No.

in the

Supreme Court

of the

United States

Term,

JASON KECHEGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

When a juror indicates that some other jurors are using their cell phones and meeting in a second room, does this require a district court to hold a Remmer hearing to determine whether there is an external influence interfering with the jury process?

May a district court request a partial verdict form be filled out by the foreperson of the jury without any indication that the jury is at an impasse?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits these cases which are directly related to this Petition:

none

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The Petitioner, Jason Kechego, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on January 31, 2024.

OPINION BELOW

The Sixth Circuit's opinion is published at 91 F.4th 845, and is attached as Appendix 1.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on January 8, 2024. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, **without due process of law**; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, **the accused shall enjoy the right to a speedy and public trial, by an impartial jury** of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE'

In December 2018, Jason Kechego was housed at the Federal Detention Center in Milan, Michigan. He was awaiting designation and transportation to a Bureau of Prisons facility after receiving a 120-month sentence for being a felon in possession of a stolen firearm. On December 17, 2018, Kechego received a phone call from a family member informing him that his niece had been molested. Soon after, a newspaper article made its way around the detention center which outlined details of the crimes of one of Kechego's fellow inmates (Christian Maire.) Maire had been convicted of running a child sex exploitation ring. According to fellow inmate Joseph Raphael, after reading the article, Kechego said it made him want to kill Maire. The prison had a code in which persons convicted of child sex offenses were treated differently by the other inmates. These offenders are known as "chomos."

On January 2, 2019, Kechego and fellow inmates Adam Wright (Creeper), Alex Castro (Sniper), and Joseph Raphael (JR) were all hanging out together, drinking homemade alcohol. At some point, JR became upset at the other three, and challenged each of them to a fight. JR went into his cell, and he was followed by Kechego, Castro, and Wright. JR was beaten unconscious.

Kechego, Castro, and Wright then went to Maire's cell. The three beat Maire, and Castro (who had a shank) stabbed Maire several times. Maire was then thrown down a flight of stairs. Michal Figura, who was also upstairs, was also beaten. After

the incident, corrections officers intervened, and Kechego, Castro, and Wright were taken into custody. While he was being taken away, Kechego asked one officer why he wasn't being praised for getting rid of a child molester. Maire was later pronounced dead. Six hours after the incident, Kechego took a blood alcohol test, which came back at .234.

On July 25, 2019, a seven count indictment was filed in the Eastern District of Michigan charging Kechego with: one count of first degree premediated murder, in violation of 18 U.S.C. § 1111 and § 2; one count of conspiracy to commit first degree murder, in violation of 18 U.S.C. § 1117; and three counts of assault with the intent to commit murder, in violation of 18 U.S.C. § 113 and § 2. The Government first charged a death penalty specification, but ultimately made the determination they would not pursue it.

Trial began on July 6, 2022, and lasted until July 22, 2022. The jury deliberated for five days. On the last day of deliberations, the foreperson of the jury sent a note to the court, informing the court of problems with the deliberation process. That juror was brought in for questioning, and she informed the court that the deliberative process was not occurring. She revealed that during deliberations, some jurors were in a different room playing cards. Some jurors were using their phone during deliberations. Finally, some jurors were refusing to listen to other jurors when they spoke (including the foreperson), and bullying others who thought

differently. In response to this, the court wanted to provide an instruction to the jury about civility and deliberations, however, the foreperson reflected that she could not continue with the process, even with such and instruction.

After the foreperson was excused from the courtroom, Kechego's counsel asked for a mistrial. Both sides also asked the court for time to research the problem. Instead, the court brought the foreperson back into the courtroom, and asked her whether she believed the jury had decided on any of the counts. He then asked the foreperson to fill out a jury verdict form on her own, with her understanding of what the jury had agreed upon. He then called in the jury (absent the foreperson) and read that verdict form to them and asked them if that was their decision. Using this method, Kechego was convicted of one count of second-degree murder, and one count of assault with the intent to commit murder (Figura).

Sentencing was held on November 8, 2022. After hearing arguments from the parties, the court imposed a sentence of 336 months, to run consecutive to the previous 120-month sentence imposed in the weapons possession case. Kechego then appealed his conviction to the Sixth Circuit, raising these issues:

1. Kechego's convictions must be vacated, as jury deliberations completely broke down, with some jurors not deliberating and playing cards, while others being accused of using their phones during deliberations.

2. Because there was some evidence in the record that that Kechego was acting under a heat of passion, it was reversible error not to give a voluntary manslaughter instruction.
3. The district court erred in not allowing in evidence that, prior to the date of the offense, Kechego had learned that his niece had been molested. Such evidence was state of mind evidence permissible under the Rules of Evidence.
4. The district court abused its discretion in dismissing a defense opinion evidence witness for defense counsel's failure to follow Rule 16, when less draconian measures were available to the court.

Ultimately, the Sixth Circuit denied the entire appeal. As the jury issue, the Court found:

> First, Kechego argues that, because some jurors pulled out phones during deliberations, the district court should have held a Remmer hearing—a hearing to examine whether the verdict was tainted by external influences. See Remmer v. United States, 347 U.S. 227 (1954). But Kechego did not ask for a Remmer hearing, so the plain-error standard governs our review. United States v. Mack, 729 F.3d 594, 606 (6th Cir. 2013). That standard requires an error that is "clear or obvious," affects the appellant's substantial rights, and "seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Soto, 794 F.3d 635, 655 (6th Cir. 2015) (citation omitted). An error is clear or obvious only when the law is "settled," see Henderson v. United States, 568 U.S. 266, 269 (2013), "rather than subject to reasonable dispute," see Puckett v. United States, 556 U.S. 129, 135 (2009). It is a demanding standard, met only in "exceptional circumstances." United States v. Vonner, 516 F.3d 382, 386 (6th Cir. 2008) (en banc) (citation omitted).
>
> In Remmer, a juror reported that, during trial, an unknown person had told him that he could "profit" from his decision in the case. 347 U.S. at

