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United States Court of Appeals
Tenth Circuit

July 24, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KYLE QUENTIN SAGO, a/k/a Kyle Sago,

Defendant - Appellant.

No. 22-5011

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:20-CR-00094-GKF-1)

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

Leena Alam, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, and Gina Gilmore, Assistant United States Attorney, on the brief), Office of the United States Attorney, Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

Defendant Kyle Sago appeals his convictions for first-degree murder in Indian country and causing death by use of a firearm during and in relation to a crime of violence (namely, first- or second-degree murder). The jury was instructed on first-

degree murder, second-degree murder, and self-defense. On appeal Mr. Sago argues that the district court plainly erred in providing model jury instructions on first- and second-degree murder that inadequately defined the required element of malice. His specific complaint is that the instructions omitted the mitigation defense commonly referred to as "imperfect self-defense." That is, he claims the instructions were defective in that they failed to inform the jury that it could not find that Mr. Sago acted with malice unless it found that he was not acting in the sincere belief (even if the belief was unreasonable) that the use of deadly force was necessary.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Mr. Sago's convictions. An instruction that a mitigating circumstance negates the malice element of first- and second-degree murder must be accompanied by a lesser-included-offense instruction informing the jury of the offense on which it could convict the defendant in light of the mitigating circumstance.[1] And it was not error—or at least not obvious error—for the district court to decline to instruct on the mitigating circumstance when Mr. Sago did not request the relevant lesser-included-offense instruction for involuntary manslaughter.

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[1] We are assuming there are no statute-of-limitations concerns, which might arise were the limitations periods different for the charged offense and the lesser-included offense. *See Spaziano v. Florida*, 468 U.S. 447, 455–57 (1984) (if limitations period for lesser-included offense has expired, defendant is not entitled to instruction on that offense unless he waives the expired statute of limitations), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016).

I. BACKGROUND

A. The Offense

Mr. Sago met his victim, Daniel Morgan, in the early 2000s when Mr. Sago was about 14 years old and Mr. Morgan was an adult. By the time Mr. Sago was 15, he had lost both parents, left school, and needed a place to live. Mr. Morgan invited Mr. Sago to come live with him. After Mr. Sago moved out, he and Mr. Morgan remained friendly and occasionally worked together. But by July 2020, when Mr. Sago was 30, the two men had not seen each other for three or four years.

On the morning of July 25, 2020, Mr. Sago decided to send Mr. Morgan a Facebook message to see if they might reconnect. Mr. Morgan and his girlfriend Sharlene Murphy were staying at the Tulsa home of Eugene Lowe, a friend whom Mr. Morgan was helping with some electrical work. In response to the message, Mr. Morgan invited Mr. Sago over to Mr. Lowe's home. Mr. Sago drove the 30 miles to Tulsa and arrived at the house around noon. When Mr. Sago arrived, Mr. Morgan got into Mr. Sago's car; they talked and then drove around the neighborhood. Mr. Sago showed Mr. Morgan a handgun he had acquired. Mr. Morgan then asked Mr. Sago if he wanted to smoke a bowl of methamphetamine. The two men went inside the house to smoke. Mr. Morgan introduced Mr. Sago to Ms. Murphy. After a brief but—by all accounts—friendly visit of 10 or 15 minutes, Mr. Sago and Mr. Morgan went back outside. They had a brief discussion about Mr. Morgan helping Mr. Sago find a lawnmower to buy. The men hugged and Mr. Sago left, as he described it, "on good terms." R., Vol. III at 294.

After leaving Mr. Lowe's house, Mr. Sago ran a few errands before going home. For reasons not appearing in the record, Mr. Sago then called Mr. Morgan and made plans to return to the house in Tulsa. But after they hung up, Mr. Sago had second thoughts about whether he should make the trip; money for gas was tight and Mr. Sago was unsure whether Mr. Morgan wanted him around. Mr. Sago attempted to call Mr. Morgan several times to talk about whether he should visit or not, but Mr. Morgan had fallen asleep and did not answer his phone. At about 5:30 p.m. Mr. Sago left his home to return to Tulsa. After pulling up in front of Mr. Lowe's house, he placed several more calls to Mr. Morgan, all of which went unanswered. Mr. Sago testified at trial that, given the trouble and expense he had taken to return to the house, he felt frustrated that Mr. Morgan would not answer the phone or come outside.

