APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

August 16, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO MIRAMONTES ROMAN,

Defendant - Appellant.

No. 17-4084
(D.C. No. 2:13-CR-00602-DN-DBP-1)
(D. Utah)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **EBEL**, and **MORITZ**, Circuit Judges.

Roberto Roman appeals his convictions for intentionally killing a law-enforcement officer and for several drug and firearm offenses. On appeal, Roman advances two arguments for reversal. First, he asserts that the district court erred by excluding evidence of his prior state-court acquittal. Next, he challenges the sufficiency of the evidence supporting his conviction for carrying a gun in furtherance of a drug-trafficking crime.[1]

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* This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.; 10th Cir. R. 32.1.

[1] Roman also contends that the double-jeopardy clause barred his underlying federal prosecution. But as we discuss below, Roman concedes we are constrained to reject this argument; he raises it only to preserve the issue for Supreme Court review.

Contrary to Roman's assertions, the district court neither violated his Sixth Amendment right to present a defense nor abused its discretion by excluding evidence of Roman's prior state-court acquittal; that evidence wasn't material, and any probative value it might have had was substantially outweighed by the risk that it would unfairly prejudice the government, confuse the issues, and mislead the jury. Moreover, there was sufficient evidence for a rational jury to find Roman guilty of carrying a firearm in furtherance of a drug-trafficking crime. Accordingly, we affirm.

Background

In January 2010, Roman drove to Ruben Chavez' residence with some methamphetamine, a Bersa pistol, and a loaded AK-47 rifle. When he arrived, he took the drugs and guns inside with him. Roman and Chavez then smoked methamphetamine, drank alcoholic beverages, watched movies, and used social media. Roman also showed the AK-47 to Chavez and allowed him to hold it. About six hours later, Roman left to sell methamphetamine to Ryan Greathouse. He again took the guns and drugs with him and put the AK-47 in his vehicle's trunk.

On the way to meet Greathouse, Roman pulled over and took the AK-47 out of the trunk and put it in the vehicle. When Roman arrived at the meeting place, Greathouse got into Roman's passenger seat. Roman drove a short distance and then sold 3.5 grams of methamphetamine to Greathouse. Greathouse paid Roman $150. He owed Roman more than that, but he explained that he would pay Roman after he collected some money later that evening.

Roman and Greathouse smoked methamphetamine and then drove to collect the money Greathouse owed Roman. On the way, they passed a marked sheriff's vehicle, which began following them. The sheriff's vehicle ultimately activated its lights and siren, and Roman pulled over. Deputy Josie Greathouse Fox—who, as happenstance would have it, was Greathouse's sister—got out of the sheriff's vehicle and approached Roman's driver-side door. As she did so, Roman rolled down the window. And as Fox neared the vehicle, she was fatally shot through the driver's window. Roman and Greathouse immediately fled the scene.

Local officers eventually found Roman hiding in a shed in Beaver, Utah and arrested him. During an interview with local investigators, he confessed to killing Fox. In the midst of his confession, he demonstrated at least 12 times how "he reached down and grabbed the AK[-]47, raised it up over his left hand or left shoulder, poked it out [of the window] just a little bit . . . and pulled the trigger." R. vol. 2, 362.

Roman was tried in state court for several offenses, including Fox's murder.[2] Despite Roman's earlier confession, he testified that Greathouse killed Fox. The state-court jury acquitted Roman of Fox's murder. The United States then brought its own charges against Roman, including intentionally killing a local law-enforcement officer in violation of 21 U.S.C. § 848(e)(1)(B) and possessing a firearm in

[2] Greathouse wasn't charged in connection with these events; he died of a drug overdose four months after Roman's arrest.

furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). This time, the jury convicted Roman on all counts. He appeals.

Analysis

I. The State-Court Acquittal

Roman first argues that the district court erred by excluding evidence of his state-court acquittal. His challenge turns on certain facts related to the government's investigation of the vehicle he was driving on the night of Fox's murder, so we begin by detailing those facts.

The day after Fox's murder, Douglas Squire, a forensic supervisor for the Utah County Sheriff's Office, investigated and searched Roman's vehicle. He found two bullet casings on the right side of the back seat and one casing on the vehicle's front passenger seat. Critically, he didn't notice any smudge marks on the vehicle's headliner—the fabric on the interior roof of the vehicle—above the driver's seat.

During Roman's state-court trial, Roman testified that Greathouse shot Fox. To test the veracity of Roman's story, state officials performed a preliminary reconstruction of Fox's murder. In doing so, they took multiple photographs of the reconstruction process.

After Roman's state-court acquittal, the government arranged to conduct its own reconstruction of Fox's murder. In preparation, Squire again investigated Roman's vehicle and took gunshot residue samples. This time, he noticed two smudge marks on the vehicle's headliner above the driver's seat. ATF Agent Gregory Klees then performed the reconstruction. He concluded that the individual sitting in

the driver's seat fired the AK-47. In reaching this conclusion, Klees relied on three factors: trajectory alignment, cartridge-case-ejection analysis, and the smudge marks on the headliner above the driver's seat. The smudge marks, according to Klees, were "the most significant piece of evidence." R. vol. 2, 870.

Roman didn't seek to suppress the smudge marks. But he did cite them as a basis for arguing, in a pretrial motion, that the district court should allow him to present evidence of his state-court acquittal to show Squire's motive to fabricate the smudge marks. Specifically, Roman pointed out that the smudge marks didn't appear in any of the photographs that state officials took during their preliminary reconstruction. So he reasoned that to the extent the smudge marks were visible in the photographs taken by the government during its subsequent reconstruction, Squire must have fabricated them.[3] And he argued that his state-court acquittal gave Squire a strong motive for doing so.

