he claimed that he was not a member of the conspiracy and was only a "buyer." The court gave a standard conspiracy instruction but refused the defendant's proposed instructions that a buyer-seller relationship, standing alone, did not prove his guilt. Although the jury received an accurate instruction defining conspiracy, the Seventh Circuit found that the jury was inadequately instructed on the defendant's theory of defense under the facts of the case. The court reversed, finding that the defendant had been denied the right to a fair trial. *Pedigo,* 12 F.3d at 626.

"It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such a full statement, when the jury consequently fall into error, is sufficient reason for reversal." *Bird v. United States,* 180 U.S. 356, 361 (1901) (reversing murder conviction, in part, based upon an erroneous definition of self-defense). Mr. Hicks' jury was only given part of the law relating to self-defense, and under the facts of this case, it was insufficient.

The error was not harmless. The prosecutor emphasized Mr. Hicks' failure to retreat multiple times during his cross-examination, and again in closing. During his questioning of Elijah Hicks, the prosecutor provided a great deal of commentary critiquing his failure to retreat:

***18** Q. (BY MR. BUCCA) You gave us a lot of testimony about how dangerous and how afraid you were of Timothy. Do you remember that testimony?

A. [BY MR. HICKS] Yes.

Q. You could have chosen not to engage with this guy; right? You could have just gone to the party and not stopped?

A. It would have only made it worse.

Q. You don't know that. * * * [I]t can't get much worse than having to kill somebody, can it? (ROA Vol. 1 at 515)

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Q. As it turns out, no pistol, no knife; right?

A. I didn't know that at the time.

Q. And that's all the more reason for you to not stop and keep going up to the party where your friends were, where you were safer. [3] *Id*. at 516.

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Q. There was no one standing behind you [when Timothy stepped towards you], was there?

A. Not that I know of.

Q. With no effort at all you could have walked right back in the direction you came, couldn't you?

A. I was never going to turn my back on him.

Q. Could have backed up, right?

A. Yeah, I did.

***19** Q. Could have turned around and ran; right? *Id*. at 519-20.

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Q. Okay. You could have tried to run?

A. I wasn't going to take that chance. [4] (ROA Vol. 1 at 520)

Given this exchange, Mr. Hicks' counsel anticipated that the Government would place emphasis on Elijah Hicks' failure to retreat in closing. Defense counsel unsuccessfully asked the district court to order the Government to refrain from any such argument. *Id*. at 542. The prosecutor claimed that he was entitled to argue that Mr. Hicks' failure to "walk away" from the confrontation was relevant. *Id.* The prosecutor also objected to Mr. Hicks' proposed instruction that would have advised the jury that there was no duty to retreat. *Id*. at 539. In fact, the prosecutor preferred that no self-defense instruction be given at all and lodged an objection to the instruction. *Id.*

In closing, the prosecutor reviewed all of Elijah Hicks' alternatives to shooting Mr. Buckley as the large and intoxicated man charged towards him, from punching Mr. Buckley to calling the police on his cell phone. *Id*. at 591. The prosecutor reminded the jury that "[Mr. Hicks] could have just walked away, but that's not what ***20** he chose to do. No one was behind him. He told you, no one was behind him, nothing was stopping him from walking away. But instead, he chose to take Timothy's life." (ROA Vol. 1 at 592) During closing argument, defense counsel advised the jury that his client had no duty to retreat *Id*. at 576, but "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky,* 450 U.S. 288, 304 (1981) (citing to *Taylor v. Kentucky,* 436 U.S. 478, 489 (1978).

Reversible error occurred because the jury was left not knowing that Mr. Hicks had no duty to retreat, and the prosecutor heavily emphasized the fact that Mr. Hicks failed to attempt retreat before shooting Mr. Buckley. Given the prosecutor's questions and argument, the jury could have hardly ignored Elijah Hicks' failure to retreat as a basis for conviction. As the law does not impose a duty to retreat when one claims to have acted in self-defense, reversal is required so that the case can be tried before a properly instructed jury.

***21 2. The district court's refusal to instruct on the use of Timothy Buckley's "Prior Violent Acts" evidence prevented the jury from proper consideration of his self-defense claim.** [5]

A. Standard of Review

The standard of review is dependent upon whether this Court finds the issue properly preserved.

a. The error was preserved.

The district court refused to give the "Prior Violent Acts" instruction in spite of defense counsel's specific request for the instruction. (ROA Vol. 1 at 94) This Court reviews a district court's refusal to give a jury instruction for an abuse of discretion, and in reviewing that discretion, it examines all the jury instructions *de novo* to see whether they accurately state the law. *United States v. Cushing,* 10 F.4th 1055, 1073 (10th Cir. 2021), citing to *United States v. Moran,* 503 F.3d 1135, 1146 (10th Cir. 2007). "We reverse only if prejudice results from a court's refusal to give a requested instruction." *United States v. Faust,* 795 F.3d 1243, 1251 (10th Cir. 2015) (internal quotation marks omitted). The failure to properly instruct on a theory of defense has ***22** constitutional implications as well. Due process requires that criminal prosecutions "comport with prevailing notions of fundamental fairness" and that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). A constitutional error is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24 (1967).

