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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE BURCIAGA ANDASOLA,

Defendant - Appellant.

No. 19-1482

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CR-00427-WJM-1)

Jacob Rasch-Chabot, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

J. Bishop Grewell, Assistant United States Attorney (Jason R. Dunn, United States Attorney, with him on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before **MATHESON**, **MURPHY**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Jose Burciaga-Andasola appeals his convictions for distributing methamphetamine and heroin, arguing that the district court violated Federal Rule of Evidence 605 by improperly testifying as a witness during his jury trial. We agree

that the district court erred. But because the government has established that the error was harmless beyond a reasonable doubt, we affirm.

Background

Andasola's convictions arise from a February 2017 drug deal. The evidence at trial established that a few days before the deal, an FBI informant called Andasola, asked to buy three ounces of heroin, and planned to meet up with Andasola later in the week. During this call and others, Andasola discussed the product he was selling using coded language, referring to it by other terms, including "cars," "horses," and "cheese." But video footage from a hidden camera worn by the informant to the drug deal revealed that Andasola was not selling such items—he was selling heroin and methamphetamine.

In the video, Andasola arrives at the agreed location just off a highway exit. Wearing a checkered shirt, Andasola enters the informant's car for a short conversation about drug quantities and prices. Then the two men drive separately to a second location on a rural road. Next, the video shows Andasola leaving his truck and riding in the informant's vehicle to a third and final location.

During the drive, Andasola reassures the informant that changing locations would avoid problems and be safer. The two men again discuss drug prices and quantities using coded language. For instance, the informant asks Andasola how much crystal he has with him, and Andasola says he has "two" (referring to two pounds of methamphetamine). Supp. R. 5. Andasola then asks the informant if he wants to buy the two or only the heroin, which he refers to with the code word

"black." He also later confirms that the informant wants the two pounds of methamphetamine.

At the third location, the video shows the informant stopping his car on a rural road as an approaching green SUV driven by an unidentified man does the same. Andasola would later admit that he owned the green SUV. The video shows Andasola sitting in the passenger seat and talking to the informant. Although the camera view does not actually show Andasola exiting the informant's vehicle, the sound of a car door opening can be heard. And then a person whose face isn't visible to the camera but who is wearing the same checkered-pattern shirt as Andasola removes foil-wrapped packages from the SUV and hands them through the driver's door to the informant. After the informant places the packages on the passenger seat, the camera view shifts back to the driver's side window, where Andasola is briefly seen standing.[1] Andasola then leaves with the unidentified man in the green SUV.

The informant delivered the packages to an FBI agent. When eventually weighed and tested, these packages held about two pounds of methamphetamine and half a pound of heroin. Three weeks later, in another recorded meeting with the informant and an undercover agent, Andasola collected payment for the earlier drug deal and discussed prices for future deals.

[1] We describe the video in detail to provide a complete account of the evidence. But we note that Andasola himself describes the events in the video more summarily, acknowledging that "[d]espite the low quality of the image, the video does show [Andasola] take foil-wrapped packages from the green SUV and hand them over to the [informant] in the driver's seat." Aplt. Br. 4.

A grand jury indicted Andasola on two counts: (1) distributing or possessing with the intent to distribute 50 grams or more of methamphetamine; and (2) distributing or possessing with the intent to distribute 100 grams or more of heroin.[2] At trial, the government presented testimony from law enforcement in addition to the informant's phone calls with Andasola arranging the drug deal, the hidden-camera video of both the drug deal and the later meeting with the undercover agent to collect payment, and transcripts of and screenshots from the audio recordings and the hidden-camera videos.[3]

Andasola testified in his own defense. He explained that at the time of his arrest, his oxycodone addiction negatively affected his mental capabilities. And when asked about the events shown on the video, he offered an elaborate explanation about the origins of the packages, which he said were not his. Specifically, Andasola testified that the informant's cousin and brother had asked him to keep some packages for them; Andasola claimed that he refused this request but said they could bury the packages on the street near his house. But according to Andasola, he could not find the packages the next day when they called and asked him to deliver the packages. He further explained that the money he collected from the undercover officer three weeks later was payment for selling a vehicle to the informant's brother.