The district court rejected Roman's argument and excluded evidence of Roman's state-court acquittal. Roman challenges this ruling on two grounds. First, he contends that the district court's decision violated his Sixth Amendment right to present a defense. Second, he asserts that the district court abused its discretion in

[3] The government argues that proof of the smudge marks existed prior to Roman's state-court trial. Specifically, it argues the photographs taken during the state's preliminary reconstruction show the smudge marks on the headliner above the driver's seat. But even assuming the smudge marks aren't visible in these photographs, we ultimately conclude, for the reasons discussed below, that Roman isn't entitled to relief on this issue. So we need not resolve the parties' dispute on this point.

excluding evidence of the acquittal under Federal Rule of Evidence 403. For the reasons discussed below, we reject both of Roman's arguments.

A. Constitutional Violation

Roman first argues that the district court violated his constitutional right to present a defense when it excluded evidence of his state-court acquittal. We review de novo whether a constitutional violation has occurred. *See United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004).

Criminal defendants have a constitutional right to present evidence in support of their defense. *See* U.S. Const. amend. VI. But this right isn't unfettered. *See Markey*, 393 F.3d at 1135. In particular, "a criminal defendant does not have a constitutional right to present evidence that is not relevant and not material to his [or her] defense." *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005).

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and that "fact is of consequence in determining the action." Fed. R. Evid. 401. And evidence is material if its absence "rendered [the] trial fundamentally unfair." *Solomon*, 399 F.3d at 1239. "In other words, 'material evidence is that which is exculpatory—evidence that if admitted would create reasonable doubt that did not exist without the evidence.'" *Young v. Workman*, 383 F.3d 1233, 1238 (10th Cir. 2004) (quoting *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997)).

Here, Roman first contends that his state-court acquittal was relevant for the limited purpose of showing Squire's motive to fabricate the smudge marks. For

purposes of this appeal, we assume Roman is correct.[4] But we disagree with Roman's subsequent assertion that the acquittal was material.

That's because even if the district court had admitted evidence of the acquittal and the jury disregarded the smudge marks as a result, the fact remains that the other evidence before the jury overwhelmingly indicated that Roman was guilty of Fox's murder. *See Young*, 383 F.3d at 1238 (concluding that excluded evidence wasn't material in absence of any indication it "would have created reasonable doubt had it been introduced").

In particular, the jury watched Roman's videotaped confession, during which he demonstrated no fewer than 12 times how he held the AK-47 and fired it at Fox. And the jury also heard evidence corroborating nearly every aspect of this confession. For example, Roman told investigators precisely where to find the AK-47 that he discarded after the murder, and this information proved accurate. Similarly, Roman said (1) he called Chavez after the murder, (2) Chavez picked up him up in an orange Corvette, (3) Roman removed the rear license plate from the vehicle he had been driving, and (4) they drove away in the Corvette. Chavez' testimony corroborated this timeline and information. Moreover, the jury heard evidence that

[4] We also assume that this evidence wasn't inadmissible hearsay. Typically, "a judgment of acquittal is hearsay." *United States v. Sutton*, 732 F.2d 1483, 1493 (10th Cir. 1984). But according to Roman, this general rule doesn't apply here because he didn't offer the judgment of acquittal for the truth of the matter asserted—i.e., to show that a prior jury acquitted him. Instead, he says he offered the acquittal to show Squire's motive for fabricating evidence of his guilt. *See United States v. Lewis*, 594 F.3d 1270, 1282 (10th Cir. 2010) (defining hearsay, in relevant part, as a statement offered to prove truth of matter asserted). For purposes of this appeal, we assume but do not decide that Roman is correct.

Roman confessed to Fox's murder a second time, to his fellow inmate Jason Corey. Finally, in addition to his confessions and the substantial corroborating evidence, the jury heard testimony that Roman twice suggested he would rather shoot a police officer than go to jail. Most notably, during his interview with local investigators, Roman told them that approximately 20 minutes before Fox's death, he saw a vehicle approaching the vehicle in which he and Greathouse were traveling and told Greathouse that if the vehicle contained police officers, it wasn't "going to be good for them." R. vol. 2, 1290. More specifically, Roman indicated that if the vehicle contained police officers, he "would shoot them." *Id.* Similarly, a few days before Fox' death, while driving with his friend Sarah Hatch, Roman passed a police officer and told Hatch that "he would do what he had to do to not go to jail." *Id.* at 1189.

In light of this overwhelming evidence of Roman's guilt, we conclude the evidence of Roman's state-court acquittal was not material. Therefore, its absence did not render his trial fundamentally unfair, and the district court did not violate Roman's constitutional rights by excluding it. *See Solomon*, 399 F.3d at 1239.

B. Evidentiary Violation

Even assuming the district court didn't violate Roman's Sixth Amendment right to present a defense by excluding evidence of the state-court acquittal, Roman argues that the district court nevertheless erred in excluding the evidence because (1) it was relevant and (2) its probative value wasn't substantially outweighed by the potential danger of unfair prejudice. *See* Fed. R. Evid. 403. The district court disagreed. It found that other evidence already established Squire's motive to

fabricate the smudge marks. And it concluded that the state-court acquittal would "create[] a substantial risk of unfair prejudice to the government." R. vol. 1, 121. We review the district court's order excluding evidence under Rule 403 for abuse of discretion.[5] *See Markey*, 393 F.3d at 1134–35.