This is not a case where the issue of an omitted instruction is being raised for the first time on appeal. On February 1, 2022, the district court ordered that any requested jury instructions be submitted by February 7, 2022. In compliance with the court's order, defense counsel submitted an instruction (among others) advising the jury as to the proper use of evidence relating to the alleged victim's prior violent acts. (ROA Vol. 1 at 95) (Attachment 2) Defense counsel cited case authority in support of the instruction when it was submitted. *Id.* Fed. R. Crim. P. 30 "does not require a defendant to continue to argue with the court once the issue has been presented and ruled upon." *United States v. Pedigo,* 12 F.3d 618, 626 (7th Cir. 1993) ("By proposing the [instruction] and citing supporting authority, the defendant made his record."). The district court in Mr. Hicks' case declined to instruct the jury as requested and none of the final instructions submitted to the jury addressed the relevance of Mr. Buckley's specific acts of violence to Elijah Hicks' state of mind and the reasonableness of his belief that he was acting in self-defense or defense of others. *Id*. at 139.

***23** The "prior violent act" issue was thoroughly briefed at the district court level. The Government filed a motion in limine to prevent the jury from knowing anything about Timothy Buckley's violent criminal past, which included two domestic assault and battery convictions and a felony conviction for assault and battery with a dangerous weapon. (ROA Vol. 1 at 98, 102) Defense counsel filed a response citing statutory authority and case law in support of the relevancy of the prior violent act evidence. *Id*. at 98, 102-106. The district court acknowledged the issue and deferred a decision until trial. *Id*. at 115. During trial, the court waited until immediately prior to Elijah Hicks' testimony before deciding whether it would admit the "prior violent act" evidence. At this time, defense counsel reminded the court of Mr. Hicks' previously submitted proposed "Prior Violent Acts" instruction and how the evidence was proffered to show his state of mind at the time of the shooting. *Id*. at 483. The district court specifically recognized this as "critical to [Mr. Hicks'] self-defense theory." *Id.* at 484. At least one court has

held that when a pretrial motion was filed and ruled upon addressing an instruction issue, the subsequent failure to specifically object to the instruction does not constitute waiver on appeal. *See United States v. Rodriguez,* 465 F.2d 5, 8-9 (2d Cir. 1972) (dealing with a question of venue). The court ruled that Mr. Hicks' theory of defense was supported by the law and permitted testimony from Elijah Hicks about Timothy Buckley's prior violent acts. *Id*. at 485. It was reversible error for the court to fail to instruct the jury on the proper use of that evidence.

***24** Finally, defense counsel's failure to reassert his request for the "Prior Violent Acts" instruction or object to the court's failure to give the requested instruction was not entirely counsel's fault. Fed. R. Crim. P. 30(b) obligates the district court to inform the parties prior to closing arguments how it intends to rule on any requested instructions, and the district court failed to comply with this rule. [6] The court never formally ruled on the "Prior Violent Acts" instruction as required. As a result, defense counsel made no specific oral objection to the court's ruling, because there was no ruling to object to.

Courts have stated that "[T]he crux of Rule 30 is that the district court be given notice of potential errors in the jury instructions, not that a party be 'required to adhere to any formalities of language and style to preserve his objection on the record.'" *United States v. Russell,* 134 F.3d 171 (3d Cir. 1998), citing *United States v. O'Neill,* 116 F.3d 245, 247 (7th Cir. 1997); *2A Charles Alan Wright, Fed. Prac. & Proc.* § 484 (3d ed. 2000). Once this Court thoroughly examines the record made concerning the "prior violent acts" issue both before and during trial, there can be no doubt that the court was fully apprised of the arguments from both parties. After reading briefs citing to legal authority and hearing the arguments of counsel, the court chose to ***25** reject the proffered instruction, and that decision should be reviewed for an abuse of discretion.

b. The failure to submit the requested instruction constitutes plain error.

Even if this Court concludes the alleged error to be unpreserved, the error was plain. To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Zubia-Torres,* 550 F.3d 1202, 1208 (10th Cir. 2008). In this context, plain error is error that affects a defendant's right to a fair and impartial trial by a properly instructed jury. *United States v. Garcia*, 2023 WL 4341599, *36 (10th Cir. July 5, 2023).

It was error for the district court to refuse to instruct on a critical aspect of Mr. Hicks' self-defense claim. The general rule in a criminal case is that instructions are erroneous if they exclude from jury consideration an affirmative defense as to which evidence has been received. *See Griego v. United States*, 298 F.2d 845, 849 (10th Cir. 1962) (conviction for receipt, concealment, or sale of heroin reversed because defendant's "lack of knowledge" defense was impaired by improper instructions). The jury instructions as given indicated that evidence relating to Timothy Buckley's violent acts was only relevant as to his reputation, rather than to show Mr. Hicks' state of mind. While the jury was provided a general instruction on Mr. Hicks' theory of defense, the self-defense instruction was flawed because it was missing critical ***26** language. By not instructing the jury as requested, the jury was further misled by Jury Instruction 12, which limited the relevance of a violent reputation to a determination as to who was the aggressor. (ROA Vol. 1 at 153) This Court must presume that the jury followed the court's instructions "in the absence of an overwhelming probability to the contrary." *United States v. Garcia,* 2023 WL 4341599, *26 (10th Cir. July 5, 2023).