As Mr. Sago parked in front of the house, Ms. Murphy was returning from a quick trip to a convenience store. Upon entering the house she noticed that Mr. Morgan's cell phone was ringing repeatedly and, picking it up, saw that the calls were coming from Mr. Sago. Recognizing the car outside as Mr. Sago's, Ms. Murphy went out to speak to him. Ms. Murphy told him that Mr. Morgan was asleep, had been up working all night, and that she was not going to wake him. Ms. Murphy testified that Mr. Sago started "arguing" with her and that as he instructed her to get Mr. Morgan so they could discuss "business," his "demeanor . . . changed." *Id.* at 118. (At trial Mr. Sago admitted that he was annoyed during the conversation with Ms. Murphy.) Ms. Murphy went inside and woke Mr. Morgan, telling him Mr. Sago

was outside and demanding that Mr. Morgan come out to talk. She offered to tell Mr. Sago to leave but Mr. Morgan said he would go out to see him. Ms. Murphy testified that Mr. Morgan was happy and smiling when he stepped out the front door.

Mr. Sago testified that while Ms. Murphy was inside waking Mr. Morgan, he started to feel worried that he was making Mr. Morgan angry and wondered if he should leave. Before he could decide what to do, he saw Mr. Morgan exit the house. Contrary to Ms. Murphy's testimony, Mr. Sago said that Mr. Morgan seemed mad, throwing his cell phone down on the porch and advancing towards Mr. Sago's vehicle. Mr. Sago testified that because he was frightened and believed Mr. Morgan might be armed, he drew his own handgun and fired several shots. One bullet struck Mr. Morgan in the chest. Mr. Morgan fell to the ground but then got up and ran away from Mr. Sago's car and toward the corner of the house as though heading for the backyard. Mr. Sago pulled forward in his car and then fired additional shots, three of which hit Mr. Morgan in the back as he fled. Mr. Morgan died at the scene.

B. Procedural History

Mr. Sago was indicted in the United States District Court for the Northern District of Oklahoma on one count of first-degree murder in Indian country, two counts of possession of ammunition by a convicted felon, and one count of causing death by using a firearm in commission of a crime of violence. The possible crimes of violence alleged in the indictment were first- and second-degree murder. Mr. Sago and the government entered into a plea agreement under which he would plead guilty to second-degree murder and be sentenced to 300 months in prison. Although the

prosecutor told the court that he thought the most likely verdict would be second-degree murder, the district court rejected the plea agreement.

In September 2021 Mr. Sago's case went to trial. Before trial the government had submitted—with defense counsel's agreement—proposed jury instructions on first-degree and second-degree murder. No self-defense instruction was proposed. Defense counsel's opening statement identified premeditation as the main dispute in the case, telling the jury that "the issue for you in this trial is going to be whether or not it was a first-degree murder versus a second-degree murder." *Id.* at 50.

During a bench conference on the last day of trial, however, the district court raised the issue of self-defense in light of Mr. Sago's testimony. Defense counsel expressed skepticism that a self-defense instruction was needed, telling the court that "[l]egally I'm not sure that it applies" and "[m]y argument would still not necessarily be that [Mr. Sago acted in self-defense]," but saying that the instruction would be "a safety precaution." *Id.* at 314. The district court said it would instruct the jury on self-defense. The judge's law clerk asked if there would be an additional lesser-included-offense instruction; the judge replied in the negative because "[i]t's got to be requested." *Id.* at 316. The court had two more conferences with counsel about the instructions, but defense counsel did not request any further lesser-included-offense instruction.

The court read the jury the Tenth Circuit pattern jury instructions on first- and second-degree murder and on self-defense. The instruction on first-degree murder set forth the five elements of the offense:

> To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First:* the defendant caused the death of the victim named in the superseding indictment, Daniel Morgan;
>
> *Second:* the defendant killed the victim with malice aforethought;
>
> *Third:* the killing was premeditated;
>
> *Fourth:* the defendant is an Indian person; and
>
> *Fifth:* the killing took place within Indian Country.

R., Vol. I at 77. The instruction on second-degree murder included the same elements except it omitted the requirement that the killing be premeditated. Both instructions contained the following definition of malice aforethought:

> To kill "with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.
>
> In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument, and the manner in which death was caused.

