In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2417

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONEL L. JOHNSON, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 1:21-cr-00019-WCG-1 — **William C. Griesbach**, *Judge.*

ARGUED DECEMBER 1, 2022 — DECIDED APRIL 24, 2023

Before EASTERBROOK, HAMILTON, and KIRSCH, *Circuit Judges*.

HAMILTON, *Circuit Judge*. A jury convicted appellant Lonel L. Johnson, Jr. of possessing more than 50 grams of methamphetamine with intent to distribute, possessing a firearm in furtherance of a drug-trafficking crime, and two counts of possessing a firearm as a felon. Johnson appeals these convictions on several grounds.

Johnson argues first that the entire indictment against him should be dismissed because his Sixth Amendment speedy trial rights were violated by the delay between his arrest on state charges and his federal trial. Johnson also challenges the drug-trafficking convictions on several grounds stemming from the government's late disclosure of a recording of a proffer statement Johnson had made upon his arrest, on condition that it not be used against him except for purposes of impeachment. We reject these challenges. Finally, Johnson points out that an officer testified improperly to an admission from the proffer during the government's case in chief and that the government's supposed fix of the error only made matters worse. We agree that the testimony and supposed fix amounted to an error, but it was harmless in view of the overwhelming evidence of guilt. We affirm Johnson's convictions.

I. *Factual and Procedural Background*

A. *Investigation by State Authorities*

Lonel L. Johnson, Jr. came to the attention of state authorities as a suspected drug dealer in February 2020 when an inmate called a phone number registered to Johnson. A detective monitoring the call overheard a voice later recognized as Johnson's describing how he identified confidential informants among drug buyers. Investigators added Johnson as a friend through an undercover Facebook account and found a video showing Johnson holding a handgun.

Within a few weeks, members of the Brown County Drug Task Force began working with Johnson's ex-girlfriend as a confidential informant. She had a methamphetamine addiction, and she told officers that she regularly purchased meth from Johnson. She said that Johnson lived on the upper floor

of a two-story apartment that operated as a "flop house" where drug users and dealers would stay for days or weeks at a time.

Working with authorities, the ex-girlfriend exchanged Facebook messages with Johnson about buying methamphetamine. The account that she messaged did not bear Johnson's name, but on April 2, 2020, the person using it sent a message saying "Bree, this is El. I got fire." Johnson admitted to using this nickname, and both the ex-girlfriend and an officer testified that "fire" referred to methamphetamine. "El" offered in writing to sell her an eighth of an ounce of methamphetamine for $100 or half that amount for $60. The ex-girlfriend testified that she spoke on the phone with Johnson the next day and he offered to sell her methamphetamine, saying he had eight ounces available.

Officers executed a search warrant at Johnson's address on April 3, 2020. Johnson refused to exit his apartment for 45 minutes. He later admitted that he used the time to flush needles and drugs down his toilet. Once inside, officers found a .22-caliber rifle sitting atop a case containing six baggies of methamphetamine and a glass pipe. Those items were concealed above a ceiling panel in Johnson's second-floor living area. The total weight of the methamphetamine was eight ounces, matching the quantity Johnson had told the informant he had available earlier that day. Officers also found drug paraphernalia, digital scales, a .22-caliber round, marijuana, prescription pills, and a debit card bearing Johnson's name sitting together in a first-floor vent.

B. *State Charges and Detention*

State police arrested Johnson during the warrant execution on April 3, 2020. Shortly after arrest Johnson answered questions in an interrogation preceded by proper warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). He also spoke with police in a separate proffer session that lasted 90 minutes and was recorded on video. Johnson agreed to provide his proffer statement on the condition that it be inadmissible against him except for purposes of impeachment.

On April 6, 2020, Johnson was charged in state court with possessing methamphetamine with intent to distribute, maintaining a drug-trafficking place, possessing a firearm as a felon, delivering heroin, possessing THC with intent to deliver, possessing body armor as a violent felon, obstructing an officer, possessing drug paraphernalia, and bail-jumping. Johnson made his first speedy trial request under state law on May 14, 2020. The Wisconsin Speedy Trial Act presumptively requires a trial within 90 days of such a demand. Wis. Stat. § 971.10(2).