228. The Supreme Court ordered a hearing to explore the effect of this external influence "upon the juror, and whether or not it was prejudicial." Id. at 230. Following Remmer, the Court has defined "external" influences to "include publicity and information related specifically to the case the jurors are meant to decide." Warger v. Shauers, 574 U.S. 40, 51 (2014). And we have held that a hearing is required whenever "a colorable claim of extraneous influence has been raised." United States v. Herndon, 156 F.3d 629, 635 (6th Cir. 1998). But a claim of external influence is not colorable merely because it is possible. United States v. Lanier, 870 F.3d 546, 549 (6th Cir. 2017) ("[A] Remmer hearing is not necessary in every instance of possible unauthorized third-party contact."). The claim must present a "likelihood of having affected the verdict," United States v. Gonzales, 227 F.3d 520, 527 (6th Cir. 2000), and "must be supported by credible evidence," United States v. Bailey, 2022 WL 2444930, at *8 (6th Cir. July 5, 2022). We have found colorable claims of external influence when some specific evidence connects a juror to outside information particular to the case at hand or to an effort to collect such information. "Thus, we found an external influence where jurors looked up the defendant's Facebook profile and performed a Google search for information relating to issues in the case." Smith v. Nagy, 962 F.3d 192, 201 (6th Cir. 2020) (citing Ewing v. Horton, 914 F.3d 1027, 1029–30 (6th Cir. 2019)). We also found an external influence when jurors were told that "members of the community" had become "aware of" one juror's service, which caused him to fear "retaliation from the defendants, their families, and their acquaintances." See United States v. Davis, 177 F.3d 552, 556–57 (6th Cir. 1999). Similarly, we found an external influence when a juror sought "outside input on the case" from an assistant district attorney, not involved with the matter, although it was unclear whether any such input was received. See United States v. Lanier, 870 F.3d 546, 550 (6th Cir. 2017).

"But we found no external influence where a jury decided to sentence a defendant to death after discussing a news account of a different defendant who had committed murder after being paroled." Nagy, 962 F.3d at 201 (citing Thompson v. Parker, 867 F.3d 461, 646–49 (6th Cir. 2017)). Nor did we find a colorable claim of external influence when factual statements some jurors made during deliberations suggested that they "may have read" a news article about the gang involved in the case. Bailey, 2022 WL 2444930, at *10. There was no allegation that the article was in the jury room or that any of the jurors had even

mentioned the article. Id. So the claim of external influence was "mere speculation." Id.

This caselaw does not make it "clear or obvious" that Kechego was entitled to a Remmer hearing. The foreperson reported only that some jurors "pull[ed] out phones" during deliberations. R. 359, Jury Trial Tr., July 22, 2022, PageID 4555. That may well have been a violation of the court rules. See E.D. Mich. Local Rule 83.32(b)(2)(F) ("Jurors . . . may carry a Personal Electronic Device, but may not use the device in any way except upon permission of a judicial officer."). But a violation of court rules is not enough to trigger a Remmer hearing; that requires a "colorable claim" that the jurors were exposed to external influences likely to taint the verdict. See Gonzales, 227 F.3d at 527. Here, the foreperson did not say that the phones were being used for anything specific. Kechego only speculates that jurors may have been "look[ing] up information about the case" or "legal terms with which they were struggling." Appellant Br. at 14. Kechego concedes that, "[o]n this record, there is no way of knowing" what the jurors were doing on their phones. Id. He argues that this is because the district court should have inquired further into the jurors' cell-phone usage and failed to do so. But without some specific evidence connecting a juror to outside information particular to the case at hand or to an effort to collect such information, Kechego's claim of external influence is too speculative to require a Remmer hearing.

Kechego also notes that some jurors were in different rooms playing cards and that the environment was hostile. But internal influences such as these are not the proper subject of a Remmer hearing. See Herndon, 156 F.3d at 634.

Second, Kechego argues that the district court should not have accepted a partial verdict. Kechego initially responded to the breakdown of deliberations by asking for a mistrial. When the district court proposed inquiring into a partial verdict, Kechego voiced concern that the process was tainted. But he then said that he would "[l]eave it to the Court's discretion." R. 359, Jury Trial Tr., July 22, 2022, PageID 4568. That could be seen as a waiver. At a minimum, that statement withdrew Kechego's previous objection, and he voiced no further objection. So we review the district court's acceptance of the partial verdict under the plain-error standard. See United States v. Beck, 842 F. App'x 1010, 1014 (6th Cir. 2021).

The Federal Rules of Criminal Procedure permit the jury to return a

partial verdict and authorize the district court to declare a mistrial when the jury cannot reach a verdict on one or more counts. Fed. R. Crim. P. 31(b). We have held that, "before declaring a mistrial," the district court "may inquire whether the jury had reached a partial verdict with respect to any of the defendants or any of the charges." In re Ford, 987 F.2d 334, 340 (6th Cir. 1992). But we have not said exactly when or how the district court may elicit or accept such a verdict. In United States v. Heriot, 496 F.3d 601 (6th Cir. 2007), we expressed concern that a court might "turn a tentative decision into a final one." Id. at 608 (quoting United States v. Wheeler, 802 F.2d 778, 781 (5th Cir. 1986)). And we cited with approval an Eighth Circuit case "admonishing district courts 'not to intrude on the jury's deliberative process.'" Id. (quoting United States v. Benedict, 95 F.3d 17, 19 (8th Cir. 1996)). Beyond that, we have given little concrete guidance. Our sister circuits have said that a district court might err by inquiring into a partial verdict while deliberations are ongoing and where there is no indication that the jury is at an impasse. See Benedict, 95 F.3d at 19. But a court does not err if it asks about a partial verdict when it is clear that the jury is at an impasse and further deliberations would prove fruitless. See Wheeler, 802 F.2d at 781.

This court's cases do not make it clear or obvious that any error occurred when the district court accepted a partial verdict in the circumstances presented here. The foreperson told the district court that deliberations had broken down and asked to be replaced. The district court decided not to order the foreperson to return to deliberations and proposed asking whether the jury had reached a partial verdict. Kechego initially protested, arguing that any verdict would be tainted. The district court responded that it would ask the foreperson whether the jury had reached any unanimous verdict that included the foreperson's "voluntary, intelligent, thoughtful conclusion." R. 359, Jury Trial Tr., July 22, 2022, PageID 4567. The district court emphasized that it would make sure that any verdict was arrived at "voluntarily without pressure." Id. at 4568. The court concluded by asking if that was "[o]kay?" Id. In response, Kechego agreed to "[l]eave it to the Court's discretion." Id. The district court called the foreperson back into the courtroom and asked her whether the jury had reached any unanimous verdict, "includ[ing] [the foreperson] at a time that [she] fe[lt] comfortable." Id. The foreperson reported that the jury had reached unanimity on all but three counts. The district court then asked her to complete a verdict form to that effect. The district court

polled each juror as to each count, confirming both the unanimous verdicts and those counts as to which there was no unanimous agreement. And although the prosecutor expressed reservation about whether this process would be acceptable, defense counsel made no objection.

