FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. AMAUJE JASON FERGUSON, *Defendant-Appellant.*	No. 19-10228 D.C. No. 4:18-cr-01495- JAS-EJM-2 OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted June 16, 2021
San Francisco, California

Filed August 17, 2021

Before: Sidney R. Thomas, Chief Judge, and
Daniel A. Bress and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Bumatay

SUMMARY*

Criminal Law

The panel affirmed a criminal judgment in a case in which the defendant sought to vacate his convictions because the magistrate judge who presided over his plea colloquy failed to explicitly ask him, as required by Fed. R. Crim. P. 11(b)(2), whether he was entering his plea voluntarily or whether his plea resulted from force, threats, or promises.

The panel reaffirmed that a Rule 11 error doesn't automatically lead to reversal; a defendant must continue to show a Rule 11 violation's impact on substantial rights before this court will undo a guilty plea. The panel wrote that, assuming the magistrate judge committed a Rule 11 violation, the defendant failed to satisfy the third prong of plain-error review—an effect on substantial rights. The panel noted that the defendant didn't argue on appeal that his plea was in fact involuntary or that it resulted from force, threats, or promises; he didn't point to anything in the record to suggest he was incompetent to plead guilty; and he didn't assert he would have declined to plead guilty if the magistrate judge had asked the Rule 11(b)(2) questions. The panel concluded that the defendant thus didn't show a reasonable probability that compliance with Rule 11 would have led to a different plea. Rejecting the defendant's suggestion that no independent showing of incompetence or vulnerability to coercion is necessary because the failure to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

comply with Rule 11(b)(2) by itself affects substantial rights, the panel wrote that the text of Rule 11(h) forecloses such a per se finding of prejudice.

COUNSEL

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OPINION

BUMATAY, Circuit Judge:

Amauje Ferguson pleaded guilty to bank robbery and conspiracy to commit bank robbery charges without a plea agreement. On appeal, Ferguson seeks to vacate his convictions because the magistrate judge presiding over his plea colloquy failed to explicitly ask him whether he was entering his plea voluntarily or whether his plea resulted from force, threats, or promises. *See* Fed. R. Crim. P. 11(b)(2). In Ferguson's view, this plea colloquy violated Rule 11(b)(2) and the failure to comply with the Rule was per se prejudicial.

But a Rule 11 error doesn't automatically lead to reversal. We reaffirm that a defendant must continue to show a Rule 11 violation's impact on substantial rights

before we will undo a guilty plea. Because Ferguson can't make such a showing, we affirm his convictions.

I.

Ferguson and two other men robbed Commerce Bank of Arizona in Tucson. As the men entered the bank wearing masks and gloves, one of them yelled "[t]his is a robbery," and ordered everyone to the ground. After opening the bank's vault, the three robbers helped themselves to bags of cash. The men then fled in a stolen black Chevrolet Malibu. Police officers quickly located the Malibu and attempted a traffic stop. Soon after, the car crashed, and the men fled on foot. All three suspects were eventually found nearby and arrested. Officers also located two bags of cash containing approximately $132,000 along the robbers' escape path. DNA evidence taken from recovered masks matched Ferguson and his two co-conspirators.

The government charged Ferguson and the two others with bank robbery and conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 371. A magistrate judge handled the preliminary proceedings. The magistrate judge held a change of plea hearing for Ferguson and his co-defendants, and they all conveyed that they would plead guilty. Ferguson and one co-defendant then pleaded without a plea agreement, while the other co-defendant accepted a plea agreement. The magistrate judge advised the defendants of their right to a jury trial, right to confront witnesses, and right against self-incrimination. Ferguson noted that he understood the magistrate judge's advisals and that he still wished to plead guilty.

The magistrate judge didn't ask Ferguson whether he was entering the plea because of force, threats, or promises. Neither did he inquire if Ferguson was pleading guilty

voluntarily. Nor did he question Ferguson about any recent drug or alcohol use, his level of education, his understanding of the proceedings, or if he had any mental impairments. Still, the magistrate determined that Ferguson's guilty plea was knowing and voluntary and not the result of force, threats, or promises. The entire Rule 11 plea colloquy for Ferguson and his co-defendants lasted no more than ten minutes.

The district court accepted Ferguson's guilty plea and sentenced him to 84 months imprisonment and three years of supervised release. This sentence was 13 months below the low end of the 97-to-151-month Guidelines range.

II.

A.

When a defendant fails to object to a Rule 11 violation, we review for plain error. *United States v. Fuentes-Galvez*, 969 F.3d 912, 915 (9th Cir. 2020). To establish plain error, a defendant must show "(1) error, (2) that is plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of the judicial proceedings." *United States v. Borowy*, 595 F.3d 1045, 1049 (9th Cir. 2010) (per curiam) (simplified). To prove that an error has affected substantial rights, a defendant must show "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

In conducting the plain-error analysis, we are "not restricted to the record of the plea colloquy." *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008). Instead, based on the entire record, we must determine whether a different result was reasonably probable without the Rule 11 error.

United States v. Escamilla-Rojas, 640 F.3d 1055, 1061–62 (9th Cir. 2011).

B.

Before accepting a defendant's guilty plea, Federal Rule of Criminal Procedure 11(b)(2) requires the district court to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." In this case, the magistrate judge did not explicitly ask Ferguson about the voluntariness of his plea or whether it involved any force, threats, or promises. Ferguson argues that this amounts to a Rule 11 error requiring automatic reversal.