Error is considered "plain" if it is obvious or clear, i.e., if it is contrary to well-settled law. *See United States v. Milton*, 62 F.3d 1292, 1294 (10th Cir. 1995). The question as to whether the so-called "reverse 404(b)" evidence rule is applicable is not the question to be decided, as the court ruled in Mr. Hicks' favor and the Government failed to appeal this decision. The obvious and clear issue is Mr. Hicks' right to have the jury properly instructed on his theory of defense when the court has found the evidence sufficient to support the instruction. *United States v. Beckstrom,* 647 F.3d 1012, 1016 (10th Cir. 2011).

The error affected Mr. Hicks' substantial rights. Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." 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. *See United States v. Duran,* 133 F.3d 1324, 1330 (10th Cir. 1998) (citing to *United States v. Olano,* 507 U.S. 725, 734 (1993)). The jury could have believed ***27** everything that it heard about violent acts committed by Timothy Buckley, and not understood how this affected Mr. Hicks' state of mind, which was essential to establishing his lawful justification for shooting Buckley. The error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano,* 507 U.S. 725, 734 (1993).

B. Since the jury was instructed on violent reputation evidence, the absence of an instruction on violent acts suggests that jurors likely used Timothy Buckley's violent history solely to determine whether he was the aggressor.

In his "Proposed Jury Instruction Number Six", Mr. Hicks requested that the court instruct the jury:
You have heard evidence of prior violent acts engaged in by Timothy Buckley that occurred at times other than the offense date of XX/XX/2021. You may consider that evidence only as it bears on the defendant's state of mind at the time of the shooting and whether it was reasonable for him to believe that the amount of force used was necessary to prevent death or great bodily harm to himself or another. It is the government's burden to prove beyond a reasonable doubt that defendant did not act in self-defense or defense of another.

It does not matter whether Timothy Buckley engaged in the violent acts or not. However, the defendant must have known of the violent acts at the time of the shooting and believed that the acts occurred for the evidence to be relevant to his state of mind. [7]

(ROA Vol. 1 at 95)

***28** The jury was instructed that it could use the violent "reputation" evidence for the sole purpose of weighing who the aggressor was in the confrontation. (ROA Vol. 1 at 153) When evaluating the significance of an omitted instruction that accurately states the law, the omission "may be evaluated by comparison with the instructions that were given." *Cupp v. Naughten,* 414 U.S. 141, 147, 155 (1973). The aggressor instruction exacerbated the error caused by the omission of the requested "Prior Violent Acts" instruction. Standing alone, the aggressor instruction improperly suggested that the *only* use for the evidence of Timothy Buckley's violent history was to determine who the aggressor was.

The jury was not provided any instruction regarding how Timothy Buckley's specific acts of violence - towards Mr. Hicks and others - could be used to explain Mr. Hicks' state of mind, and justifiable fear of Buckley, at the time of the shooting. This was essential for the jury to understand why Elijah Hicks pulled the trigger before Mr. Hicks confirmed his fear that Buckley was armed, or why he did not wait for Buckley to start beating him up before shooting him. This prevented the proper consideration of Mr. Hicks' self-defense evidence. *See generally United States v. Al-Rekabi,* 454 F.3d 1113, 1121 (10th Cir. 2006). "[A] defendant is entitled to a jury instruction if the request is timely, the evidence supports the instructions, and the proffered instruction correctly states the law." *United States v. Brown,* 33 F.3d 1002 (8th Cir. 1994) (reversing for failure to give a requested accessory after the fact ***29** instruction). This issue must be evaluated without weighing the evidence against Mr. Hicks. A defendant's right to an instruction that accurately states his theory of defense is not "cancelled" by a strong government case against him. *United States v. Opdahl,* 930 F.2d 1530, 1535 (11th Cir. 1991) (reversal for failing to properly instruct on defendant's theory of defense); *United States v. Sotelo-Murillo,* 887 F.2d 176 (9th Cir. 1989) (reversal for failure to instruct on entrapment defense).

In *United States v. Armajo,* 38 F.4th 80 (10th Cir. 2022), this Court confirmed that evidence of a victim's prior violent acts is admissible to prove a defendant's state of mind in a self-defense case. *Id.* at 86. *Armajo* did not address jury instructions.

Instead, the decision dealt primarily with the application of Fed. R. Evid. 403 to 404(b) evidence of an alleged victim's previous violent conduct when self-defense has been asserted as a defense. There are significant differences in the application of standard 404(b) law when the "prior bad acts" are not the defendant's prior bad acts. For example, Tenth Circuit Pattern Instruction 1.30 (Similar Acts) is typically referred to as a "limiting" instruction designed to protect a *defendant* from jurors' use of the prior bad act evidence as improper character evidence. *See United States v. Dudek*, 560 F.2d 1288, 1296 (6th Cir. 1977) (Rule 404(b)' s prohibition finds its source in the common law protection of the criminal defendant from risking conviction on the basis of impermissible character evidence).

