

# APPENDIX A

936 F.3d 1117

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,  
v.  
Jeffrey ANTONIO, Defendant - Appellant.  
No. 18-2118

September 4, 2019

Synopsis

Background: Following denial of defendant's motion to dismiss the indictment for lack of subject matter jurisdiction, 2017 WL 3149361, he was convicted in the United States District Court for the District of New Mexico, James O. Browning, J., of second-degree murder. Defendant appealed.

Holdings: The Court of Appeals, Tymkovich, Chief Judge, held that:

[1] offense occurred in Indian Country, so that jurisdiction was proper;

[2] even assuming that the District Court failed to make timely pretrial ruling on motion to dismiss for lack of jurisdiction, that did not amount to plain error; and

[3] step-down jury instructions on charged offense and lesser-included offense of involuntary manslaughter were proper.

Affirmed.

West Headnotes (11)

[1] Indians

↳ What is Indian country in general

To determine whether federal court jurisdiction is proper on ground that crime occurred in Indian Country, the court must determine whether the lands in question were either part of an Indian reservation, a dependent Indian community, or an Indian allotment. 18 U.S.C.A. § 1151.

1 Cases that cite this headnote

[2]

Automobiles

↳ Jurisdiction and venue

↳ Indians

↳ Crime committed in Indian country or on reservation

Charged offense of second-degree murder resulting from defendant's alleged conduct of driving while intoxicated and colliding head-on with another vehicle, which resulted in passenger's death, occurred within "Indian Country," so that jurisdiction in federal district court was proper for the second-degree murder prosecution; the site of the accident was the exterior boundary of land grant from Spain to the Pueblo Indian tribe, and the boundary was confirmed by Congress pursuant to the Pueblo Lands Act. 18 U.S.C.A. § 1151; 25 U.S.C.A. § 331.

[3]

Criminal Law

↳ Place of offense

As a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site.

1 Cases that cite this headnote

[4]

Criminal Law

↳ Jurisdiction

Even assuming that the District Court failed to make a timely pretrial ruling on defendant's motion to dismiss indictment for lack of subject matter jurisdiction or failed to make a finding of good cause to defer the jurisdictional ruling until after trial, such failure did not amount to plain error, in prosecution for second-degree murder; jury found defendant was guilty of second-degree murder, which was an entirely separate determination from the jurisdictional issue, and if the District Court later found that it lacked jurisdiction, the conviction would have been vacated. Fed. R. Crim. P. 12(d).

Step-down jury instructions, which instructed jury first on charged offense of second-degree murder, then on the lesser-included offense of involuntary manslaughter, and then instructed that jury could only consider manslaughter if they did not unanimously find defendant guilty of second-degree murder, were proper, where jury also received instructions on the mens rea distinctions between the two offenses, and was told by trial court to review the instructions as a whole before beginning its deliberations.

[5] Criminal Law

⇒ Necessity of Objections in General

Generally, if a defendant fails to raise an argument in the district court, the Court of Appeals will review it only for plain error.

[6] Criminal Law

⇒ Necessity of Objections in General

Under the plain error standard of review, an appellate court grants relief only when (1) an error occurred; (2) the error is plain or obvious; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[7] Criminal Law

⇒ Several counts or offenses

Criminal Law

⇒ Construction and Effect of Charge as a Whole

[8] Criminal Law

⇒ Review De Novo

The appellate court reviews jury instructions de novo to determine whether the jury received the relevant legal standards.

[9] Criminal Law

⇒ Plain or fundamental error

If a defendant fails to object to a jury instruction, the appellate court must review for plain error.

[10] Homicide

⇒ Intent or mens rea; malice

To support a second-degree murder conviction, the government is required to prove that the defendant acted with malice aforethought.

[11] Homicide

⇒ Recklessness, wantonness, or extreme indifference

To support a conviction for involuntary manslaughter, the jury is required to find that the defendant was reckless and displayed a wanton disregard for human life.

\*1119 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 1:16-CR-01106-JMC-1)

Attorneys and Law Firms

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John C. Anderson, United States Attorney, Office of the United States Attorney, Albuquerque, New Mexico, for Appellee.

Before TYMKOVICH, Chief Judge, EBEL, and LUCERO, Circuit Judges.

Opinion

TYMKOVICH, Chief Judge.

\*\* I This appeal requires us to consider the boundaries of the Sandia Pueblo north of Albuquerque, New Mexico. Resolving that question answers whether the federal court had jurisdiction to hear the underlying criminal case on appeal. We conclude the crime occurred within the exterior boundaries of the Sandia Pueblo, and therefore the federal court for the District of New Mexico was the proper forum for the prosecution.