This timeline was complicated by the COVID-19 pandemic. On March 17, 2020, the state courts in Brown County issued an order adjourning all jury trials through April 15, 2020. The order noted that this period would not count toward the state's statutory speedy trial requirements. Then, the Wisconsin Supreme Court issued an order on March 22, 2020 suspending all jury trials through May 22, 2020. The Supreme Court later extended the suspension of jury trials until each circuit court received approval of an operational plan addressing COVID-19 mitigation measures.

Johnson made his next speedy trial request in state court on September 14, 2020. The state court set a trial date of November 11, 2020 with a backup date of December 9, 2020. On November 3, the trial was postponed to that backup date and Johnson was released on reduced bond. On November 25, the district attorney notified the state court that he had spoken to the U.S. Attorney's Office in late September and that he expected Johnson to be charged in federal court. The state court rescheduled the case for a status conference on January 19, 2021. The state charges were dismissed without prejudice during that January 19 hearing.

C. *Federal Indictment and Trial*

In the meantime, federal prosecutors had decided on November 6, 2020 to pursue federal charges against Johnson. He was indicted in this federal case on January 20, 2021 on four counts: possessing more than 50 grams of methamphetamine with intent to distribute, possessing a firearm in furtherance of a drug-trafficking crime, and two counts of being a felon in possession of a firearm or ammunition. Johnson was taken into federal custody on February 10, 2021. He was arraigned the next day, and his federal trial was set for April 19, 2021.

Johnson moved to dismiss the federal indictment on speedy trial grounds. The district court denied this motion because time spent in state custody is not considered under the federal Speedy Trial Act. Johnson's trial began in the district court on April 20, 2021. Johnson chose to exercise his right to represent himself. The court appointed standby counsel for assistance.

On the first morning of trial, Johnson told the court of a problem concerning his 90-minute proffer session with the

state and local police on the day of his arrest. Johnson had received a detailed written summary of the proffer months earlier. But the federal prosecutors had only recently discovered that a video recording of the proffer existed. The prosecution provided Johnson with a digital copy of the recording just five days before trial. But Johnson was unable to play the video file on the equipment the jail had available.

Johnson told the district judge this was a problem because he could not remember everything that he said during the proffer, and he felt he could not take the stand without knowing the proffer's contents. The judge raised the idea of an adjournment so Johnson could see the video and prepare his own testimony. Johnson was not interested in this solution because he did not want to delay his trial further. The judge instructed the prosecution to ensure that Johnson could watch the proffer recording between the first and second days of trial. The judge reserved ruling on the proffer statement's admissibility, noting that it would likely become admissible if Johnson had a chance to view the video, if he took the stand, and if he testified inconsistently. Johnson was able to view the proffer recording before the second day of trial. He ultimately chose not to testify.

The government's trial evidence was strong. On the methamphetamine charges, the jury learned that Johnson admitted in writing to police that his fingerprints would be on the bags of methamphetamine because he had handled them the day before the search. Johnson's ex-girlfriend testified to her Facebook messages and phone call with Johnson in which he offered to sell her methamphetamine and said he had available the same amount of methamphetamine that was found in his ceiling later that day. One of the officers who participated in

the search testified that the scales and drug paraphernalia found in a first-floor vent alongside Johnson's debit card looked as if they had fallen from the second floor where Johnson lived.

Other admissions by Johnson showed that he had experience selling drugs. Johnson called himself the biggest middleman in town and agreed with an officer that he was the "meth king." Johnson admitted that he would obtain one ounce of methamphetamine at a time and break it into smaller quantities that he sold. Further, the jury heard from the officer who listened to the jailhouse call that Johnson had developed methods to avoid selling to confidential informants. In addition to all of this evidence, the jury heard one officer improperly testify to Johnson's admission from his proffer statement that one of the baggies of methamphetamine belonged to him.

Relevant to the firearm charges, the jury heard that Johnson admitted during interrogation that the Facebook video depicted him holding a handgun and that he had sold the gun for one ounce of methamphetamine. Johnson also stipulated to the fact that he knew at the relevant time that he had a prior felony conviction.