***30** Protecting the defendant is of no concern when it is the *defendant* who seeks to present evidence of a prior "bad act" committed by an uncharged third party to prove some fact pertinent to his defense. The specific instances of Timothy Buckley's violent conduct were very relevant to demonstrate *why* Elijah Hicks shot Timothy Buckley. Had the jury been instructed as requested, it would have known that the violent acts known to Mr. Hicks had direct relevancy as to why he believed that his actions were "necessary to prevent death or great bodily harm to himself or another." (ROA Vol. 1 at 95) The requested instruction was not a "limiting instruction" at all; it was just the opposite. The proposed instruction advised the jury that it could use evidence of Buckley's history of violence for an additional - and incredibly relevant - purpose not otherwise addressed in the court's instructions.

The error was not harmless. In his final closing, the prosecutor argued:

> Reasonable fear. Let's talk about whether or not, if this defendant even experienced fear, whether it was reasonable, because that's what this is going to come down to. He testified, the defendant testified that over the course of his entire life twice Timothy was punching on him, his words from the stand, not mine, "punching on him." What is the reasonable use of force with respect to being punched on? It's punch him back. It's not pulling out a gun and killing him.

Id. at 589-90.

The prosecutor's argument suggested that because the only force previously used on Elijah Hicks by Timothy Buckley was with Buckley's fist, the only reasonable force that could have been used by Elijah on XX/XX/2021 was to punch him back. ***31** The instruction offered by defense counsel would have clarified the law; that all violent acts known to Elijah Hicks could be considered in evaluating the reasonableness of his response in self-defense or defense of others.

Finally, the proffered instruction emphasized the significance of Elijah Hicks' *personal* belief, which was missing from the jury instructions given by the court. The "Prior Violent Acts" instruction advised the jury: "It does not matter whether Timothy Buckley engaged in the violent acts or not. However, the defendant must have known of the violent acts at the time of the shooting and believed that the acts occurred for the evidence to be relevant to his state of mind." (ROA Vol. 1 at 95) The jury was likely left with the erroneous impression that for whatever reason, it was the defendant's obligation to prove that Timothy Buckley actually committed these violent acts.

"When a defendant has presented sufficient evidence to warrant an instruction on the theory of self-defense, the elements of the defense should be *fully* defined." *United States v. Corrigan,* 548 F.2d 879, 883 (10th Cir. 1977) (emphasis added). Although the reason for reversal in *Corrigan* was related to the burden of proof for self-defense rather than the defendant's state of mind, the case teaches an important lesson: When there is doubt as to whether a jury correctly applied self-defense law, the prudent course is to retry the case before a properly instructed jury. The *Corrigan* court concluded: "We cannot say that the jury [misapplied

the burden of proof] in view of ***32** the general instruction, but the possibility is too great to allow the conviction to stand." *Id.* at 884. Generally, the state of mind necessary for one to act in self-defense is based solely upon what the alleged victim was doing at the time the defendant was acting in self-defense. The proffered "Prior Violent Acts" instruction made it clear that Timothy Buckley's prior violent acts - *and not just those directed towards Elijah Hicks* - could be considered in determining Mr. Hicks' state of mind.

3. By instructing the jury that flight may be considered as consciousness of Elijah Hicks' guilt, the district court improperly commented on the evidence, encouraging the jury to infer guilt from the fact that Mr. Hicks ran after the shooting. [8]

A. Standard of Review

If an objection to an individual jury instruction is made "before the jury retires to deliberate," this Court reviews the propriety of the instruction *de novo*. Fed. R. Crim. P. 30(d); *see also United States v. Sasser*, 974 F.2d 1544, 1551 (10th Cir. 1992); *United States v. Garcia*, 2023 WL 4341599, *36 (10th Cir. July 5, 2023).

****33** B. There was no reason for the court to emphasize evidence that Mr. Hicks fled the scene of the shooting. The instruction was better suited to a prosecutor's closing argument than an instruction on the law.*

Elijah Hicks ran after shooting Timothy Buckley, and he remained at large for over three months, until December 4, 2021. (ROA Vol. 1 at 505) He testified that he ran because he was afraid and did not think that anyone would believe him. *Id*. at 505-506. He stopped using his cell phone and social media accounts during this period. *Id*. at 505. The court instructed the jury, in part, that it could consider flight as "consciousness of guilt" if the Government proved beyond a reasonable doubt that Elijah Hicks fled. *Id*. at 154.

The Supreme Court has counseled courts to be wary of the probative value of flight evidence. *See Wong Sun v. United States,* 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."). This Court has not approved a "flight" instruction as part of the Tenth Circuit Pattern Instructions. However, this Court also has yet to find error in a district court's decision to instruct on flight. *See United States v. Slater,* 971 F.2d 626, 636 (10th Cir. 1992) (finding no double jeopardy violation from flight instruction); *Kreuter v. United States,* 376 F.2d 654, 657 (10th Cir. 1967). [9]

***34** A number of federal courts that have directly confronted the question agree that the better practice is *not* to give a flight instruction. *See United States v. Rodriguez,* 53 F.3d 1439, 1451 (7th Cir. 1995) (flight instruction should be given with caution, if at all); *United States v. Williams,* 33 F.3d 876, 879 (7th Cir. 1994) (better practice not to instruct as suggested in circuit pattern jury instructions); *United States v. Amuso,* 21 F.3d 1251, 1260 (2d Cir. 1994) (error to instruct that continued absence could be used to show consciousness of guilt as to crime without a factual predicate for that inference).

