IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 23-7017

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

ELIJAH DEWAYNE HICKS,
Defendant/Appellant.

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

REPLY BRIEF OF DEFENDANT/APPELLANT

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INTRODUCTION

This reply brief is in response to the "Brief of Plaintiff/Appellee" which was filed by the Government on October 25, 2023. References to the Government's brief will use "Gov't brief." References to Elijah Hicks' brief will use "Op. brief."

ARGUMENT

It is interesting to compare the Government's justification for a flight instruction (that it considers to be a necessary and appropriate statement of the law) with its less favorable view of the self-defense instructions submitted by the defense (as unnecessary or incorrect statements of the law). The common thread connecting Mr. Hicks' arguments in this reply brief is that a jury instruction from the court is fundamentally different – and more important – than argument from counsel, and the Government failed to adequately respect this important distinction in its brief. Nothing in the closing arguments from either side compensated for the instructional error alleged in Mr. Hicks' brief.

1. The flight instruction was an improper comment by the district court on the weight of the evidence.

Just because the flight instruction given in this case may not be legally incorrect does not mean that it is something that a judge should be reading to the jury over defense counsel's objection. There is no need for a jury instruction to emphasize flight or for a judge to comment on specific evidence as "consciousness of guilt." Even

though the instruction did not tell the jury that it *must* consider flight as "consciousness of guilt," it advised them that it *could* do so and therefore constituted an impermissible comment on the weight of the evidence. *See Johnson v. State,* 981 S.W.2d 759 (Tex. Ct. App. 1998). Although a federal court has the right to comment on witness testimony, it must "exercise great care to maintain an impartial attitude and not become an advocate for one of the parties to the litigation or mislead the jury." *United States v. Sowards,* 339 F.2d 401, 403 (10th Cir. 1964). An advocate may make arguments to a jury that a judge may not.

From the beginning of the trial, the jury was told that it is the judge's responsibility to instruct on the law. An instruction that essentially tells the jurors that they can consider flight as consciousness of guilt, as matter of law, places a thought in jurors' heads that simply should not come from a judge. The Government argued in its answer brief that in the absence of a flight instruction:

> The jury would be left without knowing there are reasons consistent with innocence when a defendant may flee, or the jury may believe that they were not free to disregard evidence of Defendant's flight and they must consider such evidence as consciousness of guilt.

(Gov't brief at 27)

Even if this were true in a case where a fleeing defendant did not testify, Elijah Hicks *did* testify. He was able to tell the jury exactly why he chose to leave after he shot Timothy Buckley. He hid out for four months because he was "scared." (ROA

Vol. 1 at 487) The prosecutor took the opportunity to cross-examine Mr. Hicks as to why he kept running for four months. *Id.* at 504. He questioned Mr. Hicks' fear, suggesting that if he had really been afraid, he would not have disposed of his gun. *Id.* Mr. Hicks testified that he did not stay at the scene because he knew that the police would come and he did not think that anyone would believe him. *Id.* at 505.

Elijah Hicks' decision to testify created a problem with the flight instruction: the instruction could easily be interpreted by the jury as undermining Mr. Hicks' credibility as a witness. Fed. R. Evid. 605 provides that "[t]he presiding judge may not testify as a witness at the trial." This means that '[a] judge 'may analyze and dissect the evidence, but he [or she] may not either distort it or add to it.'" *United States v. Nickl,* 427 F.3d 1286, 1293 (10th Cir. 2005), quoting *Quercia v. United States,* 289 U.S. 466, 470 (1933). It is improper for a judge to comment directly on an ultimate factual issue to be decided by the jury. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1226 (10th Cir. 2004) The credibility of witness is for the jury to determine, not the judge. The district court instructed the jury as to how they were to evaluate the credibility of witnesses. (ROA Vol. 1 at 148) "An important part of your job will be making judgments about the testimony of the witnesses, *including the Defendant*…" *Id.* at 148 (emphasis added).