II. *Analysis*

A. *Constitutional Right to a Speedy Trial*

Johnson challenges first the district court's denial of his motion to dismiss the federal indictment to remedy a violation of his Sixth Amendment right to a speedy trial. We review the district court's legal conclusions de novo and factual findings for clear error in this context. *United States v. Loera*, 565 F.3d 406, 411 (7th Cir. 2009). We find no violation here.

The Sixth Amendment right to a speedy trial is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). The duty is on charging authorities to "provide a prompt trial." *Dickey v. Florida*, 398 U.S. 30, 38 (1970). A violation of this right calls for dismissal of the indictment. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

Johnson's federal trial occurred with remarkable speed after his federal indictment and arraignment, within the 70-day deadline set by the federal Speedy Trial Act, see 18 U.S.C. § 3161(c)(1), and without any excluded delays that are so common under that Act. Johnson contends, however, that his *federal constitutional* speedy trial clock began to run back when the *state* arrested him, more than a year before his federal trial. The general rule is that time does not begin to run for a speedy trial claim "before a defendant is indicted, arrested, or otherwise officially accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982). Things may sometimes get a little complicated, though, when both state and federal prosecutions go forward against the same defendant for the same conduct. Johnson contends that the entire time from his arrest by the state should be applied to his federal prosecution on the theory that the "federal authorities were merely acting as the state's alter ego."

When state and federal laws overlap, as in this case, defendants may face prosecution by both state and federal governments. Parallel prosecutions are allowed because each government is a separate sovereign. Each has independent power to investigate crimes and to make charging decisions and strategic choices. See *Gamble v. United States*, 139 S. Ct. 1960, 1966–67 (2019); *United States v. Lanza*, 260 U.S. 377, 382 (1922). Analysis of speedy trial issues ordinarily applies

separately to each sovereign's prosecution: "The decision of state officials to arrest someone because he is wanted for conduct in violation of state law does not force the federal government to initiate whatever proceedings it might bring for the same underlying conduct at the same moment." *United States v. Clark*, 754 F.3d 401, 405–06 (7th Cir. 2014).

Just as neither sovereign can bind the other with its decision on whether to charge a defendant or how fast to pursue an investigation, neither sovereign can bind the other to a speedy trial clock, at least without proof that the two sovereigns were not in fact acting separately. We have recognized (but not found and applied) the possibility that cooperation between state and federal authorities might result in unfair and prejudicial delays in a federal prosecution. There might be a federal speedy trial violation if the state acted as "the feds' cat's paw," for example, "charging [appellant] … solely in order to detain him pending an eventual federal indictment." *United States v. Richardson*, 780 F.3d 812, 817 (7th Cir. 2015). If that exception exists, the standard of proof would need to be demanding, though, because state and federal prosecutors consult and cooperate with one another all the time. Routine consultations and decisions by one to defer to the other with a particular defendant or case or categories of cases fall far short of what might be needed to invoke the possible exception.

Johnson claims that "the federal authorities took over the case at the behest of the state authorities because the state's speedy trial clock had expired." This argument does not fit neatly into our possible "cat's paw" exception. Johnson does not contend that the state was acting as an alter ego for the federal government when the state charges were filed. Rather,

Johnson's theory is that the federal government would not have prosecuted Johnson at all if the state had not violated his speedy trial rights under state law. But given the separate-sovereigns foundation for generally not letting either sovereign dictate the timing of the other's prosecution, a state's speedy trial violation would not bar the federal government's prosecution unless perhaps the separate sovereigns colluded in the violation. See, e.g., *Richardson*, 780 F.3d at 817; *Clark*, 754 F.3d at 405–06.

To argue collusion, Johnson notes that the state and federal charges were similar and based on the same evidence. That similarity does not show collusion at all. It is only to be expected in cases where either sovereign would be in a position to prosecute. More than parallel charges based on the same conduct and evidence would be needed to show collusion.