I. Background

Jeffrey Antonio was driving his pickup truck a few miles north of Albuquerque when he was involved in a car accident. He was driving north but drifted into the southbound lane where he collided head-on with another vehicle. Antonio had been drinking, and at the time of the accident, he was significantly over the legal limit for driving. He had been convicted of driving under the influence on two occasions prior to his arrest in this case. This time, a passenger in the other vehicle was killed.

A federal grand jury returned an indictment charging Antonio with one count of second-degree murder. As an enrolled member of the Laguna Pueblo, Antonio could be charged and tried in federal court if the accident occurred in Indian Country. The United States alleged that the accident occurred

within the exterior boundaries of the Sandia Pueblo.

Prior to trial, the United States filed a motion *in limine* asking the district court to rule that the site of the accident was in Indian Country to conclusively establish federal jurisdiction. Antonio then informed the district court of his ongoing investigation into the question of the land status.

The parties presented arguments to the district court during pre-trial hearings. The government presented testimony from a land surveyor who determined the land was within Indian Country. After hearing the evidence, the district court judge stated he was "inclined to find" the site of the accident took place in Indian Country. R. Vol. 5 at 63.

One week before trial, Antonio filed a motion to dismiss the indictment for lack of subject matter jurisdiction pursuant to Federal Rule of Criminal Procedure 12(b)(2). He argued that, as a matter of law, the accident site was on privately owned land and not in Indian Country. Therefore, there was no federal jurisdiction.

The issue was revisited at a motions hearing prior to trial. The government objected to exhibits listed by Antonio, which he was planning to introduce to show that the accident site was not within Indian Country. The district court stated

Right at the moment, I'm inclined to put it in the instruction that it is within Indian Country. And with that, since I'm \*1120 making a determination pretrial, I'm putting it in the jury instructions and instructing, then[,] those exhibits will not be allowed for the purpose of contesting that this is Indian Country.

R. Vol. 5 at 318. The district court indicated it planned to deny Antonio's motion.

At trial, Antonio objected to Proposed Instruction No. 12, which instructed the jury that, as a matter of law, the site of the accident took place in Indian Country. The court stated it was going to incorporate this instruction, or a similar instruction, into the final jury instructions. Antonio responded, "I understand the Court is going to rule that it is within Indian Country. ... And to that extent, we object to the instruction that includes the consequence of that

decision." R. Vol. 5 at 738.

\*\*2 At the close of the government's case, Antonio moved for a judgment of acquittal under Rule 29 and argued there was insufficient proof that the accident took place in Indian Country. The district court judge denied the motion, noting that he was "going to tell the jury that the land is Indian Country so that ... they will make their decision based upon [the district court's] instruction that the Court has jurisdiction." R. Vol. 5 at 886.

At the close of Antonio's case, Antonio renewed his motion for judgment of acquittal, which the district court denied. The district court instructed the jury "that the alleged murder occurred within the territorial jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred at the intersection of Highway 313 and Wilda Drive, in Bernalillo County, in the District of New Mexico." R. Vol. 1 437-38.

Several weeks after trial, the district court issued its opinion denying Antonio's motion to dismiss. The district court concluded it had jurisdiction based on the Indian Pueblo Lands Act Amendments of 2005. Antonio was subsequently sentenced to a term of imprisonment of 240 months and now appeals.

## II. Analysis

Antonio raises four issues for reversal. First, whether the government met its burden to prove the accident occurred in Indian Country. Second, whether the jury was presented with sufficient evidence that the offense was committed within the territorial jurisdiction of the United States. Third, whether the district court violated Federal Rule of Criminal Procedure 12(d) by waiting until after trial to issue a written memorandum and order denying the motion to dismiss. And fourth, whether the district court erred in instructing the jury.

We address each in turn, concluding the district court committed no error.

*A. Subject Matter Jurisdiction and Indian Country*  
[1] The United States has jurisdiction over crimes committed within Indian Country as defined by 18 U.S.C. § 1151. Indian Country means

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) *all dependent Indian communities within the borders of the United States* whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). To determine jurisdiction; then, we must determine whether the lands in question were either part of an Indian reservation, a dependent Indian community, or an Indian allotment.

