FILED
United States Court of Appeals
Tenth Circuit

May 9, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IVAN MICHAEL FAUNCE,

Defendant - Appellant.

No. 22-4019

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:18-CR-00044-JNP-1)

Jessica Stengel, Assistant Federal Public Defender (Scott Keith Wilson, Federal Public Defender with her on the briefs), Salt Lake City, Utah, on behalf of the Defendant-Appellant.

Nathan H. Jack, Assistant United States Attorney (Trina A. Higgins, United States Attorney with him on the briefs), Salt Lake City, Utah, on behalf of the Plaintiff-Appellee.

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

BACHARACH, Circuit Judge.

Defendant Ivan Faunce appeals the revocation of his supervised release. While on supervised release, Mr. Faunce allegedly beat his ex-girlfriend, E.B., and locked her in an RV. The district court

- found that Mr. Faunce had committed kidnapping, aggravated assault, criminal mischief, and other violations of the terms of his supervised release and
- sentenced Mr. Faunce to two years in prison and one more year of supervised release.

Mr. Faunce appeals, creating two issues.

1. Did the district court plainly err by constructively amending the petition?

We answer *no*. Mr. Faunce argues that the district court deprived him of notice by amending the petition. In the petition, the government had alleged criminal mischief based on Mr. Faunce's conduct in breaking the rear window of E.B.'s car. In a pre-hearing memorandum, the government cited a specific sub-section of the Utah statute on criminal mischief. But during the revocation hearing, the district court invoked a different sub-section.

Mr. Faunce argues that the district court's reliance on a different sub-section created a denial of due process by depriving him of notice. To address this argument, we consider the standard of review, which turns on preservation. Mr. Faunce didn't alert the district court to his alleged lack of notice, so we apply the standard for plain error. Under this standard, Mr. Faunce needed to show an effect on his substantial rights. He didn't make this showing because the district court's classification of the conduct as criminal mischief hadn't materially affected the decision to revoke supervised release, the guideline range, or the selection of a sentence.

2. Did the district court plainly err or abuse its discretion by allowing a government witness to testify by Zoom?

We answer *no*. When the district court scheduled the revocation hearing, the courthouse was closed for an indefinite period. So the

court planned to conduct the revocation hearing through a video platform (Zoom). But days before the revocation hearing was to occur, the court announced that it would soon reopen the courthouse. Given the reopening of the courthouse, the district court granted Mr. Faunce's request to conduct the hearing in-person. But the district court permitted E.B. to testify remotely.

On appeal, Mr. Faunce urges a denial of due process when the court allowed E.B. to testify remotely. Because he failed to alert the district court to this argument, we apply the plain-error standard. Under this standard, Mr. Faunce needed to show an obvious or clear error. He didn't make this showing, for there's no caselaw in this or any other circuit court establishing a due process violation from a witness's remote testimony at a revocation hearing. So a possible denial of due process wouldn't have been obvious or clear.

Mr. Faunce also argues that the district court abused its discretion and violated the Federal Rules of Criminal Procedure by failing to properly balance the competing factors before allowing the remote testimony. But the district court balanced the factors that Mr. Faunce had urged. So we reject Mr. Faunce's arguments involving an abuse of discretion and violation of the federal rules.

Based on these conclusions, we affirm the revocation and sentence.

I. The government petitioned for revocation of supervised release.

Mr. Faunce was on supervised release when he allegedly attacked his ex-girlfriend, E.B. The government petitioned for revocation, alleging that Mr. Faunce had committed two Grade A violations (kidnapping and aggravated assault) and five Grade C violations. One of the Grade C

violations involved criminal mischief for breaking the rear window of E.B.'s car.[1]

Because of a pandemic, the courthouse was closed. So the district court scheduled the revocation hearing to take place over Zoom. But after the courthouse had arranged to reopen on the day of the revocation hearing, the court

- granted Mr. Faunce's request to conduct the hearing in-person and
- allowed E.B. to testify by Zoom.

When E.B. testified by Zoom, she acted belligerently toward defense counsel. But Mr. Faunce was able to finish his cross-examination.

II. The district court did not plainly err by finding criminal mischief.

The district court found that Mr. Faunce had committed criminal mischief. On appeal, Mr. Faunce alleges a denial of due process, claiming

---

[1] The Grade C violations were

1. failure to work full-time,
2. failure to submit a report that was both truthful and complete,
3. failure to follow the probation officer's instructions,
4. possession of a dangerous weapon, and
5. criminal mischief.

that the district court constructively amended the petition by applying a different statutory sub-section than the government had cited. But the alleged constructive amendment would not have affected Mr. Faunce's substantial rights because the district court could still have considered the underlying conduct.