Id. at 77, 79–80; *see* Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions* 2.52, 2.53 (2023 ed.) [hereinafter *10th Cir. Criminal Pattern Jury Instructions*].

The self-defense instruction stated:

> The defendant Kyle Quentin Sago has offered evidence that he was acting in self-defense.
>
> A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in such a defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

> A person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to himself.
>
> To find the defendant guilty of [first-degree murder] and [use of a firearm in commission of a crime of violence], you must be convinced that the government has proved beyond a reasonable doubt:
>
> *Either*, the defendant did not act in self-defense;
>
> *Or*, it was not reasonable for the defendant to think that the force he used was necessary to defend himself against an immediate threat.

R., Vol. I at 74; *see 10th Cir. Criminal Pattern Jury Instructions* 1.28.

The parties then delivered their closing arguments. The prosecutor asked for a verdict of guilty of first-degree murder, focusing on the evidence of premeditation. Defense counsel also emphasized that the jury's task was to determine whether Mr. Sago's actions were consistent with premeditated murder. Arguing that the government had presented no evidence of prior planning or violent intent (much less hostility), defense counsel contended that it was only when Mr. Sago felt threatened by Mr. Morgan that he made a sudden decision to fire. When counsel ended his argument he alluded to self-defense, but his main point was that even if Mr. Sago was unreasonable in feeling threatened, his actions indicated that the killing was not premeditated:

> But if you believe that it was unreasonable for [Mr. Sago] to believe he needed to use self-defense, if you believe that he wasn't being threatened with unlawful force from [Mr. Morgan], I believe it reinforces that [Mr. Sago's] proper punishment should be a second-degree murder, not first-degree. And that in regards to that, if he believed that, that the facts of that and his belief in self-defense and his actions from all day of showing up, of seeing [Mr. Morgan], leaving, coming back over there all are in indicative of not being premeditated. That's my main argument to you.

> And as the judge read it to you, jury instruction No. 23 [on second-degree murder], and when you get back to the jury room, you'll be able to go through that and look at that and read the law. And in reading that, if you apply the facts of how the shooting took place, what were [Mr. Sago's] actions at the shooting, and what were his actions throughout the day, it would be clear, as I told you in the beginning in my opening statement, that this is a case of second-degree murder. And if you don't believe the self-defense, that's our desire is for you to find him guilty of second-degree, which fits the law in this case.

R., Vol. III at 335–36. The government confined its rebuttal to discussing the burden of proof.

The jury convicted Mr. Sago on the charge of first-degree murder and on the other three counts. The district court sentenced him to life plus 120 months in prison.

Mr. Sago appeals two of his four convictions: (1) for first-degree murder in Indian country; and (2) for causing death by use of a firearm in perpetrating a crime of violence (first- or second-degree murder). He argues that the jury instructions "omitt[ed] an important concept from the definition of malice"—"that the killing be done without excuse, justification or mitigation." Aplt. Br. at 14. He then points to "a ready source of mitigation" in this case—"*imperfect* self-defense." *Id*. Mr. Sago concludes that the court plainly erred in instructing the jury on first- and second-degree murder without informing it that it could convict him of one of those offenses only if it found that he was not acting in the sincere (even if unreasonable) belief that the use of deadly force was necessary.

Mr. Sago has conceded (at least at oral argument) that if the jury found that he had genuinely, but unreasonably, shot the victim out of fear, he could be convicted of involuntary manslaughter; but he contends that he was entitled to the malice

instruction even if he did not request an involuntary-manslaughter instruction. Adding an instruction on involuntary manslaughter, he asserts, was up to the judge, acting sua sponte or at the request of the prosecutor.