Assuming the magistrate judge committed a Rule 11 violation, Ferguson fails to satisfy the third plain-error prong—an effect on substantial rights. On appeal, Ferguson doesn't argue that his plea was in fact involuntary or that it resulted from force, threats, or promises. Nor does he point to anything in the record to suggest he was incompetent to plead guilty. *Cf. United States v. Lo*, 839 F.3d 777, 784 (9th Cir. 2016) (holding that failure to comply with Rule 11(b) is not plain error "where evidence in the record shows that the defendant waived appellate rights knowingly and voluntarily"). Indeed, he doesn't assert he would have declined to plead guilty if the magistrate judge had asked the Rule 11(b)(2) questions. Ferguson thus hasn't shown a reasonable probability that compliance with Rule 11 would have led to a different plea. Any Rule 11 violation therefore failed to affect his substantial rights. *See United States v. Delgado-Ramos*, 635 F.3d 1237, 1241 (9th Cir. 2011) ("[B]ecause [the defendant] does not assert on appeal that he would not have entered the plea but for the district court's alleged error, he has not demonstrated the probability of a

different result and thus cannot show that the district court's action affected his substantial rights." (simplified)).

Ferguson argues that he has established an effect on his substantial rights based on our decision in *Fuentes-Galvez*. It is true we found plain error based on similar omissions in the Rule 11 colloquy in that case. There, we ruled that the magistrate's failure to "engage in direct inquiries regarding force, threats, or promises" or "address competence to enter the plea" was a Rule 11 error "in light of [the defendant's] significant mental challenges." 969 F.3d at 916–17.

But *Fuentes-Galvez*'s finding of an impact on substantial rights was based on circumstances not present here. Fuentes-Galvez had little schooling and a history of mental health disorders, including post-traumatic stress disorder, depression, and anxiety. *Id*. at 916. He was also on various medications to deal with several severe medical conditions. *Id*. Compounding these issues, he spoke only Spanish and had a "long history of substance abuse." *Id*. at 917. We observed that these conditions made him "especially vulnerable to entering an involuntary plea." *Id*. Under these facts, we held that the failure to make the Rule 11(b)(2) inquiries "created a significant enough risk of overlooking potential involuntariness" to justify reversing the conviction. *Id*.

In contrast, the record doesn't show that Ferguson was incompetent to plead guilty or that he was vulnerable to coercion. Far from it: the record paints the picture of a man who was healthy, and well-integrated into society. According to the presentence report, he graduated from high school, where he earned good grades and was a member of the varsity football team. He held jobs in security and retail. He worked as a lifeguard and volunteered at a center serving the homeless and the mentally ill. He has no known mental

health issues nor history of substance abuse. Further, during his presentence interview, Ferguson admitted guilt and expressed remorse. He wanted the court and others to know his involvement in the bank robbery was "a terrible decision based on financial problems and being around the wrong people." At sentencing, Ferguson again apologized to those affected by his crimes and explained that he made a "terrible decision" for which "there's no excuse." At no point did he say he wanted to change his plea or suggest his plea was involuntary. Instead, before sentencing, he affirmed that he was pleading guilty because he committed the charged crimes. Unlike the defendant in *Fuentes-Galvez*, Ferguson fails to show "a reasonable probability that the [Rule 11(b)(2)] omissions could have affected his decision to continue in his guilty plea." *See Fuentes-Galvez*, 969 F.3d at 916.

Ferguson also suggests that no independent showing of incompetence or vulnerability to coercion is necessary here because the failure to comply with Rule 11(b)(2) *by itself* affects substantial rights. For this proposition, Ferguson relies on our unpublished, non-precedential memorandum in *United States v. Garduno-Diaz*, 816 F. App'x 229 (9th Cir. 2020). Interpreting *Fuentes-Galvez*, we stated that the "failure to establish on the record that a plea is voluntary and not the product of force, threats, or promises is *inherently prejudicial*." *Id.* at 230 (emphasis added). But that is not a full statement of the law. As discussed above, *Fuentes-Galvez* was driven by the defendant's unique susceptibility to coercion and did not announce a rule that Rule 11(b)(2) violations are always prejudicial.

The text of Rule 11 itself forecloses such a per se finding of prejudice. According to the rule, "[a] variance from the requirements of [Rule 11] is harmless error if it does not

affect substantial rights." Fed. R. Crim. P. 11(h). Indeed, the Advisory Committee's Notes, which we give "weight in interpreting the Federal Rules of Criminal Procedure," *United States v. Bainbridge*, 746 F.3d 943, 947 (9th Cir. 2014) (simplified), made clear that "it does not inevitably follow [from deviations from Rule 11] that . . . the defendant's plea of guilty . . . is invalid and subject to being overturned[.]" Fed. R. Crim. P. 11 advisory committee's note to 1983 amendment. It is perhaps telling that Subsection (h) was added to Rule 11 following a period in which some courts of appeals automatically reversed for even minor Rule 11 mistakes. *United States v. Vonn*, 535 U.S. 55, 70 (2002). Ending this practice, the Supreme Court tells us, was "the one clearly expressed objective of Rule 11(h)[.]" *Id.* at 66.

Lastly, the Supreme Court has explained that the "incentive to think and act early when Rule 11 is at stake would prove less substantial" if plain-error did not apply. *See Vonn,* 535 U.S. at 73. According to the Court, plain-error in the context of Rule 11 should "encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Dominguez Benitez*, 542 U.S. at 82. Ferguson's interpretation of Rule 11(b)(2), however, requires no exertion beyond proving an error occurred. We hold that this is not the law.

III.

For these reasons, we **AFFIRM** the district court's judgment.