A. We assess the alleged error under the standard for plain error.

Because Mr. Faunce didn't make this contention in district court, we apply the plain-error standard. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).[2] Mr. Faunce argues that he preserved this contention by objecting in the revocation hearing. But he had objected there to the sufficiency of the evidence, not a lack of notice.

In his objection, Mr. Faunce had argued that under the new definition of criminal mischief, the court should classify his conduct as a misdemeanor rather than as a felony.[3] But neither the government nor the

---

[2] The government argues that Mr. Faunce bypassed the chance for plain-error review by failing to request it in his opening brief. We assume for the sake of argument that Mr. Faunce could request plain-error review for the first time in his reply brief.

[3] Under Utah Code Ann. § 76-6-106(3)(b), criminal mischief constitutes a felony when the defendant causes or intends to cause damage of at least $500. If the damage is less, Utah law classifies the criminal mischief as a misdemeanor. Utah Code Ann. § 76-6-106(3)(b)(iii) & (iv). The government did not argue that the damage to the car window had involved $500 or more.

district court had characterized Mr. Faunce's criminal mischief as a felony. So he did not preserve an issue of notice by questioning the sufficiency of the evidence.

Given the failure to preserve this issue, Mr. Faunce needed to show an error that is plain, that affects a substantial right, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Richison*, 634 F.3d at 1128.

B. The district court applied a different sub-section than the government had cited.

In a pre-hearing memorandum, the government cited a specific provision of the Utah Code on criminal mischief, § 76-6-106(2)(b). But during the revocation hearing, the district court found that a different sub-section—§ 76-6-106(2)(c)—more clearly applied.[4] Mr. Faunce argues that reliance on an uncited sub-section deprived him of due process because it identified a distinct crime.

C. The court's finding of criminal mischief did not affect a substantial right.

Under the standard for plain error, Mr. Faunce needed to show an effect on his substantial rights. *See* Part II(A), above. This showing required a reasonable probability that the error had affected the outcome.

---

[4] Utah Code Ann. § 76-6-106(2)(c) states that a person commits criminal mischief by "intentionally damag[ing], defac[ing], or destroy[ing] the property of another."

United States v. Koch, 978 F.3d 719, 729 (10th Cir. 2020). An error could potentially affect three decisions:

1. the decision to revoke Mr. Faunce's supervised release,
2. the selection of the applicable guideline range, or
3. the sentence imposed.

Mr. Faunce did not show a reasonable probability of an effect on any of these decisions. So even if the district court had obviously or clearly erred, the error wouldn't have affected a substantial right.

1. The district court's classification of the conduct as criminal mischief didn't affect the decision to revoke supervised release.

The district court found that Mr. Faunce had violated seven terms of his supervision. Of these, two were serious Grade A felony violations: kidnapping and aggravated assault. The other five violations, including criminal mischief, were Grade C.

Mr. Faunce doesn't show how the finding of criminal mischief could have affected the decision to revoke supervised release. Even without the finding of criminal mischief, Mr. Faunce's Grade A violations would have required revocation. *See* U.S. Sent'g Guidelines Manual § 7B1.3(a)(1) (U.S. Sent'g Comm'n 2021) ("Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release."). So the alleged

error as to criminal mischief didn't affect the decision to revoke supervised release.

2. The finding of criminal mischief didn't affect the guideline range.

Nor did the alleged error affect the guideline range. The guideline range stemmed from the two Grade A violations: aggravated assault and kidnapping. U.S. Sent'g Guidelines Manual § 7B1.1(a)(1) (U.S. Sent'g Comm'n 2021). Based on the two Grade A violations, the district court concluded that the guideline range would have been the same with or without a finding of criminal mischief: "[W]hether or not I find a violation . . . of the criminal mischief statute, it doesn't make any difference to the guidelines." R. vol. 4, at 225.

The court was right. Mr. Faunce had a criminal history category of VI. When an offender in category VI commits a Grade A violation, the guidelines called for a prison sentence between 33 and 41 months. U.S. Sent'g Guidelines Manual § 7B1.1(a)(1) (U.S. Sent'g Comm'n 2021). Because Mr. Faunce's underlying conviction involved a class B felony, federal law limited his maximum term of imprisonment to two years. 18 U.S.C. § 3583(e)(3). So the guideline range would have been fixed at two years with or without a Grade C violation. The finding of criminal mischief thus did not affect the guideline range.

3. The district court's finding of criminal mischief didn't affect the selection of a sentence.

Conceivably, the commission of criminal mischief could affect the district court's selection of the sentence. And Mr. Faunce argues that the court shouldn't have classified the breaking of the car window as criminal mischief. But even if he's right, the court could consider Mr. Faunce's act of breaking E.B.'s car window.