In sum, the district court concluded, as did Kechego, that the deliberative process had broken down and should not continue. The district court then asked, "neutral[ly]" and without presumption, whether there had been a partial verdict. See United States v. Moore, 763 F.3d 900, 911 (7th Cir. 2014). There is "no indication that the jury itself wished to reconsider the verdicts." Heriot, 496 F.3d at 608. And, as we found significant in Heriot, the district court "polled the jury . . . and its members unanimously affirmed the verdicts." Id.

Kechego argues that this case is different because the district court inquired into the partial verdict before the jury itself indicated that it had agreed on some counts. But there is nothing clearly problematic about that. This court's model instruction for partial verdicts permits the district court to give that instruction when the jurors indicate that they have reached such a verdict or when the jury has deliberated for an "extensive period of time." 6th Cir. Pattern Instruction 9.03. And Kechego has pointed to no authority suggesting that the district court may never broach the question of a partial verdict unless the jury has come forward with a statement that it is deadlocked or that it has reached a partial verdict. Rather, the available authority suggests that when it is clear from the circumstances, even the passage of time, that deliberations are not progressing, the district court may inquire about a partial verdict. In this case, the district court had good reason to believe that deliberations had broken down—the foreperson said so. As a result, it is not clear or obvious that this is a case in which the district court's inquiry "turn[ed] a tentative decision into a final one." See Heriot, 496 F.3d at 608 (citation omitted).

Kechego also argues that this case is controlled by Ross v. Yost, 2020 WL 6440470 (6th Cir. 2020). Ross is an unpublished single-judge order denying an application for a certificate of appealability, so it is not binding. See Scarber v. Palmer, 808 F.3d 1093, 1096 (6th Cir. 2015). Regardless, Ross does not help Kechego. In the state-court proceedings against Ross, the court "declared a mistrial in the midst of deliberations." State v. Ross, 15 N.E.3d 1213, 1218 (Ohio Ct. App. 2014). It turned out that the jury had already completed three verdict

forms acquitting the defendant, which were left behind in the jury room. Id. Ross sought to rely on those verdict forms to bar retrial under the Double Jeopardy Clause. Id. The state court denied the claim in part because the verdicts were "tentative," but "more importantly" because they were "tainted." Id. at 1224. There was a colorable claim of external influence because one juror claimed that another potential suspect had passed a polygraph examination—information that could only have come from an outside source. Id. In this case, there is no colorable claim of external influence, and no work-in-progress verdict forms. Instead, the jury returned its verdict in the courtroom, as required. See Fed. R. Crim. P. 31(a). The district court read the verdict and polled each juror individually to confirm that it was the jury's unanimous finding. The district court did not plainly err in accepting a partial verdict in these circumstances.

(Appendix 1, pp.5-10)

REASONS FOR GRANTING THE WRIT

1. **The rebuttal presumption that a Remmer hearing should be held when there is a colorable claim of an outside influence protects the Sixth Amendment jury right and comports with Due Process of law**

In 1954, this Court held that "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Eschewing this clear mandate, the Sixth Circuit held that where a jury member informs a district court that the jury process has completely broken down, including jurors utilizing cell phones in the deliberation room, that there is no duty to hold a hearing to determine whether the jury was improperly influenced. This holding conflicts with this Court's precedents and conflicts with other circuits to have addressed this issue. This Court should grant certiorari and clarify the circumstances under which a "Remmer" hearing should be held.

On the fifth day of jury deliberations, the foreperson of the jury sent a note to the court, informing the court of problems with the deliberation process. That juror was brought in for questioning, and she informed the court that the deliberative process was not occurring. She revealed that during deliberations, some jurors were in a different room playing cards. Some jurors were using their phone. Finally, some jurors were refusing to listen to other jurors when they spoke (including the foreperson), and bullying others who thought differently. The Sixth Circuit determined that these allegations did not warrant holding a Remmer hearing, as it was not obvious that the jurors were being influenced by anything outside of deliberations. (Appendix 1, p.7) But *Remmer* requires that once a colorable claim of an outside influence is made, there is a presumption that the influence was prejudicial. *Remmer*, 347 U.S. at 229. The Sixth Circuit therefore erred in determining a hearing was not necessary.

Almost every other circuit has held that when a colorable claim of an external influence on a juror or jury is made, Due Process and this Court's pronouncement in *Remmer* requires that a court hold an evidentiary hearing to determine whether the influence tainted the jury process. *Barnes v. Joyner*, 751 F.3d 229, 244 (4th Cir. 2014)("The requirement that a trial court conduct a hearing to determine juror partiality is rooted in the Constitution."); *United States v. Bishawi*, 272 F.3d 458, 462 (7th Cir. 2001)("Where, as here, the record is void of any specific information

regarding the occurrence and nature of, as well as the circumstances surrounding the ex parte contacts, the impact thereof upon the jurors, and whether or not the juries were prejudiced, a hearing in which all interested parties are permitted to participate is not only proper but necessary."); *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999)("A Remmer hearing must begin with a strong presumption that the jury tampering affected the jury's decision-making."); *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003)("When a trial court is apprised of the fact that an extrinsic influence may have tainted the trial, the proper remedy is a hearing to determine the circumstances of the improper contact and the extent of the prejudice, if any, to the defendant."); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020)("Due process 'entitles a defendant to a hearing in the trial court to ascertain actual prejudice following an allegation of extrinsic contacts with the jury.'").

That said, there is a circuit split. The Fifth Circuit has determined that *Remmer*'s presumption no longer applies, and that "the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence." *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998). The D.C. Circuit has found that a district court must "inquire whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness." *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996).