II. DISCUSSION

A. Standard of Review

Because Mr. Sago did not challenge the murder instructions in district court, he has forfeited the issues raised on appeal and our review is only for plain error.[2] *See United States v. Knight*, 659 F.3d 1285, 1287 (10th Cir. 2011). To prevail on plain-error review, Mr. Sago must demonstrate "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Starks*, 34 F.4th 1142, 1157 (10th Cir. 2022) (internal quotation marks omitted). An error is "plain" if it is "so clear or obvious that it could not be subject to any reasonable dispute"—that is, "the error must be contrary to well-settled law." *Id.* (internal quotation marks omitted). The law is ordinarily well-settled only if it has been expressed by either the

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[2] The government contends that Mr. Sago not only forfeited the issues he raises on appeal by neglecting to raise them in district court but also that he waived them (and is therefore not entitled to *any* appellate review) under the invited-error doctrine because he approved the instructions at a pretrial conference. *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) ("[A] party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right [that is, has intentionally relinquished or abandoned a known right] is not entitled to appellate relief."). The contention has substantial force, although we note that there is no reason to believe that defense counsel knew of a possible issue of self-defense (or imperfect self-defense) until Mr. Sago testified at trial. In any event, we need not decide whether there was a waiver because we affirm on plain-error review.

United States Supreme Court or a published opinion of our court, or represents a consensus of other appellate courts that have addressed the matter. *See United States v. Smith*, 815 F.3d 671, 675 (10th Cir. 2016). And "[a]n error affects substantial rights only when it is prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Harry*, 816 F.3d 1268, 1283 (10th Cir. 2016) (internal quotation marks omitted).

B. Merits

Mr. Sago's argument gets off to a good start. First, he quotes the following language from *United States v. Serawop*, 410 F.3d 656, 664 (10th Cir. 2005): "Malice is not satisfied simply by killing with an intentional or reckless mental state; instead, malice specifically requires committing the wrongful act without justification, excuse, or mitigation." *Serawop* is making the point that there are certain circumstances in which all the elements of first- or second-degree murder are satisfied but the killer's culpability is eliminated or reduced. Those circumstances are commonly referred to as affirmative defenses. In other words, what would otherwise be first- or second-degree murder does not satisfy the malice requirement if the perpetrator had a legally valid justification (such as self-defense) or excuse (such as insanity or duress), either of which would render the perpetrator not culpable,[3] or

[3] *See* 1 Jens David Ohlin, *Wharton's Criminal Law* § 14:1, at 401–02 (16th ed. 2021) [hereinafter *Wharton's*] ("In classifying defenses, commentators often distinguish between justifications and excuses. Justifications negate the wrongfulness

there were mitigating circumstances that would reduce the perpetrator's culpability to something less than murder.

It is worth pointing out that *Serawop* was not suggesting language for a jury instruction on malice. We would never suggest, or tolerate, an instruction that simply said: "Malice requires committing the wrongful act without justification, excuse, or mitigation."[4] Such an instruction would be lawless, giving free rein to the jury to apply its own notions of *justification*, *excuse*, and *mitigation*. For a defendant to benefit from such a defense, the jury would need to be instructed on the specific elements of the defense. We do not understand Mr. Sago to be saying otherwise.

The second step of Mr. Sago's argument is to suggest a possible affirmative defense for his conduct. He notes that one mitigating circumstance for murder is imperfect self-defense. Imperfect self-defense differs from self-defense in both

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of the act, while excuses negate the culpability of the actor. . . . [I]t is widely agreed that insanity is an excuse . . . [and] that self-defense is a justification.").

[4] As far as we can tell, no other circuit with a pattern jury instruction for murder includes such language in defining malice. *See* Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit, *Pattern Jury Instructions (Criminal Cases)* 2.52A (2019 ed.); Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *Federal Criminal Jury Instructions of the Seventh Circuit*, 18 U.S.C. § 1111 Definition of "Malice Aforethought" (2022 ed.); Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* 6.18.1111A-1 (2021 ed.); Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* 16.1 (2023 ed.) (in cases where defendant allegedly acted in self-defense, referring to self-defense instruction); Judicial Council of the United States Eleventh Judicial Circuit, *Eleventh Circuit Pattern Jury Instructions, Criminal Cases* O45.1 (2020 ed.) (in cases where defendant allegedly acted in self-defense, adding an additional element barring jury from convicting unless prosecution negates the defense).

definition and effect. Self-defense is a long-recognized *justification* for the use of deadly force against another person. "A person may resort to self-defense if he *reasonably* believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response." *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014) (emphasis added) (citing *10th Cir. Criminal Pattern Jury Instructions* 1.28); *see* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4, at 192 (3d ed. 2018) ("One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he *reasonably* believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger." (emphasis added)). One who acts in self-defense is innocent of the crime.

