

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

July 10, 2023

UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 22-6055

ISAIAH WHITEFOX REDBIRD,

Defendant - Appellant.

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CR-00347-F-1)**

Howard A. Pincus, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

D.H. Dilbeck, Assistant United States Attorney (Robert J. Troester, United States Attorney, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

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

MORITZ, Circuit Judge.

Isaiah Whitefox Redbird, a member of the Kiowa Nation, appeals his jury convictions for first-degree murder and assault resulting in serious bodily injury. He argues that the district court improperly admitted character evidence about his propensity for violence under Federal Rule of Evidence 404(a)(2)(B). But Redbird

did not raise that specific objection at trial, so we may reverse his convictions only if he shows that the district court plainly erred in admitting the disputed evidence. Because Redbird does not argue plain error on appeal, we conclude that he waived his evidentiary challenge and therefore affirm his convictions.

Background

Redbird's convictions stem from a 2018 incident in Carnegie, Oklahoma, involving Byron Tongkeamah Jr. and Tongkeamah's girlfriend, Kayleigh Roughface, who at the time both lived in a carport attached to an abandoned home. One night in September, Redbird arrived at the carport with a crowbar and used it to hit both occupants on the head several times, killing Tongkeamah and seriously wounding Roughface. For this conduct, the government charged Redbird with premeditated first-degree murder (and, alternatively, second-degree murder) as to Tongkeamah, in violation of 18 U.S.C. § 1111(a); and assault resulting in serious bodily injury as to Roughface, in violation of 18 U.S.C. § 113(a)(6).¹

At trial, Redbird testified that he acted in self-defense. According to Redbird, he carried a crowbar for protection that night because he and Tongkeamah had several increasingly tense interactions in the previous weeks, and he had to walk through an area where he might run into Tongkeamah. While walking by the carport, Redbird recounted, he decided to stop in and ask about reports that Tongkeamah had murdered Redbird's close childhood friend, Cindy Kaudlekaule, the year before. On Redbird's

¹ The indictment also charged Redbird with assaulting Roughface with intent to commit murder, but the jury acquitted Redbird of that count.

telling, when asked about the reports, Tongkeamah began searching for an axe to attack Redbird. Fearing for his safety, Redbird stepped forward and hit Tongkeamah with the crowbar, then hit Roughface because she appeared to be grabbing a weapon, and then hit Tongkeamah a second time for good measure. The government disputed this account, instead arguing that Redbird went to the carport planning to kill Tongkeamah and Roughface based on the former's rumored role in Kaudlekaule's murder; that he attacked the pair while they were sleeping; and that he only later tried to justify his premeditated conduct by claiming self-defense.

Early in the trial, an evidentiary dispute arose during defense counsel's cross-examination of the government's first witness—Special Agent Micah Ware, who investigated the case for the Bureau of Indian Affairs. The dispute began when defense counsel elicited testimony from Ware that Tongkeamah had prior robbery and burglary convictions, had served prison time, and belonged to a violent prison gang. When defense counsel expanded on the latter point by asking if the gang's members were “known as stabbers,” the government objected that the question would elicit improper evidence about Tongkeamah's character trait for violence. R. vol. 4, 266. The government argued that even though evidence about Tongkeamah's violence could bear on self-defense if Redbird “was aware of” that trait when the alleged crimes occurred, Redbird had not “established that [he] knew these specific things about . . . Tongkeamah.” *Id.* at 267; *see also United States v. Armajo*, 38 F.4th 80, 83 (10th Cir. 2022) (noting that self-defense requires “a genuine and reasonable belief that [defendant] was in imminent danger of death or great bodily harm”).

In response, defense counsel represented that Redbird would later testify that he knew about Tongkeamah’s violent character trait, thus making the testimony relevant to show his state of mind for self-defense. Based on that representation, the district court overruled the government’s objection and allowed the questioning to continue. Defense counsel then had Ware confirm that Tongkeamah “had violent tendencies”; that he routinely beat Roughface; that he was a bully; that he intimidated and threatened people; that he was a suspect in Kaudlekaule’s murder; and that he sometimes beat up and robbed his uncle.² *Id.* at 268.

On redirect, the evidentiary dispute resurfaced when the government asked Ware whether he knew that Redbird possessed “the same trait for violence” as Tongkeamah. *Id.* at 294. When defense counsel objected, the government asserted that under Federal Rule of Evidence 404(a)(2)(B), it could offer evidence about Redbird’s violent trait because the defense had offered evidence about Tongkeamah’s violent trait. *See* Fed. R. Evid. 404(a)(2)(B)(ii) (allowing prosecution to respond to defense evidence about “an alleged victim’s pertinent trait” with “evidence of the defendant’s same trait”). Defense counsel countered that testimony about Redbird’s violence was inadmissible because the cross-examination did not address Redbird’s “character for peacefulness or anything else” and instead simply asked Ware about Tongkeamah’s violence “because [the] defense is self-defense.” R. vol. 4, 295. After the government responded that the

² Redbird presented similar evidence about Tongkeamah’s character for violence—that he committed specific violent acts or had a reputation for violence—from 10 of the 12 witnesses the government called after Ware.

testimony was fair game because the defense had offered character evidence about Tongkeamah’s “propensity for violence,” the district court overruled the defense’s objection. *Id.* at 296; *see also* Fed. R. Evid. 404(a)(1) (describing propensity evidence as “[e]vidence of a person’s character” offered “to prove that on a particular occasion the person acted in accordance with the character”).

