FILED
United States Court of Appeals
Tenth Circuit

April 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH A. DUNN,

Petitioner - Appellant,

v.

KEN SMITH, Warden; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 22-2082
(D.C. No. 1:18-CV-00289-MIS-KBM)
(D. New Mexico)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Kenneth A. Dunn, a New Mexico state prisoner, was convicted of first-degree kidnapping and other crimes. Mr. Dunn filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 based on, *inter alia*, failure to instruct the jury on an element of first-

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

degree kidnapping. The district court denied relief because it viewed the instructional error as harmless but granted a certificate of appealability ("COA").

Mr. Dunn now appeals on the grounds that the jury was not instructed on every element of a first-degree kidnapping offense and the state court relied on a version of the kidnapping statute not yet in effect at the time of his offense. Because these errors were harmless, we affirm the denial of Mr. Dunn's habeas petition.

I. BACKGROUND

On the night of the crimes in 2003, Mr. Dunn pushed his way into the victim's home, repeatedly prevented her from fleeing, physically restrained her, and committed digital sexual penetration. Police responded to a neighbor's report of screaming coming from the victim's home. The victim testified that, as Mr. Dunn was penetrating her and she was screaming, she heard a knock at the door and continued to scream. The responding officer testified that, as he approached the home, he could hear a female voice screaming, "Get away from me, get away from me." Trial Audio Disc 4 Track 1 at 1:09:36–48. The officer drew his weapon, announced himself, and "banged pretty hard on the door." *Id.* at 1:10:25–35. Mr. Dunn opened the door immediately, and the officer ordered him to the ground. Mr. Dunn complied, stating something like, "It's about time you got here. What took you so long?" *Id.* at 1:11:02–08. At that point, the officer could still hear the victim screaming and crying. The officer entered the home and discovered her hiding under a piano, crying, mostly naked, and partially handcuffed.

Mr. Dunn was charged with criminal sexual penetration, aggravated burglary, and the conviction Mr. Dunn challenges here: "Kidnapping (Great Bodily Harm)," which

carried a basic sentence of eighteen years. Supp. ROA at 2, 4; N.M. Stat. Ann. § 31-18-15(A)(1). The New Mexico statute in effect at the time defined kidnapping as follows:

> A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:
>
> (1) that the victim be held for ransom;
>
> (2) that the victim be held as a hostage or shield and confined against his will;
>
> (3) that the victim be held to service against the victim's will; or
>
> (4) to inflict death, physical injury or a sexual offense on the victim.
>
> B. Whoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict great bodily harm upon the victim.

N.M. Stat. Ann. § 30-4-1 (1978) (Cum. Supp. 2003). Later in 2003, the statute was amended to replace "great bodily harm" with "physical injury or sexual offense." 2003 N. M. Laws, Ch. 1, § 2.

New Mexico's Uniform Jury Instructions ("NMUJI") at the time of the offense split the elements of first-degree kidnapping across two instructions. NMUJI 14-403 set forth the elements of N.M. Stat. Ann. § 30-4-1(A), with use notes indicating that "[i]f first degree kidnapping is an issue," a special verdict form is given. The special verdict form, NMUJI 14-6018, asked the jury whether "the defendant did not voluntarily free [the victim] in a safe place" and whether "the defendant inflicted great bodily harm on [the victim]." If the jury answered "yes" to at least one of these, the defendant was guilty of first-degree kidnapping. If the jury answered "no" to both, the defendant was guilty of

only second-degree kidnapping. The use notes to NMUJI 14-6018 clarified that "[a]ll kidnapping is first degree kidnapping unless the defendant voluntarily frees the victim and does not inflict great bodily harm on the victim."[1]

At trial, the jury received only the instruction on the essential elements of kidnapping under N.M. Stat. Ann. § 30-4-1(A). The jury did not receive the special verdict form, received no instruction on the elements of N.M. Stat. Ann. § 30-4-1(B), and made no findings about whether Mr. Dunn voluntarily freed the victim. The jury found Mr. Dunn guilty, he was convicted of first-degree kidnapping, and the state court sentenced him to eighteen years on the kidnapping conviction.

Mr. Dunn first raised the issue of incomplete jury instructions in a pro se state habeas proceeding in 2014. After an evidentiary hearing, the state district court denied his petition. The state court explained that the use notes required the special verdict form to be used "if there is an issue as to whether the defendant voluntarily freed the victim in a safe place." Supp. ROA at 309–10 (quotation marks omitted). The state court reasoned that "the Court was correct in not giving the jury the special instruction," because "witness testimony made clear that the victim was not voluntarily freed" and the jury had

[1] It is unclear whether, at the time of the offense and conviction, New Mexico courts would have interpreted N.M. Stat. Ann. § 30-4-1(B) as containing defenses to first-degree kidnapping or elements of first-degree kidnapping. The New Mexico Supreme Court has since interpreted these circumstances to be elements of first-degree kidnapping, at least one of which must be affirmatively proven. *See State v. Gallegos*, 206 P.3d 993, 998 (N.M. 2009). If the state proves only the elements in (A) without at least one of the elements in (B), the conviction is for second-degree kidnapping only.

convicted Mr. Dunn of criminal sexual penetration. *Id.* at 310. Mr. Dunn appealed directly to the New Mexico Supreme Court, and it summarily denied certiorari.