And finally, the Sixth Circuit in this case determined "without some specific evidence connecting a juror to outside information particular to the case at hand or to an effort to collect such information, Kechego's claim of external influence is too speculative to require a Remmer hearing." (Appendix 1, p.7)

Petitioner would note that in denying certiorari in *Shoop v. Cunningham*, 143 S. Ct. 37, 214 L. Ed. 2d 241 (2022), Justices Thomas, Alito, and Gorsuch all questioned whether *Remmer*'s presumption of a hearing to investigate outside influences on a jury was based on any constitutional foundation, and was still good precedent. 143 S.Ct at 42. This observation seems to depart from *Smith v. Phillips*, 455 U.S. 209, 218, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982), where this Court tied the right to a Remmer hearing to Due Process. See also *United States v. Olano*, 507 U.S. 725, 738, 113 S. Ct. 1770, 1780, 123 L. Ed. 2d 508 (1993)("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."). This case provides a good vehicle for resolution of this issue.

And in resolving this issue, the rebuttable presumption of the requirement of a hearing is the better outcome to protect Due Process. The facts of this case show why this is so. Here, the foreperson of the jury alleged that jurors were using their cell phones during the deliberative process. Further, the jury itself was split into two

rooms. Had the court held a hearing, it could have determined whether the jurors were looking up extraneous facts of the case on their phones, or contacting persons outside the jury for influence or advice. Indeed, the Sixth Circuit noted in this case that "without some specific evidence connecting a juror to outside information particular to the case at hand or to an effort to collect such information, Kechego's claim of external influence is too speculative . . ." (Appendix 1, p.7) This presents a classic chicken and the egg dilemma for the defense: the defense is expected to prove that jurors were looking up matters relating to the case on their phones without having a hearing to determine what jurors were doing with their phones. Such a rule is untenable, and is why this Court created the presumption in the first place.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). Here, Due Process includes the duty of a trial court, once confronted with the fact that jurors are engaging in outside influences during deliberations, to hold a hearing to determine whether those outside influences tainted the jury verdict. The Sixth Circuit's construction of the quantum of evidence necessary to require a hearing is unworkable, and does not comport with this Court's precedents. This Court should grant certiorari review, and remand for a Remmer hearing.

2. **The process of obtaining partial jury verdict violated Due Process and the Sixth Amendment right to counsel**

"Every defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of a jury of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude." *United States v. Thomas*, 449 F.2d 1177, 1181 (D.C. Cir. 1971). In this case, in addition to not conducting a Remmer hearing, the district court did an extraordinary thing: it asked the foreperson whether she thought the jury had decided any of the indictment claims, and when she said she thought they did, had her alone fill out a verdict form. The court then brought in the rest of the jury, without the foreperson, and asked them whether they agreed with her already filled out verdict form. This process violated Due Process and the Sixth Amendment jury trial right.

Start with the basic proposition that this Court has held that "the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020). This right is cabined within the Sixth Amendment jury trial right. See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 867, 130 S. Ct. 3020, 3094, 177 L. Ed. 2d 894 (2010). "[U]nanimity relates directly to the deliberative function of the jury. Unanimity serves to effectuate the purpose of the jury system by promoting the full

expression of the views of all members of the jury and by insuring that those views are taken into account as fully and fairly as possible in reaching a verdict." *United States v. Scalzitti*, 578 F.2d 507, 512 (3d Cir. 1978).

The process used by the district court was not "a unanimous" verdict, as there was no instance where all twelve jurors were in the same room, providing the verdict to the court. Nor did the jury, acting as a whole, indicate to the court that they had a partial verdict to give, or had stopped deliberating on any of the counts of conviction. Under such circumstances, the process used by the district court cannot comport with the court's duty to ensure a unanimous verdict.

The verdict was also not returned "in open court." Federal Rule of Criminal Procedure 31(a) requires that a unanimous verdict must be returned in open court. This rule codified the common law requirements known to Congress in 1944. See Advisory Committee Notes, Subdivision (a). "The requirement that verdicts be announced in open court 'vindicates the judicial system's symbolic interest in maintaining the appearance of justice and its pragmatic interest in giving the finder of fact a final opportunity to change its decision.'" *United States v. Canady*, 126 F.3d 352, 362 (2d Cir. 1997). Here, there was no verdict made in open court, because the foreperson was not there.

Finally, the district court violated Due Process when it coerced a verdict by inquiring of the foreperson whether the jury had come up with a partial verdict, and

then asking the rest of the jury to assent to the foreperson's understanding. Such a procedure is inherently coercive.

The Sixth Circuit determined, as to this claim, that "a court does not err if it asks about a partial verdict when it is clear that the jury is at an impasse and further deliberations would prove fruitless." (Appendix 1, p.8) Setting aside for the moment that there was in fact no indication that the jury was at an impasse, this is not a correct statement of the law. As the Eighth Circuit determined in *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996), "The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one. [ ] It is improper for a trial court to intrude on the jury's deliberative process in such a way as to cut short its opportunity to fully consider the evidence. Such an intrusion would deprive the defendant of 'the very real benefit of reconsideration and change of mind or heart.'"

The Seventh Circuit has also held that it is improper for a district court to ask for a partial verdict before the jury has conveyed that it has completed deliberations on some counts but was deadlocked on others. *United States v. Moore*, 763 F.3d 900 (7th Cir. 2014). There, while the jury was deliberating, the court asked the jury whether it had agreed on any of the charges. The jury foreperson specified that they had agreed on some charges, so the district court had the jury fill out the form as to everything they decided. The court then polled the jury to see whether they might

ever agree on the other counts – despite some disagreement on that question, the court order the jury back for further deliberations. Shortly thereafter, the jury returned a verdict as to all counts. In reversing the convictions, the Seventh Circuit determined: "[]the court's decision to ask for a partial verdict, when the jury had not yet finished its deliberations as to the undecided count nor indicated that it was deadlocked, needlessly injected uncertainty into the verdict." *Id.* at 912. "Jurors may not realize that in delivering a partial verdict, they are foreclosing to themselves any further consideration of the charges included in that verdict. Locking in a partial verdict may thus deprive the jury of 'the opportunity to gain new insights concerning the evidence' as it bears on a count or a defendant as to which a partial verdict has been rendered, [ ] , and 'deprive the defendant of 'the very real benefit of reconsideration and change of mind or heart.'" *Id.* at 911.

The rule followed by the Seventh and Eighth Circuit is the correct one, as it provides the jury with the opportunity to determine for itself whether it is finished deliberating. The process used by the district court here violated Due Process and the right to a unanimous verdict guaranteed by the Sixth Amendment. The Sixth Circuit's determination, that this was a justified action by the district court, creates a circuit split which this Court must resolve. This Court should grant certiorari and vacate the convictions.

CONCLUSION

Kechego requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and reverse the convictions.