While the consensus is not universal, the more enlightened state courts either do not permit a flight instruction or do so conditionally. A state appellate court in Texas has found the flight instruction to be improper because it constitutes a comment by the trial judge on the weight of the evidence. *See also People v. Parrish,* 230 Cal.Rptr. 118 (Cal. Dist. Ct. App. 1986) (improper to give flight instruction where identity of the perpetrator is the issue); *Fenelon v. State,* 594 So.2d 292, 294 (Fla. 1992) (court can think of no reason why flight evidence should be singled out for comment by the court). [10]

***35** Federal Rule of Evidence 605 provides: "The presiding judge may not testify as a witness." The rule extends well beyond situations in which the trial judge formally takes the witness stand. Rule 605 "would serve little purpose if it were violated only where a judge observes all the formalities - taking of an oath, sitting in the witness chair, etc. - of an ordinary witness." *United States v Blanchard*, 542 F.3d 1133, 1149 (7th Cir. 2008); *see also* 27 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 6063 (2d ed. 2022) ("a judge may be said to 'testify' even if she has not literally been called as a witness," as Rule 605 applies "to a wide range of judicial statements and actions that are not normally thought to constitute witness testimony"). While a prosecutor is free to argue the weight of the evidence in closing, there is simply no legitimate reason to permit the court to do so. *Johnson v. State,* 981 S.W.2d 759 (Tex. Ct. App. 1998).

The error is not harmless. "Improper judicial testimony that impacts the credibility of the defendant or a key witness can, in some cases, operate to undermine the defendant's entire defense and - in such cases - is not harmless." *United States v. Andasola,* 13 F.4th 1011, 1019 n.7 (10th Cir. 2021) (and cases cited therein).

***36 4. Second Degree Murder is not a crime of violence because it does not require the conscious and volitional use of force against another. Mr. Hicks' conviction(s) under 18 U.S.C. § 924(c) in Count Two and 18 U.S.C. § 924(j) in Count Three should be reversed.** [11]

A. Standard of Review

This Court is free to review whether second degree murder under 18 U.S.C. § 1111(a) is a "crime of violence" pursuant to 18 U.S.C. § 924(c) *de novo*. *See United States v. Melgar-Cabrera,* 892 F.3d 1053, 1060 (10th Cir. 2018).

B. Using the categorical approach, the possibility that Second Degree Murder can be committed recklessly, with a depraved heart, or under a gross deviation from a reasonable standard of care, is insufficient under Borden v. United States [12] ***to satisfy the necessary mens rea for a "crime of violence" under 18 U.S.C. § 924(c).***

If second degree murder is not a "crime of violence," Mr. Hicks' convictions in Counts Two and Three must be reversed. 18 U.S.C. § 924(j) relies upon Section 924(c), which prohibits using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence. 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is defined as a crime that is a felony which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §§ 16(a); 924(c)(3)(A). Murder in the second degree is a general ***37** intent crime that requires the government to prove, beyond a reasonable doubt, the following: 1.) the defendant caused the death of the alleged victim; 2.) the defendant killed the victim with malice aforethought; 3.) the defendant is an Indian person; and 4.) the killing took place in Indian country. *See United States v. Brown,* 287 F.3d 965, 974 (10th Cir. 2002) (describing second degree murder as a general intent crime). The Tenth Circuit's characterization of second-degree murder as a general intent crime is important, because "[w]hat the common law would traditionally consider a 'general intent' crime, ...encompasses crimes committed with purpose, knowledge, *or recklessness*." *United States v. Zunie*, 444 F.3d 1230, 1234 (10th Cir. 2006) (emphasis added.) "Malice aforethought" includes concepts of "depraved heart" and "reckless and wanton" conduct that amounts to a "gross deviation from a reasonable standard of care" *See United States v. Houser,* 130 F.3d 867, 871 n. 3 (9th Cir. 1997); *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000).

The question as to whether second degree murder is a "crime of violence" is answered by looking at the elements of the offense. Applying the "categorical approach," this Court must "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the generic crime], while ignoring the particular facts of the case." *Mathis v. United States,*

136 S.Ct. 2243, 2248 (2016). "An offense does not qualify as a '[crime of violence]' unless the *least* serious conduct it ***38** covers falls within the elements clause." *Borden v. United States,* 141 S.Ct. 1817, 1832 (2021).

The crime of second-degree murder can be committed without the specific intent to kill, as "reckless and wanton" conduct will suffice. The Supreme Court indicated in *Borden* that a crime permitting a conviction based on a *mens rea* of recklessness would not qualify as a crime of violence under the Armed Career Criminal Act. 141 S.Ct. at 1825. Second degree murder is, therefore, not a "crime of violence" under either the ACCA or 18 U.S.C. § 924(c) because it can be committed recklessly.

