

United States Court of Appeals
For the Eighth Circuit

No. 17-2189

United States of America

Plaintiff - Appellee

v.

Nicholas Ryan Hemsher

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: March 14, 2018

Filed: June 20, 2018

Before GRUENDER, BEAM, and KELLY, Circuit Judges.

BEAM, Circuit Judge.

Nicholas Hemsher appeals following a jury conviction on firearms-related charges. He challenges the sufficiency of the evidence, the district court's¹ ruling on hearsay objections, and aspects of the court's sentencing calculation. We affirm.

¹The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

I. BACKGROUND

"We recite the facts in the light most favorable to the jury's verdict." United States v. Daniel, 887 F.3d 350, 353 (8th Cir. 2018) (quoting United States v. Payne-Owens, 845 F.3d 868, 870 n.2 (8th Cir. 2017)).

In June 2016, Hemsher and three co-defendants were indicted by a federal grand jury on firearm theft and possession charges. Hemsher was charged with possession of stolen firearms in violation of 18 U.S.C. § 922(j) and being a felon in possession of firearms in violation of 18 U.S.C. § 922(g)(1). The investigation leading to these indictments involved the gathering of information by law enforcement over a few-day period in February 2016.

In that month, Jack Hulscher reported to police that his home had been burglarized and that two gun safes, several guns, and ammunition were missing from the residence. After investigating, a Sioux Falls police officer determined that the safes were carried out of the home. The officer questioned Jack's son, Robert Hulscher, an initial co-defendant in this matter, who claimed at the time that he left the house around 11:30 a.m. and drove around the city for a couple hours. Robert Hulscher denied any involvement with the taking of the safes or the guns. A few days after the theft, officers returned to the Hulscher residence in response to a family dispute. When officers arrived they separated the parties. Jack Hulscher testified that the dispute began when Robert told him he might know where the stolen guns were. Jack Hulscher claimed that Robert said, "he knew a guy with a crew that did that kind of stuff," concerning the firearms. Separately, Robert Hulscher told officers that he took the safes that had been reported missing. His father believed that Robert was under the influence at the time of this questioning and Robert's statements were totally inconsistent with his previous denial. A detective then spoke to Robert a third time the day after the family dispute and Robert denied taking the guns as he did during his first questioning.

Around that time, a sheriff deputy arrested Nicolas Wingler, also an initial co-defendant, on an outstanding warrant. Wingler was in possession of a controlled substance and marijuana at the time. When interviewed, Wingler told detectives that there were about eight firearms in his apartment. Following Wingler's arrest, officers began surveillance of the apartment until a search warrant could be obtained with the information Wingler provided during the interview. During surveillance, the detectives observed a silver Camry parked in the driveway that left with two occupants. The Camry returned at 10:30 p.m. and the driver, identified as Hemsher, exited the vehicle and unsuccessfully attempted to enter Wingler's apartment.

Officers followed the Camry when it left the complex and briefly lost sight of the car, but noted that when they located the Camry again, they observed an unknown male walking near the location of Hemsher's tattoo parlor. A marked police car then pulled over the Camry. Hemsher was the driver and sole occupant at the time officers stopped the vehicle. Officers arrested Hemsher on an outstanding warrant and took him into custody, impounding the Camry for a later search. When the Camry was later searched, a detective found a gun on the floor of the driver's seat as well as ammunition in the trunk. Hemsher's girlfriend owned the Camry.

Detectives executed a search warrant at Wingler's home and at the time they did so they encountered Matthew Marshall, a third initial co-defendant, in the apartment house. Marshall had dropped a large black bag containing six firearms wrapped in a blanket outside Wingler's apartment. One additional firearm was located in Wingler's apartment.

At the trial of Hemsher and co-defendant Hulscher, Wingler and Marshall, who had pled guilty, testified as cooperating witnesses. Wingler testified that he knew Hemsher was in possession of firearms, that Hemsher wanted Wingler to sell them, and that the two texted regarding the number for sale. Wingler also testified that Hemsher had the guns laid out in the back of his tattoo shop and Wingler took them

from there back to his apartment. Wingler testified he knew they were stolen because Hemsher told Wingler a "buddy" stole them from his dad. Wingler additionally testified that he told Hemsher that Hemsher could come to his apartment to check on the guns and the two exchanged phone calls and text messages concerning how much to charge and what Wingler would receive in exchange for coordinating their sale.