Respectfully submitted,

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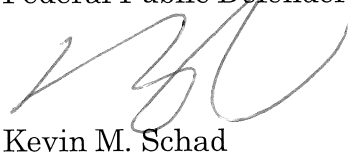

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APPENDIX

1. COURT OF APPEALS ORDER January 31, 2024

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0018p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON DALE KECHEGO,

Defendant-Appellant.

No. 22-2041

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:19-cr-20498-2—Paul D. Borman, District Judge.

Argued: December 6, 2023

Decided and Filed: January 31, 2024

Before: COLE, GILMAN, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. William J. Vailliencourt, Jr., UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. William J. Vailliencourt, Jr., UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

OPINION

LARSEN, Circuit Judge. Jason Kechego was convicted of second-degree murder for killing fellow inmate Christian Maire. Kechego challenges several of the district court's rulings during trial. We AFFIRM.

I.

Jason Kechego was an inmate at the Federal Detention Center in Milan, Michigan. On December 17, 2018, Kechego received a phone call informing him that his niece had been molested. Around the same time, a newspaper article was circulating among the inmates revealing that Christian Maire, a fellow inmate, had been convicted of child exploitation. Inmates who had committed such crimes were referred to as "chomos" and were at the bottom of the prison's social hierarchy.

Roughly two weeks later, on January 2, 2019, Kechego gathered with fellow inmates Alex Castro, Adam Wright, and Joseph Raphael to consume contraband alcohol. The gathering devolved into an argument, and Raphael was badly beaten. Kechego, Castro, and Wright then went to Maire's cell. They beat and stabbed Maire and threw him down a flight of stairs. Maire died. In the aftermath, Kechego remarked to the guards that "they got themselves a chomo" and that the guards should be "giving them high-fives." R. 262, Jury Trial Tr., July 11, 2022, PageID 2906. Kechego's blood-alcohol content the morning after Maire's killing was 0.236.

A grand jury indicted Kechego, Castro, and Wright for various offenses. A superseding indictment charged Kechego with first-degree murder, 18 U.S.C. § 1111(a), conspiracy to commit first-degree murder, 18 U.S.C. § 1117, assault with the intent to commit murder, 18 U.S.C. § 113(a)(1), and assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6). Wright pleaded guilty; Kechego and Castro went to trial.

On June 6, 2022, a month before trial, Kechego notified the government that he was planning to present expert testimony about retrograde extrapolation—a technique for estimating prior blood-alcohol content based on a later measurement. The government moved to exclude the testimony because Kechego had not provided an expert report. *See* Fed. R. Crim. P. 16(b)(1)(C). The court ordered Kechego to provide the report by June 27, 2022. Kechego failed to meet the deadline, so on June 30, 2022, the government again moved to exclude. At a hearing on the motion, Kechego said that he was not sure that he would ever be able to provide an expert report. The district court then excluded the testimony. At trial, Kechego was permitted to introduce evidence of his blood-alcohol content the morning after Maire's killing and expert testimony about prison culture.

The trial began on July 6, 2022. In his opening statement, Kechego told the jury that it would hear about the December 17, 2018, phone call that had informed him of his niece's sexual assault. Kechego later sought to admit evidence of the call, but the government objected, arguing that the call was irrelevant because it took place two weeks before Maire's killing. The district court agreed with the government and excluded the call.

At the close of evidence, Kechego requested a voluntary-manslaughter instruction. He argued that he lacked malice because he acted out of a "heat of passion," specifically, "a deep-seated hatred for chomos that boiled over." R. 354, Jury Trial Tr., July 14, 2022, PageID 4344. Kechego characterized the phone call, the newspaper article, his intoxication, and the prison culture as a "perfect storm" that caused him to lose control. *Id.* at 4347–48. The government objected, arguing that there was no evidence of a sudden and adequate provocation. The district court agreed and refused to give the instruction.

On July 18, 2022, the district court instructed the jury on the charges in the superseding indictment and the lesser-included offense of second-degree murder. The jury deliberated for the next five days. On July 22, 2022, the foreperson sent a note to the judge saying that she no longer felt comfortable and would like to be replaced. The foreperson complained that the other jurors were playing cards, screaming, arguing, and not taking her seriously. The foreperson speculated that the other jurors were treating her differently because she had revealed during voir dire that her brother had been incarcerated. The judge called the foreperson into the courtroom and told her that he would order the other jurors to change their behavior. But the foreperson maintained that she could not return to deliberations. She also said that when the other jurors disagreed with her, they "pull[ed] out phones" and made noises. R. 359, Jury Trial Tr., July 22, 2022, PageID 4555. The judge again asked the foreperson whether she would return to deliberations if he warned the other jurors that they risked contempt charges for failing to be respectful. The foreperson refused and was dismissed from the courtroom.

The district court consulted the parties as to the appropriate remedy. Kechego argued for a mistrial. The government suggested that the jury be admonished and ordered to continue deliberating. The court accepted neither proposal. The government then suggested taking a partial verdict. The court was receptive to that and asked Kechego what he thought. Kechego

voiced concern that the entire process was so tainted that no verdict should be taken. The court disagreed and told the parties that it planned to ask the foreperson whether any partial verdicts had been reached "unanimously" and "voluntarily." *Id.* at 4567. The court inquired whether this plan was "[o]kay?" *Id.* at 4568. Kechego then agreed to "[l]eave it to the Court's discretion." *Id.*

The foreperson was called back into the courtroom. The judge asked "whether the jury has reached unanimity, which would include [the foreperson] at a time that [she] fe[lt] comfortable, with regard to any of the counts in the indictment." *Id.* The foreperson reported unanimity on all but three counts and was again dismissed from the courtroom.

The government worried that the district court could not elicit a partial verdict without an indication from the jury that it had reached one, and without then sending the jury back to continue deliberations. The district court responded that it was not going to return the foreperson to deliberations but acknowledged that this was an unusual case. After considering the issue, the district court concluded that it could accept a partial verdict. The court explained that it planned to have the foreperson complete the verdict form before polling the jurors. Kechego began to say: "Just for the record, I agree with the Court's pro . . . ." *Id.* at 4572. But the district court interrupted.