\*1121 Answering that question was not always simple given the complicated history of land transactions on Indian lands. In United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), the Supreme Court determined the Pueblo lands were within Indian Country and subject to federal jurisdiction even though the lands were not formally designated as a reservation. *Id.* at 47, 34 S.Ct. 1. But the designation of the Pueblos as "dependent Indian communities" after Sandoval left the status of non-Indian held land within the Pueblo communities in question. Ultimately, the Pueblo Lands Act of 1924 was adopted to settle conflicting claims to Pueblo lands.

Because the Pueblo are a dependent Indian community, and because titles to individual tracts of land were transferred to non-Indians after the 1924 Act, questions arose about federal jurisdiction on Pueblo lands. Although the Pueblo lands fell within Indian Country because the Pueblos were a dependent Indian community, 18 U.S.C. § 1151 did

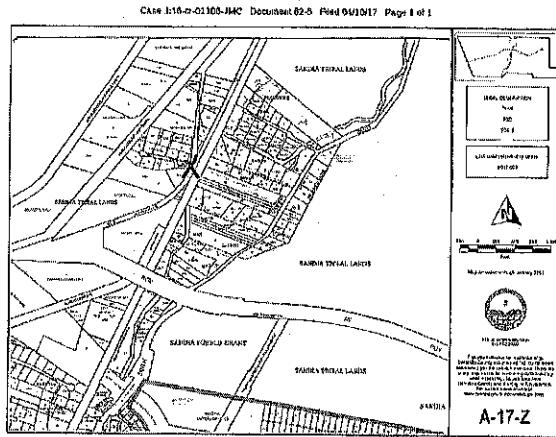
not account for tracts of land within the dependent Indian communities that were owned by non-Indians. Under § 1151, these private holdings would not necessarily be subject to federal jurisdiction.

\*<sup>3</sup>To avoid checkerboard jurisdiction, Congress passed the 2005 Amendments to the Indian Pueblo Lands Act, which clarified criminal jurisdiction specifically on Pueblo lands. The Amendments specified the United States has jurisdiction “over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico.” Indian Pueblo Lands Act Amendments of 2005, Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005), codified at 25 U.S.C. § 331 Note (emphasis added).

Thus, the question in this case is whether the accident occurred on a tract of land covered by the Indian Pueblo Lands Act Amendments of 2005.

The accident took place at the intersection of Highway 313 and Wilda Drive in Bernalillo County. The parcel of land on which this intersection is located was originally granted to the Sandia Pueblo in 1748 by the King of Spain, and includes a large section east of the Rio Grande River. A portion of this parcel, which includes the relevant intersection, eventually came into private ownership, belonging to an individual named Pedro C. Garcia. In 1930, Mr. Garcia and his wife conveyed in fee simple a right-of-way along the Rio Grande to the Middle Rio Grande Conservancy District. The remaining parcel, known as Private Claim 364, is still privately owned. The intersection is located on Private Claim 364 (see below).

\*1122



[2] With that background, we consider first whether the exterior boundaries of the land grant include the site of the accident, and then whether Congress confirmed those boundaries as required by the 2005 Amendments.

#### *1. Exterior Boundaries of the Sandia Pueblo*

Both parties agree the offense took place “within the exterior boundaries of [a] grant from a prior sovereign.” In 1748, the King of Spain granted to the Pueblo of Sandia a parcel of land that described the Rio Grande as the western boundary of the grant.<sup>1</sup> In 1924, Congress passed the Pueblo Lands Act, which quieted title to certain tracts of land within the exterior boundaries of the different Pueblos that was disputed by Pueblos and non-Indians. In 1933 and 1934, through the 1924 Pueblo Lands Act, Congress issued land patents to Garcia for Private Claim 364, which sat entirely within the boundaries of the 1748 land grant. Because the offense took place on Private Claim 364, it took place within the exterior boundaries of the original land grant by a sovereign.

1 In 1848, under the Treaty of Guadalupe-Hidalgo, Mexico ceded to the United States a large land mass including the land where the Pueblo Indians resided.

2. *Confirmed by Congress*

The next question is whether the exterior boundaries of the disputed lands were confirmed by Congress. Antonio claims the district court erred in finding that Congress confirmed the western boundary, which was marked by the Rio Grande River. The district court found that Congress confirmed the exterior boundaries, including the western boundary, in a piece of legislation enacted in 1858. 11 Stat. 374, 374 (1859).