Marshall testified that he observed guns at the tattoo shop and, later, in Wingler's living room closet. Marshall said he knew Wingler was going to sell the firearms and that Marshall moved the guns from the bed to the black bag Marshall had with him when the officers executed the warrant. When Hemsher came to Wingler's apartment to check on the guns, it was Marshall who encountered Hemsher. Marshall testified that when he arrived, Hemsher demanded his money or his firearms, which Marshall interpreted to mean that the firearms in the apartment belonged to Hemsher. During the visit someone knocked on the door and Marshall stated that Hemsher pointed a gun at Marshall's head until the person knocking left. Hemsher then left the apartment after demanding that Marshall either deliver the firearms or have Wingler contact him.

The government also called Hemsher's then-girlfriend to the stand. She testified she owned the Camry and that Hemsher had the Camry all day on February 22, 2016—the relevant day in this investigation. She testified she never saw anything illegal in her car that day.

All eight firearms recovered by law enforcement were received in evidence; the seven retrieved from Wingler's apartment and the one from the Camry. Jack Hulscher identified them as the guns stolen from his home. Wingler also testified that the firearms were the ones he received from Hemsher. Marshall additionally testified that they were the firearms he observed in Wingler's apartment.

Hemsher questioned his then-girlfriend and additional witnesses, all of whom testified either that they saw nothing illegal in the Camry on the day in question, or that they never saw Hemsher with a gun. Each witness testified to communicating with Hemsher after his arrest via phone or jail-approved text messaging. Hemsher informed one of the witnesses that Wingler had spoken to the police about the case and that Hemsher thought he was a "rat" and a "snitch" for doing so.

Co-defendant Robert Hulscher was acquitted on all counts. Hemsher was convicted on two counts: possessing a stolen firearm and being a felon in possession of a firearm. The district court enhanced Hemsher's sentence for the possession of eight firearms and additionally for possessing those firearms in connection with another felony offense given the evidence that Hemsher was trying to traffic them. Finally, the court also increased Hemsher's sentence for his obstructive conduct, as there was evidence that he told one of his witnesses to testify that she did not see anything illegal from the dates of February 20 through February 22, 2016, and additional evidence of obstruction in text messages sent by Hemsher from jail. The resulting Guidelines range was 120 to 150 months and the court imposed concurrent sentences at the bottom of the range—120 months on each count.

II. DISCUSSION

A. Sufficiency and Trial Objection

This court reviews sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the verdict, giving it the benefit of all reasonable inferences. United States v. Bart, 888 F.3d 374, 377-78 (8th Cir. 2018). Reversal is warranted only if no reasonable juror could find the defendant guilty beyond a reasonable doubt. Id. at 378. The general standard is that absent extraordinary circumstances, the reviewing court does not weigh the evidence or evaluate witness credibility when making sufficiency of the evidence determinations. United States

v. Crenshaw, 359 F.3d 977, 988 (8th Cir. 2004). Such extraordinary circumstances arise when the reviewing court determines no reasonable person could believe the testimony offered. Id. ("Although ordinarily witness credibility is left completely to the jury and is beyond appellate review, we must reverse a conviction if no reasonable person could believe the incriminating testimony.") (quoting United States v. Watson, 952 F.2d 982, 988 (8th Cir. 1991)).

On appeal Hemsher argues this case presents an extraordinary circumstance allowing this court to review credibility determinations. According to Hemsher, although normally a cooperating witness's testimony is not rendered insubstantial just because of its self-interest, here, there were two self-interested witnesses whose testimony was so full of material inconsistencies that there was no way the jury could rely on their testimony. Hemsher points out the many inconsistencies of Wingler and Marshall throughout their questioning by officers, and claims the accounts of Wingler and Marshall presented at trial were "impossible" in light of the defense's evidence; namely Hemsher's then-girlfriend and friends who testified they never saw Hemsher with a gun. As a result of these inconsistencies, Hemsher claims he was convicted based upon speculation and surmise.