As discussed above, evidence is relevant if it tends "to make a fact [of consequence] more or less probable." Fed. R. Evid. 401. And relevant evidence is generally admissible. *Id.* 402. But a district court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* 403.

Roman first contends that his state-court acquittal was relevant for the limited purpose of showing Squire's motive to fabricate the smudge marks. For purposes of evaluating this argument, we again assume the relevance of Roman's state-court acquittal. But Roman further argues that the acquittal's probative value wasn't substantially outweighed by the risk of unfair prejudice because an appropriate limiting instruction would have mitigated that risk. On this point, we disagree.

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[5] Citing *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), Roman urges us to review the district court's Rule 403 determination de novo. But in *McVeigh*, we conducted de novo review because the record included a colloquy "that shed[] considerable light on how the district court viewed the evidence," even though the district court "failed to make an explicit record of its balancing of the Rule 403 factors." *Id.* at 1189. In contrast, the district court explicitly balanced the Rule 403 factors here. Thus, Roman's reliance on *McVeigh* is misplaced, and we reject his argument for de novo review.

It's simply unrealistic to suggest that this jury, tasked with deciding whether Roman was guilty of murdering a police officer, could have set aside the significance of Roman's state-court acquittal for *the same murder* and considered that acquittal solely as evidence of the motive to fabricate. As such, the district court didn't abuse its discretion in concluding that a limiting instruction wouldn't have sufficiently mitigated the risks inherent in admitting this evidence. *See United States v. De La Rosa*, 171 F.3d 215, 219–20 (5th Cir. 1999) (explaining that "evidence of a prior acquittal will often be excludable . . . because its probative value likely will be 'substantially outweighed by the danger of prejudice, confusion of the issues, or misleading the jury'" (quoting Fed. R. Evid. 403)); *United States v. Doles*, 335 F. App'x 736, 738–39 (10th Cir. 2009) (unpublished) (concluding that district court didn't abuse its discretion by excluding, for purposes of federal trial on charges of knowingly and unlawfully selling drug paraphernalia, evidence that defendant was acquitted in state court of similar charges; noting that "risk of confusion of the issues was high").

Our conclusion is bolstered by Roman's failure to cite a single case in which we—or any of our sibling circuits—have concluded that a district court abused its discretion by excluding evidence of a defendant's prior state-court acquittal for the same conduct at issue in a subsequent federal trial. Roman does cite *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1988). There, the district court admitted evidence of a prior acquittal "for the purpose of showing," in a subsequent *civil* proceeding, "that the plaintiffs incurred damages in the form of attorneys' fees in successfully

defending against the state criminal charges, and that the fees charged were reasonable in light of the success achieved." *Id.* at 1388. The Ninth Circuit reluctantly affirmed, noting that although it "would have been inclined to exclude the evidence of acquittal[]," the district court didn't abuse its discretion in admitting it. *Id.* at 1389.

But *Borunda* doesn't stand for the proposition that a district court necessarily abuses its discretion in refusing to admit evidence of an acquittal when it's offered to prove something other than a defendant's innocence. On the contrary, *Borunda* illustrates the wide latitude that district courts enjoy in determining whether evidence is admissible under Rule 403. Because the district court in this case didn't exceed that wide latitude in excluding evidence of Roman's state-court acquittal, it didn't abuse its discretion.

II. Sufficiency of the Evidence

Next, Roman challenges the sufficiency of the evidence supporting his conviction for possessing a firearm in furtherance of a drug-trafficking crime. We typically review the sufficiency of the evidence de novo. *See United States v. Wilson*, 244 F.3d 1208, 1219 (10th Cir. 2001). But as the government points out, Roman failed to renew his motion for a judgment of acquittal after the close of evidence, so our review is limited to plain error. *See United States v. Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013) (explaining that to succeed on plain-error review, appellant must establish (1) that error occurred, (2) that it was plain, (3) that it affected his or her substantial rights, and (4) that it "seriously affect[ed] the fairness, integrity, or public

reputation of judicial proceedings" (quoting *United States v. Story*, 635 F.3d 1241, 1244 (10th Cir. 2011))).

Of course, as Roman points out in reply, this is mostly a distinction without a difference: "review under the plain[-]error standard . . . and a review of sufficiency of the evidence usually amount to largely the same exercise." *Id.* (quoting *United States v. Duran*, 133 F.3d 1324, 1335 n.9 (10th Cir. 1998)). That's because the first three elements of plain-error review are necessarily satisfied when there's insufficient evidence of guilt. *Id.* And "it is only in a rare case when the absence of sufficient evidence will not meet the fourth factor of plain[-]error review." *Id.*

Under either standard, we won't "weigh evidence or consider credibility of witnesses." *Id.* at 1188 (quoting *United States v. Renteria*, 720 F.3d 1245, 1253 (10th Cir. 2013)). Further, we must draw all reasonable inferences in the light most favorable to the government and ask only whether "a reasonable jury could find [the defendant] guilty beyond a reasonable doubt." *Id.* (alteration in original) (quoting *United States v. Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008)).[6]

[6] The government urges us to find Roman's sufficiency challenge waived because Roman failed to argue for plain error in his opening brief. The failure to address plain error in an opening brief typically "marks the end of the road for an argument" not raised in district court. *United States v. Lamirand*, 669 F.3d 1091, 1099 n.7 (10th Cir. 2012) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011)). But Roman fully argued for plain error in his reply brief. *See United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016) (reviewing for plain error where appellant "argued plain error fully in his reply brief"). And the government also sought and received permission to file a surreply brief. As such, the issue has been fully briefed, and we therefore opt to address it. *See United States v. Montgomery*, 550 F.3d 1229, 1231 n.1 (10th Cir. 2008) (exercising discretion to ignore waiver because "the issue ha[d] been briefed fully and argued by the parties").