[2] The superseding indictment also included a charge for illegally possessing a firearm. On the government's motion, the district court dismissed that charge with prejudice before trial.

[3] The informant did not testify because he died before trial.

On cross-examination, Andasola at times suggested that he did not remember the events shown in the video. But he also admitted that the video showed him meeting the informant, following the informant to the second location, and driving with the informant to the third location. He further acknowledged that the video showed him standing next to the green SUV. But when asked about the portion of the video showing a person whose face is not visible, but who is wearing the same checkered shirt worn by Andasola in other portions of the video, handing the packages to the informant, Andasola asserted that the "video's been changed" to look like he handed the packages to the informant, which he "never did." R. vol. 3, 440. On redirect, he questioned whether the video played for the jury was "the original one"—that is, whether it was the same one the government produced in discovery and his attorney played for him at the jail. *Id.* at 451. His attorney then asked him to identify the differences he observed "between that video and this video." *Id.* "In that video," Andasola maintained, "somebody puts drugs in back of that car, and you see their—their hands, their arms, like this, not with—not from the—not in the front and not with the jacket on." *Id.*

This testimony triggered a sidebar conversation with the district court, outside the jury's hearing. The government represented that no other video existed and that the video played for the jury was the same video produced in discovery. Because defense counsel's question as to the differences Andasola observed "between that video and this video" implied that there were two videos, the government asked the district court to instruct the jury that there was only one video. *Id.* Defense counsel

acknowledged that there was only one video but added that Andasola simply believed he saw a different video and wanted to testify to that fact. The district court ultimately instructed the jury "that there is only one video that exists in this case. That video has been labeled as Government Exhibit 14. To the extent there was any implication that another video exists, that is not an accurate statement. There is only one video." *Id.* at 458.

In the end, the jury convicted Andasola of both offenses, and the district court imposed concurrent 150-month prison sentences and a five-year term of supervised release. Andasola appeals.

Analysis

Andasola's sole argument on appeal is that the district court committed reversible error by testifying as a witness at trial in violation of Rule 605 when it instructed the jury that, contrary to Andasola's testimony, there was only one video. Our review is de novo. *United States v. Nickl*, 427 F.3d 1286, 1293 (10th Cir. 2005).

Rule 605 provides that "[t]he presiding judge may not testify as a witness at the trial." This means that "[a] judge 'may analyze and dissect the evidence, but he [or she] may not either distort it or add to it.'" *Nickl*, 427 F.3d at 1293 (quoting *Quercia v. United States*, 289 U.S. 466, 470 (1933)). That is because distorting or adding to the evidence is "the functional equivalent of witness testimony." 27 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 6063 (2d ed. 2020) (explaining that "[t]he most important factor" in distinguishing "proper judicial statements and statements that trigger the application of Rule 605" should be

"whether the judge's statement is essential to the exercise of some judicial function or is the functional equivalent of witness testimony").

For instance, in *Nickl*, we found a Rule 605 error where the presiding judge answered a question in place of a witness. 427 F.3d at 1294. There, the defendant faced a charge for aiding and abetting a bank employee in the misapplication of bank funds. *Id.* at 1291. One element of that crime required proof that the bank employee "acted with intent to injure or defraud" the bank. *Id.* at 1292. At the defendant's trial, the bank employee gave "conflicting testimony" on this element, first stating that she lacked this intent but then "admitting she had pleaded guilty to having an intent to defraud." *Id.* And when the bank employee was questioned on this point a third time, the presiding judge "interrupted and responded" in place of the bank employee, stating that he would not have accepted the bank employee's guilty plea unless he was convinced that she had the required intent. *Id.* at 1292–93. We held that this "added new evidence" because it "did not summarize [the bank employee's] testimony, it reshaped it." *Id.* at 1294. Further, we concluded that this error was not harmless because the other evidence of the bank employee's intent was not strong and the judge's comment left little room for the jury to reach its own conclusion on the issue. *Id.* at 1294–95.