Imperfect self-defense does not eliminate culpability, it just reduces it. The distinguishing factor in imperfect self-defense is "the [un]reasonableness of the defendant's belief that deadly force was necessary to prevent death or great bodily harm." *Toledo*, 739 F.3d at 569. If the defendant was *unreasonable* in holding a subjective belief that deadly force was necessary, the killing is not justified, but it may be mitigated. Whereas a reasonable belief that great harm is imminent *justifies* the use of deadly force, providing a complete defense to murder and entitling the defendant to an acquittal, an unreasonable belief in the need to use force renders the defendant criminally negligent and guilty of the lesser-included offense of involuntary manslaughter. *See id.* at 568–69; 2 LaFave, *Substantive Criminal Law* § 15.3(a), at 701 ("[I]f a defendant who did not initiate the difficulty honestly but

unreasonably believes either that he is in danger of the injury or that killing is the only way to prevent it, . . . the matter [in some jurisdictions] fall[s] into the category of manslaughter, consisting of those homicides which lie in between murder and no crime."). Imperfect self-defense is thus sometimes referred to as a partial or incomplete defense, as it only mitigates the offense to involuntary manslaughter (a type of killing without malice, with its attendant lesser punishment) rather than exonerating the defendant in full. *See Toledo*, 739 F.3d at 568; *Wharton's* § 14:9, at 427 ("In jurisdictions that require a finding of 'malice' for a murder conviction, the downgrading of murder to manslaughter in cases of imperfect self-defense can be explained as a finding that the defendant did not act with the required malice to be found guilty of murder.").

Thus far, we have no quarrel with Mr. Sago. We do not agree, however, with his view of the consequences that flow from the above two propositions. As he would have it, when there is evidence of mitigation, the defendant is entitled to an instruction on the advantages to him of the mitigating circumstance (that is, acquittal of first- and second-degree murder) without an accompanying instruction on the possible negative consequences (conviction of the lesser-included offense of involuntary manslaughter). But a mitigating-circumstances instruction, unlike a justification or excuse instruction, is inappropriate unless accompanied by a lesser-included-offense instruction. We acknowledge that a single instruction describing both the elements of the charged offense and the effect of a specifically raised affirmative defense will likely be satisfactory when the affirmative defense is a

justification or excuse, because justification and excuse are *complete* defenses to the crime. Although it is common for a *justification* or *excuse* defense to be the subject of a separate instruction (that is, an instruction apart from the instruction on the elements of murder) that informs the jury that if such justification or excuse is not negated by the government's evidence the defendant must be acquitted, there is no functional difference between (1) giving that separate instruction and (2) including in the murder instruction a direction that failure to disprove the excuse or justification negates the malice element. But *mitigation* is not a complete defense. A defendant who is successful with respect to a mitigation defense is still culpable.

In our view, it would be intolerable to instruct a jury that a mitigation affirmative defense (such as imperfect self-defense) would establish innocence of the charged offense while failing to instruct the jury that the mitigating circumstances only reduce culpability to that of a lesser-included offense.[5] Doing so could not possibly advance the cause of justice. *Cf. Spaziano*, 468 U.S. at 455–56 ("Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted . . . would simply introduce another type of distortion into the factfinding process."). Yet Mr. Sago is contending not only that such a one-sided instruction would be permissible but also that the district court plainly erred by not giving such an instruction sua sponte.

[5] *See* footnote 1.

Nothing could be plainer than that the district court did not commit plain error. We have not been presented with, nor are we aware of, any occasion on which an appellate court has endorsed an instruction like the one proposed by Mr. Sago—in which the jury is informed that a mitigating affirmative defense is ground for acquittal of the charged offense but is not informed that the defendant could still be guilty of the lesser-included offense resulting from the mitigation. To require such an instruction when the defense has not requested it would be still more remarkable. Indeed, we have held that even when an affirmative defense is a complete defense (a justification or excuse), an instruction on the defense is not required if not requested by the defendant. *See United States v. Ybarra Cruz*, 982 F.3d 1284, 1295 (10th Cir. 2020) (district court committed no error in failing to instruct on defense of duress because the defendant "never sought the instruction. The district court wisely did not inject itself into [the defendant's] trial strategy.").[6]

