FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKY BARKSDALE GREEN,

Defendant - Appellant.

No. 22-2062
(D.C. No. 2:06-CR-02605-JB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **TYMKOVICH**, and **MATHESON**, Circuit Judges.

Ricky Barksdale Green, proceeding pro se,[1] appeals from the district court's judgment revoking his supervised release. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Mr. Green proceeds pro se at his own request. We construe a pro se litigant's filings liberally, but we do not act as his attorney. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

BACKGROUND

In sentencing Mr. Green for federal drug and firearms offenses, the district court ordered a term of imprisonment plus eight years of supervised release. Mr. Green began serving his term of supervised release in January 2020.

In August 2020, Mr. Green was arrested for violating New Mexico law. United States Probation Officer Eduardo Casteneda petitioned the federal district court to revoke Mr. Green's supervised release for violating a condition prohibiting him from committing any federal, state, or local crimes. The probation officer later filed an amended petition adding allegations that Mr. Green had failed two April 2021 drug tests by testing positive for marijuana, in violation of a condition that he refrain from unlawfully using controlled substances. The operative petition, the third amended petition for revocation, alleged both that (1) Mr. Green had committed a state crime, specifically felony aggravated battery against a household member (strangulation or suffocation) and misdemeanor battery against a household member; and (2) Mr. Green had unlawfully used a controlled substance.

Although Mr. Green admitted the drug-use allegations, he contested the state-crime allegations. Before the revocation hearing he filed a motion in limine to require the United States to present the live testimony of the victim of the alleged batteries, D.S., rather than relying on hearsay evidence. In response the government told the district court it could not locate D.S., and even if it could find and serve her, it doubted she would testify, given that the state had dismissed its charges against Mr. Green because she was unwilling to testify.

The district court deferred consideration of the motion in limine until after the hearing. The government presented its case through Hobbs, New Mexico police officer Dalton Hacker and Probation Officer Casteneda.

Officer Hacker testified that a man called the Hobbs police, stating that his former girlfriend, D.S., had sent him texts indicating she might be in danger and a photo in which she looked like she had been beaten. The photo showed a woman with a prominent black eye. Officer Hacker and another officer did a welfare check on D.S. at her home, which was a one-room improved outbuilding. When Officer Hacker saw D.S., he thought her eye area "appeared worse in person" than in the pictures. R. Vol. III at 96. Mr. Green was in D.S.'s room, and when the officers asked to speak with her outside, he soon came out and told her to invoke the Fifth Amendment. D.S. was tense and not forthcoming with the officers until Officer Hacker called an ambulance and was able to speak with her outside Mr. Green's presence. She then told him that Mr. Green had caused the injuries to her face. After Officer Hacker arrested Mr. Green and put him in a squad car, D.S. told him that Mr. Green had strangled her until she blacked out. She woke up with the injuries to her face. Officer Hacker testified that he saw a rubbing or a bruising, consistent with a finger or thumb, on D.S.'s neck.

Probation Officer Casteneda testified that the day after the arrest D.S. spoke to him on the telephone, telling him Mr. Green choked her until she blacked out. She then sent him texts with pictures showing her black eye and again stating Mr. Green

had choked her. After that conversation and the texts, however, he did not hear from D.S. again.

Mr. Green testified on his own behalf, denying that he caused the injury to D.S.'s eye and that he strangled or choked her. He testified that while D.S. was struggling with a blowing tarp, trying to cover furniture on a pallet in the yard, she fell and hit her face on the furniture, or perhaps on the pallet. Mr. Green also presented an affidavit from his niece stating that D.S. told her that Mr. Green did not cause her eye injury.

Ultimately the district court denied the motion in limine. After finding the hearsay statements were sufficiently reliable, the district court balanced Mr. Green's interest in confrontation against the government's good cause for not producing D.S. Noting that the government had acted diligently to try to obtain D.S.'s testimony, the district court concluded "that the United States has demonstrated good cause for not presenting [her] testimony that, when considered with the hearsay's reliability, outweighs Green's interest in confronting and cross-examining [D.S.]." R. Vol. I at 139.

The district court further found that Mr. Green assaulted and strangled D.S. It did not consider Mr. Green's testimony to be credible. Instead, it "believe[d] [D.S.'s] statement to Hacker that Green caused her facial injuries when he strangled her and caused her to blackout, because [D.S.'s] story is consistent with her injuries, and Hacker's demeanor and testimony were credible." *Id.* at 89 n.2. Concluding "by a preponderance of the evidence that Green assaulted [D.S.] and, therefore, that he

committed the crime of Aggravated Battery Against a Household Member, N.M.S.A. § 30-3-16," the district court held "he violated a mandatory term of his supervised release" and revoked supervised release.[2] *Id.* at 109. It sentenced Mr. Green to 30 months of imprisonment and 48 months of supervised release. Mr. Green now appeals.