The government then elicited testimony from Ware about Redbird’s propensity for violence, reputation in the community as a violent person, and prior conviction for a violent felony. And later, after Redbird confirmed his knowledge of Tongkeamah’s propensity and reputation for violence, the government cross-examined Redbird about his prior violent-felony conviction and an incident in which he had stabbed someone.

Ultimately, the jury convicted Redbird of first-degree murder and assault resulting in serious bodily injury.³ At sentencing, the district court imposed a mandatory life prison term for the murder charge and a consecutive ten-year prison term for the assault charge. Redbird appeals.

Analysis

Redbird challenges his convictions based on the district court’s decision to admit character evidence about his propensity for violence. The standard of review applicable to that evidentiary ruling depends on whether Redbird made a timely, specific objection to the disputed evidence at trial. *See United States v. Battles*, 745 F.3d 436, 452 (10th Cir. 2014); Fed. R. Evid. 103(a)(1). If he did, we review for

³ The jury also convicted Redbird of second-degree murder, but the district court dismissed that charge as a lesser-included offense of first-degree murder.

abuse of discretion. *Battles*, 745 F.3d at 452. But if he failed to properly object, we may reverse only if he shows plain error. *Id.* Under that standard, Redbird must show “(1) an error[;] (2) that is plain,” meaning “clear or obvious under current law”; “(3) that affects substantial rights”; and (4) that “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 445 n.9 (quoting *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007)).

Redbird’s evidentiary challenge focuses on Ware’s testimony that Redbird has a propensity for violence, which the district court admitted under Rule 404(a)(2)(B). Under that provision, when a criminal defendant offers evidence about “an alleged victim’s pertinent [character] trait” and the district court admits such evidence, the government may “offer evidence of the defendant’s same trait.” Fed. R. Evid. 404(a)(2)(B)(ii). Redbird argues that the district court could not admit the challenged testimony under this provision because it applies only if the defendant offers evidence of a victim’s character trait for a propensity purpose—to show that the victim “acted in accordance with th[at] . . . trait” on a particular occasion. Fed. R. Evid. 404(a)(1). Rule 404(a)(2)(B) was “not implicated” here, Redbird says, because he elicited testimony about Tongkeamah’s violence only for a “non[]propensity purpose”—to support his self-defense theory by showing that he knew about such violence and therefore reasonably feared for his life when Tongkeamah allegedly searched for an axe. Aplt. Br. 28; *see also* Fed. R. Evid 404 advisory committee’s note to 2000 amendments (explaining that prosecution cannot admit evidence about defendant’s character under Rule 404(a) if defendant “merely use[d] character

evidence for a purpose other than to prove the alleged victim’s propensity to act in a certain way”).

The government argues that Redbird failed to preserve this evidentiary challenge because he did not object to Ware’s testimony on “the specific ground” he advances on appeal. Aplee. Br. 16 (quoting *United States v. Lamy*, 521 F.3d 1257, 1265 (10th Cir. 2008)); *see also United States v. Ramirez*, 348 F.3d 1175, 1181 (10th Cir. 2003) (explaining that “[t]he specific ground for reversal of an evidentiary ruling on appeal must . . . be the same as that raised at trial”; otherwise, plain-error review applies (ellipsis in original) (quoting *United States v. Norman T.*, 129 F.3d 1099, 1106 (10th Cir. 1997))). More specifically, the government contends that when objecting at trial, Redbird never argued (as he now does) that the testimony about his propensity for violence was inadmissible under Rule 404(a)(2)(B) because he had offered evidence of Tongkeamah’s violence solely for a nonpropensity purpose.

The record confirms as much. Recall that when defense counsel objected to the government asking Ware if Redbird possessed “the same trait for violence” as Tongkeamah, the government justified the inquiry under Rule 404(a)(2)(B), asserting that this provision applied because the district court had allowed Redbird to admit evidence about Tongkeamah’s violent character trait. Defense counsel’s three-paragraph response, reproduced below, asserted various reasons for objecting to the government’s proposed testimony—none of which align with the argument Redbird makes on appeal:

We object to it, Your Honor, because we never got into the good character, character for peacefulness or anything else of . . . Redbird. We were simply asking about . . . Tongkeamah because our defense is self-defense.

Now, there may be an opportunity for the government to question . . . Redbird about that when he testifies; however, this is not the appropriate time with this witness, so we object to it. It's improper character evidence as to . . . Redbird.