The district court had the foreperson complete the verdict form and called the other jurors in. The court read each count of the verdict form to the jury and polled each juror individually. The jury unanimously convicted Kechego of second-degree murder; unanimously acquitted him of first-degree murder, assault with intent to commit murder, and assault resulting in serious bodily injury; and failed to reach unanimity on conspiracy to commit first-degree murder. The court accepted the partial verdict, declared a mistrial on the remaining counts, and dismissed the jury. The government later dismissed the conspiracy charge.

Kechego was sentenced to 336 months' imprisonment. He now appeals.

II.

Kechego objects to several of the district court's rulings during trial. He argues that the district court: (1) should have held a *Remmer* hearing; (2) should not have accepted a partial verdict; (3) should have given a voluntary-manslaughter instruction; (4) should have permitted his expert to testify; and (5) should have admitted evidence of a phone call that he received. We conclude that the district court made no reversible error.

A.

First, Kechego argues that, because some jurors pulled out phones during deliberations, the district court should have held a *Remmer* hearing—a hearing to examine whether the verdict was tainted by external influences. *See Remmer v. United States*, 347 U.S. 227 (1954). But Kechego did not ask for a *Remmer* hearing, so the plain-error standard governs our review. *United States v. Mack*, 729 F.3d 594, 606 (6th Cir. 2013). That standard requires an error that is "clear or obvious," affects the appellant's substantial rights, and "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Soto*, 794 F.3d 635, 655 (6th Cir. 2015) (citation omitted). An error is clear or obvious only when the law is "settled," *see Henderson v. United States*, 568 U.S. 266, 269 (2013), "rather than subject to reasonable dispute," *see Puckett v. United States*, 556 U.S. 129, 135 (2009). It is a demanding standard, met only in "exceptional circumstances." *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc) (citation omitted).

In *Remmer*, a juror reported that, during trial, an unknown person had told him that he could "profit" from his decision in the case. 347 U.S. at 228. The Supreme Court ordered a hearing to explore the effect of this external influence "upon the juror, and whether or not it was prejudicial." *Id.* at 230. Following *Remmer*, the Court has defined "external" influences to "include publicity and information related specifically to the case the jurors are meant to decide." *Warger v. Shauers*, 574 U.S. 40, 51 (2014). And we have held that a hearing is required whenever "a colorable claim of extraneous influence has been raised." *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998). But a claim of external influence is not colorable merely because it is possible. *United States v. Lanier*, 870 F.3d 546, 549 (6th Cir. 2017) ("[A] *Remmer* hearing is not necessary in every instance of possible unauthorized third-party

contact."). The claim must present a "likelihood of having affected the verdict," *United States v. Gonzales*, 227 F.3d 520, 527 (6th Cir. 2000), and "must be supported by credible evidence," *United States v. Bailey*, 2022 WL 2444930, at *8 (6th Cir. July 5, 2022).

We have found colorable claims of external influence when some specific evidence connects a juror to outside information particular to the case at hand or to an effort to collect such information. "Thus, we found an external influence where jurors looked up the defendant's Facebook profile and performed a Google search for information relating to issues in the case." *Smith v. Nagy*, 962 F.3d 192, 201 (6th Cir. 2020) (citing *Ewing v. Horton*, 914 F.3d 1027, 1029–30 (6th Cir. 2019)). We also found an external influence when jurors were told that "members of the community" had become "aware of" one juror's service, which caused him to fear "retaliation from the defendants, their families, and their acquaintances." *See United States v. Davis*, 177 F.3d 552, 556–57 (6th Cir. 1999). Similarly, we found an external influence when a juror sought "outside input on the case" from an assistant district attorney, not involved with the matter, although it was unclear whether any such input was received. *See United States v. Lanier*, 870 F.3d 546, 550 (6th Cir. 2017).

"But we found no external influence where a jury decided to sentence a defendant to death after discussing a news account of a different defendant who had committed murder after being paroled." *Nagy*, 962 F.3d at 201 (citing *Thompson v. Parker*, 867 F.3d 461, 646–49 (6th Cir. 2017)). Nor did we find a colorable claim of external influence when factual statements some jurors made during deliberations suggested that they "may have read" a news article about the gang involved in the case. *Bailey*, 2022 WL 2444930, at *10. There was no allegation that the article was in the jury room or that any of the jurors had even mentioned the article. *Id.* So the claim of external influence was "mere speculation." *Id.*

This caselaw does not make it "clear or obvious" that Kechego was entitled to a *Remmer* hearing. The foreperson reported only that some jurors "pull[ed] out phones" during deliberations. R. 359, Jury Trial Tr., July 22, 2022, PageID 4555. That may well have been a violation of the court rules. *See* E.D. Mich. Local Rule 83.32(b)(2)(F) ("Jurors . . . may carry a Personal Electronic Device, but may not use the device in any way except upon permission of a judicial officer."). But a violation of court rules is not enough to trigger a *Remmer* hearing; that

requires a "colorable claim" that the jurors were exposed to external influences likely to taint the verdict. *See Gonzales*, 227 F.3d at 527. Here, the foreperson did not say that the phones were being used for anything specific. Kechego only speculates that jurors may have been "look[ing] up information about the case" or "legal terms with which they were struggling." Appellant Br. at 14. Kechego concedes that, "[o]n this record, there is no way of knowing" what the jurors were doing on their phones. *Id.* He argues that this is because the district court should have inquired further into the jurors' cell-phone usage and failed to do so. But without some specific evidence connecting a juror to outside information particular to the case at hand or to an effort to collect such information, Kechego's claim of external influence is too speculative to require a *Remmer* hearing.

Kechego also notes that some jurors were in different rooms playing cards and that the environment was hostile. But internal influences such as these are not the proper subject of a *Remmer* hearing. *See Herndon*, 156 F.3d at 634.

The district court did not plainly err by not holding a *Remmer* hearing.

B.

Second, Kechego argues that the district court should not have accepted a partial verdict. Kechego initially responded to the breakdown of deliberations by asking for a mistrial. When the district court proposed inquiring into a partial verdict, Kechego voiced concern that the process was tainted. But he then said that he would "[l]eave it to the Court's discretion." R. 359, Jury Trial Tr., July 22, 2022, PageID 4568. That could be seen as a waiver. At a minimum, that statement withdrew Kechego's previous objection, and he voiced no further objection. So we review the district court's acceptance of the partial verdict under the plain-error standard. *See United States v. Beck*, 842 F. App'x 1010, 1014 (6th Cir. 2021).