Johnson also relies on the timing of events in his cases to show collusion. The federal government indicted Johnson the day after the state dismissed its charges. But earlier events are more relevant to and weigh more heavily against collusion during the state's charging and detention of Johnson. It was not until late September 2020 that the U.S. Attorney's Office even became aware of the state case brought against Johnson back in April 2020. This delay does not support an inference that the state acted as the alter ego of the federal government in charging and holding Johnson. See *Clark*, 754 F.3d at 405 (declining to find collusion where "the record is devoid of any indication that the federal government was involved at all in his prosecution at the time of the [state] arrest, let alone that it instructed the state authorities to arrest Clark or that it wanted him arrested so that it could initiate proceedings

against him"). Plus, the evidence used against Johnson at his federal trial consisted entirely of items found in his home during the April 2020 search and his own statements given shortly after arrest. It is not as if state authorities spent the complained-of time investigating, finding new witnesses, and developing a case against Johnson that the federal government could not have presented earlier. There is no evidence that the state and federal government colluded to violate Johnson's speedy trial rights through his state detention.

Absent such evidence of collusion, we consider for constitutional (as opposed to statutory) speedy trial purposes the three months between Johnson's federal indictment and his federal trial. See *United States v. Dickerson*, 975 F.2d 1245, 1252 (7th Cir. 1992) ("The one-year period between Dickerson's arrest by state authorities on state charges and the return of the federal indictment cannot be the basis of a Sixth Amendment claim.").

The Supreme Court identified four factors to weigh in considering a Sixth Amendment speedy trial claim in *Barker*, 407 U.S. at 530. The first factor—length of delay—acts as a "triggering mechanism" determining whether we advance to consider the other three factors. *Id.* If there is no "delay which is presumptively prejudicial," then "there is no necessity for inquiry into the other factors." *Id.*

A delay approaching one year is considered presumptively prejudicial in the Seventh Circuit. E.g., *United States v. Arceo*, 535 F.3d 679, 684 (7th Cir. 2008). Here, only three months elapsed between Johnson's federal indictment and trial. This length of time is not presumptively prejudicial and does not require further speedy trial analysis. The federal

government did not violate Johnson's Sixth Amendment right to a speedy trial.

B. *Constitutional Right to Testify on One's Own Behalf*

Johnson next claims the district court violated his constitutional right to testify on his own behalf. The accused in a criminal case has a constitutional right to testify on his or her own behalf even though (a) the text of the Constitution does not explicitly include it and (b) at the time of the founding the opposite rule was firmly established in the common law: accused defendants could *never* testify at their own trials. See *Ferguson v. Georgia*, 365 U.S. 570, 573 (1961); see also Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 105–10 (2012). "Here, as in England, criminal defendants were deemed incompetent as witnesses." *Ferguson*, 365 U.S. at 574. It was not until 1864 that Maine became the first state to enact legislation guaranteeing defendants the right to testify on their own behalf. *Id.* at 577. And it was not until 1961 that the Supreme Court recognized this right under the federal Constitution. *Id.* at 596.

The Supreme Court later wrote that this right is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment privilege against self-incrimination. *Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987); see also *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment … or in the Compulsory Process or Confrontation clauses of the Sixth Amendment … We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."). A defendant's right to testify on his or her own behalf is "an integral part of the right

to present a complete defense" and is clearly established by Supreme Court precedent. *Fieldman v. Brannon*, 969 F.3d 792, 801 (7th Cir. 2020); see also *Rock*, 483 U.S. at 49 ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

Johnson had the choice whether to testify at his trial. He chose not to. He contends, however, that the late disclosure of his proffer recording violated his right. His theory is that the late disclosure forced him to face "a Hobson's choice—testify and risk impeachment with a lengthy recorded proffer he had no reasonable opportunity to review before trial, or not testify at all." Johnson argues that the late disclosure caused essentially the same Sixth Amendment deprivation that the Supreme Court found in "a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock*, 483 U.S. at 55. Johnson also relies on *Fieldman*, in which we followed *Rock* to hold that barring a defendant from testifying on a topic material to his guilt or innocence violated the Sixth Amendment. 969 F.3d at 804–06.