When selecting the new sentence, the district court could consider "the nature and circumstances of the offense" triggering revocation. 18 U.S.C. §§ 3553(a)(1), 3583(e). For Mr. Faunce, these offenses included kidnapping.

The district court found kidnapping based in part on E.B.'s statements to a nurse about how she had fled in her car:

> And I think if we look at the evidence of what happened in the vehicle -- even in the statements that she made to medical personnel at the hospital or to law enforcement at the time, she described how she was trying to drive away, and she was in the vehicle without all of her clothing on, and she had to use a can of bug repellent and spray it in Mr. Faunce's face in order to be able to leave. I think that I believe that testimony from her about the Off. I don't think she would have made that up or that she was in a state of mind to make that up and get that into the medical records at the time. So that's a piece of her testimony that I believe, and I believe that . . . establishes kidnapping.

R. vol. 4, at 233 (statement of the district court). E.B. also told the nurse that when she returned to the car, Mr. Faunce had "'busted [her] rear window with his elbow.'" Appellee's Supp. R. vol. 2, at 25. So the court

could consider Mr. Faunce's act of breaking the window when sentencing him for the kidnapping violation. *See United States v. Booker*, 63 F.4th 1254, 1261 (10th Cir. 2023) (stating that the district court could base the sentence for revocation on the conduct "that resulted in the violations of the conditions of supervised release"); *accord United States v. Dennis*, 35 F.4th 1116, 1118 (8th Cir. 2022) (stating that when imposing a revocation sentence, district courts may "consider relevant conduct underlying alleged supervised release violations that [had been] dismissed"); *United States v. Simtob*, 485 F.3d 1058, 1063 (9th Cir. 2007) ("[A] district court may properly look to and consider the conduct underlying the revocation as one of many acts contributing to the severity of the violator's breach of trust . . . .").

Because the district court could consider the evidence that Mr. Faunce had broken the car window, the only question is whether the court's classification of that conduct as criminal mischief had affected the sentence.

Any such effect was unlikely. The court based the sentence on Mr. Faunce's attack on E.B., which led to findings of kidnapping and aggravated assault. On top of these violations, the district court could consider the breaking of E.B.'s car window. The only conceivable effect would stem from classification of the breakage as a separate Grade C

violation. But classification as a Grade C violation would have paled in comparison to the far more serious violations of kidnapping and aggravated assault.

Mr. Faunce argues that it is impossible to disaggregate the effect of the Class C violation on the district court's decision-making. For this argument, Mr. Faunce relies on *United States v. Henry*, 852 F.3d 1204 (10th Cir. 2017).[5] In *Henry*, we concluded that a district court had improperly allowed hearsay evidence at a revocation hearing. *Id.* at 1208 (citing *United States v. Jones*, 818 F.3d 1091, 1100 (10th Cir. 2016)). Relying on that evidence, the district court found that the individual on supervised release had committed a second assault. *Id.* We recognized our inability to "disaggregate [the] role, if any, the second violation [had] played in the district court's final sentencing decision." *Id.* Because we could "only speculate what sentence the district court would have issued absent a legal error," we reversed and remanded for resentencing. *Id.* at 1209.

[5] In *Henry*, the government bore the burden of proving harmlessness. 852 F.3d at 1208. Here, though, Mr. Faunce bears the burden of showing plain error. *See* Part II(A), above; *see also United States v. Gonzalez-Huerta*, 403 F.3d 727, 736 (10th Cir. 2005) ("[P]lacing the burden on the appellant is one of the essential characteristics distinguishing plain error from harmless error.").

But in *Henry*, the district court had based the second assault on inadmissible hearsay evidence. *Id.* at 1208–09. So the evidence was inadmissible to show either the underlying conduct or the violation itself. Here, though, the district court could have considered the conduct underlying the allegation of criminal mischief.

In *Henry*, we couldn't have known whether a second assault had contributed to the sentence. 852 F.3d at 1208–09. That uncertainty doesn't exist here. Mr. Faunce committed seven violations, and two of these were serious Grade A violations: kidnapping and aggravated assault. The district court described Mr. Faunce's attack on E.B. as "really serious conduct where someone's life was endangered." R. vol. 4, at 243. And Mr. Faunce pleaded guilty to three other Grade C violations and admitted the facts of a fourth, resulting in a total of five Grade C violations.

We have no reason to believe that the sentence would have been milder with one fewer Grade C violation. So we conclude that Mr. Faunce has not shown an effect on his substantial rights. This conclusion prevents reversal under the plain-error standard.

D. Mr. Faunce waived his new challenge to the sufficiency of the evidence under the newly cited sub-section.

Mr. Faunce argues in his reply brief that the evidence was insufficient to prove any form of criminal mischief. But he failed to include the argument in his opening brief, and the reply brief was too late.