We disagree. This case does not present the extraordinary circumstance where no reasonable person could believe the incriminating testimony. The witnesses were subject to thorough cross-examination regarding their testimony and their motives for providing testimony and there was more than sufficient evidence to convict Hemsher on the possession charges. Possession may be actual or constructive. United States v. Jackson, 365 F.3d 649, 655 (8th Cir. 2004). The evidence sufficiently connected Hemsher to the guns in Wingler's apartment as well as to the gun in the Camry, because the evidence showed he was the last person to occupy the Camry and to exercise control over the gun prior to it being located. Further, Hemsher coordinated the movement of the guns to Wingler's possession so as to facilitate their sale. See United States v. Howard, 413 F.3d 861, 864 (8th Cir. 2005) (determining the

government sufficiently connected Howard with stolen guns in part using circumstantial evidence). Further, there was circumstantial evidence that Hemsher knew the guns were stolen given his comment to Wingler that he got the guns from his "buddy" who stole them from his dad, the burglary victim who identified the recovered guns as his own. And, Marshall testified that Hemsher threatened him at gunpoint at Wingler's apartment when Hemsher arrived to get his money or his guns. Viewing the evidence in the light most favorable to the verdict, there was sufficient evidence supporting Hemsher's conviction.

B. Hearsay

The trial court's evidentiary rulings excluding evidence are reviewed for abuse of discretion unless an offer of proof has not been made, in which case they are reviewed only for plain error. United States v. DeMarce, 564 F.3d 989, 995 (8th Cir. 2009); United States v. Henley, 766 F.3d 893, 916 (8th Cir. 2014); Fed. R. Evid. 103(a)(2).

On appeal Hemsher challenges two evidentiary rulings made by the district court, both sustaining hearsay objections made by the government. First, during his case-in-chief, Hemsher recalled a detective to question him about his interview with Wingler to highlight that Wingler's account of events had changed from the officer's initial questioning of Wingler to Wingler's trial testimony. The district court sustained hearsay objections made by the government without a response from Hemsher. On appeal, for the first time, Hemsher argues the court erred in sustaining the government's objection because the questioning was presented for impeachment purposes admissible under Federal Rule of Evidence 613(b) (extrinsic evidence of a prior inconsistent statement). Hemsher also contends that failure to allow this questioning was necessarily prejudicial because Wingler's credibility was paramount in Hemsher's conviction. However, Hemsher did not make an offer of proof concerning either the substance or purpose of the testimony at trial and thus the

district court was never able to consider whether the posited testimony was proper impeachment of Wingler under Rule 613(b).

Rule 613(b) permits the admission of extrinsic evidence of a witness's prior inconsistent statements only where the witness is "given an opportunity to explain or deny" the statement and "the [opposite] party is given an opportunity to examine the witness." In this case, these Rule 613(b) preconditions were satisfied. Wingler *was* afforded an opportunity to explain or deny his statements during the government's case-in-chief, as he was questioned on cross-examination about statements he previously made to the detective during prior interviews and how those statements changed over time. Wingler claimed at trial he did not recall certain statements, or gave varying answers on the stand when presented with his inconsistencies. Based on Hemsher's first-time assertions on appeal, the inconsistencies he wanted to highlight by calling the detective himself involved whether or not Wingler saw guns at the tattoo shop and met Hemsher there to retrieve them, and how many guns Wingler said were kept at the tattoo shop. The government does not respond to Hemsher's Rule 613(b) argument, maintaining only that Hemsher sought to introduce Wingler's statements for the truth of the matter and that they were thus inadmissible hearsay. If we assume Hemsher offered the testimony of the detective to impeach Wingler by showing that Wingler made statements contrary to his trial testimony, the excluded evidence was not hearsay, and the trial court erred in excluding the extrinsic evidence on that basis. United States v. Eagle, 498 F.3d 885, 888 (8th Cir. 2007).

A mere showing of error does not, of course, entitle Hemsher to a new trial; the error must be plain. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). We conclude that the district court did not plainly err in excluding the detective's testimony since Hemsher failed to lay an evidentiary foundation by showing it to be Rule 613(b) evidence. Hemsher claims the error was clearly prejudicial because Wingler's testimony and credibility was key to the government's case. In the end,

however, *a fortiori*, the error was not plain because these inconsistencies had already been addressed with Wingler during the government's case on thorough cross-examination by two different counsel for the two defendants at trial. Accordingly, highlighting that testimony yet again with the defendant himself was redundant and the court's exclusion of that testimony did not affect Hemsher's substantial rights on these facts. Eagle, 498 F.3d at 889. Given the rigorous cross-examination that already took place, Wingler's credibility was an issue squarely before the jury at all times and the fact that Wingler changed his story on multiple occasions as well as his motivation for doing so was strenuously examined with him. Therefore, the error, if any, of excluding the purported extrinsic evidence was not plain.