I. Waiver

We first consider the government's assertion that Andasola waived his Rule 605 argument by "affirmative[ly] agree[ing] that the district court could tell the jury

that there was only one video."[4] Aplee. Br. 19. We reject this argument for two reasons. First, the government relies on an inapposite case, *United States v. Carrasco-Salazar*, 494 F.3d 1270 (10th Cir. 2007). There, the defendant abandoned an objection below by "indicating to the district court that it had been resolved," and we concluded that such abandonment amounted to waiver. *Id.* at 1273. But here, Andasola never objected to the proposed instruction on Rule 605 grounds. He therefore could not have waived any such argument by "abandon[ing]" it. *Id.* at 1272–73. Moreover, as Andasola points out, the lack of a Rule 605 objection below is not relevant: Rule 605 itself provides that "[a] party need not object to preserve the issue."

Second, the instruction the district court provided to the jury went beyond what defense counsel "affirmative[ly] agree[d]" to. Aplee. Br. 19. Defense counsel responded "[o]kay" when the district court announced it would "tell the jury that there is only one video . . . in this case . . . and that there is no other video." R. vol. 3, 456. But when giving the instruction, the district court informed the jury both that "[t]here is only one video" *and* that "[t]o the extent there was any implication that

[4] Andasola argues that the government waived its waiver argument "by raising the issue in such a perfunctory manner." Rep. Br. 2. To be sure, the government's argument is short. But it does not resemble the cursory (or nonexistent) arguments in the two cases Andasola cites. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006) (reaching defendant's unpreserved merits challenge because government waived waiver by "not argu[ing]" it); *United States v. De Vaughn*, 694 F.3d 1141, 1154 n.9 (10th Cir. 2012) (declining to consider waiver argument supported by one case cited in standard-of-review section but never applied in analysis section). We therefore conclude that the government adequately raised the waiver issue.

another video exists, that is not an accurate statement." *Id.* at 458. In so doing, it essentially instructed the jury that Andasola's testimony suggesting the video had "been changed" was not truthful—and defense counsel did not agree to this instruction. *Id.* at 440. Thus, we reject the government's waiver argument.

II. Rule 605 Error

Moving to the merits, the government "agrees that [it] was legal error" for the district court to instruct the jury that only one video existed. Aplee. Br. 17–18. At the same time, the government paradoxically disagrees that this conceded legal error violated Rule 605, insisting that "[i]t stretches the text of Rule 605 to suggest that the instruction here amounted to testimony from the judge as a witness." *Id.* at 17. But the district court violates Rule 605 when it "add[s] to" the record evidence. *Nickl*, 427 F.3d at 1293 (quoting *Quercia*, 289 U.S. at 470). And here, after Andasola testified that the video had been altered, the district court—rather than holding the government to its burden to introduce contrary evidence—"simply instructed the jury that, in fact, there was no other video." Rep. Br. 2. Thus, the district court introduced new evidence to the jury by deciding a disputed factual issue for the jury, in violation of Rule 605. *See Nickl*, 427 F.3d at 1294 (finding Rule 605 error where district court's statement reshaped witness's testimony).

III. Harmlessness

A finding of Rule 605 error does not end our inquiry. We next consider whether the error was harmless. *See id.* at 1293–94.

A. Legal Standard

Both parties cite *Nickl* for their opposing positions regarding the applicable test for harmlessness. Andasola argues that the government must show "that the error was harmless beyond a reasonable doubt." Aplt. Br. 19 (quoting *Nickl*, 427 F.3d at 1293). The government, on the other hand, suggests that an error is harmless when "the properly admitted evidence is 'sufficiently strong' to conclude that the error did not affect the jury's decision." Aplee. Br. 19 (quoting *Nickl*, 427 F.3d at 1294).