Listing random "innocent" reasons for flight in a jury instruction that fail to match up with the reasons that Mr. Hicks' gave when he testified suggest that the

reasons he gave are not "innocent." The jury instruction listed the following "innocent" reasons for fleeing: "Fear of law enforcement, reluctance to become involved in an investigation, or simple mistake may cause a person who has committed no crime to immediately flee." (ROA Vol. 1 at 154) Mr. Hicks did not claim to have left the scene by "simple mistake." The speculative language in the instruction is irrelevant at best, and at worst, a harmful comment by the court on Mr. Hicks' credibility.

The instructions were sufficient (and superior) without the flight instruction. It is not very convincing for the Government to claim in its answer brief that the flight instruction (that Mr. Hicks objected to) was somehow for his own good. The Government wrote: "[T]he failure to provide the jury with any instruction regarding how to assess the evidence would be more prejudicial to Defendant [than not giving the instruction]. (Gov't brief at 27) If the instruction was ostensibly for Mr. Hicks' benefit, he was well within his rights to reject the instruction and not have it forced upon him by a benevolent prosecutor. The Government wanted the instruction for the very reason that defense counsel objected to it: because the instruction reminded the jury that it could use evidence of flight as "consciousness of guilt." During closing, the prosecutor argued: "…I submit to you that running for four months is evidence of consciousness of guilt. The instruction says you can consider it that way, and I submit to you that you should." (ROA Vol. 1 at 591)

The Government cited to four cases in support of its argument that the district court did not abuse its discretion in instructing the jury on flight. Three of these cases did not address flight at all.[1] (Gov't brief at 26) The fourth case – *United States v. Martinez*[2] – briefly mentioned a flight instruction, but the issue on appeal in that case was whether the district court had erred in excluding evidence of flight. The *Martinez* court found that the court had abused its discretion by excluding the evidence. Obviously, since the district court had excluded the evidence in *Martinez,* the issue as to whether the defendant's flight should be emphasized with an instruction was not before the court. *Id.*

An instruction on flight is unnecessary in any trial. Giving a flight instruction when a defendant has testified and provided reasons for his quick departure from the scene was an abuse of discretion.

[1] *United States v. Harris,* 661 F.2d 138, 142 (10th Cir. 1981); *United States v. Nolan,* 551 F.2d 266, 271 (10th Cir. 1977); *United States v. Krohn,* 573 F.2d 1382, 1389 (10th Cir. 1978).

[2] 681 F.2d 1248, 1256 (10th Cir. 1982). *Martinez* cited to *Bailey v. United States,* 410 F.2d 1209 (10th Cir. 1969) (finding the flight instruction to be adequately supported by the evidence).

2. Under the facts of Mr. Hicks' case, the self-defense pattern instruction was insufficient to properly apprise the jury of his defense.

a.) The court agreed that additional instruction was necessary.

The district court agreed that the pattern self-defense instruction failed to provide a complete explanation of Mr. Hicks' defense under the facts of this case. In addition to the deficient pattern instruction, the court instructed the jury in "Instruction No. 12" that it could consider Timothy Buckley's reputation for violence "[i]n deciding whether or not Defendant was the aggressor in the confrontation…".[3] (ROA Vol. 1 at 153)

b.) It was an abuse of the court's discretion to refuse to instruct that Mr. Hicks had no duty to attempt retreat before he could assert self-defense.

The self-defense jury instruction was not an inaccurate statement of the law, but it was deficient and left the jury with an *incomplete* statement of the law. (ROA Vol. 1 at 160) ***Mr. Hicks had no duty to retreat.*** Mr. Hicks submitted a proposed self-defense instruction that explained that he had no duty to retreat. (ROA Vol. 1 at 91) The Government opens its argument in response to Mr. Hicks' first proposition with a claim that his proposed instruction was "legally incorrect." (Gov't brief at 15) The

[3] Mr. Hicks' proposed instruction contained additional language: "While the deliberate killing of another cannot be justified solely by that person's character for violence, 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." (ROA Vol. 1 at 94) The court did not explain why it omitted the requested language.