As to Hemsher's second challenge to the exclusion of certain evidence on hearsay grounds, Hemsher also questioned Wingler's across-the-hall neighbor on the stand about what the neighbor heard the police officers say during the execution of the search warrant in an attempt, according to Hemsher, to bolster Marshall's testimony about his alleged rough treatment by the officers at the time of his arrest. These statements were hearsay and were properly excluded. Hearsay is not admissible unless one of several exceptions applies: Fed. R. Evid. 802. Hemsher made no offer of proof at trial, but on appeal, claims the testimony concerning what the officers purportedly stated during the execution of the warrant was admissible under Rule 803(2) as excited utterances. The "excited utterance" exception applies to any statement "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2); DeMarce, 564 F.3d at 997 ("The rationale of the excited utterance exception is that the stress of nervous excitement or physical shock stills the reflective faculties, thus removing an impediment to truthfulness." (quoting Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999))). The execution of a search warrant in the normal course of employment by trained officers does not constitute a startling event. However, even assuming the circumstances here were abnormally startling, Hemsher has not shown that the exclusion of this evidence affected his substantial rights. He claims the testimony

supported the credibility of Marshall, which he views as one of the most important issues at trial, but the jury had sufficient opportunity to evaluate Marshall's credibility throughout the trial. Because Hemsher has failed to show that the purported error affected his substantial rights, he has not satisfied the plain error standard.

C. Sentence

This court reviews a district court's interpretation and application of the Guidelines *de novo* and its factual findings for clear error. United States v. Bates, 584 F.3d 1105, 1108 (8th Cir. 2009).

1. U.S.S.G. § 2K2.1(b)(1)(B)

As to his sentence, Hemsher first argues the court erred in applying an enhancement under U.S.S.G. § 2K2.1(b)(1)(B) because the offense involved 8-24 firearms. The district court found that eight firearms were recovered by law enforcement and all eight were involved in Hemsher's offenses. Hemsher argues that this calculation is wrongly based on the self-serving, inconsistent testimony of Wingler himself, and that law enforcement never actually saw Hemsher enter Wingler's apartment that day, but rather only that he approached the building. However, as earlier noted, seven firearms attributed to Hemsher were located in Wingler's apartment and the eighth was located in the vehicle Hemsher was driving. There was evidence supporting the conclusion that law enforcement witnessed Hemsher approach Wingler's apartment complex on the day the firearms were recovered. There was additional testimony that Wingler obtained all seven firearms from Hemsher at the tattoo shop and that the two discussed the sale of those firearms via text. Too, Marshall testified about Hemsher's appearance at Wingler's apartment demanding his money and guns. There was thus circumstantial evidence supporting the enhancement. Under a clear error standard of review, we affirm the district court's findings in support of the enhancement.

2. U.S.S.G. § 2K2.1(b)(6)(B)

Next, Hemsher claims the district court erred in applying a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for using or possessing a firearm in connection with another felony offense, here trafficking firearms. "In applying § 2K2.1(b)(6) when the defendant has not been convicted of another state or federal felony offense, the district court must find by a preponderance of the evidence that another felony offense was committed, and that use or possession of the firearm facilitated that other felony." United States v. Dixon, 822 F.3d 464, 465 (8th Cir. 2016) (quoting United States v. Littrell, 557 F.3d 616, 617 (8th Cir. 2009)). The district court reasoned that Hemsher was convicted of possession of stolen firearms and that his possession offense was connected to trafficking of the stolen firearms. In light of the record evidence, the district court was referring to the witness testimony and evidence of Hemsher's intent and agreement to sell the firearms for profit (*i.e.*, a conspiracy or attempt to sell stolen firearms).

Hemsher's focus on appeal is on his claim that the application note to § 2K2.1(b)(6)(B) prohibits the use of trafficking as the other felony offense in this case because the Guidelines defines "[a]nother felony offense" as "any federal, state, or local offense, *other than the explosive or firearms possession or trafficking offense*, punishable by imprisonment for a term exceeding one year." U.S.S.G. § 2K2.1 cmt. 14(C) (emphasis added). Hemsher further points out that application note 13(D) supports his argument that under the Guidelines, "another felony offense" must be something other than possession and trafficking offenses. Application note 13(D) states as much, he claims, by describing "another felony offense" as "*i.e.*, an offense other than a firearms possession or trafficking offense." U.S.S.G. § 2K2.1 cmt. 13(D). Reading these notes in tandem, Hemsher claims "the other felony offense" supporting the enhancement under § 2K2.1(b)(6)(B) has to be something other than a firearms possession or trafficking offense and thus on the facts present here, the

plain language of the Guidelines prohibits the enhancement of a possession offense with a trafficking offense.