Mr. Dunn then filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the District of New Mexico. The district court rejected his petition as time-barred, but after Mr. Dunn obtained a certificate of appealability, this court remanded with instructions to reconsider the timeliness issue. However, we noted that "the procedural issue can be bypassed if the district court determines that the [§ 2254 petition] fails on the merits." ROA at 594.

On remand, the district court appointed counsel for Mr. Dunn and, after receiving a report and recommendation from a magistrate judge, the district court denied relief. The district court noted that Respondents had waived the exhaustion and timeliness issues and had requested a decision on the merits. After reviewing the record, the district court agreed with the magistrate judge that it was "uncontested and supported by overwhelming evidence" that Mr. Dunn did not release the victim, "such that the jury verdict would have been the same absent the error."[2] ROA at 961 (quoting *Neder v. United States*, 527 U.S. 1, 17 (1999)). However, the district court granted a COA because it determined Mr. Dunn had "made a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists

[2] The district court also reasoned the jury verdict would have been the same because Mr. Dunn was convicted of criminal sexual penetration, which the district court believed supported the first-degree kidnapping charge. In affirming the district court, we do not endorse its reasoning on this point, and Appellees also concede it was erroneous.

could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 966 (internal quotation marks omitted). This appeal followed.

II. DISCUSSION

On appeal, Mr. Dunn argues that the failure to instruct the jury on all the elements of first-degree kidnapping violated the Sixth and Fourteenth Amendments, which Amendments require proof of every element of an offense beyond a reasonable doubt. Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), he contends his conviction for first-degree kidnapping, without a jury finding he either failed to voluntarily release the victim in a safe place or he inflicted great bodily harm on the victim, violates his constitutional rights. Mr. Dunn contends the instructional error was not harmless because a jury could have concluded he voluntarily released the victim.

Mr. Dunn also argues violation of the Due Process Clause because the court applied a version of the statute that was not yet in effect at the time Mr. Dunn committed the kidnapping offense. We do not address this argument because any such error was harmless. Overwhelming and uncontested evidence that Mr. Dunn failed to voluntarily release the victim provided an alternate basis for the first-degree kidnapping conviction.

A. Legal Standard

A federal court may entertain an application for a writ of habeas corpus on the ground that a state prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). However, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "erects a formidable barrier to federal

habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). AEDPA prohibits federal courts from granting habeas relief on a claim a state court adjudicated on the merits unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). This standard is intentionally difficult to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

We review denial of a petition under § 2254 de novo, *Welch v. Workman*, 639 F.3d 980, 991 (10th Cir. 2011), deferring to the last reasoned state-court decision—if any—where AEDPA requires, *Bonney v. Wilson*, 817 F.3d 703, 711 n.6 (10th Cir. 2016) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). The state district court was the only state court to issue a reasoned opinion in this case, so we look to that opinion to evaluate Mr. Dunn's claim.

B. Analysis

Apprendi and *Alleyne* reflect the general rule that facts affecting a sentence must be found by a jury. 530 U.S. at 490; 570 U.S. at 103, 108 *passim*. Like most constitutional errors, however, *Apprendi*-type errors are subject to harmlessness analysis. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). As relevant here, omission of an element of a crime from a jury instruction is subject to harmless error review. *Neder v.*

United States, 527 U.S. 1, 9 (1999) ("[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."). Only where an instructional error "vitiates *all* the jury's findings"—for example, a defective instruction on reasonable doubt—is it a structural error exempt from harmless-error analysis. *Id.* at 11 (quotation marks omitted). Where all the evidence supports the omitted element, applying harmless error "does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

Neder identified the general test for harmless constitutional error as that in *Chapman v. California*: whether "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15 (quoting 386 U.S. 18, 24 (1967)). *Neder* specified omission of an element from jury instructions is harmless if, after a thorough review of the record, "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17; *see id.* at 19; *see also United States v. Kahn*, 58 F.4th 1308, 1318 (10th Cir. 2023) (declining to "parse out the proper formulation of the harmless-error standard for direct review under *Neder*" because government had not proven harmless error under either test (quotation marks omitted)). The state bears the burden of proving harmlessness. *Kahn*, 58 F.4th at 1318.

To obtain a conviction for first-degree kidnapping, the state had to prove one of two elements: Mr. Dunn did not voluntarily free the victim in a safe place or Mr. Dunn inflicted great bodily harm. It is undisputed Mr. Dunn did not inflict great bodily harm

under the definition then in effect. Under § 30-4-1(B), then, Mr. Dunn's conviction for first-degree kidnapping had to rest on a finding that Mr. Dunn did not voluntarily free the victim in a safe place. Because the jury was not provided the special verdict form containing the elements of first-degree kidnapping, it made no such finding. Mr. Dunn argues this resulted in constitutional error under *Apprendi*, *Alleyne*, and *United States v. Haymond*, 139 S. Ct. 2369, 2380 (2019) (holding it unconstitutional to increase punishment on the basis of judge's finding by a preponderance of the evidence the defendant had violated conditions of release). Appellees concede that the omission was error. However, Appellees argue—and the district court agreed—the error was harmless because the evidence Mr. Dunn did not voluntarily release the victim was overwhelming and uncontested.