Government does not state why the instruction is incorrect, only that the instruction was unnecessary. The court's instruction on self-defense was a faithful copy of Tenth Circuit Pattern Instruction 1.28. (ROA Vol. 1 at 160) The Government took no issue with the law on which Mr. Hicks' self-defense instruction was based: A defendant has no duty to attempt retreat before he can assert a self-defense claim. (Gov't brief at 16) If this is an accurate statement of the law, the jury should have been so instructed.

The Government responds to Mr. Hicks' first proposition as though he had alleged prosecutorial misconduct:

> [T]he government was well within its right to introduce evidence regarding Defendant's ability to retreat and then argue in closing Defendant's use of force was unreasonable given his ability to retreat.

(Gov't brief at 17)

Mr. Hicks did *not* allege prosecutorial misconduct in this case. Just as the Government was free to present evidence of flight and argue in closing that it demonstrated Mr. Hicks' consciousness of guilt, it was free to argue that Mr. Hicks' use of force was unreasonable because he could have walked away without shooting Mr. Buckley. Yet the Government maintains that a flight instruction was necessary to clarify (and buttress) its "consciousness of guilt" argument, while Mr. Hicks was denied the same clarification regarding his self-defense claim. A defendant's right to sufficient instructions on his theory of defense is without a doubt more important

than the Government's right to a "flight" instruction. In calling Mr. Hicks' proposed language "superfluous," the Government confuses appropriate argument from counsel and appropriate instruction from the court. (Gov't brief at 19) The fact that the Government was free to argue that Mr. Hicks' use of force was unreasonable (because he could have left without shooting Mr. Buckley) makes it even more important that the jury knows an attempt to flee is not a prerequisite to a successful self-defense claim.

The Government argues that Mr. Hicks suffered no harm because of the missing language in the self-defense instruction due to two things that occurred during closing argument. First, the Government was careful not to misstate the law in its closing. While the Government argued that Mr. Hicks *should* have retreated, it never claimed that he had an obligation to do so. (Gov't brief at 18-19)

This does not support the Government position, because the legitimate "failure to retreat" argument in the Government's closing made the absence of the requested language *more* harmful. The prosecutor argued that Mr. Hicks' actions were unreasonable because he could have "just walked away." (Gov't brief at 18, citing ROA Vol. 1 at 591-92) The jury certainly could have interpreted this as an obligation to attempt retreat before Mr. Hicks' could assert a self-defense claim, and defense counsel expressed this fear to the court. (ROA Vol. 1 at 542) The solution to the problem could not have been simpler, yet the district court refused to deviate from

the pattern self-defense instruction by adding the requested *correct* language. (ROA Vol. 1 at 539) Instead of offering an alternative instruction, the prosecutor took the unreasonable position that no self-defense instruction should be given at all. *Id. See United States v. Toledo,* 739 F.3d 562, 567 (10th Cir. 2014) (when deciding whether the evidence supports a self-defense instruction, the court must give full credence to the defendant's testimony).

Second, the Government claimed that counsel's closing argument provided an adequate substitute for the language missing from the court's self-defense jury instruction. The Government wrote that since "[d]efense counsel adequately explained the duty to retreat to the jury…" there was no need to properly instruct the jury on the law. (Gov't brief at 19) This is unconvincing. The Supreme Court recognizes the obvious distinction between instructions coming from the court and argument coming from counsel. *Taylor v. Kentucky,* 436 U.S. 478, 488-89 (1978) ([A]rguments of counsel cannot substitute for instructions by the court."). In *Taylor,* the Supreme Court found error in the district court's refusal to give a presumption of innocence instruction. The Court specifically rejected the Government's argument that the jury had been instructed on the burden of proof, and defense counsel adequately described the presumption of innocence in closing. "Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to

hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be…" *Id.* at 489.

c.) The jury was not provided any instruction as to how to use evidence of Timothy Buckley's prior violent acts.

The court instructed the jury as to how it could use evidence of Mr. Buckley's violent reputation, without providing any direction as to how evidence of specific violent acts could be used to evaluate Mr. Hicks' state of mind at the time of the shooting. Of the two, the later was more important as it was essential to establish the reasonableness of Mr. Hicks' actions. In a very real sense, instructing only on Mr. Buckley's *reputation* for violence worsened Mr. Hicks' defense appreciably, as the jury could reasonably have interpreted the "character or reputation" instruction as a limiting instruction that explained the sole method by which Mr. Buckley's prior violent behavior could be considered.