The Federal Rules of Criminal Procedure permit the jury to return a partial verdict and authorize the district court to declare a mistrial when the jury cannot reach a verdict on one or more counts. Fed. R. Crim. P. 31(b). We have held that, "before declaring a mistrial," the district court "may inquire whether the jury had reached a partial verdict with respect to any of the defendants or any of the charges." *In re Ford*, 987 F.2d 334, 340 (6th Cir. 1992). But we

have not said exactly when or how the district court may elicit or accept such a verdict. In *United States v. Heriot*, 496 F.3d 601 (6th Cir. 2007), we expressed concern that a court might "turn a tentative decision into a final one." *Id.* at 608 (quoting *United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986)). And we cited with approval an Eighth Circuit case "admonishing district courts 'not to intrude on the jury's deliberative process.'" *Id.* (quoting *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996)). Beyond that, we have given little concrete guidance. Our sister circuits have said that a district court might err by inquiring into a partial verdict while deliberations are ongoing and where there is no indication that the jury is at an impasse. *See Benedict*, 95 F.3d at 19. But a court does not err if it asks about a partial verdict when it is clear that the jury is at an impasse and further deliberations would prove fruitless. *See Wheeler*, 802 F.2d at 781.

This court's cases do not make it clear or obvious that any error occurred when the district court accepted a partial verdict in the circumstances presented here. The foreperson told the district court that deliberations had broken down and asked to be replaced. The district court decided not to order the foreperson to return to deliberations and proposed asking whether the jury had reached a partial verdict. Kechego initially protested, arguing that any verdict would be tainted. The district court responded that it would ask the foreperson whether the jury had reached any unanimous verdict that included the foreperson's "voluntary, intelligent, thoughtful conclusion." R. 359, Jury Trial Tr., July 22, 2022, PageID 4567. The district court emphasized that it would make sure that any verdict was arrived at "voluntarily without pressure." *Id.* at 4568. The court concluded by asking if that was "[o]kay?" *Id.* In response, Kechego agreed to "[l]eave it to the Court's discretion." *Id.* The district court called the foreperson back into the courtroom and asked her whether the jury had reached any unanimous verdict, "includ[ing] [the foreperson] at a time that [she] fe[lt] comfortable." *Id.* The foreperson reported that the jury had reached unanimity on all but three counts. The district court then asked her to complete a verdict form to that effect. The district court polled each juror as to each count, confirming both the unanimous verdicts and those counts as to which there was no unanimous agreement. And although the prosecutor expressed reservation about whether this process would be acceptable, defense counsel made no objection.

In sum, the district court concluded, as did Kechego, that the deliberative process had broken down and should not continue. The district court then asked, "neutral[ly]" and without presumption, whether there had been a partial verdict. *See United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014). There is "no indication that the jury itself wished to reconsider the verdicts." *Heriot*, 496 F.3d at 608. And, as we found significant in *Heriot*, the district court "polled the jury . . . and its members unanimously affirmed the verdicts." *Id.*

Kechego argues that this case is different because the district court inquired into the partial verdict before the jury itself indicated that it had agreed on some counts. But there is nothing clearly problematic about that. This court's model instruction for partial verdicts permits the district court to give that instruction when the jurors indicate that they have reached such a verdict *or* when the jury has deliberated for an "extensive period of time." 6th Cir. Pattern Instruction 9.03. And Kechego has pointed to no authority suggesting that the district court may never broach the question of a partial verdict unless the jury has come forward with a statement that it is deadlocked or that it has reached a partial verdict. Rather, the available authority suggests that when it is clear from the circumstances, even the passage of time, that deliberations are not progressing, the district court may inquire about a partial verdict. In this case, the district court had good reason to believe that deliberations had broken down—the foreperson said so. As a result, it is not clear or obvious that this is a case in which the district court's inquiry "turn[ed] a tentative decision into a final one." *See Heriot*, 496 F.3d at 608 (citation omitted).

Kechego also argues that this case is controlled by *Ross v. Yost*, 2020 WL 6440470 (6th Cir. 2020). *Ross* is an unpublished single-judge order denying an application for a certificate of appealability, so it is not binding. *See Scarber v. Palmer*, 808 F.3d 1093, 1096 (6th Cir. 2015). Regardless, *Ross* does not help Kechego. In the state-court proceedings against Ross, the court "declared a mistrial in the midst of deliberations." *State v. Ross*, 15 N.E.3d 1213, 1218 (Ohio Ct. App. 2014). It turned out that the jury had already completed three verdict forms acquitting the defendant, which were left behind in the jury room. *Id.* Ross sought to rely on those verdict forms to bar retrial under the Double Jeopardy Clause. *Id.* The state court denied the claim in part because the verdicts were "tentative," but "more importantly" because they were "tainted." *Id.* at 1224. There was a colorable claim of external influence because one juror claimed that another potential suspect had passed a polygraph examination—information that could only have

come from an outside source. *Id.* In this case, there is no colorable claim of external influence, and no work-in-progress verdict forms. Instead, the jury returned its verdict in the courtroom, as required. *See* Fed. R. Crim. P. 31(a). The district court read the verdict and polled each juror individually to confirm that it was the jury's unanimous finding.

The district court did not plainly err in accepting a partial verdict in these circumstances.

C.

Third, Kechego argues that the district court should have given a voluntary-manslaughter instruction. We review the district court's refusal to give an instruction under the abuse-of-discretion standard. *United States v. Hills*, 27 F.4th 1155, 1188 (6th Cir. 2022).

A defendant is entitled to an instruction on a lesser-included offense when: "(1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser." *United States v. Colon*, 268 F.3d 367, 373 (6th Cir. 2001). The third requirement is at issue here. A defendant is "entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable juror to find in his favor." *United States v. Tisdale*, 980 F.3d 1089, 1095 (6th Cir. 2020) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

18 U.S.C. § 1112 defines voluntary manslaughter as the "unlawful killing of a person, without malice" "upon a sudden quarrel or heat of passion." "[T]o constitute manslaughter, there must be sufficient evidence of provocation to arouse an ordinary and reasonable person to kill the decedent." *United States v. Bishop*, 1998 WL 385898, at *6 (6th Cir. 1998). "It is well established that if the defendant had enough time between the provocation and the killing to reflect on his or her intended course of action, 'then the mere fact of passion would not reduce the crime below murder.'" *United States v. Bordeaux*, 980 F.2d 534, 537–38 (8th Cir. 1992) (quoting *Collins v. United States*, 150 U.S. 62, 65 (1893)); *see also* Wayne R. LaFave, 2 Subst. Crim. L. § 15.2 (3d ed.) (emphasizing the "temporary" loss of self-control). The heat of passion must result from a "*sudden* provocation." *See Bordeaux*, 980 F.3d at 537.