The parties' inconsistent references to *Nickl* are understandable. In addressing what we termed a "Rule 605 error" in *Nickl*, we cited the harmlessness standard for constitutional error, harmlessness beyond a reasonable doubt, relying on *United States v. Paiva*, 892 F.2d 148 (1st Cir. 1989). *See* 427 F.3d at 1293. In *Paiva*, the First Circuit did hold "that the judge's error in adding to the evidence his explanation of a field test was harmless beyond a reasonable doubt." 892 F.2d at 159. But it did so only after sua sponte declining to treat the error as arising under Rule 605, finding it "more properly addressed under federal caselaw governing a district court judge's power of comment and the inherent limitations on this power." *Id.* at 158–59. Thus, it's not clear whether *Paiva* supports *Nickl*'s application of a constitutional harmless-error standard to Rule 605 error.[5]

And despite initially reciting the constitutional harmless-error standard in *Nickl*, it doesn't appear that we held the government to its burden under that standard.

[5] Andasola does not suggest that the error here was anything other than a Rule 605 error.

See 427 F.3d at 1293–95. Instead, after concluding that a Rule 605 error occurred, we found it "necessary to decide whether the testimony was prejudicial." *Id.* at 1294. Then, relying on our own decision in *Lillie v. United States*, 953 F.2d 1188 (10th Cir. 1992), we held that the "[e]rroneous admission of evidence is harmless only if other competent evidence is 'sufficiently strong' to permit the conclusion that the improper evidence had no effect on the decision." 427 F.3d at 1294 (quoting *Lillie*, 953 F.2d at 1192).

Lillie involved a judge's improper viewing of the scene of a slip-and-fall accident rather than a judge's testimony at trial. 953 F.2d at 1189. But we nevertheless characterized the judge's action, in part, as a Rule 605 violation because "[w]hen a judge engages in off-the-record fact gathering, he essentially has become a witness in the case." *Id.* at 1191. And we specifically held in *Lillie* "that an improper view is to be judged by the general standard regarding the erroneous admission of evidence." *Id.* at 1192. We ultimately concluded that the judge's actions were not harmless because the other evidence was not strong enough "to permit the conclusion that the improper evidence had no effect on the decision." *Id.*

Because both parties cite *Nickl* without recognizing its potentially inconsistent conclusions, we lack briefing on the issue of whether the Rule 605 error here is subject to the constitutional harmless-error standard or to the lower standard of harmlessness more typically applied to evidentiary errors. *Compare United States v. Summers*, 414 F.3d 1287, 1303 (10th Cir. 2005) (explaining that for constitutional errors, "the government bears the burden of demonstrating that the error was

harmless beyond a reasonable doubt"), *with United States v. Glover*, 413 F.3d 1206, 1210 (10th Cir. 2005) (explaining that for nonconstitutional errors, "the government bears the burden of demonstrating, by a preponderance of the evidence, that the substantial rights of the defendant were not affected").[6] In any event, we need not decide which standard applies because, as we explain below, we are convinced that the error in this case is harmless even under the stricter standard.

B. Discussion

Andasola argues that the district court's comments "decimated" his defense, and he again looks to *Nickl* to support his position. Specifically, he argues that the judge's comment "left no room for the jury to draw its own conclusions" about his claim that the government edited the video to make it look like he had handed the informant the packages—a claim he says was a core component of his defense that he did not personally distribute the drugs to the informant. Aplt. Br. 19; *see also Nickl*, 427 F.3d at 1295 (finding error not harmless in part because judge's "remarks left little room for jurors to draw their own conclusions"). But *Nickl* is distinguishable.

[6] We note that at least two circuits have applied a substantial-rights harmlessness analysis to Rule 605 error. *United States v. Blanchard*, 542 F.3d 1133, 1151 (7th Cir. 2008) ("The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded." (quoting *United States v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007))); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007) (explaining that "we apply the harmless[-]error standard and consider whether there is a 'fair assurance,' based on an independent review of the record, that the judge's unsupported remarks did not affect the decision"); *see also* 27 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 6065 (2d ed. 2020) (stating that party asserting Rule 605 error must show that error affected substantial rights).