While the two commentary notes, read together and highlighted by Hemsher might give pause to the discussion, we are bound to apply the plain language of application note 14(C), which this court has already stated narrows the scope only slightly, but determinatively, for our purposes.

Application note 14(C) narrows the scope only slightly, by defining "another felony offense" to exclude "the explosive or firearms possession or trafficking offense." Importantly, application note 14(C) does not exclude "any," "an," or "a" firearms possession offense. The word "the" is a definite article commonly employed to refer to something specific. See United States v. I.L., 614 F.3d 817, 821 (8th Cir. 2010). The phrase "the . . . firearms possession . . . offense" in application note 14(C) most plainly refers to the underlying offense of conviction Thus, the plain language of application note 14(C) excludes only the underlying firearms possession offense of conviction from the definition of "another felony offense."

United States v. Jackson, 633 F.3d 703, 705-06 (8th Cir. 2011). Indeed, in United States v. Walker, 771 F.3d 449, 451-52 (8th Cir. 2014), we clarified this interpretation as congruent with the 2011 Guidelines amendments, which removed any doubt that "another felony offense" contemplated by the § 2K2.1(b)(6)(B) enhancement categorically removed firearm possession and trafficking offenses from the four-level enhancement altogether as Hemsher advocates here. Accordingly, the court did not err in applying an enhancement under § 2K2.1(b)(6)(B) after determining that Hemsher's firearms possession offense was connected to the other felony offense of firearms trafficking.

3. U.S.S.G. § 3C1.1

Hemsher also argues that the district court erred in applying an obstruction of justice enhancement under U.S.S.G. § 3C1.1. "We give great deference to a district court's decision to impose an obstruction of justice enhancement, reversing only when the district court's findings are insufficient." United States v. Cunningham, 593 F.3d 726, 730 (8th Cir. 2010). Covered conduct under § 3C1.1 includes threatening, intimidating, or otherwise unlawfully influencing or attempting to influence a witness, directly or indirectly. U.S.S.G. § 3C1.1 cmt. n.4(A). The district court sufficiently reviewed the text messages admitted at trial sent by Hemsher while in custody and was reasonable in concluding that he communicated with the recipients to threaten, intimidate or otherwise influence the witnesses, including the "snitch" he referenced.

4. Procedural and Substantive Unreasonableness

As to Hemsher's claim that his sentence is procedurally and substantively unreasonable, a matter this court reviews under a deferential abuse-of-discretion standard, we find none. United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc). The district court discussed its review of the presentence report and detailed Hemsher's criminal history and the resulting sentence of 120 months was at the bottom of the Guidelines range and is therefore presumptively reasonable. United States v. Ewert, 828 F.3d 694, 698 (8th Cir. 2016). Though presumptively reasonable, Hemsher argues the great disparity between his sentence and those of the cooperating co-defendants is evidence that his sentence is unreasonable. 18 U.S.C. § 3553(a)(6) (instructing sentencing courts to take into account the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct).

Citing United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006), Hemsher claims his own sentence of 120 months is wholly unreasonable when viewed in light of the six- and seven-month respective sentences imposed on co-defendants Marshall and Wingler. However, Hemsher's argument founders on the mistaken premise that the statutory direction to avoid unwarranted sentencing disparities among defendants refers to differences among co-conspirators. It does not. United States v. Pierre, 870 F.3d 845, 850 (8th Cir. 2017). Additionally, we have limited the Lazenby decision to the "unusual circumstances" presented in that case, which included "a consolidated appeal involving both conspirators that permitted a remand for resentencing of both parties." United States v. Fry, 792 F.3d 884, 892-93 (8th Cir. 2015). This case does not present such a unique circumstance. And, in any event, any disparity in sentencing among Hemsher and the noted co-defendants here was warranted. These defendants were dissimilar. Wingler and Marshall pleaded guilty, accepted responsibility, and cooperated with the government, all of which would have warranted favorable consideration in their sentencing. Id. at 893. The district court reasonably arrived at Hemsher's sentence.