The state court did not apply *Apprendi*, *Alleyne*, or *Neder*, or identify their legal principles, so we need not address whether it unreasonably applied them. *See Murphy v. Royal*, 875 F.3d 896, 914 (10th Cir. 2017). Mr. Dunn does not argue the state court's decision rested on an unreasonable determination of facts in light of the evidence. Therefore, we evaluate only whether the state court's decision was contrary to clearly established federal law.

Even if the state court's determination that there was no instructional error was contrary to *Apprendi* and *Alleyne* overcoming AEDPA's bar, Mr. Dunn's § 2254 petition fails on the merits as the instructional error was harmless under *Neder*. The overwhelming, uncontested evidence at trial showed Mr. Dunn did not voluntarily free the victim. Mr. Dunn has not identified any conflicting evidence; he argues only about

the interpretation of the evidence, suggesting a jury could find his actions of opening the door to police, asking why they took so long, and surrendering without resistance to constitute voluntarily freeing the victim in a safe place. But the police, not Mr. Dunn, freed the victim, and Mr. Dunn did not act voluntarily in the matter—he took no steps whatsoever to release the victim before police forced the issue by banging on the door and announcing themselves. *See Taylor v. Powell*, 7 F.4th 920, 932 (10th Cir. 2021) (explaining that, where the highest court of the state has not decided an issue, we must predict how it would rule); *cf. State v. Barrera*, 22 P.3d 1177, 1184–85 (N.M. 2001) (defining "voluntary" in a different context as "the product of a free and deliberate choice rather than intimidation, coercion, or deception" (quotation marks omitted)); *State v. Laguna*, 992 P.2d 896, 900 (N.M. Ct. App. 1999) (determining sufficient evidence supported finding of no voluntary release where defendant drove victim to home of victim's sister's boyfriend but momentarily restrained the victim in the car before victim fought himself free); *State v. Munoz*, 972 P.2d 847, 852 (N.M. 1998) (determining that in context of confession, "[v]oluntariness means freedom from official coercion" (internal quotation marks omitted)); *see also State v. Stammer*, No. A-1-CA-35694, 2020 WL 1815945, at *4 (N.M. Ct. App. Mar. 5, 2020) (unpublished) (upholding a first-degree kidnapping conviction where the defendant had unlocked the door behind which the victim had been confined after the victim's father arrived to pick up the victim, rejecting argument this showed voluntary release). We see no basis in New Mexico law for distinguishing between first-degree kidnapping and second-degree kidnapping on the basis of the perpetrator's degree of resistance to law enforcement's rescue attempts.

Mr. Dunn argues voluntary release was contested at trial but points to no part of the trial where his attorney made such an argument, and our review finds none. Mr. Dunn suggests counsel attempted to elicit testimony relevant to safe release, but this would not have changed the verdict because the attempt was unsuccessful: no testimony plausibly showed voluntary release. Mr. Dunn also argues the state court's decision to instruct the jury on false imprisonment shows the state court thought it possible the evidence showed voluntary release, but even Mr. Dunn acknowledges voluntary release is not an element of false imprisonment.

This case is easily distinguishable from cases in which we have found instructional omissions not harmless. In *Kahn*, for example, the defendant was charged with knowingly or intentionally distributing controlled substances without authorization. *Kahn*, 58 F.4th at 1314. However, the jury was not instructed to determine whether the defendant knowingly or intentionally acted without authorization; it asked only whether "he acted outside the usual course of professional medical practice or without a legitimate medical purpose." *Id.* at 1315. We rejected the government's harmlessness argument under *Neder*, noting that intent was a central issue in the trial and the evidence the defendant knowingly or intentionally acted without authorization was not overwhelming. *Id.* at 1319. We also rejected the government's argument under the general harmlessness standard, explaining that a knowing failure to act outside professional norms was not equivalent to a knowing failure to act without authorization. *Id.* at 1320. Here, there is no evidence Mr. Dunn voluntarily released the victim but instead overwhelming evidence Mr. Dunn did not do so.

This case is also easily distinguishable from *United States v. Johnson*, 878 F.3d 925 (10th Cir. 2017), which Mr. Dunn asserts supports his position. In *Johnson*, we determined an instructional error constituted plain error affecting substantial rights because the evidence was contested and not overwhelming. *Id.* at 929–30. Here, by contrast, the evidence Mr. Dunn did not voluntarily release the victim was uncontested and overwhelming. The outcome of the trial would have been the same had the jury been properly instructed. Therefore, the error was harmless.

III. CONCLUSION

Mr. Dunn has failed to show he is entitled to habeas relief under 28 U.S.C. § 2254. Therefore, we **AFFIRM** the district court's denial of Mr. Dunn's petition for a writ of habeas corpus.

Entered for the Court

Carolyn B. McHugh
Circuit Judge