To convict Roman under § 924(c)(1)(A), the government was required to prove beyond a reasonable doubt that Roman (1) distributed methamphetamine to Chavez; (2) used or carried a firearm; and (3) did so during and in relation to that distribution. *See United States v. Nicholson*, 983 F.2d 983, 990 (10th Cir. 1993). Roman doesn't dispute that he distributed methamphetamine to Chavez. Nor does he dispute that he used or carried a firearm as he did so. Instead, he argues only that the government failed to prove that he used or carried the firearm "in relation to" the distribution of methamphetamine.[7] § 924(c)(1)(A).

Although not without boundaries, "[t]he phrase 'in relation to' is expansive." *Smith v. United States*, 508 U.S. 223, 237 (1993). Critically, a person carries a firearm "in relation to" a drug-trafficking offense if the firearm either facilitates or has "the *potential* of facilitating" the drug-trafficking crime. *United States v. Brown*, 400 F.3d 1242, 1250 (10th Cir. 2005) (emphasis added) (quoting *Smith*, 508 U.S. at 238). For instance,"[o]ne recognized theory that explains how a gun facilitates a drug[-]trafficking crime is that the gun deters interference with the crime." *Id.* at 1251 (quoting *United States v. Radcliff*, 331 F.3d 1153, 1159 (10th Cir. 2003)).

Roman contends the evidence was insufficient to show that he carried the firearm "in relation to" his distribution of drugs to Chavez. § 924(c)(1)(A). In support, he points out that although he carried the AK-47 from his vehicle to Chavez' residence, the government didn't establish the distance between the residence and the

[7] In his opening brief, Roman also argued that there was insufficient evidence to prove he carried the AK-47 *during* the distribution to Chavez. But because Roman explicitly withdrew this argument in his reply brief, we decline to consider it.

location where he parked. Thus, he maintains there was no evidence that he used the weapon for protection or deterrence during his walk from his vehicle to the house. Roman also points out that the government presented no evidence that the police or anyone else "would be happening by [Chavez'] living room." Aplt. Br. 56. Thus, he again suggests the government failed to present evidence that he needed the weapon for protection or deterrence while he was in Chavez' living room.

But Roman cites no authority, and we are aware of none, indicating that the government must identify a specific threat in order to establish that a gun was carried to facilitate or potentially facilitate a drug-trafficking crime. Instead, case law supports the jury's conclusion that Roman carried the loaded firearm in his vehicle and then into Chavez' house to facilitate or potentially facilitate his distribution of methamphetamine. *See United States v. King*, 632 F.3d 646, 656 (10th Cir. 2011) (stating that loaded firearms are "better suited" to protect drugs than unloaded firearms); *United States v. Winder*, 557 F.3d 1129, 1139 (10th Cir. 2009) (explaining that carrying firearm from vehicle was "strong evidence of [d]efendant's willingness to carry a gun to 'deter interference' with his drug[-]dealing pursuits" (quoting *United States v. Banks*, 451 F.3d 721, 726 (10th Cir. 2006))); *United States v. Lott*, 310 F.3d 1231, 1248 (10th Cir. 2002) (concluding that purpose of loaded firearm next to drug paraphernalia "was to provide defense or deterrence in furtherance of" drug-trafficking crime). Moreover, ATF Agent Jeff Bryan testified regarding the "very close connection" between firearms and drug distribution and explained that firearms protect drug distributors from theft and from law enforcement. R. vol. 2, 642.

Nevertheless, Roman asserts the jury couldn't reasonably infer here that Roman brought the gun for protection or deterrence purposes because the evidence showed that (1) Chavez didn't pay for the methamphetamine, (2) he and Chavez are friends, (3) he and Chavez have a common interest in firearms, and (4) he allowed Chavez to handle the AK-47. Roman suggests that this evidence established only that he brought the AK-47 inside so he could show it to a fellow gun enthusiast. But even assuming that's the case, it doesn't undermine the gun's *potential* to facilitate the distribution. And to support a conviction under § 924(c)(1)(A), "[t]here is no requirement" that the gun's potential to facilitate the drug-trafficking crime must "be the sole reason for the possession of the gun." *Radcliff*, 331 F.3d at 1158–59

Under these circumstances, we conclude the government presented sufficient evidence to permit the jury to find that Roman possessed the loaded AK-47 in order to facilitate or potentially facilitate his distribution of methamphetamine to Chavez. Thus, we affirm his § 924(c)(1)(A) conviction.

III. Double Jeopardy

Finally, Roman asserts that in light of the earlier state-court acquittal, the subsequent federal prosecution violated the double-jeopardy clause. But he concedes that this challenge is foreclosed by the Supreme Court's longstanding dual-sovereignty rule.[8] *See, e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870

[8] We recognize that the Supreme Court has granted certiorari to consider the constitutionality of the dual-sovereignty rule. *See United States v. Gamble*, 694 F. App'x 750 (11th Cir. 2017) (unpublished), *petition for cert. granted* June 28, 2018 (No. 17-646). But that doesn't alter our obligation to apply the Court's current

(2016) (explaining that criminal defendant may be prosecuted twice for same offense so long as prosecutions are "brought by different sovereigns"); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (holding that acquittal in state court didn't bar prosecution by federal government for substantially same crime). Indeed, he raises this argument only "to preserve it for review by the Supreme Court." Aplt. Br. 64.