United States v. Mendoza, 468 F.3d 1256, 1260 (10th Cir. 2006). So we need not consider the sufficiency of the evidence of criminal mischief.[6]

III. The district court's decision to allow E.B. to testify remotely did not constitute plain error or an abuse of discretion.

The government sought revocation of Mr. Faunce's supervised release when the courthouse was closed because of a pandemic. So the district court set the revocation hearing by Zoom, and Mr. Faunce voiced no objection.

Roughly two months later, the district court eased its restrictions and announced that it would reopen on Monday, February 14, 2022, which was the day set aside for the revocation hearing. On the Wednesday before the hearing, Mr. Faunce objected to E.B.'s appearance by Zoom. In this objection, Mr. Faunce argued that E.B. should appear in-person rather than by Zoom because the government hadn't shown good cause for E.B. to

---

[6] Mr. Faunce presents a narrower argument in his opening brief concerning evidence on economic loss. There Mr. Faunce says that

- the new criminal mischief sub-section contained "an additional element" of "loss amount" and
- the government did not offer "*any* proof of loss amount nor was Mr. Faunce on notice to prepare a defense on this element."

Appellant's Opening Br. at 27 (emphasis in original). But criminal mischief may be committed even when there's actual or intended "loss *less* than $500 in value." Utah Code Ann. § 76-6-106(2)(c) (emphasis added). So Mr. Faunce could have been guilty of criminal mischief even if the conduct hadn't caused any economic loss.

appear remotely. The district court overruled the objection. On appeal, Mr. Faunce contends that the court violated his right to due process, failed to conduct a balancing test, and committed an abuse of discretion.

We conclude that

- Mr. Faunce forfeited his contention involving a denial of due process,
- the district court conducted the required balancing test, and
- the court didn't abuse its discretion.

A. Mr. Faunce forfeited his new challenge involving a denial of due process.

In district court, Mr. Faunce objected to E.B.'s appearance by Zoom. But his objection didn't rely on the right to due process. Mr. Faunce could have raised the right to due process in his pre-hearing memorandum, at a pre-hearing status conference, or during oral argument at the revocation hearing. Despite these opportunities, Mr. Faunce never contended that E.B.'s appearance by Zoom would have resulted in a denial of due process.[7]

1. We conduct de novo review of the contention involving a denial of due process.

In the appeal, Mr. Faunce supports his theory of due process with contentions that (1) he either didn't make in district court or (2) lacked a

[7] Mr. Faunce did contend that if E.B. weren't to appear at all (either in-person or by Zoom), introduction of her out-of-court statements would

constitutional dimension when presented there. Here, for example, Mr. Faunce presents new contentions involving how

- testimony by videoconference dilutes the defendant's right of confrontation and
- the right to physically confront witnesses bears a lengthy historical tradition.

For the first contention, Mr. Faunce cites empirical studies, movie scenes showing cross-examinations, and evidence involving in-court use of technologies like closed-circuit television. Appellant's Reply Br. at 17–18; Appellant's Opening Br. at 31 & 32 n.8; *see also* Appellant's Reply Br. at 20 (emphasizing that videoconference participants control their own screens and environments, unlike witnesses in court); Appellant's Opening Br. at 47–48 (discussing the central role of a witness's physical presence in various fact-finding processes); Appellant's Opening Br. at 46–47 (emphasizing how E.B.'s behavior during the revocation hearing demonstrates the importance of in-person witness testimony). For the second contention, Mr. Faunce relies on Blackstone's Commentaries and Supreme Court cases addressing the Confrontation Clause. Appellant's Opening Br. at 31–33. But Mr. Faunce didn't alert the district court to these authorities.

---

result in a denial of due process. But E.B. did appear by Zoom, and Mr. Faunce did not allege a denial of due process from E.B.'s Zoom appearance.

On appeal, Mr. Faunce uses these contentions to support a new theory, arguing for the first time that due process encompasses the right to in-person questioning of adverse witnesses at revocation hearings. In district court, however, Mr. Faunce didn't rely on due process for his alleged right to in-person questioning.

At the pre-hearing status conference, Mr. Faunce did argue that remote testimony would make it harder for the district court to evaluate E.B.'s credibility:

> [T]his witness, E.B., her credibility is very much at stake. And there are differences in the fact finder, which is Your Honor of course at the evidentiary hearing, to determine her credibility. Nonverbal comments, things like that, the way she responds is harder to tell on video as it is in person. So that is another reason, where a witness who is so important and her credibility is at issue, that she should appear in person before the fact finder . . . .

R. vol. 4, at 11. But Mr. Faunce never said or suggested that this argument had a *constitutional* dimension. Instead, Mr. Faunce grounded his argument on Fed. R. Crim. P. Rule 32.1. *See id.* at 12 ("And defense's position, to have that fair hearing, E.B. should be present under Rule 32.1, under the balancing test.").