\*1123 We agree with the district court. The 1858 Act confirmed the land claim of the Sandia Pueblo, part of which later became the Garcia tract and Private Claim 364. The 1858 Act specified it was “confirm[ing]” the land “reported on favorably by the said surveyor-general, on the thirtieth of November, eighteen hundred and fifty-six.” 11 Stat. 374. The surveyor general’s report from November 30, 1856 described the Rio Grande as the western boundary of the Sandia Pueblo. H.R. Exec. Doc. No. 36 (34th Cong.); *see also Pueblo of Sandia Boundary*, 96 Interior Dec. 331, 333, 1988 WL 410394, at \*2 (Dec. 9, 1988). Accordingly, Congress has confirmed the boundary of land granted by a prior sovereign.

\*\*4 Antonio asserts the 1858 Act should be construed as only the relinquishment of the United States’s title and not as a confirmation of the exterior boundaries. But the Act specifically stated “this *confirmation* shall only be construed as a relinquishment of all title and claim of the United States to any said lands,” and “this confirmation” was the “land ... reported on favorably by the said surveyor-general.” 11 Stat. 374 (1858) (emphasis added). In short, Congress explicitly said it was confirming the Spanish land grant lands, including the parcels at issue in this case.

Antonio also contends the Act would not have confirmed the Rio Grande River as the western boundary of the Garcia tract if Garcia or his predecessors in interest held adverse valid rights to this land in 1858. But neither party provided any evidence that Garcia held adverse valid rights to the land. And even if there was evidence that he held adverse valid rights, the 1858 Act would have still confirmed the western boundary—even if it would not have touched on any dispute over who had valid rights to specific tracts of land *within* the boundaries of the Sandia Pueblo.

The 1924 Pueblo Lands Act confirms this. The 1924 Pueblo

Lands Act was enacted “to resolve conflicting claims to Pueblo lands and to award compensation for the extinguishment of Pueblo land rights.” *Cohen’s Handbook of Federal Indian Law* § 4.07[2][b], at 316 (Neil Jessup Newton et al. eds., 2012). The Pueblo Lands Board was established to “determine the exterior boundaries of the lands” and “the status of all lands within those boundaries.” *Id.* This statute only addressed how land disputes were to be resolved—it did not affect the 1858 confirmation nor did it exempt any specific properties or terminate federal jurisdiction.

The 2005 Amendments similarly support the district court’s conclusions. The 2005 Amendments granted federal jurisdiction over land within an exterior boundary of a grant from a prior sovereign that was also confirmed by Congress, and the Amendments qualified this grant by saying “except as otherwise provided by Congress.” 119 Stat. 2573.<sup>2</sup> This qualification requires \*1124 a clear directive from Congress exempting certain lands from jurisdiction. The 1858 Act did not exempt the Garcia tract from confirmation. Nor does the 1924 Act provide this clear directive—it does not even mention jurisdiction but rather quieted title to tracts of disputed land.

SEC. 20. CRIMINAL JURISDICTION.

2 (a) IN GENERAL. -- Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.

(b) JURISDICTION OF THE PUEBLO. -- The Pueblo has jurisdiction, as an act of the Pueblos' inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.

(c) JURISDICTION OF THE UNITED STATES. -- The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.

(d) JURISDICTION OF THE STATE OF NEW MEXICO. -- The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the United States.

25 U.S.C. § 331 Note.

\*\*5 Although the size of the Garcia tract of land has changed as a result of accretion, this jurisdictional grant has not changed. The Rio Grande has slowly moved west, leaving a strip of land between the east bank at the time of the 1748 grant and the Garcia tract. The district court found that because the Sandia Pueblo had fenced and posted the strip of land, the land belonged to the Sandia Pueblo. This would mean Garcia's tract was surrounded entirely by Sandia Pueblo land, making it manifestly within Indian Country.

Antonio disputes this conclusion and asserts the government failed to provide any evidence in support. But the dispute over the strip of land between the Rio Grande and the original Pueblo boundaries has no bearing on federal jurisdiction established in the 2005 Amendments. In fact, the 2005 Amendments were enacted to prevent this very type of confusion over jurisdiction. Rather than have checkerboard jurisdiction over certain tracts of land but not others, courts conduct a simple, two-part analysis. To establish jurisdiction under the 2005 Amendments, parties must show that the land was part of a grant from a prior sovereign and Congress confirmed the boundaries. Even if Garcia or the Middle Rio

Grande Conservancy District owned the land, the parcel as a whole would still fall within the boundaries of a grant from a prior sovereign that were confirmed by Congress. In this case, both parties agree the land where the offense occurred was part of a grant from a prior sovereign. And the 1858 Act confirmed the Rio Grande as the western boundary of this land, placing the site of the offense squarely within federal jurisdiction

\* \* \*

In sum, we conclude the charged offense occurred in Indian Country.