As Roman acknowledges, we must follow the Supreme Court's dual-sovereignty holdings. *See United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007). We therefore reject his double-jeopardy argument.

Conclusion

Because evidence of the state-court acquittal wasn't material, the district court didn't violate Roman's constitutional rights by excluding it. Nor did the district court's decision amount to an abuse of discretion; any probative value the acquittal might have had was outweighed by the risk that it would unfairly prejudice the government, confuse the issues, and mislead the jury. Moreover, there was sufficient evidence for the jury to find that Roman possessed the AK-47 in relation to his act of distributing drugs to Chavez. Finally, Supreme Court precedent forecloses Roman's double-jeopardy argument. Accordingly, we affirm.

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precedent. *See United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008) (stating that precedent is binding "even when the Supreme Court grants certiorari on an issue").

FILED
United States Court of Appeals
Tenth Circuit

June 23, 2015

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO MIRAMONTES ROMAN,

Defendant - Appellant.

No. 14-4126
(D.C. No. 2:13-CR-00602-DN-DBP-1)
(D. Utah)

ORDER AND JUDGMENT*

Before **GORSUCH**, **McKAY**, and **BACHARACH**, Circuit Judges.

Mr. Roberto Roman was found guilty on state charges of possession of a dangerous weapon by a restricted person and tampering with evidence; he was acquitted on an additional charge of aggravated murder. He was later charged in federal court on 11 counts growing out of the same events. Mr. Roman argued that the federal prosecution violated the Double

* The parties do not request oral argument, and the Court has determined that oral argument would not materially aid our consideration of the appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). Thus, we have decided the appeal based on the briefs.

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.

Jeopardy Clause. The federal district court rejected this argument, and he renews the argument on appeal.

We must decide: Does the Double Jeopardy Clause prevent federal authorities from prosecuting individuals for federal crimes after state prosecutions for state crimes? We conclude that the dual prosecutions would not violate the Double Jeopardy Clause because our precedent treats federal and state prosecutorial entities as independent sovereigns.

I. Standard of Review

In reviewing the district court's ruling, we engage in de novo review. *United States v. Barrett*, 496 F.3d 1079, 1117 (10th Cir. 2007).

II. Double Jeopardy

The Double Jeopardy Clause provides that no person should "be twice put in jeopardy" for the same offense. U.S. CONST. Amend. V. In applying this clause, the Supreme Court has recognized the "dual sovereignty doctrine," which provides that two crimes are committed when a defendant commits a single act violating the laws of separate sovereigns. *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)). Under this doctrine, prosecution of Mr. Roman by two separate sovereignties did not violate the Double Jeopardy Clause.

Mr. Roman asks us to overrule these Supreme Court precedents. We cannot do that. *See United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007) ("To the extent [the defendant] questions the continued viability of the dual sovereignty doctrine . . . this court is bound to follow [*United States v. Lanza*, 260 U.S. 377 (1922)] . . . until such time as the Supreme Court overrules it.").

Under the Supreme Court's dual sovereignty doctrine, the federal prosecution did not violate the Double Jeopardy Clause. Thus, we affirm.

Entered for the Court

Robert E. Bacharach
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROBERTO MIRAMONTES ROMAN, Defendant.	**MEMORANDUM DECISION AND ORDER DENYING MOTION TO RECONSIDER** Case No. 2:13-CR-602-DN-DBP District Judge David Nuffer

Defendant Roberto Miramontes Roman seeks reconsideration[1] of his Motions to Dismiss[2] brought pursuant to the Double Jeopardy Clause of the United States Constitution.[3] Mr. Roman argues that reconsideration is appropriate[4] in light of Justice Ginsberg's concurring opinion in *Puerto Rico v. Sanchez Valle*.[5] Because the law of the case doctrine precludes reconsideration of Mr. Roman's Motions to Dismiss,[6] Mr. Roman's Motion to Reconsider[7] is DENIED.

[1] Motion to Reconsider Motion to Dismiss on Double Jeopardy Grounds ("Motion to Reconsider"), docket no. 165, filed Sept. 14, 2016.

[2] Motion to Dismiss Under Double Jeopardy Clause ("Motion to Dismiss"), docket no. 29, filed Feb. 28, 2014; Amended Motion to Dismiss Under Double Jeopardy Clause ("Amended Motion to Dismiss"), docket no. 68, filed Apr. 29, 2014 (collectively "Motions to Dismiss").

[3] U.S. Const. Amend. V.

[4] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016; Memorandum in Support of Motion to Reconsider Motion to Dismiss on Double Jeopardy Grounds ("Supporting Memorandum"), docket no. 166, filed Sept. 14, 2016.

[5] 136 S.Ct. 1863, 1877, 195 L.Ed.2d 179 (2016) (Ginsberg, J., concurring).

[6] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[7] Docket no. 165, filed Sept. 14, 2016.

BACKGROUND

On September 5, 2013, the government filed an eleven-count Indictment[8] against Mr. Roman. Mr. Roman subsequently filed a Motion to Dismiss[9] pursuant to the Double Jeopardy Clause of the United States Constitution[10] seeking dismissal of Counts VII and VIII of the Indictment.[11] Mr. Roman later filed an Amended Motion to Dismiss[12] encompassing Counts II through X of the Indictment.[13] On September 30, 2014, the Motions to Dismiss[14] were denied by Memorandum Decision and Order[15] based on the dual-sovereignty doctrine. Mr. Roman then appealed[16] to the Tenth Circuit Court of Appeals, which affirmed.[17] Mr. Roman did not file a petition for writ of certiorari with the United State Supreme Court.