[6] We are not alone in requiring this of defendants. Of the circuits to have considered a claim regarding an unrequested affirmative-defense instruction, most hold there is no error. *See United States v. Tyson*, 653 F.3d 192, 212 (3d Cir. 2011) (no error in failing to give instruction on defense to firearms charge because defendant "did not request an instruction"; "although the evidence arguably would have supported a[n] . . . instruction [on the defense]," defendant may have had strategic reasons for not requesting the instruction and "[i]t is not for the district court to *sua sponte* determine which defenses are appropriate under the circumstances"); *United States v. Newton*, 677 F.2d 16, 17 (2d Cir. 1982) (per curiam) ("the trial court was not under an obligation sua sponte to instruct the jury about the availability of . . . an affirmative defense" when the defendant "did not . . . submit a timely request for such an instruction to the trial judge"; there was therefore no error); *United States v. Gutierrez*, 745 F.3d 463, 472–73 (11th Cir. 2014) ("Although a defendant may be entitled to a self-defense instruction, he must still request that the instruction be included in the jury charge"; the district court is therefore "not required *sua sponte* to instruct the jury on an affirmative defense that

We note, however, that Mr. Sago argues that a lesser-included-offense instruction on involuntary manslaughter could have been given even if he had not requested it. Perhaps he is saying that if an instruction on the mitigating affirmative

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has not been requested by the defendant"; court then proceeded to review for plain error, but that review did not consider whether there was sufficient evidence for the instruction; rather, the court said: "A District Court is not required to instruct the jury on an affirmative defense in light of defense counsel's silence. . . . It follows *a fortiori* that the District Court is not required to provide a defense instruction where the defendant is unsure, unequivocal, or expresses doubt as to the instruction's inclusion."); *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998) (where defendant did not offer an instruction and did "not rely on the theory of defense . . . at trial, the district court's failure to offer an instruction on that theory *sua sponte* is not plain error"). *But cf. United States v. Bear*, 439 F.3d 565, 568–69 (9th Cir. 2006) (defendant testified that she believed that a deputy sheriff had authorized her unlawful acts as part of an investigation and "[in] closing argument, defense counsel clearly indicated that [her claim of public authority] was the crux of [her] defense"; but, for some unknown reason, defense counsel did not request a public-authority instruction; court reversed, explaining that "[w]hen a defendant actually presents and relies upon a theory of defense at trial, the judge must instruct the jury on that theory even where such an instruction was not requested."); *United States v. Guevara*, 706 F.3d 38, 46 (1st Cir. 2013) ("Guevara neither requested an entrapment instruction nor objected contemporaneously to the omission of such an instruction from the court's charge, and he thus must demonstrate plain error in the district court's failure to instruct the jury on that defense." The court ruled that there was no plain error.).

Leading treatises support the same view. *See* 2A Charles Alan Wright & Peter J. Henning, *Federal Practice & Procedure [Criminal]* § 482, at 414–16 (4th ed. 2009) ("A party is entitled to a specific instruction on his theory of the case if there is evidence to support it and a proper request for such an instruction is made." (footnotes omitted)); 1 Paul H. Robinson & Catherine Palo, *Criminal Law Defenses* § 68.50, at Supp. 155 (1984 ed. & Supp. 2022) ("[T]rial courts are not required to provide instructions for every possible theory of defense just because some supporting evidence may be produced at trial, if the defendant has not relied on the particular defense theory."); 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 24.8(g), at Supp. 164 (4th ed. 2015 & Supp. 2022–2023) ("A judge generally has no constitutional obligation to give an affirmative defense instruction sua sponte if the defendant does not request it, although some states require sua sponte instruction under state law." (footnote omitted)).

defense must be accompanied by a lesser-included-offense instruction, then it was plain error not to give both instructions. But if that is his argument, we must reject it.[7]

On multiple occasions this court has said that a defendant is not entitled to a lesser-included-offense instruction unless the instruction has been requested at trial. *See Toledo*, 739 F.3d at 568 ("To secure a lesser included offense instruction, a defendant must satisfy four criteria. First, the defendant must make a proper request . . . ." (citation and internal quotation marks omitted)); *United States v. Pacheco*, 884 F.3d 1031, 1047 (10th Cir. 2018) ("[I]f there is evidence to support a lesser included offense *and defendant requests such a charge*, the court has no discretion to refuse to give the instruction." (internal quotation marks omitted) (emphasis added)).