III. CONCLUSION

For the reasons stated herein, we affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, * 4:16-CR-40070-02-KES
*
Plaintiff, *
*
-vs- * TRANSCRIPT OF
* SENTENCING HEARING
* May 15, 2017
*
NICHOLAS RYAN HEMSHER, *
*
Defendant *

TRANSCRIPT OF
SENTENCING HEARING

BEFORE THE HONORABLE KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

* * * * *

APPEARANCES:

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1 PROCEEDINGS held on Monday, May 15, 2017, 10:04 a.m.

2 THE COURT: This is the time scheduled for a
3 sentencing in the matter entitled United States of
4 America versus Nicholas Ryan Hemsher. Would counsel
5 please note their appearances for the record.

6 MS. MAMMENGA: Jennifer Mammenga for the
7 United States.

8 MR. ENGELS: Rich Engels appearing with Nick
9 Hemsher.

10 THE COURT: And, Mr. Engels, did you have a
11 chance to review the presentence report with your
12 client?

13 MR. ENGELS: Yes, Your Honor.

14 THE COURT: And there were a number of
15 objections filed that I'll take up. And the Government
16 also had an objection. I'm going to address the
17 Defendant's objections first.

18 The first objection is to Paragraphs 7
19 through 12; they're factual objections. And the
20 Defendant states that he objects because he maintains
21 his innocence of the charges in the case. I reviewed
22 Paragraphs 7 through 12.

23 Mr. Engels, is there any particular
24 provision that you think there wasn't evidence admitted
25 at trial about?

1 MR. ENGELS: No, Your Honor. We believe
2 that the -- those paragraphs as stated are supported by
3 evidence at trial. We just continue to maintain
4 Mr. Hemsher's innocence.

5 THE COURT: I reviewed 7 through 12, and it
6 appeared to me that there was evidence at trial to
7 support all of the information regarding the factual
8 information in 7 through 12. And I found that
9 information to be reliable and that the Government has
10 met their burden by a preponderance of the evidence
11 regarding the information contained in Paragraphs 7
12 through 12. So that objection is overruled and the
13 report will remain as written.

17 Mr. Engels?

25 But, Your Honor, we believe it's most likely

1 that the jury believed that Mr. Hemsher possessed the
2 one gun that was found in the vehicle which he was the
3 last person to drive. And -- and therefore we object to
4 the four-level enhancement for eight firearms.

5 For the reasons that we stated in the
6 Sentencing Memorandum, Your Honor, the witnesses,
7 Wingler and Marshall, suffer from a bit of a lack of
8 credibility, Your Honor. And the jury could very well
9 have found that Mr. Hemsher possessed only one gun that
10 was in the vehicle he was driving and discounted the
11 testimony of Wingler and Marshall regarding the other
12 seven guns.

13 THE COURT: Ms. Mammenga?

14 MS. MAMMENGA: Your Honor, as the probation
15 officer's response states in the Addendum to the PSR,
16 the Court is free to consider information not
17 necessarily admissible at trial. And there was not a
18 need for a special verdict form in order for the Court
19 to find that Mr. Hemsher was in possession of eight
20 firearms.

21 In this case we rely on the testimony of Nic
22 Wingler who said that he and the Defendant were involved
23 in the seven firearms together that were located after
24 Mr. Wingler's arrest, in addition to that eighth firearm
25 that was found in the vehicle the Defendant was driving.

1 For these reasons we ask the Defendant's objection to be
2 overruled.

3 THE COURT: To find eight firearms there is
4 not any requirement that the jury return a special
5 verdict form making that finding. The Court can make
6 that finding after reviewing the evidence. And I do
7 make that finding. There were seven firearms located in
8 Wingler's apartment, six in a black bag and one in his
9 apartment located after Wingler was arrested. Wingler
10 testified that he received the firearms from the
11 Defendant. An eighth gun was located in the vehicle
12 that the Defendant was driving.

13 The Defendant claims that Wingler's
14 testimony is not credible, but I find that it's
15 corroborated by the fact that while the law enforcement
16 officers were doing surveillance of Wingler's place,
17 they noted that the Defendant came by that place twice
18 while they were doing surveillance. So there was
19 obviously some connection between Wingler and the
20 Defendant.