Mr. Hicks would suggest that should the *Borden* decision leave this Court with any uncertainty as to whether the statutory definition of "crime of violence" applies under the categorical analysis of second-degree murder as defined in 18 U.S.C. § 1111(a), then this uncertainly must be resolved in his favor. This Court has demonstrated a willingness to apply the rule of lenity when addressing ambiguous language in criminal statutes. *United States v. Elliot*, 937 F.3d 1310 (10th Cir. 2019). "When faced with a criminal statute too vague for the case at hand, the right answer likely is to apply the rule of lenity and 'declin[e] to apply [the statute] on a case-by-case basis.'" *Borden,* 141 S.Ct. at 1836 (2021) (THOMAS, J., dissenting) Although the Tenth Circuit sided with the government in *United States v. Mann,* 899 F.3d 898 (10th Cir. 2018), its refusal to apply the rule of lenity in that case took the court down the ***39** wrong path. *Mann,* 899 F.3d at 908. Its finding - that recklessness was sufficient *mens rea* to qualify as a crime of violence - has now been shown to be demonstrably incorrect by the Supreme Court's decision in *Borden.* Had the court applied the rule of lenity (as requested by the defendant), this Court would have likely made the right decision.

As pointed out by Justice Kavanaugh in his dissent in *Borden*, "[t]he line between knowing and reckless crimes is thin." *Borden,* 141 S.Ct. at 1844. Should this Court find itself close to that line in Mr. Hicks' case, the rule of lenity demands that the issue presented be resolved in his favor. Counts Two and Three should be reversed with instructions to dismiss because second degree murder is not a "crime of violence" under the categorical approach.

***40 5. It was error for the district court to deny Mr. Hicks' motion to dismiss Count Two as multiplicitous. Since the § 924(c) conviction in Count Two is a lesser-included offense of the § 924(f) conviction in Count Three, Mr. Hicks' convictions for both counts violate the Fifth Amendment. Count Two must be reversed with instructions to dismiss.** [13]

A. Standard of Review

The standard of review is dependent upon whether this Court finds the issue properly preserved.

41** ***a. The error was preserved.

On charges involving multiplicity, this Court generally engages in *de novo* review. *United States v. McCullough,* 457 F.3d 1150, 1162 (10th Cir. 2006). The court's decision to impose convictions for both Counts Two and Three was apparently inadvertent, as was defense counsel's failure at sentencing to remind the court of its previous decision.

The issue is nonetheless preserved. In response to Mr. Hicks' "Motion to Dismiss Count Two as Multiplicitous", the court assured the parties that "[s]hould the jury return a verdict of guilty on both Counts Two and Three, the Court will vacate the conviction on Count Two at the time of sentencing. (ROA Vol. 1 at 64) The undersigned attributes the court's failure to remember this to the unusually lengthy period between the jury trial and sentencing in this case. Due to a dramatic increase in the number of cases in the Eastern District of Oklahoma after the *McGirt* decision, it took almost a year for a presentence investigation report to be finalized in this case. Mr. Hicks was convicted on February 17, 2022, but was not sentenced until February 28, 2023. Neither the district court, nor the parties, remembered that Court Two was to be dismissed. This Court should remedy the error by remanding this case to the district court with directions to dismiss Count Two, as was the court's intention all along.

***42** Mr. Hicks preserved the record as required by Fed. R. Crim. P. 12(b)(3)(B)(ii). (ROA Vol. 1 at 26) The multiplicity issue was thoroughly briefed by the parties and the district court overruled Mr. Hicks' motion to dismiss. *Id*. at 64. After the close of evidence, Mr. Hicks objected to the § 924(c) jury instruction orally and in writing. *Id*. at 90, 540. The objection was overruled. *Id.* at 540. As held in Third Circuit:

> The purpose of requiring contemporaneous objection at trial for full appellate review is to ensure that the trial court has an opportunity to consider and rule on disputed questions of law. When an issue has been raised, and a ruling made, that purpose is served.

United States v. Price, 458 F.3d 202, 206 (3d Cir. 2006).

The double jeopardy objection was preserved for appellate review.

b. The double jeopardy violation constitutes plain error.

Courts apply plain error review when an issue was *not* brought to the attention of the district court, but that is not what happened here. After objecting twice, both before trial and after the evidence was presented at trial, defense counsel failed to remind the court of its previous ruling when Mr. Hicks appeared for sentencing. If this Court finds that the failure to object (essentially what would have been a *third* objection to the same error) waives the issue, it can review for plain error. Courts have long recognized that double jeopardy claims which are not preserved for appeal are reviewable for plain error. *United States v. Miller*, 527 F.3d 54, 70 (3d Cir. 2008); *Jones v. Habti,* 2020 WL 1905969 *6 (E.D. Okla. 2020) (unreported). The right to be ***43** free from double jeopardy is protected by the Fifth Amendment, and this Court applies plain error review "less rigidly when reviewing a potential constitutional error." *United States v. Chatwin,* 60 F.4th 604, 609 (10th Cir. 2023), citing *United States v. Dazey,* 403 F.3d 1147, 1174, 1178 (10th Cir. 2005).

To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Zubia-Torres,* 550 F.3d 1202, 1208 (10th Cir. 2008).