Mr. Hicks' requested "prior violent acts" jury instruction[4] addressed two shortcomings in the court's self-defense instructions. The proposed instruction explained that: (1) the jury could consider how evidence of Mr. Buckley's prior violent acts affected Mr. Hicks' state of mind and therefore the reasonableness of force used; and (2) the jury did not have to make a finding that the prior violent acts occurred, only that Mr. Hicks *believed* they occurred. (ROA Vol. 1 at 95) Instead, the court's

[4] (ROA Vol. 1 at 95)

instructions left the jury with no instruction on how to evaluate Mr. Hicks' fear of Timothy Buckley and its effect on the reasonableness of his actions. Since the Government's argument was that Mr. Hicks' actions were unreasonable, the requested instruction could not have been more important.

Once again, the Government confuses argument from instruction. The Government asserts there was no error in the district court's failure to instruct the jury on the law relating to Mr. Hicks' self-defense claim because defense counsel "was free to argue that [Mr. Hicks] reasonably believed deadly force was necessary because of his knowledge of the victim's prior violent acts. And in fact, Defendant made this exact argument multiple times during his closing argument." (Gov't brief at 23) The Government cites to no authority for this "defense counsel fixed everything in closing" position. As already stated in this brief, the Supreme Court has held that a defense counsel's argument in closing is no substitute for a proper jury instruction from the court. The jury in Mr. Hicks' case was instructed to follow the rules of law *as provided in the jury instructions*. (ROA Vol. 1 at 141) Further, the jury was instructed that the jury must base its decision on the evidence, and what attorneys argue is not evidence. *Id.* at 146.

The Government was able to take advantage of the absence of a "violent acts" instruction. The prosecutor argued in his final closing:

> You know what would make [shooting Timothy Buckley four times] reasonable? If the person you were shooting was armed, was about to cause serious injury to you, or death. There's no evidence, no evidence in this record that Timothy was armed.

(ROA Vol. 1 at 589)

The prosecutor briefly referenced Mr. Hicks' fear, but argued that since all Mr. Buckley had done to Mr. Hicks before was punch him, it was only reasonable for him to fear getting punched, which did not justify deadly force. (ROA Vol. 1 at 590) The requested instruction would have countered the prosecutor's arguments with justification for shooting an unarmed man.

Taken to its logical extreme, the Government's argument that a defense counsel can instruct on the law would eliminate the need for *any* jury instructions, if the attorneys adequately addressed the law in closing argument. This is not the law, nor will it ever be.

d.) The record was adequately preserved regarding the "violent act" instruction proposed by defense counsel.

The record does not reflect exactly how the district court in Mr. Hicks' trial assembled the final instructions distributed to the parties. Prior to the on-the-record proceeding, an instruction conference took place off the record with the judge's clerk

and the parties, without the judge.[5] After this meeting the clerk retired, presumably to meet with the judge. When the judge entered the courtroom, he advised counsel they were to return to the courtroom at "1 o'clock so as to finalize our jury instructions. I believe that we have copies that will – that are ready." (ROA Vol. 1 at 531) The court referred to these as the "final jury instructions." *Id.* at 531.

When the parties returned to the courtroom, both sides were given an opportunity to object "to the instructions or verdict forms as proposed." *Id.* at 534. Defense counsel listed his objections, and even referenced alternative instructions to those he objected to. (ROA Vol. 1 at 535-540) He did not mention Mr. Hicks' proposed prior violent acts instruction, in no small part because the district court failed to announce his decision to exclude the instruction as required by Fed. R. Crim. P. 30(b).[6] Defense counsel presumed that the requested instruction had been refused, just as every objection he lodged to the given instructions had been overruled.[7] (ROA Vol. 1 at 535-540)

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[5] The prosecutor made a brief reference to the conference: "Judge, as I had articulated at the conference with regard to this matter, that's not part of the pattern jury instruction and, therefore, we would object [to defense counsel's proffered Instruction No. 7]." (ROA Vol. 1 at 535-36)

[6] Counsel is not claiming the failure to comply with Rule 30(b) is independent error warranting relief. *See United States v. Algee,* 599 F.3d 506, 515 (6th Cir. 2010). The district court's failure to comply with Rule 30(b) should, however, be a factor for this Court to consider in determining the proper standard of review.