21 So I find that that meets the Government's
22 burden of proof and the objection is overruled. There
23 is evidence of eight firearms. So Paragraph 18 will
24 remain as written.

25 Paragraph 19 deals with the imposition of

1 two levels based upon the stolen status of the firearms
2 in question. The Defendant asserts that the two levels
3 should not be applied because the base offense level for
4 the charge under 922(j), possession of stolen firearms,
5 already incorporates the stolen status of the firearms.
6 Mr. Engels?

7 MR. ENGELS: Your Honor, with further
8 research I believe that Ms. Schenkel's analysis of that
9 is correct and we're not pursuing that objection.

10 THE COURT: So that's withdrawn, and
11 Paragraph 19 will remain as written.

12 Objection number 4 is to Paragraph 20, deals
13 with the imposition of the four levels assessed for
14 possession of any firearm in connection with another
15 felony offense. Mr. Engels?

16 MR. ENGELS: Your Honor, we don't believe
17 that that enhancement applies because there was no other
18 felony offense that Mr. Hemsher was charged with. But
19 also there's no evidence that he was involved with the
20 actual theft of the firearms or any other felony, Your
21 Honor.

22 The cases that were cited by the Government
23 we believe are distinguished from this particular case,
24 the Hemsher case, for reasons that I said in the
25 Sentencing Memorandum.

1 And basically the Government's argument if
2 accepted would mean that everybody -- every felon
3 charged with a stolen firearm would necessarily have
4 this four-level enhancement just because of the fact
5 that the firearm was stolen, and I don't believe that
6 that was the intent of the guidelines.

7 THE COURT: Ms. Mammenga?

8 MS. MAMMENGA: Your Honor, again here we
9 would agree with the probation officer's response in the
10 PSR. What distinguishes this is that this was a
11 trafficking of stolen firearms, not just the possession
12 of stolen firearms as an additional felony. There was
13 evidence at trial through Mr. Wingler of that conspiracy
14 between the Defendant and Mr. Wingler to sell those
15 firearms, and that is really what the crux of this is.
16 And for those reasons we would ask that the enhancement
17 apply and the Defendant's objection be overruled.

18 THE COURT: I find that the enhancement does
19 apply. The Defendant was convicted of possession of
20 stolen firearms. The other felony that would be in
21 connection with that offense would be trafficking of
22 stolen firearms.

23 And I find that the testimony of Mr. Wingler
24 and the text messages from the Defendant to Wingler
25 indicate that they had an agreement between the two of

1 them to attempt to traffic the stolen firearms. This
2 isn't an instance where the Defendant just had
3 possession of the stolen firearms; he planned on selling
4 those firearms to other people in order to raise money.
5 So the objection is overruled and the four-point
6 enhancement will apply.

7 Objection number 5 is to Paragraphs 24 and
8 27 based on his prior objections. Because those have
9 been overruled, this one is also overruled.

10 It also mentions the proposed amendment to
11 the sentencing guidelines. Would you like to address
12 that?

13 MR. ENGELS: No, Your Honor, I hadn't
14 intended to address that.

15 THE COURT: Well, the proposed amendment
16 that you're referencing, it's not something that the
17 Sentencing Commission has adopted yet, has it?

18 MR. ENGELS: No, Your Honor.

19 THE COURT: And it hasn't been sent to
20 Congress for them to either act or not act upon?

21 MR. ENGELS: Correct.

22 THE COURT: In the past if the Sentencing
23 Commission has indicated that they are going to suggest
24 to Congress that an amendment be adopted, I have applied
25 the proposed amendment, but this is not in that posture.

1 The Sentencing Commission has not adopted the proposed
2 amendment and it has not been sent to Congress for
3 either approval or rejection. And the Sentencing
4 Commission has not indicated that it would be
5 retroactive.

6 So I do not believe that something that is
7 being talked about as a proposed amendment is sufficient
8 to decrease the offense level. So objection 5 is
9 overruled and the report will remain as written.

10 Objection number 6 is to Paragraph 70 and it
11 omits facts regarding Amber Weber. The report has been
12 amended. Anything further that you think should be
13 added?

14 MR. ENGELS: No, Your Honor.

15 THE COURT: Then the amendment will remain
16 in place.

17 Objection number 7 is to Paragraph 145. And
18 that would be modified if the Court had sustained any of
19 the objections 2 through 5. Because I didn't, the
20 report will remain as written and that objection is
21 overruled.