Rock and *Fieldman* do not extend to this case. In each of those cases, the trial court barred the defendant from offering certain categories of relevant testimony in his defense. Johnson retained the ability to choose whether to testify, making his situation more like the ones addressed in *Luce v. United States* and *United States v. Wilson*.

In *Luce*, the Supreme Court reviewed a defendant's challenge to a trial court's conditional ruling under Federal Rule of Evidence 609(a) that if Luce testified and claimed no prior involvement with drugs, then the government could use a

prior drug conviction for impeachment. 469 U.S. 38, 39–40 (1984). Luce chose not to testify. As a result, the Supreme Court said that it could not review the trial court's conditional ruling. Luce's challenge was subject to harmless-error review, and his choice not to testify left reviewing courts "handicapped" in that assessment, which would involve "wholly speculative" reasoning. *Id.* at 41–42. The Supreme Court noted that, without knowing how the testimony would have unfolded, "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole." *Id.* at 42.

This court applied *Luce* to a Fifth Amendment claim also subject to harmless-error review in *United States v. Wilson*, 307 F.3d 596, 599–601 (7th Cir. 2002). See also *Crane*, 476 U.S. at 691 (noting harmless-error analysis applies to improper exclusion of relevant defense testimony). Wilson sought both to testify about a purported associate and to prevent the government from mentioning his selective post-arrest silence in refusing to name the associate. *Wilson*, 307 F.3d at 598–99. The trial court conditionally ruled that if the defendant brought up the associate, then the government could introduce evidence of his post-arrest silence. *Id.* at 599. Wilson chose not to introduce any testimony about the associate. After he was convicted, he argued on appeal that the conditional ruling violated his Fifth Amendment privilege against self-incrimination. Relying on *Luce* and its progeny in other circuits, we ruled that we could not review Wilson's Fifth Amendment challenge. *Id.* at 601. Wilson chose not to introduce the associate evidence, so the government did not introduce the

evidence of his silence. Evaluating the effects of "a potential introduction of evidence by the government in response to his potential testimony" would have been an exercise in speculation. *Id.*

In both *Luce* and *Wilson*, the defendants faced difficult choices similar to Johnson's: testify and risk impeachment or not present desired testimony to the jury. But unlike Johnson, the defendants in those cases did not face an element of surprise. Both Luce and Wilson knew what impeachment to expect if they took the stand. Johnson did not know because of the late disclosure of the proffer recording. The district court here, however, took steps to mitigate that difference. The judge first asked whether Johnson was requesting a continuance. Johnson said no because he did not want to wait any longer for trial. Johnson instead wanted the proffer to be off-limits for impeachment: "If it wasn't for the proffer, then I would have got on the stand and be able to say certain things that I want to, but I can't do that because I can't even remember what was put into the proffer at all."

This was not a good argument for prohibiting possible impeachment with the proffer. Johnson's later comments indicate that his final decision not to testify was based on learning the contents of his proffer, not on his continuing to feel unprepared to anticipate surprise impeachment. The judge ensured that Johnson had an opportunity to hear the proffer recording before he had to decide whether to take the stand. After Johnson heard the recording, he chose not to testify, explaining that "this is a decision to not impeach myself." By listening to the recording, Johnson learned that his prior statements would contradict what he planned to tell the jury. He told the judge that during his proffer, he "just want[ed] to go home so

I'm saying anything … [the proffer] was something I was just trying to do to go home, like, hey, I just want to go home, I want to say whatever." These on-the-record statements make clear that once Johnson knew the proffer's contents, he chose not to testify to avoid anticipated impeachment, not because he did not know his proffer's contents.[1]

Johnson's challenge based on the late disclosure of the recording, even framed as a violation of his right to testify, is subject to harmless-error review. E.g., *United States v. Books*, 914 F.3d 574, 580 (7th Cir. 2019); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988). Johnson chose not to testify, so he left us without a record of how he would have testified, of impeachment evidence that would have been admitted, and of how that evidence could have affected the jury's verdict. Johnson's constitutional theory does not warrant reversal.