[7] A total of six objections were lodged, and all six objections were overruled without explanation.

Mr. Hicks is not asking this Court to review error that was not brought to the district court's attention. The law on which the instruction was based was briefed and argued by the parties.[8] Defense counsel argued to the court that Mr. Hicks' state of mind "is the most relevant thing of this entire trial, [ ] his fear, and whether or not that fear was a reasonable one…" (ROA Vol. 1 at 482) A proposed instruction on the use of evidence of Mr. Buckley's prior violent acts was provided to the court and defense counsel is entitled to presume that the court read the proposed instruction. Had the court complied with Rule 30(b), defense counsel would have tendered an objection to the court's ruling, as he did with the instructions that were given. If the purpose of preservation is to give the court notice, defense counsel surely did so.

Defense counsel reminded the court of the filed proposed instruction during trial, and the court acknowledged the importance of the prior bad act evidence as "critical to [Mr. Hick's] self-defense theory." (ROA Vol. 1 at 484) The court held "that evidence regarding defendant's knowledge of Buckley's criminal history and any other acts of violence goes directly to defendant's state of mind and whether he had a reasonable fear of bodily injury and is relevant to defendant's self-defense or defense of others defense asserted in this case." *Id.* at 484-85. The facts in this case are a far

[8] *See* Opening brief at 23, describing the briefing on the admissibility of prior violent acts and the relevancy of the evidence. In other words, the issue was thoroughly briefed and the court was aware that defense counsel had submitted a jury instruction on the law relating to the use of the violent act evidence.

cry from those where this Court applied plain error review because defense counsel failed to request a jury instruction that was later argued to be error on appeal. *See United States v. Sago,* 74 F.4th 1152, 1160 n.6 (10th Cir. 2023) (collecting cases). Mr. Hicks is not arguing that any instruction should have been given *sua sponte.*

This Court recently determined that it does not require strict adherence to the rule that a legally sufficient proposed instruction must be proffered to preserve error when the defendant's imperfect self-defense claim was obvious to the court. *United States v. Britt,* 79 F.4th 1280, 1293-94 (10th Cir. 2023) (When defense counsel specifically requests an instruction on a legally viable defense supported by evidence, "a district court is obligated to formulate and then tender to the jury such an instruction."). *Britt* suggests that given Mr. Hicks' clearly articulated self-defense claim and his reference to the proposed instruction during trial, the court had an obligation to properly instruct on that defense. *Britt* at 1286. In *Britt,* the government conceded that an abuse of discretion standard of review applied. *Id.*

The abuse of discretion standard should apply in Mr. Hicks' case. In *United States v. Rodriquez,* 465 F.2d, 5, 8-9 (2d. Cir. 1972) the Second Circuit found that defendant's argument on the theory of venue was sufficient to preserve defendant's objection "to the theories of venue upon which the jury was instructed." *Id.* at 9. "It is evident that the court was fully aware of the defense position with respect to venue." *Id.* at 8. Once again, the court's knowledge of the defendant's argument is a relevant

consideration for this Court on appeal. The district court in Mr. Hicks' case was fully aware of the "prior violent act" argument, the court ruled that the prior violent act evidence was admissible, and the court acknowledged that an instruction had been submitted on the issue.[9] The district court neglected to rule on the proffered instruction as required by Rule 30(b), and defense counsel failed to object to a ruling that was never properly made. For the plain error rule to apply, a defendant must have "an opportunity to object" to the court's ruling. Fed. R. Crim. P. 51(b) provides: "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."