They're going far afield of perhaps his prior felony conviction to go into any number of possible unadjudicated acts, and we don't think that a self-defense defense opens the door to a wholesale attack on the defendant's character, so we object to it.

R. vol. 4, 295–96. Nowhere in the response above does Redbird argue, as he does on appeal, that he never opened the door to defendant character evidence under Rule 404(a)(2)(B) because he offered victim character evidence only for a nonpropensity purpose.

In the first paragraph, defense counsel asserted that he did not open a *different* door to admitting defendant propensity evidence because he “never got into [Redbird’s] good character” or “character for peacefulness” when cross-examining Ware. *Id.* at 295; *see also* Fed. R. Evid. 404(a)(2)(A) (allowing prosecution to rebut evidence about “the defendant’s pertinent trait”). Next, defense counsel explained that he instead asked Ware about Tongkeamah’s violence only “because [Redbird’s] defense is self-defense.” R. vol. 4, 295. But that statement does not convey what Redbird now argues: that he elicited testimony about Tongkeamah’s violent character *only* for a nonpropensity purpose. As the government notes, such testimony could have also been relevant in the self-defense analysis for a propensity purpose—to

show that the victim was the aggressor. *See United States v. Talamante*, 981 F.2d 1153, 1156 (10th Cir. 1992) (noting that defendant may offer “evidence of a victim’s violent character to prove that the victim was the aggressor”); *Perrin v. Anderson*, 784 F.2d 1040, 1045 n.3 (10th Cir. 1986) (explaining that even if evidence of victim’s character trait “ha[d] no bearing on whether defendants had a reasonable fear of [victim], it is directly relevant to the issue of who was the aggressor in the fight”). Given these dual potential purposes, defense counsel’s single reference to self-defense was not “‘definite’ enough to indicate to the district court ‘the precise ground’” on which Redbird now objects to Ware’s testimony. *United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) (quoting *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977)); *cf. also United States v. Barrera-Landa*, 964 F.3d 912, 918 n.4 (10th Cir. 2020) (noting that party does not preserve issue for appeal by discussing it “only in a vague and ambiguous way below” (quoting *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1314 n.4 (10th Cir. 1998))).

The remainder of defense counsel’s response likewise raised grounds different from the one Redbird now presses on appeal. The second paragraph, for instance, objects to the timing of the government’s question about Redbird’s trait for violence: Defense counsel suggested that although the government could perhaps “question . . . Redbird about that when he testifie[d]” later, it could not broach the subject “with this witness.” R. vol. 4, 295. And in the third paragraph, defense counsel simply speculated that the government, if allowed to question Ware about Redbird’s violence, might mount “a wholesale attack on [Redbird’s] character” by discussing

not only his “prior felony conviction” but also “any number of possible unadjudicated acts.” *Id.* at 296. Like the points in the first paragraph, these statements about the timing and scope of the government’s character evidence bear no resemblance to the argument Redbird advances in this appeal.

Tellingly, Redbird does not meaningfully dispute this reading of defense counsel’s objection below. He points to no particular statement in the objection that, in his view, “squarely presented” to the district court the basis on which he now challenges the government’s evidence about his propensity for violence. *United States v. Taylor*, 514 F.3d 1092, 1096 (10th Cir. 2008). Instead, Redbird asserts that this basis should have been obvious to the district court because it had just allowed defense counsel to cross-examine Ware about Tongkeamah’s violence only for a nonpropensity purpose: to help establish Redbird’s own state of mind. And since that issue “was front and center for all concerned,” Redbird says, he “did not have to reiterate . . . that [he] had introduced proof of . . . Tongkeamah’s violence [only for] a state-of-mind theory.” Rep. Br. 4. But the record suggests the issue was not front and center for the district court. Indeed, despite the earlier evidentiary ruling admitting testimony about Tongkeamah’s violence for a nonpropensity purpose, the district court nevertheless later accepted (erroneously, in Redbird’s view) the government’s characterization that such testimony had instead been admitted to show Tongkeamah’s propensity for violence. And crucially, Redbird never corrected that characterization or otherwise made clear that he objected for the reason he advances

on appeal. We therefore conclude that plain-error review applies. *See Lamy*, 521 F.3d at 1265.

Before us, however, Redbird does not argue that he can satisfy the plain-error standard. Instead, he argues only that it should not apply in the first place because he adequately preserved his objection. This failure to argue plain error dooms Redbird's appeal: "When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all" *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). Thus, we hold that Redbird has waived his evidentiary challenge.⁴

Conclusion

Because Redbird waived his evidentiary challenge to the government's character evidence, we affirm his convictions.

⁴ Given this conclusion, we do not reach the government's argument that Redbird could not establish plain error even if we overlooked his waiver. Nor do we consider the government's alternative arguments that the district court properly admitted Ware's testimony and that, in any event, any error was harmless.