C. *Rule 16*

Next, Johnson argues that even if the late proffer disclosure was not a constitutional violation, it violated Federal Rule of Criminal Procedure 16 and that the district court abused its discretion in responding to it. Like the related constitutional claim, this claim is subject to harmless-error review and is also barred by Johnson's choice not to testify at trial. E.g., *United States v. Owens*, 18 F.4th 928, 940 (7th Cir. 2021).

Federal Rule of Criminal Procedure 16(a)(1)(B)(i) provides that upon "a defendant's request, the government must disclose to the defendant … any relevant written or recorded statement by the defendant if: the statement is within the

[1] The defendant's dilemma brings to mind the old adage that one should always tell the truth because it's the easiest thing to remember.

government's possession, custody, or control; and the attorney for the government knows—or through due diligence could know—that the statement exists." The rule gives trial judges discretion in addressing a violation, allowing a judge to order that the evidence be made available, to grant a continuance, to bar admission of the evidence, or to issue "any other order that is just under the circumstances." *Id.*

The district judge's conditional ruling on using the proffer recording was reasonable and well within his discretion. In any event, when a district court makes a conditional ruling on the admissibility of evidence, "the party objecting to it must satisfy the condition if he wants to preserve the issue for appellate review." *Aguirre v. Turner Constr. Co.*, 582 F.3d 808, 814 (7th Cir. 2009); see also *Ohler v. United States*, 529 U.S. 753, 758–59 (2000); *Luce*, 469 U.S. at 43. By not testifying, Johnson failed to satisfy a condition central to the ruling he now tries to challenge. He left reviewing courts without "a basis for determining whether the judge's ruling had made a difference." *Aguirre*, 582 F.3d at 814. Under *Aguirre* and consistent with the Supreme Court's reasoning in *Luce* discussed above, Johnson's challenge on appeal is barred by his choice not to testify.

D. *Brady v. Maryland*

Johnson also claims that the late disclosure amounted to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires disclosure, upon request, of exculpatory evidence to an accused defendant. To show a *Brady* violation, "a defendant must establish a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003). Such a showing must "focus[ ] not on

trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt." *Id.*

Johnson has not tried to argue that the contents of the recorded proffer or his potential testimony would have changed the outcome of the trial. His counsel acknowledged at oral argument that there is no material difference between the contents of the proffer recording and the detailed written summary to which Johnson had access months before his trial. Instead, the argument is that, absent the late disclosure, Johnson would have prepared to testify on his own behalf. We cannot know what Johnson would have said on the stand, nor could we do more than guess how the government might have responded or how any of this might have affected the jury's verdict. The conclusory statement that "the outcome of the trial may well have been different had he been given the opportunity to testify on his own behalf" does not establish a *Brady* claim.[2]

E. *Improper Use of Proffer Contents*

Finally, Johnson points out a troubling error from his trial: a government witness improperly testified to an admission

[2] In the same paragraph as his *Brady* argument, Johnson cites an Eleventh Circuit case to argue that the late disclosure "render[ed] [the] trial so fundamentally unfair as to violate due process." But a key fact in the cited case was that the prosecutor assured the defendant before trial that the government had produced all of the defendant's statements. *Lindsey v. Smith*, 820 F.2d 1137, 1150 (11th Cir. 1987). Based on that assurance, the defendant was unprepared to counter an undisclosed statement upon its surprise introduction at trial. *Id.* at 1150–51. Johnson does not claim he was actively misled as to the existence of the proffer recording. Accordingly, *Lindsey* does not help Johnson show that the late disclosure here amounted to a reversible error.

Johnson made during his proffer interview. The prosecutor realized this error and claimed that the government would fix it during redirect. But the government's "fix" was insufficient and misleading. Johnson claims that this error requires a new trial, but he cannot show the prejudice required for that remedy.

The testimony at issue related to the charge of possessing methamphetamine with intent to distribute. Recall that when state police arrested Johnson, he participated in an interrogation that had been preceded by proper warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). He also provided a separate proffer statement. The government was free to use the contents of the interrogation at trial, but it could not use Johnson's statements from the proffer interview except potentially for impeachment. At trial, Investigator Brendan Pizzala testified that, during the interrogation, Johnson had admitted "that he had touched the bags [of methamphetamine] and looked at it and only one of the bags was his." Johnson did admit to touching the bags during his interrogation, but he admitted that one bag was his only during his proffer.