Mr. Roman now seeks reconsideration[18] of his Motions to Dismiss.[19] Mr. Roman argues that reconsideration is warranted[20] in light of Justice Ginsberg's concurring opinion in *Puerto Rico v. Sanchez Valle*,[21] which called for a fresh examination of the dual-sovereignty doctrine in

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[8] Docket no. 1, filed Sept. 5, 2014.

[9] Docket no. 29, filed Feb. 28, 2014.

[10] U.S. Const. Amend. V.

[11] Docket no. 1, filed Sept. 5, 2013.

[12] Docket no. 68, filed Apr. 29, 2014.

[13] Docket no. 1, filed Sept. 5, 2013.

[14] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[15] Docket no. 84, entered Sept. 30, 2014.

[16] Notice of Appeal, docket no. 85, filed Oct. 6, 2014.

[17] Order and Judgement, docket no. 130, filed July 15, 2015.

[18] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016.

[19] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[20] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016; Supporting Memorandum, docket no. 166, filed Sept. 14, 2016.

[21] 136 S.Ct. at 1877 (Ginsberg, J., concurring).

future cases. The government filed its Response Memorandum[22] on September 28, 2016, arguing that reconsideration is precluded by the law of the case doctrine.

DISCUSSION

"Motions to reconsider are proper in criminal cases even though the Federal Rules of Criminal Procedure do not specifically provide for them."[23] However, "[t]he law of the case doctrine precludes relitigation of a ruling of law in a case once it has been decided."[24] "The doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"[25] "Th[e] doctrine is based on sound public policy that ligation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided."[26] Therefore, "[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal."[27] This form of the law of the case doctrine is known as the mandate rule.[28]

Nevertheless, as "[t]he law of the case doctrine is a rule of practice,"[29] "[it] is not an inexorable command[.]"[30] "[Courts] will depart from the law of the case doctrine in three

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[22] United States' Response to Defendant's Motion to Reconsider Motion to Dismiss on Double Jeopardy Grounds ("Response Memorandum"), docket no. 171, filed Sept. 28, 2016.

[23] *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014).

[24] *United States v. West*, 646 F.3d 745, 748 (10th Cir. 2011).

[25] *Id.* (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

[26] *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998) (internal quotations omitted).

[27] *West*, 646 F.3d at 747-48 (internal quotations omitted).

[28] *Ute Indian Tribe v. State of Utah*, 935 F.Supp. 1473, 1516-17 (D. Utah Apr. 2, 1996); Bryan A. Garner et al., *The Law of Judicial Precedent* 442, 459 (2016).

[29] *Id.* at 748.

[30] *Alvarez*, 142 F.3d at 1247 (internal quotations omitted).

exceptionally narrow circumstances: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice."[31]

Mr. Roman seeks reconsideration[32] of his Motions to Dismiss[33] brought pursuant to the Double Jeopardy Clause of the United States Constitution.[34] However, because Mr. Roman appealed the Memorandum Decision and Order[35] denying his Motions to Dismiss[36] and the Tenth Circuit Court of Appeals affirmed,[37] the decision of the Tenth Circuit established the law of the case[38]with respect to the Motions to Dismiss.[39] And Mr. Roman's Motion to Reconsider[40] fails to meet any of the exceptions[41] that would permit reconsideration of the Motions to Dismiss.[42]

Mr. Roman makes no attempt to point to substantially different evidence or to argue that the decision of the Tenth Circuit[43] is clearly erroneous.[44] Mr. Roman also cites to no change in

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[31] *Id.*

[32] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016.

[33] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[34] U.S. Const. Amend. V.

[35] Notice of Appeal, docket no. 85, filed Oct. 6, 2014.

[36] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[37] Order and Judgement, docket no. 130, filed July 15, 2015.

[38] *West*, 646 F.3d at 747-48.

[39] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[40] Docket no. 165, filed Sept. 14, 2016.

[41] *Alvarez*, 142 F.3d at 1247.

[42] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[43] Order and Judgement, docket no. 130, filed July 15, 2015.

[44] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016; Supporting Memorandum, docket no. 166, filed Sept. 14, 2016.

controlling authority.[45] Rather, Mr. Roman's Motion to Reconsider[46] relies solely on Justice Ginsberg's concurring opinion in *Puerto Rico v. Sanchez Valle*.[47] Justice Ginsberg's concurrence[48] is not the holding of the *Sanchez Valle* majority,[49] nor does it conclude that the dual-sovereignty doctrine should no longer be applied as an exception to double jeopardy. The concurrence merely calls for a fresh examination of the dual-sovereignty doctrine in future cases.[50] Therefore, the law of the case doctrine precludes reconsideration of Mr. Roman's Motions to Dismiss.[51]

ORDER

IT IS HEREBY ORDERED that Mr. Roman's Motion to Reconsider[52] is DENIED.

Signed November 15, 2016.

BY THE COURT

District Judge David Nuffer

[45] Motion to Reconsider, docket no. 165, filed Sept. 14, 2016; Supporting Memorandum, docket no. 166, filed Sept. 14, 2016.

[46] Docket no. 165, filed Sept. 14, 2016.