*B. Sufficient Evidence*

Whether the district court properly denied Antonio's motion for judgment of acquittal is broken into two parts. First, we must determine whether the district court issued a jurisdictional ruling before instructing the jury. Second, if the district court did not issue a ruling, we must determine whether the instruction provided a sufficient factual and legal basis for finding Antonio guilty of the charged offense.

It is true the district court did not issue a written ruling with a thorough explanation about the jurisdictional question until after Antonio was convicted. But it is equally true the district court gave a preliminary ruling that the site of the accident fell within Indian Country. The district court stated, "[S]ince I'm making a determination pretrial, I'm putting it in the jury instructions and instructing, then[,] those exhibits will not be allowed for the purpose of contesting that this is Indian Country." R. Vol. 5 at 318. At trial, the district court judge noted, "I know you have your objection to the Court finding [the land within Indian Country], but understanding that I'm going to find it [in one jury instruction] or another." R. Vol. 5 at 737. The district court made clear that it found the land was within Indian Country.

Antonio points to language in the record where the district court appeared indecisive. \*1125 For example, the district court stated it was "inclined to find [the accident site is] within the [Pueblo] exterior boundaries," but it stated that it wanted "to do a little bit more work on this." R. Vol. 5 at 213. But later, the district court made clear that it was making a decision even though a written memorandum and order would not be issued until later.

Furthermore, Antonio acknowledged the district court's ruling. Antonio objected to the jury instruction that resulted from this decision, stating he understood "the Court is going to rule that [the intersection] is within Indian Country." R. Vol. 5 at 738. Antonio later stated, "There has been insufficient proof that the site of the accident actually occurred within Indian Country. ... The Court's made a decision, about which you'll write, and we'll address it down the line." R. Vol. 5 at 882. Based on the district court's statements and Antonio's own statements, everyone understood the district court had issued a ruling.

\*\*6 Even if the district court did not make a jurisdictional determination before trial, the jury instructions provided the jury with a sufficient basis to convict Antonio. Whether the crime occurred within the United States territorial jurisdiction is both a factual and legal question. On one hand, the jury must determine whether the crime occurred at the intersection of Highway 313 and Wilda Drive—this is a factual question. On the other, the district court must determine whether that intersection is within the territorial jurisdiction—this is a legal question.

[3]The jury was only instructed to determine the factual component. The jurors were tasked with deciding whether the evidence showed the offense was committed at the intersection of Highway 313 and Wilda Drive—the location of which both parties admit. This factual decision by the jury has no bearing on whether that intersection falls within federal jurisdiction. And a legal decision by the court about the jurisdiction of that intersection has no bearing on whether the accident actually occurred at that location. In *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999), this court held, "[a]s a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site." In this case, the trial court made clear the land fell within Indian Country, and the jury independently concluded the offense occurred at the intersection agreed to by the parties.

We conclude the district court issued a preliminary ruling prior to issuing the jury instructions. But even if the district court failed to issue a preliminary ruling, the jury still had sufficient evidence to convict Antonio because the jurors answered the factual question of whether the offense occurred at the intersection of Highway 313 and Wilda Drive. Thus, the jurisdictional ruling by the district court had no bearing on this factual finding.

#### C. Good Cause

[4] [5] [6]Next, Antonio contends the district court failed to make a finding of "good cause" as required by Federal Rule of Criminal Procedure 12(d) to defer the jurisdictional ruling until after trial.<sup>3</sup> Under \*1126 Rule 12(d), the court is required to "decide every pretrial motion before trial unless it finds good cause to defer a ruling." But the government asserts the district court did issue a jurisdictional ruling. The government also argues any alleged violation did not affect Antonio's substantial rights under plain error review because it did not affect "the outcome of the district court proceedings." *United States v. Cotton*, 535 U.S. 625, 632, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

3 Antonio argues this court reviews de novo compliance with the requirements of the Federal Rules of Criminal Procedure. *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). But the government notes Antonio failed to raise this before the district court. "Because [d]efendant did not raise this argument below, we review it only for plain error." *United States v. Lacy*, 904 F.3d 889, 893 (10th Cir. 2018). The Court, therefore, grants relief only when "(1) an error occurred; (2) the error is plain or obvious; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

As we have already concluded, the district court made a jurisdictional ruling before trial. *See* Section II.B. But even if the district court did not make a timely ruling or adhere to Federal Rule of Criminal Procedure 12(d), this was not plainly erroneous. The jury found by a preponderance of evidence that Antonio was guilty of second-degree murder—a finding that was entirely separate from the jurisdictional determination. Had the district court found that it lacked jurisdiction, the conviction would have been vacated.