Although not specifically argued by the Government, Mr. Hicks contends that the Government cannot establish that any instructional error was "harmless beyond a reasonable doubt." The error directly affected Mr. Hicks' ability to present a defense. *See United States v. Britt,* 79 F.4th 1280, 1292 (10th Cir. 2023) (reversing on instructional error despite a strong government case).

[9] Defense counsel advised the court: "I know we have submitted a proposed instruction for how to address [prior violent acts], that essentially, paraphrasing, is that those convictions are relevant for how they influence Mr. Hicks and his state of mind." (ROA Vol. 1 at 483)

e.) Alternatively, the failure to give the requested "prior violent acts" instruction constituted plain error.

The Government asks this Court to review for plain error. While counsel believes the issue to have been adequately preserved under the facts of this case, Mr. Hicks presented an alternative plain error argument in his opening brief. (Op. brief at 25) None of the cases cited by the Government in its answer brief address the precise issue presented in this case, where the failure to object concerns a proposed jury instruction that was submitted and acknowledged, but not given to the jury. Mr. Hicks contends that even under plain error analysis, this Court should reverse.

This Court cannot address the district court's failure to instruct the jury on prior violent acts in a vacuum. It must also look at the inadequacy of the two instructions that were given on self-defense. Mr. Hicks objected to both instructions and offered an alternative to each.[10] (ROA Vol. 1 at 536-37; 538-39) *See* Defendant's Proposed Jury Instructions Numbers 5 and 6. *Id.* at 94-95. The court's self-defense instructions only addressed a limited use of Mr. Buckley's violent history and therefore did not accurately state the law applicable to this case. Mr. Hicks' entire defense rested on Mr. Buckley's violent history; it was essential that the jury receive proper instruction on how to use that evidence.

[10] Instruction No. 12 addressed Timothy Buckley's reputation for violence; (ROA Vol. 1 at 153) Instruction No. 19 was the pattern self-defense instruction. *Id.* at 160.

Applying the first prong of plain error analysis, the failure to give the proposed prior violent act instruction constituted error. An instruction amounts to error where, "considering the instructions as a whole, the jury has been misled." *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998). This Court has held so-called "reverse 404(b)" evidence to be admissible[11] and the district court admitted the evidence. Unfortunately, the court failed to instruct as to how the evidence could be used in support of Mr. Hicks' self-defense claim. The Government denies any error, arguing that the self-defense pattern instruction was sufficient. (Gov't brief at 23) This is not supported by the record. The district court believed the pattern instruction to be inadequate and gave a second self-defense instruction relating to Mr. Buckley's reputation for violence. (ROA Vol. 1 at 153) The proposed instruction submitted by Mr. Hicks addressed Mr. Buckley's "prior violent acts" and further instructed the jury that the evidence was relevant to Mr. Hicks' state of mind at the time of the offense and whether his knowledge of these prior violent acts justified his actions. (ROA Vol. 1 at 95) Further, the instruction explained that it was not necessary for Mr. Hicks to prove that the acts occurred, only that he believed that they had occurred. *Id.* "Without question, a defendant is entitled to an instruction on a defense that is supported by the evidence and the law." *United States v. Sparks,* 791 F.3d 1188, 1193

[11] *United States v. Armajo,* 38 F.4th 80 (10th Cir. 2022)

(10th Cir. 2015), citing to *United States v. Haney,* 318 F.3d 1161, 1163 (10th Cir. 2003) (en banc). In this case, Mr. Hicks' self-defense claim rested almost exclusively on his state of mind at the time of the shooting and whether his fear of Timothy Buckley (based upon Buckley's prior behavior) justified the shooting. The instruction submitted by Mr. Hicks would have explained this to the jury.

