No. 23-2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY BUNTYN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Judge Kea W. Riggs, No. 1:20-CR-00708-KWR

SURREPLY BRIEF FOR THE UNITED STATES AS APPELLEE

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The primary focus of this appeal is defendant-appellant Anthony Buntyn's challenge to the sufficiency of the evidence supporting the jury's finding that Buntyn deprived pretrial detainees of their Fourteenth Amendment rights—*i.e.*, the deprivation-of-a-right element of his conviction under 18 U.S.C. 242. *See* Br. 34-43.[1] As set forth in the United States' response brief, Buntyn forfeited de novo review of that issue by failing to raise it in his renewed motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure and waived appellate review of the same by failing to argue for plain-error review in his opening brief on appeal. U.S. Br. 32-34. Buntyn continues to insist that he preserved a sufficiency claim concerning the deprivation-of-a-right element. Reply Br. 8-10. In the alternative, he argues for the first time on appeal that this Court should review that issue under the plain-error standard. *Id.* at 10-12.

Buntyn's argument that he preserved a sufficiency claim concerning the deprivation-of-a-right element is not persuasive and underscores that his failure until now to argue for plain-error review was no mistake. This Court therefore should not exercise its discretion to excuse Buntyn's waiver. Regardless, Buntyn

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[1] "Br. __" refers to the page numbers in Buntyn's opening brief. "U.S. Br. __" refers to the page numbers in the United States' response brief. "Reply Br. __" refers to the page numbers in Buntyn's reply brief.

makes no effort to argue that his sufficiency claim satisfies the plain-error standard.[2]

ARGUMENT

A. Buntyn forfeited de novo review of the sufficiency of the evidence supporting the jury's finding of a deprivation of pretrial detainees' Fourteenth Amendment rights.

In his reply brief, Buntyn unpersuasively attempts to argue again that he preserved a sufficiency-of-the-evidence challenge regarding the deprivation-of-a-right element of his Section 242 conviction. Reply Br. 8-10.

At the outset, Buntyn's argument focuses nearly exclusively on his *initial* Rule 29 motion that he made at the close of the United States' case-in-chief.[3] But the *renewed* Rule 29 motion that Buntyn made after the close of all evidence is the relevant motion for determining whether Buntyn properly preserved the issue.

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[2] Buntyn's reply brief includes no response to the United States' arguments concerning the district court's *Allen* instruction. *See* U.S. Br. 51-55. Accordingly, Buntyn has waived any "non-obvious responses he could have made" to those arguments. *Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019). Buntyn also briefly states for the first time on appeal that he "did not cause bodily harm to" S.K. Reply Br. 20. Because Buntyn did not in his opening brief challenge the sufficiency of the evidence supporting the jury's finding that he caused S.K. bodily injury, he has waived that issue. *United States v. Leffler*, 942 F.3d 1192, 1997 (10th Cir. 2019) ("In this Circuit, we generally do not consider arguments made for the first time on appeal in an appellant's reply brief and deem those arguments waived.").

[3] Buntyn frames his preservation argument as concerning "[w]hen [he] renewed his Rule 29 motion" (Reply Br. 8); however, all but one of his citations to the record concern his initial Rule 29 motion (*see id.* at 8-9).

When a defendant introduces evidence in his defense after filing a Rule 29 motion, "the defendant is deemed to have withdrawn his motion and thereby to have waived any objection to its denial." *United States v. Bowie*, 892 F.2d 1494, 1496 (10th Cir. 1990) (quoting *United States v. Lopez*, 576 F.2d 840, 842 (10th Cir. 1978)).

As the United States pointed out in its response brief (at 32-33), Buntyn's renewed Rule 29 motion challenged the sufficiency of the evidence only with respect to the willfulness element of his Section 242 conviction. By specifically challenging only the sufficiency of the evidence supporting the willfulness element, Buntyn forfeited a sufficiency-of-the-evidence challenge on "all grounds not specified." *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011) (citation omitted). Buntyn therefore forfeited a sufficiency claim concerning the deprivation-of-a-right element.

Even if this Court were to consider Buntyn's initial Rule 29 motion, his preservation argument still would fail. Buntyn now concedes that his initial motion expressly challenged the sufficiency of the evidence supporting every element of a Section 242 offense and sentencing enhancement *except* the deprivation-of-a-right element. Reply Br. 8 (noting that the initial motion challenged the sufficiency of the evidence supporting the color-of-law, willfulness, and bodily-injury elements). But he appears to argue that the United States

nevertheless somehow understood the motion as challenging the sufficiency of the evidence supporting the deprivation-of-a-right element and that the district court raised the issue "sua sponte." *Id.* at 8-9. Those arguments have no merit.

In its response to Buntyn's initial Rule 29 motion, the United States identified the conditions of confinement that amounted to a deprivation of pretrial detainees' Fourteenth Amendment rights. 2R.950-952. But the United States' thoroughness in addressing all of the elements of a Section 242 offense and enhancement did not cure Buntyn's forfeiture.