In this case, there was insufficient evidence to support a voluntary-manslaughter conviction. Kechego argued that he lacked malice because he acted out of a "heat of passion," specifically, "a deep-seated hatred for chomos that boiled over." R. 354, Jury Trial Tr., July 14, 2022, PageID 4344. Kechego characterized the phone call, the newspaper article, his intoxication, and prison culture as a "perfect storm" that caused him to lose control. *Id.* at 4347–48. But a two-week-old phone call and similarly dated newspaper article are not sudden provocations. The same goes for a deep-seated hatred of child molesters, which Kechego's expert said was part of a broader prison culture. And the standard against which Kechego's conduct is measured is that of an ordinary and reasonable sober person, so his intoxication is unavailing. *See* Wayne R. LaFave, 2 Subst. Crim. L. § 9.5(e) (3d ed.).

Kechego argues that the district court applied too rigorous a standard in deciding not to give the voluntary-manslaughter instruction. He says that he needed only "some evidence" of heat of passion. Appellant Br. at 26. There are two problems with that. First, it is not clear that he proffered any evidence of heat of passion, as that term is used in the law. Second, "some evidence" is not the standard. As Kechego later acknowledges, there must be "sufficient" evidence to support a conviction on the lesser offense. Reply Br. at 8 (citing *United States v. Eggleston*, 823 F. App'x 340, 346 (6th Cir. 2020) (quoting *Mathews*, 485 U.S. at 63)).

The district court did not abuse its discretion in denying Kechego's request for a voluntary-manslaughter instruction.

D.

Fourth, Kechego argues that the district court should have permitted his expert to testify on retrograde extrapolation. The district court excluded this testimony as a discovery sanction. We review the district court's decision under the abuse-of-discretion standard. *United States v. Maples*, 60 F.3d 244, 246 (6th Cir. 1995).

The Federal Rules of Criminal Procedure require a defendant to provide a written summary of expert testimony when that testimony goes to the defendant's mental condition. Fed. R. Crim. P. 16(b)(1)(C). The Rules provide that when a party fails to comply, the district court may: (1) order discovery; (2) grant a continuance; (3) exclude the evidence; or (4) enter

any other order that is "just under the circumstances." Fed. R. Crim. P. 16(d)(2). The district court should impose the "'least severe sanction necessary' . . . to serve remedial objectives." *Maples*, 60 F.3d at 247–48. That decision is informed by: (1) the reason for delay; (2) the degree of prejudice; and (3) whether the prejudice can be cured with a less severe sanction. *Id.* at 247.

In this case, Kechego failed to provide an expert report despite being provided an extended deadline to do so. What's more, he informed the district court that he was not confident he would ever be able to provide the report. Kechego does not challenge these facts. Instead, Kechego argues that the district court abused its discretion in excluding his expert, which he characterizes as "choos[ing] the most onerous remedy." Appellant Br. at 29. He says that the government "knew the gist" of his expert's planned testimony and could have prepared without delaying trial. *Id.* at 30. But the district court considered that argument, disagreed, and carefully considered the appropriate sanction. First, the court concluded that there was no adequate justification for Kechego's failure to provide the report. *United States v. Castro*, 2022 WL 2915582, at *4 (E.D. Mich. July 25, 2022). Second, the court concluded that allowing the expert to testify without the report would significantly prejudice the government by hindering its efforts to prepare for cross-examination or secure a rebuttal witness. *Id.* Third, the court concluded that no less severe sanction would suffice because the jury had already been selected, witnesses had been scheduled, and trial capacity was limited post-COVID-19. *Id.* The district court thoughtfully exercised its discretion.

Kechego nevertheless argues that, "under similar circumstances, the Government has not received such a draconian punishment." Appellant Br. at 30 (citing *United States v. Ledbetter*, 929 F.3d 338 (6th Cir. 2019)). But Kechego fails to account for the fact that the court had already extended the disclosure deadline, provided warning that no further extensions would be given, and concluded that this scientific subject matter could not be adequately rebutted without a report. He offers no case in support of his theory that a district court abuses its discretion in excluding expert testimony under those circumstances. And we see no abuse of discretion here.

E.

Finally, Kechego argues that the district court should have admitted evidence of a phone call that he received two weeks before Maire's killing. That phone call reported that his niece had been sexually assaulted, although the assault had nothing to do with Maire. The district court excluded the phone call on the ground that it was irrelevant, *see* Fed. R. Evid. 402, and because, even if relevant, admitting it would have been more unfairly prejudicial than probative, *see* Fed. R. Evid. 403. We review the district court's ruling under the abuse-of-discretion standard. *United States v. Chavez*, 951 F.3d 349, 357–58 (6th Cir. 2020).

Kechego argues that the call was relevant evidence of his mental state because it goes to why he killed Maire. He also notes that the district court did not explain why the evidence was more unfairly prejudicial than probative.[1] Regardless, we cannot grant relief because the district court's error, if any, was harmless. *See* Fed. R. Crim. P. 52(a). To the extent that Kechego argues that the phone call was admissible evidence of his mental state, relevant to the distinction between first- and second-degree murder, any error was harmless because Kechego was acquitted of first-degree murder. And as to Kechego's voluntary-manslaughter theory, any error was harmless because, even considering the minimally probative two-week-old phone call, Kechego proffered insufficient evidence for an instruction on that theory for the reasons previously discussed. "[W]e may not grant a new trial on the basis of non-constitutional trial error where we have a 'fair assurance' that the verdict was not 'substantially swayed' by the error." *United States v. Kettles*, 970 F.3d 637, 643 (6th Cir. 2020) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). We have that assurance here.

* * *

We AFFIRM.

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[1]It may be that the district court excluded the evidence because of its tendency to engender sympathy for Kechego. We have stated that evidence is not unfairly prejudicial merely because it paints the defendant in a bad light. *See United States v. Young*, 847 F.3d 328, 349 (6th Cir. 2017). It follows that evidence is not unfairly prejudicial merely because it paints the defendant in a sympathetic light. We need not decide how that principle applies to this case because any error in excluding the phone call evidence was harmless.