Second, the error was plain. An error is considered plain where it is "clear or obvious." *United States v. Muñoz*, 812 F.3d 809, 813 (10th Cir. 2016) (quoting *Morales-Fernandez v. INS*, 418 F.3d 1116, 1124 (10th Cir. 2005)). Although Fed. R. Evid. 404(b) is typically employed by the prosecution, this Court has addressed its use by defendants and determined the evidence to be admissible. *United States v. Montelongo,* 420 F.3d 1169 (10th Cir. 2005) (Evidence of a non-defendant's bad acts is admissible "for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him."), citing to *Agushi v. Duerr,* 196 F.3d 754, 760 (7th Cir. 1999). Indeed, the district court found the evidence admissible and relevant to Mr. Hicks' self-defense theory. A defendant is entitled to an instruction on his theory of defense. *See Griego v. United States,* 298 F.2d 845, 849 (10th Cir. 1962) (Op. brief at 25) The fact that a jury instruction given to Mr. Hicks' jury contained a definition of self-defense and defense-of-others does not preclude plain error review. *See generally United States v. Duran,* 133 F.3d 1324, 1331 (10th Cir. 1998)

(although entrapment was defined for the jury, plain error reversal due to failure to expressly place the burden of disproving entrapment on the Government).

Third, the error affected Mr. Hicks' substantial rights. "[A] defendant generally must demonstrate that an error was 'prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" *United States v. Bustamante-Conchas,* 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc) (quoting *United States v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* Instead, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Hasan,* 526 F.3d 653, 665 (10th Cir. 2008).

An instruction affects substantial rights if it "concerns a principal element of the defense or an element of the crime." *Duran*, 133 F.3d at 1330. An instruction advising the jury of the proper use of evidence of Timothy Buckley's "prior violent acts" was core to Elijah Hicks' self-defense claim. There exists a reasonable probability that the failure to instruct on "prior violent acts" affected the outcome of Mr. Hicks' trial. *See United States v. Olano,* 507 U.S. 725, 734 (1993) (discussing Rule 52(b)). *See also United States v. Piette,* 45 F.4th 1142, 1164 (10th Cir. 2022) (improper instruction on statute of limitations burden constituted plain error).

The Government responds that its strong case precludes a finding that Mr. Hicks' substantial rights were affected. The only issue for the jury was whether Mr. Hicks acted in self-defense, and the Government listed in its brief what it perceived to be weaknesses in Mr. Hicks' self-defense claim. (Gov't brief at 24-25) Rather than argue the merits of the Government's list in this reply brief, Mr. Hicks would point out that these weaknesses were exacerbated by the inadequate self-defense instructions. In other words, without a legitimate use for the violent act evidence, the jury was left with a scenario where Mr. Hicks shot an unarmed man. The jury was not instructed on how it could use the evidence of Mr. Buckley's violent acts and how the evidence affected Mr. Hicks' state of mind. The list of so-called weaknesses would undoubtedly be made *less* weak had the jury properly applied the evidence to Mr. Hicks' self-defense claim. *See United States v. Britt,* 79 F.4th 1280 (10th Cir. 2023) (even in a so-called "strong case" the failure to properly instruct on a theory of defense can be prejudicial). The failure to properly instruct the jury essentially gutted Mr. Hicks' self-defense claim; thereby affecting the outcome of the case.

Finally, "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 instructional error. *United States v. Duran,* 197 F.3d 472, 481 (10th Cir. 1999) (internal quotation marks omitted). "In considering the fourth prong, the seriousness of the error must be examined in the context of the case

as a whole." *United States v. Bustamante-Conchas,* 850 F.3d 1130, 1141 (10th Cir. 2017). While the district court provided a pattern instruction defining self-defense, it was incomplete. Given the nature of Mr. Hicks' self-defense claim, the absence of any instruction as to how the jury was to utilize evidence of Mr. Buckley's prior acts of violence and how it affected Mr. Hicks' state of mind undermined the fairness or integrity of the trial and constituted plain error.

Mr. Hicks took numerous steps throughout the trial to ensure that the district court was aware of the "prior violent act" issue and he presented a proposed instruction that accurately described the law. This Court has held that "we apply the plain error rule less rigidly when reviewing a potential constitutional error." *United States v. Walker,* 74 F.1163, 1183 (10th Cir. 2023) citing *United States v. Salas,* 889 F.3d 681, 687 (10th Cir. 2018). Mr. Hicks has argued that the instructional deficiencies undermined his right to have the jury properly instructed as to his theory of defense. Considering everything that happened at Mr. Hicks' trial, it would be unfair to ignore counsel's efforts at bringing the error to the court's attention.