Nor did the district court raise sua sponte the sufficiency of the evidence supporting the deprivation-of-a-right element. The district court denied Buntyn's initial Rule 29 motion with virtually no analysis. 2R.957 ("Viewing the evidence in light most favorable to the United States, the Court finds that a prima facie case has been established as to each of the three counts, and your motion will be denied."). That is markedly different from what happened in *United States v. Hernandez-Rodriguez*, 352 F.3d 1325 (10th Cir. 2003). In that case, a defendant attempted to suppress the fruits of a search that he argued was not supported by probable cause. *Id.* at 1328. The district court disagreed, but it specifically raised the separate issue of whether "the warrant and affidavit for search of the residence articulated the condition precedent for execution of the warrant with sufficient specificity." *Ibid.* Here, the district court did not identify, let alone analyze the

deprivation-of-a-right issue in resolving Buntyn's initial Rule 29 motion. The court therefore did not "evaluate [that] legal issue in light of its factual context[] and . . . develop the factual record necessary to resolve it." *Id.* at 1329.

B. This Court should not exercise its discretion to excuse Buntyn's failure to argue for plain-error review in his opening brief.

As set forth in the United States' response brief, although this Court reviews forfeited sufficiency claims under the plain-error standard, a defendant waives appellate review entirely by failing to argue for plain-error review in his opening brief on appeal. U.S. Br. 31-32 (citing *United States v. Leffler*, 942 F.3d 1192, 1198-1199 (10th Cir. 2019)). This Court retains discretion to excuse such a waiver, but should do so only if reviewing the issue would "serve the adversarial process." *Id.* at 32 (quoting *Leffler*, 942 F.3d at 1200).

In *Leffler*, this Court declined to excuse a waiver in part because the defendant's "failure to argue for plain-error review in his opening brief [did not] appear to be a product of mistake." 942 F.3d at 1198 (internal quotation marks and citation omitted). As Buntyn points out (Reply Br. 11-12), a lack of mistake was apparent in *Leffler* because the defendant failed to comply with Tenth Circuit Rule 28.1(A) by "cit[ing] the precise references in the record where the issue was raised and ruled on." *Leffler*, 942 F.3d at 1196 (quoting 10th Cir. R. 28.1(A)). In contrast, Buntyn's opening brief identified places in the record where he *purportedly* preserved a sufficiency challenge regarding the deprivation of a right

element. Br. 32. But his misrepresentation of the arguments that he made in his Rule 29 motions are just as suggestive of a lack of mistake as was Leffler's complete failure to cite the record. Accordingly, the reasons that this Court refused to excuse the defendant's waiver in *Leffler* apply with equal force here.

C. Buntyn makes no attempt to argue that his sufficiency claim satisfies the plain-error standard.

Even if this Court were to review Buntyn's forfeited sufficiency claim under the plain-error standard, he has made no attempt to argue that his claim satisfies that standard. "A defendant establishes plain-error relief by showing (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. Guinn*, 89 F.4th 838, 848 (10th Cir. 2023) (internal quotation marks and citation omitted). To be sure, Buntyn's reply brief recites those factors (Reply Br. 10), but he never explains how they apply to his sufficiency claim.

Buntyn appears to assume that any sufficiency challenge that could have prevailed under de novo review automatically meets the plain-error standard. But this Court has rejected that assumption. Such a sufficiency challenge typically will establish the first three factors of the plain-error standard. *See United States v. Goode*, 483 F.3d 676, 681 n.1 (10th Cir. 2007) ("[A] conviction in the absence of sufficient evidence of guilt is plainly an error, clearly prejudiced the defendant, and almost always creates manifest injustice."). But not necessarily so with respect to

the fourth factor. *Ibid.* (stating that "all active members of this court . . . agree that" the fourth factor of the plain-error standard must be established "in the context of a challenge to the sufficiency of the evidence"). Buntyn has therefore waived any opportunity to correct his previous waiver of appellate review concerning the deprivation-of-a-right element.

Even if this court were to excuse Buntyn's multiple layers of forfeiture and waiver, the United States has explained at length how the evidence supports the jury's finding on the deprivation-of-a-right element. U.S. Br. 34-47. Buntyn's argument to the contrary relies heavily on unwarranted speculation about the bases upon which the jury acquitted him of other charges and found that other detainees besides S.K. did not suffer bodily injury. Reply Br. 1-7, 17-18. His argument also depends on inferences that he improperly draws in his own favor. *E.g.*, *id.* at 17 (stating that a reasonable jury "easily [could have] believed" Buntyn's testimony); *see also United States v. Walker*, 74 F.4th 1163 (10th Cir. 2023) (stating that sufficiency-of-the-evidence review requires this Court to "make reasonable inferences in the light most favorable to the Government" (citation omitted)), *cert. denied*, No. 23-6119 (Jan. 8, 2024). Under any standard of review, sufficient evidence supports Buntyn's Section 242 conviction.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the United States' response brief, this Court should affirm Buntyn's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with page limit set forth in this Court's January 25, 2024, order. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Jonathan L. Backer
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Date: January 31, 2024

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing SURREPLY BRIEF FOR THE UNITED STATES AS APPELLEE, prepared for submission via ECF, complies with the following requirements.

1. All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;

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Date: January 31, 2024