On appeal, Mr. Faunce points out that Rule 32.1 codified *Morrissey v. Brewer*, where the Supreme Court had established that due process entitles an individual facing revocation of release to confront adverse witnesses. 408 U.S. 471, 488–89 (1972); *see* p. 20, below. But that doesn't

mean that the rule's balancing test is coextensive with *Morrissey*, and we've never addressed whether *Morrissey* itself would require the same balancing test. *Cf. United States v. Jones*, 818 F.3d 1091, 1101 (10th Cir. 2016) (declining to decide whether an error in applying Rule 32.1(b)(2)(C) "is constitutional or nonconstitutional"). And courts elsewhere are divided. *Compare United States v. Ferguson*, 752 F.3d 613, 618 (4th Cir. 2014) (stating that the Fourth Circuit's balancing test is based on Rule 32.1 and "does not flow directly from *Morrissey* or due process"), *and United States v. Kelley*, 446 F.3d 688, 692 n.4 (7th Cir. 2006) (declining to require a balancing test under *Morrissey*), *with United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004) (stating that *Morrissey* requires the district court to balance the right to confrontation against the government's reasons for excusing confrontation).

Mr. Faunce forfeited his theory of due process by failing to present it in district court. *See United States v. Duran*, 941 F.3d 435, 449 (10th Cir. 2019). Though we could review this theory anyway under the plain-error standard, *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019), Mr. Faunce hasn't invoked plain error. So we would ordinarily consider this theory waived. *Id.*

The government hasn't challenged preservation, so we have discretion to overlook Mr. Faunce's forfeiture. *United States v. McGehee*,

672 F.3d 860, 873 n.5 (10th Cir. 2012). To determine how to exercise our discretion, "we can (1) weigh the harms from each party's failure to adequately present its argument and (2) consider the adequacy of input from the parties." *United States v. Williams*, 893 F.3d 696, 701 (10th Cir. 2018).

The parties have briefed the due process issue here, but didn't do so in district court. The failure to brief the issue there prevented the district court from ruling on the disputed issue, which entails an important matter of constitutional law that no circuit has squarely presented in a published opinion.

We addressed similar circumstances in *Abernathy v. Wandes*, 713 F.3d 538 (10th Cir. 2013). There a habeas petitioner had forfeited his constitutional challenge, and the government's appeal brief didn't raise the forfeiture. *Id.* at 551–52. Though the petitioner hadn't invoked the plain-error standard, we applied that standard anyway rather than consider the issue waived. *Id.* at 552.

We take the same approach here. The parties have briefed the due process issue here, but not in district court. The failure to brief the issue in district court leaves us without a ruling on the due process issue, and no circuit court has resolved the issue in a published opinion. We thus apply the plain-error standard, as we did in *Abernathy*.

2. The district court did not plainly err.

Under the plain-error standard, Mr. Faunce must show the existence of a plain error. *See* Part II(A), above. An error is "plain" when it is "obvious" or "clear." *United States v. Garcia*, 946 F.3d 1191, 1201–02 (10th Cir. 2020). An error isn't ordinarily considered obvious or clear when the matter is one of first impression. *See United States v. Turrietta*, 696 F.3d 972, 981 (10th Cir. 2012) ("Since a district court cannot be faulted for failing to act on its own motion where the law is unsettled, a matter of first impression will generally preclude a finding of plain error."). Though the issue here involves a matter of first impression, we consider the possibility of an obvious or clear deprivation of due process through the decision to allow E.B. to testify by Zoom.

The asserted denial of due process originated roughly 50 years ago in *Morrissey v. Brewer*, 408 U.S. 471 (1972). There the Supreme Court concluded that the right to due process entitles defendants in parole revocation proceedings to "confront and cross-examine adverse witnesses" absent a showing of good cause. *Id.* at 488–89. This right was then applied to other revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (noting that *Morrissey* applies to probation revocation hearings); *United States v. Ruby*, 706 F.3d 1221, 1226 (10th Cir. 2013) (noting that *Morrissey* applies to hearings for revocation of supervised release). The

right was also codified in Federal Rule of Criminal Procedure 32.1(b)(2)(C). *See* Fed. R. Crim. P. 32.1 advisory committee's note to 1979 amendment; *Ruby*, 706 F.3d at 1226.

The resulting issue for due process is whether a video platform provided an opportunity to "confront and cross-examine adverse witnesses" under *Morrissey*. But when the *Morrissey* Court recognized the right to confrontation, video platforms were not generally available. *See Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 776 (6th Cir. 2008) ("[V]ideoconferencing was not available in the early 1970s, and thus was not contemplated by the Supreme Court in *Morrissey*."). So we must apply current technological developments to a precedent created when video platforms weren't generally available.