[47] 136 S.Ct. at 1877 (Ginsberg, J., concurring).

[48] *Id.*

[49] *Id.* at 1868-1877.

[50] *Sanchez Valle*, 136 S.Ct. at 1877 (Ginsberg, J., concurring).

[51] Docket no. 29, filed Feb. 28, 2014; Docket no. 68, filed Apr. 29, 2014.

[52] Docket no. 165, filed Sept. 14, 2016.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROBERTO MIROMANTES ROMAN, Defendant.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS UNDER DOUBLE JEOPARDY CLAUSE** Case No. 2:13-cr-00602-DN-DBP-1 District Judge David Nuffer Magistrate Judge Dustin B. Pead

Defendant Robert Miromantes Roman, by and through counsel, moves to dismiss "Counts 2 through 10 of the Indictment in this case on the basis that prosecution of such counts violates the Fifth Amendment's Double Jeopardy Clause."[1] For the reasons set forth below, Mr. Roman's motion[2] and amended motion[3] are DENIED.

BACKGROUND

Mr. Roman was previously prosecuted by the State of Utah for three Counts:

Count I. Aggravated Murder, in violation of Utah Code § 76-5-202;

Count II. Tampering with Evidence, in violation of Utah Code § 76-8-510.5; and

Count III. Possession of a Firearm by a Category II Restricted Person, in violation of Utah Code § 76-10-503.[4]

After trial held in the Fourth Judicial District Court, Spanish Fork Division, Utah County, an eight-person jury found Mr. Roman not guilty of Count I, guilty of Count II, and guilty of Count III.[5]

[1] Amended Motion to Dismiss under Double Jeopardy Clause, docket no. 68, filed April 29, 2014.

[2] Motion to Dismiss under Double Jeopardy Clause, docket no. 29, filed February 28, 2014.

[3] Amended Motion to Dismiss under Double Jeopardy Clause, docket no. 68, filed April 29, 2014.

[4] Amended Information, docket no. 69-2, filed April 29, 2014.

After the conclusion of the state court trial, an 11-count indictment was returned against Mr. Roman in this court.[6] The indictment includes the following charges:

Count 1.	Distribution of a Schedule II controlled substance, in violation of 21 U.S.C. § 841 (a)(1);
Count 2.	Possession of a firearm in furtherance of a drug trafficking crime (Count 1), in violation of 18 U.S.C. § 924(c)(1)(A);
Count 3.	Distribution of a Schedule II controlled substance, in violation of 21 U.S.C. § 841 (a)(1);
Count 4.	Possession of a firearm in furtherance of a drug trafficking crime (Count 3), in violation of 18 U.S.C. § 924(c)(1)(A);
Count 5.	Distribution of a Schedule II controlled substance, in violation of 21 U.S.C. § 841 (a)(1);
Count 6.	Possession of a firearm in furtherance of a drug trafficking crime (Count 5), in violation of 18 U.S.C. § 924(c)(1)(A);
Count 7.	Killing of a local law enforcement officer to avoid apprehension for a felony drug crime in violation of 21 U.S.C. § 848(e)(1)(B);
Count 8.	Use, carry, and discharge of a firearm during and in relation to a crime of violence (Count 7), in violation of 18 U.S.C. § 924(c)(1)(A);
Count 9.	Possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2);
Count 10.	Possession of a firearm by an illegal alien, in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2); and
Count 11.	Illegal reentry by a previously removed alien, in violation of 8 U.S.C. § 1326.[7]

Shortly after the filing of the indictment, Mr. Roman moved to dismiss Counts 7 and 8 on double jeopardy grounds pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[8] Later, Mr. Roman amended his motion to dismiss "to broaden the

[5] Verdict, docket no. 69-2, filed April 29, 2014.

[6] Indictment, docket no. 1, filed September 5, 2013.

[7] Indictment at 2-5, docket no. 1, filed September 5, 2013.

[8] Motion to Dismiss under Double Jeopardy Clause at 1, docket no. 29, filed February 28, 2014.

previous motion to dismiss to now encompass counts not previously noted in that motion."[9] The amended motion seeks to dismiss "Counts 2 through 10 of the Indictment in this case on the basis that prosecution of such counts violates the Fifth Amendment's Double Jeopardy Clause."[10] The government opposes the motion based on the dual sovereignty doctrine.[11]

DISCUSSION

The Fifth Amendment states that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]"[12] This clause of the Fifth Amendment is commonly known as the Double Jeopardy Clause, and prohibits "not only multiple punishments for the same crime, but also multiple prosecutions as well."[13] "One significant limitation exists, however, to the protection afforded by the Double Jeopardy Clause."[14] The exception "is known as the dual sovereignty doctrine, under which courts recognize that the Clause is no bar to serial prosecution and punishment undertaken by separate sovereign entities."[15] "The Supreme Court has explained that the doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government, and [w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses."[16] "In other words, the doctrine is best understood . . . *not* as an exception to double

[9] Amended Motion to Dismiss under Double Jeopardy Clause, docket no. 68, filed April 29, 2014.

[10] Amended Motion to Dismiss under Double Jeopardy Clause, docket no. 68, filed April 29, 2014.

[11] United States' Response to Defendant's Motion to Dismiss on Double Jeopardy Grounds at 5, docket no. 70, filed May 28, 2014.

[12] U.S. Const. amend. V.

[13] *U.S. v. Barrett*, 496 F.3d 1079, 1118 (10th Cir. 2007) (internal citation and quotation marks omitted).