One persuasive reason for the requirement that such instructions be requested is that whether to request such an instruction is often a strategic or tactical decision. A defendant (or a prosecutor) may think it advantageous to require the jury to make an all-or-nothing decision. Or a defendant may think that instructing on a questionable affirmative defense (certainly the situation here) will distract the jury from focusing on what defense counsel thinks is the best argument (in this case, that the killing was not premeditated).

To be sure, on some occasions when we have reviewed a trial judge's failure to sua sponte give an unrequested lesser-included-offense instruction, we have

[7] Judge Matheson does not join this paragraph or the remainder of Section II.

examined whether the failure was reversible on plain-error review, rather than simply relying on the proposition that it is not error to fail to give such an unrequested instruction. But as far as we can tell, this analysis never resulted in a reversal, so the decision to conduct plain-error review can be treated as dictum. *See United States v. Thompson*, 518 F.3d 832, 866 (10th Cir. 2008) (claim that the district court erred in failing to sua sponte give lesser-included-offense instruction "may not be entitled to any appellate review—even for plain error"; regardless, defendant failed to meet prong four of the plain-error standard); *United States v. Eddy*, 523 F.3d 1268, 1270–71 (10th Cir. 2008) ("Our precedent is not entirely clear whether a district court's refusal to *sua sponte* give a lesser-included offense instruction is even entitled to appellate review or whether we review for plain error"; nonetheless, defendant failed to demonstrate plain error); *United States v. Bruce*, 458 F.3d 1157, 1164–65 & 1164 n.3 (10th Cir. 2006) (we have "often held in noncapital cases involving direct appeals that a trial court does not err in refusing to give a lesser included instruction—even one supported by the evidence—if the defendant neglects to make a proper request for one at trial"; but noting that we have sometimes reviewed for plain error, court proceeded to determine that defendant failed to satisfy prong four of the plain-error standard (internal quotation marks omitted)).

In short, the weight of authority strongly suggests that there was no error by the district court in declining to sua sponte give an instruction relating to imperfect self-defense. But all we need to decide in this case is that any error by the court in

not sua sponte giving such an instruction does not require reversal on plain-error review.

Mr. Sago has failed to carry this burden. First, even if it was error not to give a lesser-included-offense instruction, the above-cited cases demonstrate that there was ample authority to support the district court's view that such an instruction had to be requested. Mr. Sago therefore fails to satisfy the second requirement for reversal on plain-error review—that the error be "so clear or obvious that it could not be subject to any reasonable dispute." *Starks*, 34 F.4th at 1157.

Nor has he satisfied the third requirement—that he suffered prejudice because "there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Harry*, 816 F.3d at 1283. Recall that there was no evidence that Mr. Morgan was about to use deadly force against Mr. Sago when Mr. Sago first shot him from his car, knocking Mr. Morgan to the ground. And, even more telling, when Mr. Morgan got up and ran away from the car, Mr. Sago pulled forward in his car and shot Mr. Morgan three times in the back as he ran away. Under these circumstances, we see very little likelihood that any jury would have convicted on involuntary manslaughter. And that likelihood is even smaller for the particular jury that convicted Mr. Sago, because it found him guilty of premeditated first-degree murder and not of the instructed lesser offense of second-degree murder, which differs only in the absence of premeditation. How likely is it on the facts of this case that the jury would conclude that Mr. Sago premeditated the murder but then in fact decided to kill Mr. Morgan only out of fear? *See United States v. Frady*,

456 U.S. 152, 172, 174 (1982) (where district court instructed on first- and second-degree murder and manslaughter, defendant was not prejudiced by flawed malice instruction, in part because there was "no substantial likelihood that the same jury that found [the defendant] guilty of first-degree murder would have concluded, if only the malice instructions had been better framed, that his crime was only manslaughter. The jury, after all, did not merely find [the defendant] guilty of second-degree murder, which requires only malice. It found [him] guilty of first-degree—deliberate and premeditated—murder"; "a rational jury that believed [the defendant] had formed a plan to kill . . . with reflection and consideration amounting to deliberation, could not also have believed" a heat-of-passion defense (internal quotation marks omitted)). We affirm the convictions below.

III. CONCLUSION

We **AFFIRM** Mr. Sago's convictions of first-degree murder in Indian country and use of a firearm during and in relation to a crime of violence.