Though the Supreme Court wasn't discussing video platforms, the Court later elaborated on *Morrissey*'s right to confrontation by focusing on the need for adverse witnesses to testify "live." For example, the Court later explained that it hadn't intended in *Morrissey* to create a blanket prohibition against "alternative[s] to live testimony" like "affidavits, depositions, and documentary evidence." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973). Nor did the Court intend to prevent "creative solutions to the practical difficulties of the *Morrissey* requirements." *Id.*

Applying *Morrissey* and the endorsement of creative solutions to practical difficulties, we've held that a district court satisfied the right to due process by allowing the government to use an officer's written reports despite the defendant's inability to cross-examine the officer. *Kell v. U.S. Parole Comm'n*, 26 F.3d 1016, 1019–20 (10th Cir. 1994). In concluding that the inability to cross-examine the officer didn't violate due process, we reasoned that the "reports contain[ed] sufficient indicia of reliability to be appropriate substitutes for live testimony." *Id.* at 1020. So under the plain-error standard, we must determine the obviousness or clarity of any possible error in the district court's allowance of Zoom testimony.

We would be hard-pressed to regard any possible error as obvious or clear. The district court required E.B. to make herself available through Zoom for both direct examination and cross-examination. The court thus "allow[ed] [Mr. Faunce] to confront and hear his accuser[] in real time." *Wilkins*, 512 F.3d at 776.

On appeal, Mr. Faunce presents substantially new arguments involving the superiority of in-person testimony over testimony through videoconference. *See, e.g.*, Appellant's Reply Br. at 17 (characterizing virtual testimony as providing only a "constrained and artificial opportunity for some version of confrontation"). During the pre-hearing

status conference, defense counsel did argue that live testimony would be better than remote testimony for the evaluation of E.B.'s credibility:

> Nonverbal comments, things like that, the way she responds is harder to tell on video as it is in person . . . . [W]here a witness . . . is so important and her credibility is at issue, . . . she should appear in person before the fact finder.

R. vol. 4, at 11. But Mr. Faunce provided no support for his conclusion, failing to cite any of the sources that he identifies here. *Id.* We cannot fault the district court for failing to consider data that hadn't been presented. *See United States v. Rodriguez*, 858 F.3d 960, 963 (5th Cir. 2017) ("The district court could not have abused its discretion by failing to consider facts not presented.").

Mr. Faunce also points to E.B.'s outrageous behavior during cross-examination as support for the superiority of in-person testimony over virtual testimony. Appellant's Opening Br. at 41–46. But during oral argument, Mr. Faunce conceded that E.B.'s conduct in the revocation hearing could not have affected the earlier decision to allow remote testimony. We agree and can't fault the district court for failing to consider conduct that had not yet taken place.

* * *

Given Mr. Faunce's opportunity to see and hear E.B. in real time, the district court didn't commit an obvious or clear error in declining to sua sponte find a denial of due process. *See Wilkins v. Timmerman-Cooper*, 512

F.3d 768, 774–76 (6th Cir. 2008) (concluding that the use of videoconferencing at a parole revocation hearing did not constitute an unreasonable application of *Morrissey*).[8]

B. The district court conducted the balancing required by Rule 32.1 and acted within its discretion by finding that E.B. could testify remotely.

In this appeal, Mr. Faunce invokes not only the right to due process but also Federal Rule of Criminal Procedure 32.1(b)(2)(C). Under Rule 32.1, the district court must apply a balancing test when the defendant is unable to "question" witnesses. *See United States v. Jones*, 818 F.3d 1091, 1100 (10th Cir. 2016) (adopting Rule 32.1's balancing test). Mr. Faunce argues that the district court failed to conduct this balancing test and gave too little weight to the importance of E.B.'s testimony.

Mr. Faunce did have an opportunity to question E.B. But the questioning occurred through Zoom rather than in-person. A threshold issue thus exists on the applicability of the balancing test.

---

[8] In *Wilkins*, the Sixth Circuit was reviewing a habeas petition. 512 F.3d at 770. There an Ohio state appellate court had affirmed a parole revocation after a revocation hearing conducted by videoconference. *Id.* at 773. Federal law prohibited habeas relief unless the state's highest court had unreasonably applied Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *see Wilkins*, 512 F.3d at 774. So the Sixth Circuit considered the reasonableness of the state court's application of *Morrissey*. *Id.* at 774–76.

We assume for the sake of argument that Rule 32.1(b)(2)(C) required a balancing test. Even if balancing were required, the district court would have satisfied the requirement by balancing the government's reasons for excusing E.B.'s in-person appearance against Mr. Faunce's right of confrontation. And in balancing these considerations, the court acted within its discretion by allowing E.B. to testify by Zoom.

