

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 17, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN DWIGHT CLEMENTS,

Defendant - Appellant.

No. 24-2171
(D.C. No. 5:23-CR-01389-MIS-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH, MURPHY**, and **ROSSMAN**, Circuit Judges.

This appeal addresses a defendant’s argument that the district court should have granted a pretrial motion to dismiss a criminal charge. If the charge is dismissed after the trial, does the defendant have standing to appeal the denial of his pretrial motion? We answer *no* because standing requires a conviction and the post-trial dismissal prevented a conviction.

* This order and judgment is not precedential except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

1. Following a guilty verdict, the district court dismisses a charge of possessing a firearm while being a drug user or addict.

A young girl accused her stepfather, Mr. Kevin Clements, of kidnapping, sexual abuse, and use of a gun during the abuse. Mr. Clements was charged with sex trafficking, kidnapping, possessing a firearm while being a drug user or addict, and possessing a firearm after a felony conviction. Before trial, Mr. Clements moved to dismiss the charges involving possession of a firearm, arguing that they were based on unconstitutional prohibitions. The district court denied the motion, and the jury found guilt on all of the charges. After the verdict, however, the prosecution moved to dismiss the charge involving possession of a firearm while being a drug user or addict, acknowledging that the defendant would otherwise have two convictions for the same act of possession. This time, the court granted the motion to dismiss. Mr. Clements was convicted on the other charges.

2. Mr. Clements lacks standing to challenge the denial of his pretrial motion to dismiss.

Mr. Clements argues that the district court waited too long to dismiss the charge involving possession of a firearm while being a drug user or addict. In making this argument, he acknowledges that he wasn't convicted of this charge. But he observes that the denial of his pretrial motion resulted in introduction of prejudicial evidence about his drug use.

This observation leads the government to characterize Mr. Clements's argument as one involving "spillover," which is "when the evidence admitted to prove a charge as to which the defendant was acquitted" spills over into the jury's consideration of other charges. *United States v. Simon*, 12 F.4th 1, 43 (1st Cir. 2021). But Mr. Clements disavows a freestanding claim of prejudicial spillover, insisting that he is instead challenging the constitutionality of the law criminalizing possession of a firearm by drug users or addicts. Appellant's Reply Br. at 23–24.

Even if he is right about the constitutional issue, however, a defendant can ordinarily challenge only a conviction or sentence. *See United States v. Parr*, 351 U.S. 513, 518 (1956). And Mr. Clements wasn't convicted or sentenced for possessing a firearm while being a drug user or addict. So a resolution of the statute's constitutionality would be academic. *McKinney v. Gannett Co.*, 694 F.2d 1240, 1247–48 (10th Cir. 1982). Absent a conviction or sentence on this count, the legal posture is "as though no charges had been made." *United States v. MacDonald*, 456 U.S. 1, 10 (1982).

Like a defendant who hasn't been charged under the statute, Mr. Clements wasn't injured from the statute itself. He *was* arguably injured from the introduction of evidence about his drug use. But he isn't

complaining about the introduction of that evidence.¹ So he must rely on the existence of the statute itself for standing. And the statute didn't cause any injury to Mr. Clements given the dismissal of the corresponding charge. So Mr. Clements lacks standing to challenge the constitutionality of the statute. *See United States v. Risner*, 129 F.4th 361, 366 (6th Cir. 2025).²

¹ Mr. Clements couldn't complain about the admissibility of that evidence because he didn't object at trial. *See* Fed. R. Evid. 103(a)(1) (a party must object to preserve a claim of error in admitting evidence); *United States v. Wright*, 363 F.3d 237, 248 (3d Cir. 2004) (declining to consider the merits of an argument involving prejudicial spillover when the defendant did not move for a new trial on this ground). Though Mr. Clements didn't preserve the argument, we could ordinarily consider it under the plain-error standard. *United States v. Tee*, 881 F.3d 1258, 1274 n.3 (10th Cir. 2018). But Mr. Clements hasn't asked us to review the issue for plain error. So Mr. Clements waived a potential argument involving the admissibility of the evidence. *See United States v. Richardson*, 136 F.4th 1261, 1269 (10th Cir. 2025) (stating that a defendant waived an argument by failing to request plain-error review on an issue that wasn't preserved in district court).

² In *United States v. Risner*, a defendant was charged with possessing a firearm after a felony conviction, and the district court denied a pretrial motion to dismiss this charge as a violation of the Second Amendment. 129 F.4th at 364. The district court later dismissed this charge based on a plea agreement. *Id.* The defendant appealed, arguing that the district court should have dismissed this charge before the trial. *Id.* at 365–66. The Sixth Circuit concluded that the defendant lacked standing because he was never convicted on this charge.

Mr. Clements lacks standing to challenge the statute criminalizing possession of a firearm while using drugs. So we dismiss this part of the appeal.

3. Our precedents foreclose Mr. Clements's other challenges.

Though the district court ultimately dismissed the charge of possessing a gun as a drug user or addict, the court declined to dismiss the charge for possessing a firearm after a felony conviction. Mr. Clements appeals that ruling, arguing again that the statute violates the Second Amendment. But this challenge is foreclosed by our precedent in *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025).³ So we reject this challenge.

Mr. Clements also challenges the admissibility of testimony by two women about sexual abuse when they were teenagers. Federal Rule of Evidence 413(a) permits evidence of uncharged sexual assaults in a criminal case when the defendant is accused of sexual assault. *See United States v. Benally*, 500 F.3d 1085, 1090 (10th Cir. 2007). Mr. Clements argues that this testimony was inadmissible under Rule 413 because he was charged with sex trafficking rather than sexual assault.⁴

³ Mr. Clements concedes that our precedent *Vincent* forecloses his constitutional challenge to this statute. Defendant's Unopposed Mot. to Abate at 2.

⁴ The district court ruled in the alternative that the testimony was admissible under Federal Rule of Evidence 414. Mr. Clements challenges this ruling, too. But we need not resolve that challenge given our conclusion that the testimony was admissible under Rule 413.

We rejected this argument in *United States v. Clay*, 148 F.4th 1181 (10th Cir. 2025). There the defendant had made the same argument after being charged with kidnapping and transportation across state lines with the intent to engage in illegal sexual activity. We held that Rule 413 refers to the circumstances of the conduct alleged, not a law or generic crime. *Id.* at 1195–98. Under that holding, Rule 413 allowed the introduction of the women’s testimony in Mr. Clements’s trial.⁵

Affirmed.

Entered by the Court

Robert E. Bacharach
Circuit Judge

⁵ Mr. Clements concedes that his argument is foreclosed by *Clay*. Defendant’s Unopposed Mot. to Abate at 2.