DISCUSSION

"When a convicted defendant violates a condition of supervised release, the sentencing judge may revoke the term of supervised release and impose prison time." *United States v. Vigil*, 696 F.3d 997, 1002 (10th Cir. 2012) (citing 18 U.S.C. § 3583(e)(3)). The decision need only be supported by a preponderance of the evidence. § 3583(e)(3); *United States v. Disney*, 253 F.3d 1211, 1213 (10th Cir. 2001). We "generally review[] a district court's decision to revoke supervised release for abuse of discretion," while reviewing "[u]nderlying questions of law" de novo. *United States v. Shakespeare*, 32 F.4th 1228, 1232 (10th Cir.) (internal quotation marks omitted), *cert. denied*, 143 S. Ct. 463 (2022). When a defendant fails to object in the district court, however, our review is only for plain error. *See id.* Plain error requires a defendant to show "(1) an error (2) that is clear or obvious, rather than subject to reasonable dispute, (3) affected his substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (brackets and internal quotation marks omitted).

[2] The district court also found that Mr. Green committed the drug-use violation. That violation is not at issue in this appeal.

Mr. Green first challenges the district court's decision to allow the government to rely on hearsay testimony. The Sixth Amendment's Confrontation Clause does not apply in supervised-release revocation proceedings. *See United States v. Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017). Federal Rule of Criminal Procedure 32.1(b)(2)(C) affords a defendant at a revocation hearing "an opportunity to . . . question any adverse witness unless the court determines that the interest of justice does not require the witness to appear." To "determine whether the interest of justice does not require the witness to appear," the court must balance "(1) the person's interest in the constitutionally guaranteed right to confrontation against (2) the government's good cause for denying it." *United States v. Jones*, 818 F.3d 1091, 1099-1100 (10th Cir. 2016) (internal quotation marks omitted). In performing the balancing test, "reliability is a very important factor in determining the strength of a releasee's confrontation right." *Id.* at 1100 (internal quotation marks omitted).

The district court recognized that it was required to apply the balancing test and weighed the appropriate factors. It acknowledged that Mr. Green had a strong interest in confronting D.S. But it concluded the hearsay statements were supported by other evidence, including Officer Hacker's bodycam video, and thus were sufficiently reliable. Given that the government could not locate D.S., despite using reasonable efforts, the district court then concluded the government had good cause for not calling her. Weighing these factors against each other, the district court concluded that the government's good cause, combined with the hearsay's reliability, outweighed Mr. Green's interest in confronting D.S. We see no error in conducting

the balancing test and thus no abuse of discretion in admitting the hearsay evidence. *See Curtis v. Chester*, 626 F.3d 540, 547-48 (10th Cir. 2010) (recognizing that when "the credibility of the victim's statements are supported by other sources, [the defendant] has a diminished interest in testing those statements through confrontation" and that the government's "good cause in denying confrontation [was] substantial" where it could not locate the witness).

Mr. Green further attempts to undermine the credibility of Officer Hacker and Probation Officer Casteneda. Appraising witness credibility, however, is a function generally reserved to the factfinder. *See United States v. Leach*, 749 F.2d 592, 600 (10th Cir. 1984). "A determination of witness credibility is reviewed for clear error, and we will not hold that testimony is, as a matter of law, incredible unless it is unbelievable on its face, i.e., testimony as to facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Hoyle*, 751 F.3d 1167, 1175 (10th Cir. 2014) (brackets and internal quotation marks omitted). The inconsistencies Mr. Green points out do not rise to that level.

Mr. Green also challenges the reliability of police bodycam videos that were played during the revocation hearing, objecting that the videos were not played in full and citing law about the admissibility of duplicates versus original evidence. But he has not shown where he raised either of these objections in the district court, and on appeal he has not shown error, much less plain error. The same is true with regard to (1) his objection that the prosecutor allowed Officer Hacker to refresh his

recollection by reviewing his report, and (2) his contention that the prosecutor committed misconduct by correcting an earlier misstatement of fact she had made to the court.[3]

Finally, Mr. Green alleges his counsel was ineffective. It has long been the general rule in this circuit that "[i]neffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). We see no reason to depart from that rule here.

CONCLUSION

We deny Mr. Green's motions to supplement the record on appeal,[4] but we sua sponte direct the Clerk to file district court document CM/ECF No. 320 in a sealed supplemental record on appeal. We affirm the district court's judgment.

Entered for the Court

Harris L Hartz
Circuit Judge

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[3] To the extent Mr. Green attempts to assert different claims of prosecutorial misconduct in his reply brief, "we typically do not consider issues first raised in a reply brief, especially when the appellant fails to invoke plain error, as is the case here." *United States v. Barrett*, 797 F.3d 1207, 1221 n.3 (10th Cir. 2015) (citation omitted).

[4] We deny the motions as unnecessary as to requested materials that already appear in the supplemental record on appeal. We deny the remainder of the motions because Mr. Green has not shown the other materials he requests were part of the record before the federal district court. *See United States v. Kennedy*, 225 F.3d 1187,

1191 (10th Cir. 2000) ("This court will not consider material outside the record before the district court. . . . [Federal Rule of Civil Procedure] 10(e) allows a party to supplement the record on appeal but does not grant a license to build a new record." (internal quotation marks omitted)). Mr. Green's assertion that the materials were part of the state-court record does not support adding new materials to the record on appeal.