[14] *Id.* (internal citation and quotation marks omitted).

[15] *Id.* (internal citation and quotation marks omitted).

[16] *Id.* (internal citation and quotation marks omitted) (alteration in original).

jeopardy, but rather as a manifestation of the maxim that where a defendant violates the law of two sovereigns, he commits separate offenses."[17]

In this case, Mr. Roman acknowledges that "current Supreme Court precedent permits prosecution of previously acquitted and convicted counts due to the dual sovereignty exception"[18] and that "this Court is bound by the dual sovereignty doctrine,."[19] But he argues that the doctrine should be repudiated and Counts 2 through 10 should be dismissed because Mr. Roman was previously prosecuted in state court and was "convicted of possessing the firearm at issue in Counts 2, 4, 6, 8, 9 & 10"[20] and was "acquitted of the murder of Josie Greathouse Fox, Counts 7 & 8,"[21] and because "the conduct underlying Counts 3 and 5 are part of the 'same criminal act, occurrence, episode, or transaction.'"[22]

Mr. Roman further argues that the dual sovereignty exception deviates considerably from the Framers' intent,[23] is analytically flawed in that it treats the State and the federal government as separate sovereigns,[24] and is inconsistent with the approach of other areas of criminal procedure such as self-incrimination and unreasonable search and seizure.[25]

The United States responds to these arguments by noting that "[e]ven if any of the federal charges contain the same elements as the state charges, they are not the 'same offense' for

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[17] *Id.* (internal citation and quotation marks omitted) (alteration in original).

[18] Memorandum in Support of Motion to Dismiss on Double Jeopardy Grounds at 5, docket no. 69, filed April 29, 2014.

[19] *Id.* at 8 n. 14, docket no. 69, filed April 29, 2014.

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.* (quoting *Ashe v. Swenson*, 397 U.S. 436, 453 (1970)).

[23] *Id.* at 8-10.

[24] *Id.* at 10-12.

[25] *Id.* at 13-15.

purposes of double jeopardy."[26] The United States argues that it is prosecuting federal crimes, not state crimes, and is therefore "entitled to vindicate its interest in prosecuting Roman for his alleged violation of federal criminal statutes" regardless of whether the State of Utah has already pursued charges based in state law for the same conduct.[27] The United States correctly points out that the U.S. Supreme Court created the dual sovereignty doctrine, has had opportunities to overrule it, but thus far has refused to do so."[28]

Because the dual sovereignty doctrine has not been overruled by the U.S. Supreme Court, and because the federal charges are not the same as the state charges under which Mr. Roman was previously prosecuted, there is no basis to grant Mr. Roman's motion to dismiss. The state charges were based in the Utah Code and the federal charges are based in the United States Code. Therefore, regardless of whether the charges are based in the same conduct, the charges are being pursued under separate legal regimes and are not the "same" for purposes of double jeopardy analysis. The U.S. Supreme Court has made clear that the dual sovereignty doctrine is still a valid legal doctrine, and therefore each sovereign is permitted to prosecute alleged violations of its own laws.

Moreover, although Mr. Roman cites many academic works that criticize the dual sovereignty doctrine, and makes the argument that the doctrine is contrary to the view espoused by the Framers at the inception of this country's foundation, he fails to cite to any case overruling the doctrine. Therefore, his request to eradicate the doctrine from American

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[26] United States' Response to Defendant's Motion to Dismiss on Double Jeopardy Grounds at 4 (citing *Heath v. Alabama*, 474 U.S. 82, 87 (1985) and *United States v. Dixon*, 509 U.S. 688, 696 (1993)), docket no. 70, filed May 28, 2014.

[27] United States' Response to Defendant's Motion to Dismiss on Double Jeopardy Grounds at 4.

[28] *Id.* at 5 (citing *Abbate v. United States*, 359 U.S. 187, 194-95 (1950) and *Heath*, 474 U.S. at 92).

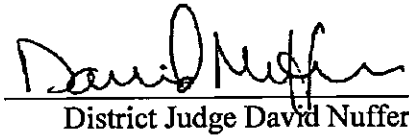
jurisprudence cannot be granted by this court since "lower courts are required to follow the precedential decisions of higher courts on questions of law."[29]

CONCLUSION AND ORDER

IT IS THEREFORE ORDERED that Defendant Robert Miromantes Roman's Motion to Dismiss Under Double Jeopardy Clause[30] and Amended Motion to Dismiss Under Double Jeopardy Clause[31] are DENIED.

Signed September 29, 2014.

BY THE COURT



District Judge David Nuffer

[29] *B.T. ex rel. G.T. v. Santa Fe Public Schools*, 506 F.Supp.2d 718, 724-25 (citing *Hutto v. Davis*, 454 U.S. 370, 375 (1982)).

[30] Motion to Dismiss under Double Jeopardy Clause, docket no. 29, filed February 28, 2014.

[31] Docket no. 68, filed April 29, 2014.

FILED
United States Court of Appeals
Tenth Circuit

October 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO MIRAMONTES ROMAN,

Defendant - Appellant.

No. 17-4084

ORDER

Before **PHILLIPS**, **EBEL**, and **MORITZ**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 2, 2019

Mr. Howard A. Pincus
Fed Pub. Def. for Dist. CO &WY
633 17th Street
Suite 1000
Denver, CO 80202

Re: Roberto Miramontes Roman
v. United States
Application No. 18A680

Dear Mr. Pincus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on January 2, 2019, extended the time to and including March 11, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jeffrey Atkins
Deputy Clerk