1. The district court conducted the required balancing test.

District courts must use a balancing test when the defendant is unable to "question" an adverse witness. Fed. R. Crim. P. 32.1(b)(2)(C).[9] Mr. Faunce did have a chance to "question" E.B. But that questioning took place by Zoom, and we can assume for the sake of argument that the district court had needed to balance Mr. Faunce's interest in confrontation with the government's proof of good cause. To conduct that balancing, the court would have needed to consider what was at stake.

The stakes usually involve admissibility of statements when the declarants are unavailable for any "questioning." When declarants aren't available to be questioned, their statements can usually come in only as hearsay. So until now, we and other courts have ordinarily applied the

[9] At the hearing, E.B. refused to answer some questions and temporarily left the Zoom hearing. But E.B. returned and answered all of the questions.

balancing test to determine the admissibility of hearsay. *See, e.g.*, *United States v. Henry*, 852 F.3d 1204, 1207 (10th Cir. 2017); *United States v. Taveras*, 380 F.3d 532, 536 (1st Cir. 2004); *United States v. Diaz*, 986 F.3d 202, 209 (2d Cir. 2021); *United States v. Lloyd*, 566 F.3d 341, 343–45 (3d Cir. 2009). The context here is different, for Mr. Faunce acknowledges that E.B.'s testimony by Zoom did not constitute hearsay.[10]

Because E.B.'s testimony came through Zoom, Mr. Faunce's cross-examination took place through a computer screen—not in-person. But the district court and Mr. Faunce could still see E.B.'s demeanor and hear everything that she said. So the stakes of the balancing involved the difference between Mr. Faunce's ability to confront E.B. in-person and through Zoom.

These stakes required some adjustment in the application of the balancing test. Ordinarily, for example, the balancing test considers the reliability of out-of-court statements because of the inability to cross-examine the declarant. *See United States v. Doswell*, 670 F.3d 526, 529–31 (4th Cir. 2012); *United States v. Lloyd*, 566 F.3d 341, 344–45 (3d Cir.

---

[10] Though the testimony didn't constitute hearsay, we can assume for the sake of argument that the district court needed to apply the balancing test. *But cf. United States v. Teixeira*, 62 F.4th 10, 22 (1st Cir. 2023) (concluding "that a third-party statement that falls within a hearsay exclusion need not be subjected to Rule 32.1 balancing prior to its admission in a revocation proceeding").

2009). Here, though, Mr. Faunce could test E.B.'s reliability by cross-examining her.

Granted, that testing of E.B.'s reliability came through Zoom rather than a conventional in-person confrontation. So the district court would have needed to consider the difference in Mr. Faunce's ability to probe E.B.'s reliability by questioning her through Zoom rather than in-person. But the court fully considered these differences based on every consideration that the parties had presented.

Prior to the revocation hearing, Mr. Faunce and the government had two opportunities to present arguments on whether E.B. should be required to appear in-person: (1) in their pre-hearing memoranda and (2) during the pre-hearing status conference. In the memoranda and status conference, both parties asked the district court to apply the rule's balancing test. *See* R. vol. 2, at 11, 28.

The government urged the court to allow E.B. to testify by video based on six arguments:

1. The Fifth Amendment doesn't categorically bar a witness from appearing remotely at a revocation hearing.

2. E.B. lived out of town, so an appearance in-person would require last-minute arrangements for travel, lodging, and childcare.[11]

[11] The pre-hearing status conference took place at 10:30 a.m. on Friday, February 11, 2021. Later that day, the district court issued a written order

3. E.B. was "terrified of the defendant and of inadvertently disclosing her whereabouts to him." *Id.* at 10.

4. The government had subpoenaed E.B. to appear by Zoom, and she would likely refuse to participate in-person.

5. Since the start of the pandemic, witnesses had routinely testified over Zoom without problems.

6. E.B.'s testimony was not central to the government's case, and other evidence supported the government's allegations.

Mr. Faunce responded to each argument and presented two of his own in a pre-hearing memorandum:

1. E.B. presented "unique and special confrontation needs."

2. E.B.'s "ungrounded assertion of generalized fear" was insufficient under *United States v. Jones*, 818 F.3d 1100 (10th Cir. 2016).

R. vol. 2, at 27–28. And at the pre-hearing status conference, Mr. Faunce presented six more arguments:

1. Mr. Faunce needed to conduct significant cross-examination of E.B.

2. It would be a bad precedent to allow a witness to testify over Zoom because of inconvenience or fear.

3. Credibility could be assessed more effectively from in-person testimony than video testimony.

4. Technological glitches could arise.

---

permitting E.B. to testify by Zoom. The revocation hearing took place on Monday, February 14, 2021.