There was error. All parties, as well as the district court, had concluded before trial that a conviction for violating both 18 U.S.C. § 924(c) and § 924(f) would violate the Fifth Amendment's Double Jeopardy Clause. (ROA Vol. 1 at 44, 64)

The error was plain. An error is plain if it is clear or obvious under current, well-settled law. Historically, courts have treated greater and lesser-include offenses as the same for double jeopardy purposes. *See Brown v. Ohio,* 432 U.S. 161, 168-169 (1977) (collecting authorities). Given the fact that the district court had identified the error and decided upon a remedy, the error in convicting Mr. Hicks of both the greater and lesser offense is plain. *See United States v. Fincher*, 2022 WL 1105745 *3 (E.D. Okla. April 13, 2022) (unpublished) (collecting decisions).

The error affected Mr. Hicks' substantial rights. Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though ***44** it was not brought to the court's attention." Satisfying the third prong of plain-error review - that the error affects substantial rights - "usually means that the error must have affected the outcome of the district court proceedings." *United States v. Cotton,* 535 U.S. 625, 632 (2002) (quotations omitted). Mr. Hicks was convicted of a greater and

a lesser offense in violation of the Fifth Amendment to the United States Constitution. *See United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (A conviction had in violation of the Fifth Amendment must be reversed, even if it did not increase the length of the defendant's sentence). Mr. Hicks would not have been convicted in Count Two had the district court imposed the previously promised remedy (that was proposed and agreed to by the Government). This Court can conclude that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

B. Had either party reminded the district court at sentencing that it had already decided to dismiss Count Two, there can be little doubt that Count Two would have been dismissed. Unfortunately, this did not happen, and Mr. Hicks was convicted and sentenced in both counts in violation of the Fifth Amendment.

The rule forbidding multiplicity stems from the Fifth Amendment to the United States Constitution, which prevents a defendant from being placed twice in jeopardy for one offense. *Blockburger v. United States,* 284 U.S. 299 (1932). The rule "prohibits the government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act." ***45** *United States v. Kimbrough,* 69 F.3d 723, 729 (5th Cir. 1995). Two statutes define the same offense when "one is a lesser-included offense of the other." *Rutledge v. United States,* 517 U.S. 292, 297 (1996); *see also Harris v. Oklahoma,* 433 U.S. 682-83 (1977) (noting that the Double Jeopardy Clause treats offenses as one "[w]hen, as here, conviction of a greater crime ...cannot be had without conviction of the lesser crime").

By its very terms, 18 U.S.C. § 924(j) requires a violation of 18 U.S.C. § 924(c) as an element of the offense. It is impossible to violate 18 U.S.C. § 924(j) without violating 18 U.S.C. § 924(c). The only meaningful difference between the two provisions is that § 924(j) requires proof of one additional fact: a death. Count Two is therefore a lesser-included offense of Count Three because it "requires no proof beyond that which is required for conviction of the greater." *See Brown v. Ohio,* 432 U.S. 161, 168 (1977).

Because 18 U.S.C. § 924(c) is a lesser-included offense of 18 U.S.C. § 924(j), Mr. Hicks cannot be subject to multiplicitous punishments absent "a clear indication of contrary legislative intent." *Missouri v. Hunter,* 459 U.S. 359, 367 (1983). The "majority view in the courts of appeal" is "that there is insufficient indication that Congress intended sentences to be imposed under both subsection 924(j) and the lesser-included offense of subsection 924(c)" to overcome the presumption that *Blockburger* applies. *See United States v. Fincher,* 2022 WL 1105745, *4 (E.D. Okla. April 13, 2022) (unpublished) (and cases cited therein).

***46** The First, Second, Fourth, Fifth, Sixth, and Ninth Circuits have held or indicated that convictions for the same conduct under both sections 924(c) and 924(j) violate double jeopardy. *See United States v. Sanchez,* 623 Fed.Appx. 35, 38 n.1 (2d Cir. 2015) (noting that section 924(c) conviction was vacated without opposition by the government because it was a lesser-included offense of the section 924(j) charge); *United States v. Wilson,* 579 Fed.Appx. 338, 348 (6th Cir. 2014) (The government conceded that convictions for both § 924(c) and § 924(j) were double jeopardy violations and the parties agreed that the court should vacate the § 924(c) convictions.); *United States v. Garcia-Ortiz,* 657 F.3d 25, 27-31 (1st Cir. 2011) (holding that the conviction and sentence under 924(c) must be annulled because section 924(c) is a lesser-included offense of 924(j)); *United States v. Palacios,* 982 F.3d 920, 924 (4th Cir. 2020) (parties agreed that § 924(c) is a lesser-included offense of § 924(j)); *United States v. Gonzales,* 841 F.3d 339 (5th Cir. 2016) (finding that Congress did not intend to impose cumulative punishments for the same conduct under § 924(c) and § 924(j)); *United States v. Ablett,* 567 Fed.Appx. 490, 491 (9th Cir. 2014) (government conceded that concurrent sentences for § 924(c) and § 924(j) violate the Fifth Amendment).

Although this Court has yet to specifically address the double jeopardy question regarding § 924(c) and § 924(j), it has found the two subsections to be "discrete" crimes. *See United States v. Melgar-Cabera,* 892 F.3d 1053 (10th Cir. 2018). Convictions ***47** for two subsections of the same statute can violate double jeopardy. *United States v. Johnson,* 130 F.3d 1420, 1426 (10th

Cir. 1997) (finding a conviction for violating 18 U.S.C. § 922(g)(1) and § 922(g)(3) violate double jeopardy). This Court should remand Count Two to the district court with instructions to dismiss.