As discussed, the erroneously admitted testimony in *Nickl* concerned an element of the defendant's crime: that the bank employee intended to defraud the bank. *See* 427 F.3d at 1294. And on this element, we held that the presiding judge "answered in place of [the bank employee] and emphatically stated he was convinced [the bank employee] intended to defraud the bank." *Id.* at 1295. Because the jurors in *Nickl* "would have felt obliged to accept the judge's testimony" on a point that effectively established an element of the crime, we concluded that the error was not harmless. *Id.*

Here, in contrast, the jury was not required to find that Andasola physically handled the drugs in order to convict him of distribution. As the government highlights, "physically handling the drugs is not necessary for a distribution conviction." Aplee. Br. 20. Indeed, the district court instructed the jury on constructive possession and accomplice liability, neither of which required proof that Andasola touched the drugs.

Moreover, in *Nickl*, the presiding judge's testimony regarding the intent element addressed an issue on which the other evidence "was not 'sufficiently strong to permit the conclusion' that [it] had no effect upon the jury's decision." 427 F.3d at 1294 (quoting *Lillie*, 953 F.2d at 1192). In other words, the government's case in *Nickl* did not include "an abundance of evidence on [the bank employee's] intent to defraud the bank." *Id.* So when the presiding judge expressed his belief that the accomplice "had the intent to defraud, he introduced evidence [that] the government was not able to otherwise establish." *Id.* at 1295. As a result, the presiding judge's

comments "almost certainly affected the jury's conclusions." *Id.*; *see also Blanchard*, 542 F.3d at 1152 (finding reversible Rule 605 error based on judge's comments that affected credibility of "star" government witness whose testimony "was the lynchpin of the government's case").

Here, though, the weight of the other evidence against Andasola regarding possession—whether actual or constructive—with intent to distribute was overwhelming. As an initial matter, Andasola does not dispute the accuracy of any other portion of the video, which was highly incriminating in its own right. It showed Andasola haggling over drug prices and quantities, instructing the informant to drive an indirect path to multiple locations to evade law enforcement, and meeting the green SUV, a car he admitted that he owned and from which drugs were removed before being placed in the informant's vehicle. Additionally, as the prosecutor emphasized during closing argument, "more than the video" showed that Andasola "possessed th[e] drugs with the intent to distribute." R. vol. 3, 538. In particular, recorded phone calls showed Andasola arranging the deal, discussing prices and quantities, and using coded references to drugs. Andasola does not dispute the accuracy of those calls. Nor does he dispute the accuracy of the video of his later meeting with the informant and another undercover agent, during which Andasola collected payment for the drugs from the earlier deal and arranged future deals.

Against this plethora of overwhelming evidence, Andasola asserts that the improper testimony was nevertheless not harmless because it amounted to the trial judge undermining his credibility and thus his entire defense. Specifically, he

contends that the jury "was never given the opportunity to independently assess [his] credibility" because "it was instructed by the district court that it could not credit his testimony that the government had doctored evidence." Rep. Br. 7 (emphasis omitted). But even assuming Andasola's testimony was credible, it did not contradict the vast majority of the government's evidence against him, including the phone calls, the remainder of the video of the drug deal, and the video of the later meeting at which Andasola discussed payment and future deals. Thus, we conclude that the additional evidence introduced by the presiding judge's improper testimony and any resulting loss of credibility did not affect the jury's analysis of Andasola's guilt and was harmless beyond a reasonable doubt.[7] *See Nickl*, 427 F.3d at 1294.

Conclusion

Although the district court erred under Rule 605 by instructing the jury that only one video existed, that error was harmless beyond a reasonable doubt in light of the other overwhelming evidence of Andasola's guilt. Accordingly, we affirm Andasola's convictions.

[7] In rejecting Andasola's credibility argument, we do not downplay the seriousness of the district court's error. Improper judicial testimony that impacts the credibility of the defendant or a key witness can, in some cases, operate to undermine the defendant's entire defense and—in such cases—is not harmless. *See, e.g.*, *Blanchard*, 542 F.3d at 1151–52 (finding judicial testimony on credibility of "key government witness" whose "testimony was crucial to establishing" element of crime not harmless); *cf. Quercia*, 289 U.S. at 468, 471–72 (reversing because judge instructed jury that defendant "wiped his hands during his testimony" which "is almost always an indication of lying" and that "every single word that man said, except when he agreed with the [g]overnment's testimony, was a lie"). But as we have explained above, this is not such a case.