5. E.B.'s fear was unreasonable because Mr. Faunce would be in custody and in handcuffs throughout the hearing, and the defense would not ask E.B. where she was.

6. Logistical issues (like arranging childcare, travel, and lodging) are an inherent part of participating in court proceedings.

The district court considered these arguments and allowed E.B. to testify by Zoom, weighing

- the court's positive experience in conducting remote hearings throughout the pandemic,
- the ability of the court and the defendant to see E.B., along with her mannerisms and body language, in order to evaluate credibility,
- the fact that E.B.'s testimony did not appear to be the linchpin of the government's case, and
- the practical difficulties of obtaining E.B.'s presence at an in-court proceeding.

By weighing these factors, the court balanced Mr. Faunce's interest in confrontation against the government's proof of good cause. *See United States v. Franklin*, 51 F.4th 391, 400–01 (1st Cir. 2022) (concluding that the district court had "implicitly conducted the balancing required by Rule 32.1(b)(2)(C)"). The court's balancing of these factors (1) included each consideration that the parties had presented and (2) accounted for the difference in Mr. Faunce's ability to question E.B. through Zoom rather than in-person. So the district court did not fail to conduct the required balancing.

2. The district court acted within its discretion by allowing E.B. to testify remotely.

Mr. Faunce also challenges the district court's ultimate decision to allow E.B. to testify remotely. We review this decision for an abuse of discretion. *United States v. Henry*, 852 F.3d 1204, 1207 (10th Cir. 2017). An abuse of discretion occurs when a district court's decision is arbitrary or capricious or results in a manifestly unreasonable judgment. *United States v. Weidner*, 437 F.3d 1023, 1042 (10th Cir. 2006). We conclude that the district court acted within its discretion by allowing E.B. to testify by Zoom, for the court reasonably weighed every consideration that had been presented. *See* Part III(B)(1), above.

On appeal, Mr. Faunce presents four new arguments:

1. The government objected to in-person questioning because of pessimism that E.B. would comply with a subpoena to appear in-person.

2. Appearance in-person is necessary to expose the witness to the formality of a court proceeding.

3. In-person cross-examination is central to fact-finding processes.

4. Mr. Faunce could not fully cross-examine E.B. because she had terminated the videoconference.[12]

[12] E.B.'s uncooperative behavior occurred at the revocation hearing, after the briefing had already concluded. So we don't fault Mr. Faunce for omitting this argument in his pre-hearing memorandum.

The district court acted reasonably even though it didn't consider Mr. Faunce's new arguments. In determining whether the district court abused its discretion, we focus on what the parties had presented; after all, the court couldn't abuse its discretion "by failing to consider facts not presented." *United States v. Rodriguez*, 858 F.3d 960, 963 (5th Cir. 2017).

Mr. Faunce also argues that the district court abused its discretion because the factors lay as they did in *Jones*, where we had reversed a ruling that allowed hearsay testimony. *United States v. Jones*, 818 F.3d 1091, 1102 (10th Cir. 2016). Granted, some similarities exist between the factors here and in *Jones*. For example, both E.B. and the witness in *Jones* had previously refused to cooperate with a state's prosecution. And in both cases, the government argued that the witness had feared the defendant. *Id.* But in *Jones*, the government needed to show harmlessness; and here, Mr. Faunce bears the burden to prove an abuse of discretion. *See id.* at 1101 (concluding that because the district court had erred, the government needed to show harmlessness to avoid reversal); *United States v. Allen*, 449 F.3d 1121, 1125 (10th Cir. 2006) (stating that we review evidentiary decisions for an abuse of discretion).

Beyond the difference in standards, three factual differences exist between *Jones* and our case:

1. In *Jones*, the district court hadn't balanced the considerations before allowing hearsay testimony. 818 F.3d at 1100–01. Here

the court balanced the considerations before allowing the remote testimony.

2. In *Jones*, the testimony had been critical. *Id.* at 1101. Here the testimony constituted only part of the government's case against the defendant.

3. In *Jones*, the witness hadn't appeared at all. *Id.* at 1102. Here the witness appeared by both video and audio.

So even though some similarities existed with *Jones*, the district court could reasonably arrive at a different result in light of the differences in the standard and in the facts.

* * *

In deciding that E.B. could testify remotely, the district court considered

- the parties' reasons for and against in-person testimony and
- Mr. Faunce's interest in confrontation.

After conducting that balancing, the court had discretion to allow E.B. to testify by Zoom.

IV. Conclusion

The district court did not commit reversible error by

- applying a different sub-section for criminal mischief or
- permitting E.B. to testify by Zoom.

So we affirm the revocation of Mr. Faunce's supervised release and the selection of a sentence.