CONCLUSION

Counts Two and Three, or at least Count Two, should be reversed with instructions to dismiss. The second degree murder conviction in Count One should be reversed for a new trial before a properly instructed jury.

Respectfully submitted,

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Appendix not available.

Footnotes

1 Defense counsel submitted a self-defense instruction that specifically informed the jury that Elijah Hicks had no duty to retreat. (ROA Vol. 1 at 91) He argued for its submission at the close of evidence and objected to the pattern self-defense instruction that the court used. The objection was overruled. *Id*. at 538-39 (Attachment 3)

2 The most recent Pattern Instructions from the Tenth Circuit were produced in 2005.

3 Defense counsel's objection to this non-question was sustained. (ROA Vol. 1 at 516)

4 Defense counsel's objection that this question had been asked and answered was sustained. (ROA Vol. 1 at 520)

5 Defense counsel filed a pleading in which he argued that the violent act evidence was admissible to show Elijah Hicks' state of mind under Fed. R. Evid. 404(b). (ROA Vol. 1 at 102) The district court deferred any ruling until trial. *Id*. at 115.

The court ultimately permitted at least some testimony regarding specific violent acts committed by Thomas Buckley. *Id*. at 484-485. Defense counsel submitted a proposed instruction advising the jury as to the proper use of this evidence. *Id*. at 95 (Attachment 2) The district court failed to give the requested instruction.

6 Fed. Rule Crim. P. 30(b): **Ruling on a Request.** The court *must* inform the parties before closing arguments how it intends to rule on the requested instructions." (emphasis added).

7 The instruction was a modification of the Tenth Circuit Pattern instruction 1.30 relating to similar "404(b)" acts engaged in by a defendant.

8 Defense counsel objected to the flight instruction. (ROA Vol. 1 at 537-38) (Attachment 4) The objection was overruled. *Id.* at 538. No formal written objection was filed by the defense, as the flight instruction was not included in the Government's proposed instructions. *Id*. at 68. In response to Mr. Hicks' objection, the Government argued that flight is "an important fact, and I think that the instruction as drafted will assist the jury in their deliberations." *Id*. at 338.

9 The Honorable John F. Heil, III recently addressed the admissibility of flight evidence in *United States v Barker,* 2023 WL 2663241 *11 (E.D. Okla. March 28, 2023). The fact that the Government may argue flight as indicative of guilt is not the issue; Mr. Hicks simply claims that this argument is better suited to a prosecutor and not a judge.

10 Florida removed the instruction from its standard instructions, apparently in an effort to eliminate "[l]anguage which might be construed as a comment on the evidence." Fla. Std. Jury Instr. (Crim.), Committee Report at xvi (The Florida Bar Feb. 15, 1980). Other jurisdictions have expressed similar concerns. *See People v. Larson,* 572 P.2d 815, 817 (Colo. 1977); *State v. Wrenn,* 584 P.2d 1231, 1233 (Idaho 1978); *State v. Bone,* 429 N.W.2d 123, 125-27 (Iowa 1988); *State v. Stilling*, 590 P.2d 1223, 1230 (Or. 1979); *State v. Grant,* 272 S.E.2d 169, 171 (S.C. 1980); *State v. Menard,* 424 N.W.2d 382, 384 (S.D. 1988).

11 The district court denied Mr. Hicks' Motion to Dismiss Counts Two and Three for Failure to State an Offense. (ROA Vol. 1 at 59) (Attachment 5) Defense counsel reasserted his objection to the instructions on Counts Two and Three at the close of evidence, prior to instructing the jury. *Id*. at 539. The court overruled his objection.

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13 Defense counsel filed a motion to dismiss Count Two, which alleged a violation of 18 U.S.C. § 924(c), as multiplicitous. (ROA Vol. 1 at 26) The Government responded to the motion by conceding that § 924(c) was a lesser-included offense of § 924(j) as alleged in Count Three, but nonetheless believed it best that the jury be instructed on both counts. *Id*. at 44. The Government proposed: "Should the defendant be convicted of all counts at trial, a remedy for any multiplicity issues at sentencing would be to proceed only on the greatest offense dismissing any remaining multiplicitous counts. *Id.* Specifically, the Government advised the district court that "the proper remedy would be to vacate the conviction of Count Two at the time of sentencing." *Id.*

The district court agreed wholeheartedly with the Government's analysis, and while it denied Mr. Hicks' motion to dismiss, it ordered that "[s]hould the jury in this case return a verdict of guilty on both Counts Two and Three, the Court will vacate the conviction on Count Two at the time of sentencing." *Id*. at 64. (Attachment 6)

Prior to instructing the jury, Mr. Hicks objected in writing to the Government's proposed 924(c) instruction in Count Two. *Id*. at 90. Defense counsel offered an alternative instruction to the one provided in Count Three that included the elements of the lesser charge. *Id*. at 540. The district court overruled the objection and instructed the jury on both Counts Two and Three. *Id*. at 540.

At sentencing, neither party reminded the district court of its pretrial promise and the court convicted Mr. Hicks of both Counts Two and Three. (ROA Vol. 3 at 56)

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