3. The Fifth Amendment Violation

The Government has conceded Mr. Hicks' fifth proposition on appeal, that his conviction and sentence in Count Two for violating 18 U.S.C. § 924(c) violates the Double Jeopardy Clause of the Fifth Amendment. This is something that the parties and the district court agreed to from the start; the court and the Government

determined that the proper remedy would be to dismiss Count Two at sentencing should Mr. Hicks be convicted of both Counts Two and Three. (ROA Vol. 1 at 44; 64) The court failed to dismiss Count Two as it had previously promised, and the Government has graciously refrained from arguing that counsel's failure to object at sentencing constitutes waiver of the issue on appeal.

Although this Court is not required to accept the Government's concession of error, Mr. Hicks would point out that the error is inarguably a violation of the Fifth Amendment, since 18 U.S.C. § 924(c) is a lesser-included offense of 18 U.S.C. § 924(j) and Congress has not expressed any intent to permit multiple convictions for the use of the same firearm during a crime of violence. Although the Eleventh Circuit may disagree, *United States v. Julian,* 633 F.3d 1250, 1256-57 (11th Cir. 2011) (cited on page 34 of the Gov't brief) only addressed double jeopardy in *dicta.* The defendant in *Julian* had not been convicted of both § 924(c) and § 924(j). The only issue before the Eleventh Circuit in *Julian* was whether the district court was required to impose a sentence under 18 U.S.C. § 924(j) consecutive to the underlying crime of violence or drug trafficking crime.

Due to the Government's election to not argue on appeal that defense counsel failed to preserve the error by objecting at sentencing, the preservation issue is not before this Court and any waiver argument has been (voluntarily) forfeited by the Government. *See Abernathy v. Wanders,* 713 F.3d 538, 552 (10th Cir. 2013); *United States*

v. Heckenliable, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006). Left with only the merits of Mr. Hicks' challenge to decide, the appropriate remedy (should this Court not reverse and remand for a new trial based on instructional error)[12] is to remand to the district court for sentencing on Counts One and Three only. The question as to the appropriate term – including whether the remaining sentences run currently or consecutively – is for the district court to determine. Mr. Hicks does not agree with the Government's analysis on page 35 of its brief.

CONCLUSION

Elijah Hicks was convicted of second degree murder and the jury was not properly instructed on this theory of defense. Mr. Hicks' convictions should be reversed for a new trial. At the very least, this Court should reverse Mr. Hicks'

[12] Arguably, the multiplicity error was caused by erroneous instructions that permitted the double jeopardy violation to occur. Mr. Hicks presented the court with an alternative instruction that would have treated Count Two as a lesser-included offense of Count Three. (ROA Vol. at 89) Under the facts of Mr. Hicks' case, the jury could not have convicted him of Count Two without convicting him of Count Three, and the requested instruction would not have permitted a finding of guilt in both counts. There was no reason to instruct the jury on both counts as though they were independent of each other. As with all of Mr. Hicks' objections to the instructions, the court overruled the objection and refused to give his alternate requested instruction. (ROA Vol. 1 at 540) Finally, the instructions confused the jury. The jury submitted a note to the court during deliberations indicating that jurors were unclear about the relationship between Counts 2 and 3 and "if they have to match Count 1." (ROA Vol. 1 at 598)

conviction in Count Two and remand Counts One and Three to the district court for resentencing.

Respectfully submitted,

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Date: November 13, 2023.

s/ *Stuart W. Southerland*

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I hereby certify that the digital version of this brief and attachments is an exact copy of any paper copy required to be submitted to the court. It has been scanned by the most recent version of Symantec Endpoint Protection and according to the program is free of viruses.

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s/ *Stuart W. Southerland*

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2023, I electronically filed this brief, with attachments, in the Tenth Circuit using the ECF System, which transmitted a Notice of Docket Activity to the following ECF registrants:

Lisa Williams – Assistant United States Attorney

s/ *Stuart W. Southerland*