\*\*7 Accordingly, we hold the district court issued a jurisdictional ruling, and any delayed ruling did not affect Antonio's substantial rights.

#### D. Jury Instructions

Finally, Antonio contends the district court incorrectly instructed the jury regarding his theory of the case.

[7] The government charged Antonio with second-degree murder. The district court instructed the jury on second-degree murder and the lesser included offense of involuntary manslaughter. The district court also instructed the jury that Antonio's defense theory was that he was guilty of involuntary manslaughter due to his intoxication. But the district court rejected Antonio's proposed instruction explaining the difference between second-degree murder and involuntary manslaughter. Antonio takes issue with two aspects of the instruction. First, he argues the district court erred by instructing the jury first on second-degree murder and then instructing the jury to only consider involuntary manslaughter if the jury did not unanimously find him guilty of second-degree murder. Second, he argues the district court erred by failing to include his proposed instruction.

[8] [9] The court reviews jury instructions *de novo* to determine whether the jury received the relevant legal standards. United States v. Crockett, 435 F.3d 1305, 1314 (10th Cir. 2006). But if the party fails to object to an instruction, the court must review for plain error. United States v. Benford, 875 F.3d 1007, 1016 (10th Cir. 2017).

Antonio did not object to the district court's instruction that the jury must not consider whether Antonio was guilty of involuntary manslaughter unless it found him not guilty of second-degree murder. He only requested the court include an additional instruction explaining the distinction between the two. Antonio now argues that by requesting the explanatory instruction, he properly preserved his objection to the instruction.

Because Antonio did not clearly object to the instruction or explain how his proposed explanatory instruction would cure any alleged problems, we review for plain error. We reverse only if we find that "(1) an error occurred; (2) the error is plain or obvious; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation \*1127 of judicial proceedings." Lacy, 904 F.3d at 893.

Reviewing for plain error, there was no error in the district court's step-down instructions. In United States v. Visinaiz, this court held it "was entirely proper to have the jury consider the second degree murder charge first." 428 F.3d 1300, 1309 (10th Cir. 2005). In Visinaiz, the defendant challenged the jury instructions, arguing the district court failed "to adequately instruct the jury on the distinction between the malice present in second degree murder and the malice present in involuntary

manslaughter." *Id.* The court held the instructions clearly stated the law and applicable standards.

The jury instructions are not given at random—there is a method to instructing the jury. If a defendant could be convicted of one of two offenses, one offense must be listed before the other. This step-down instruction format is not problematic where the jury considers the greater offense before considering the lesser included offense. In any event, the jury was told by the district court to review the instructions as a whole before beginning its deliberations, and doing so would have clearly laid out Antonio's theory of defense.

\*\*8 Antonio argues these step-down instructions effectively told the jury to disregard Antonio's theory of defense. He asserts that because the difference between manslaughter and second-degree murder is one of degree, the jury should have been instructed to consider "the boundary which separates the two crimes of murder and manslaughter." Stevenson v. United States, 162 U.S. 313, 320, 16 S.Ct. 839, 40 L.Ed. 980 (1896). But because these step-down instructions have been upheld previously in identical circumstances, we conclude there was no error.

[10] [11] It was also not error to exclude Antonio's proposed instruction. Each of the instructions on second-degree murder and involuntary manslaughter explained the mens rea requirement. For second-degree murder, the jury was required to find that Antonio acted with "malice aforethought." In contrast, for the involuntary manslaughter charge, the jury was only required to find that he was reckless and displayed a wanton disregard for human life. The involuntary manslaughter charge specifically compared the two, noting that the involuntary manslaughter charge "is not extreme in nature." R. Vol. 1 at 465.

Furthermore, the jury heard every instruction and was specifically told to consider the instructions as a whole. The law presumes the jury follows the instructions given to it by a district court. United States v. Poole, 545 F.3d 916, 921 (10th Cir. 2008). There is no evidence that the jury failed to consider involuntary manslaughter or that Antonio's substantial rights were otherwise affected. Therefore, the district court did not plainly err when instructing the jury.

### III. Conclusion

We AFFIRM the district court. We hold the district court correctly determined it had federal subject matter jurisdiction and issued this ruling prior to trial. We also hold the district court did not err in instructing the jury.

All Citations

936 F.3d 1117, 2019 WL 4180406

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