The prosecutor noticed the error and pointed it out to the court during a recess. The government told the court that it would "quickly correct that statement" on redirect. With Pizzala on the stand, the prosecutor said "I just want to clarify one thing. During cross examination, you were asked by the defendant about some of the statements he made, and you testified that the defendant indicated that one of the bags was his. Do you remember testifying about that?" Pizzala did remember, so the prosecutor continued: "Upon further reflection, did he actually say that during his Mirandized [sic]

interview?" Pizzala responded, "Not during his Mirandized [sic] interview."

This response from Pizzala implied rather clearly to jurors that Johnson did admit that one bag of drugs was his, just not during the interrogation that had been preceded by *Miranda* warnings. This "fix" did not fix anything. Instead, it only doubled the jury's exposure to the improper use of the proffer, contrary to the promise the government had made as a condition of the proffer. The "solution" also doubled the violation of the district court's explicit bar on the government's use of the proffer during its case in chief. This was a troubling error that should have been further corrected, such as by having the court make clear to the jury that the government had not presented any evidence that Johnson admitted one bag of drugs belonged to him.

The parties disagree over whether Johnson sufficiently objected to the testimony at issue and thus whether we should review the error under a harmless-error or plain-error standard. We need not decide whether Johnson properly objected. Either standard of review requires us to consider whether the error prejudiced the outcome of trial, and we find no prejudice here. See *United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011) ("The third prong of the plain error test—whether the error affected the defendant's substantial rights—calls for essentially the same inquiry as harmless error analysis.").

The harmless-error test looks to "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999), quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). Under Supreme Court precedent the harmless-error test can apply to challenges to the "erroneous admission of

evidence in violation of the Fifth Amendment's guarantee against self-incrimination." *Neder*, 527 U.S. at 18. In such cases, the Supreme Court has rephrased the harmless-error standard of review as whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.*

Similarly, the third prong of the plain-error standard requires that the complained-of error "affect substantial rights" (or in other words "have been prejudicial") for reversal. *United States v. Olano*, 507 U.S. 725, 734 (1993); see also Fed. R. Crim. P. 52(b). The Supreme Court says that this prong's analysis "normally requires the same kind of inquiry" as the harmless-error test with "one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. This burden-shifting makes no difference in Johnson's case. Even assuming that the government had this burden, it was met by the quantity and quality of incriminating evidence, aside from the one point of improper testimony.

Reviewing the other evidence presented at trial, it is clear beyond reasonable doubt that a rational jury would have found Johnson guilty of possessing methamphetamine with intent to distribute. Properly admitted and uncontested evidence showed that Johnson told officers his fingerprints would be found on the six bags of methamphetamine hidden in his ceiling because he had handled the bags the day before the home search. Johnson also admitted that he dealt up to an ounce at a time and was the biggest middleman in town for methamphetamine. A detective had listened to Johnson describe to an inmate the methods he used while selling drugs from his home to screen out undercover officers. Officers

found scales, drug paraphernalia, and a .22-caliber bullet with Johnson's own debit card in a downstairs vent and a .22-caliber gun sitting on top of the drugs in Johnson's ceiling. Johnson's ex-girlfriend testified that Johnson offered to sell her methamphetamine the day before and the day of the search. Specifically, Johnson said he had eight ounces of methamphetamine available, which matched the quantity found in the six bags of drugs.

Johnson argued to the jury that he did not know the methamphetamine was in his ceiling and that someone else must have put it there. Given the admission that his fingerprints would appear on the bags of drugs because he had handled them the day before and his telling his ex-girlfriend that he had the quantity of methamphetamine found available for sale, Johnson's argument was unpersuasive and countered by a large amount of trial evidence. Setting aside Pizzala's improper remarks and considering only the properly admitted evidence, it is clear beyond a reasonable doubt that a rational jury would find Johnson guilty of possessing the six bags of methamphetamine with intent to distribute.

The judgment of the district court is AFFIRMED.