22 Objection number 8 is to Paragraphs 154 and
23 155. And the Defendant urges the Court not to impose
24 fines or costs of prosecution because the Defendant does
25 not have the ability to pay. The report is correct as

1 written and I'll decide if there will be fines or costs
2 of prosecution as part of the sentencing. So the
3 objection is overruled and the report will remain as
4 written.

5 The Defendant also objects to Paragraphs 158
6 and 159 and argues that there are factors warranting a
7 departure or variances from the advisory guideline
8 range. And I'm going to leave the report as written,
9 but will consider the Defendant's written motion for a
10 downward variance at the time of sentencing. So that
11 objection is overruled.

12 Does that address all of your objections,
13 Mr. Engels?

14 MR. ENGELS: Yes, Your Honor.

15 THE COURT: The Government objected to
16 Paragraph 23, arguing that the two-level enhancement for
17 obstruction of justice should apply. Ms. Mammenga?

18 MS. MAMMENGA: Your Honor, we would call ATF
19 agent Brent Fair to the stand.

20 BRENT FAIR, GOVERNMENT'S WITNESS, SWORN

21 DIRECT EXAMINATION

22 Q. (BY MS. MAMMENGA) Can you please state your
23 name?

24 A. Good morning. My name is Brent Fair. My last
25 name is spelled F-A-I-R.

1 Q. And how are you employed?

2 A. I'm a special agent with the Bureau of Alcohol,
3 Tobacco, Firearms and Explosives.

4 Q. And were you the case agent in this case?

5 A. Yes, I was.

6 Q. And as part of your investigation did you obtain
7 text messages sent by Mr. Hemsher while he was in
8 pretrial detention?

9 A. Yes, I did.

10 Q. And how were those text messages sent?

11 A. I believe they were sent from the Yankton County
12 facility using an iPad device or something similar
13 maintained by the subject and paid for through him.

14 Q. And is that type of device provided to inmates by
15 the Yankton County Jail?

16 A. I believe so, yes.

17 Q. And I'm showing you what's been marked as
18 Government's Exhibit 1. Can you tell me what this is?

19 A. This is an excerpt of text messages from that
20 recovery of text messages from Yankton County.

21 Q. And these are text messages sent by Defendant
22 Nicholas Hemsher?

23 A. Yes, that's correct.

24 Q. And did you review these text messages in
25 preparation for trial and preparation for today?

1 A. Yes, I have.

2 Q. And I notice on this there are some text messages
3 that are highlighted. Did you highlight those text
4 messages?

5 A. Yes, I did.

6 MS. MAMMENGA: Your Honor, at this time we
7 offer Government's Exhibit 1.

8 MR. ENGELS: No objection.

9 THE COURT: Exhibit 1 is received.

10 Q. (BY MS. MAMMENGA) And pertaining to the
11 highlighted text messages why are those highlighted?

12 A. Those particular text messages involve discussion
13 of snitches, informants or witnesses for the Government,
14 testimony, witnesses for trial, things of that nature.

15 Q. And do any text messages pertain to folks outside
16 of the jail getting ahold of anybody?

17 A. Yes. There is a section in here in which there's
18 a request made for a person outside the jail facility to
19 make contact with an inmate in a jail facility, a
20 different facility, and to speak with that person off of
21 the recorded telephone line or be cautious of it and to
22 provide that person with information that Matthew
23 Marshall was an informant for the Government and a
24 snitch.

25 Q. And who is -- I guess who is Mr. Hemsher speaking

1 with when he's making that request?

2 A. Those text messages are to Amber Weber or a
3 device used by Amber Weber.

4 Q. And who is Mr. Hemsher asking Ms. Weber to get
5 ahold of?

6 A. Mike Spath.

7 Q. And do you know who Mike Spath is?

8 A. I do.

9 Q. How do you know who he is?

10 A. I am aware of Mike Spath through numerous
11 criminal investigations. I've interviewed him. I've
12 also been part of criminal investigations to his
13 activities.

14 Q. And are those ATF investigations into Mike Spath?

15 A. Some were, yes.

16 Q. And are you aware of his criminal history,
17 generally?

18 A. I am aware generally he is a -- what I would
19 describe as a career criminal and a violent person.

20 Q. And do you know who any of these other text
21 messages in this document are sent to?

22 A. Some I do not, but some are to other -- another
23 witness, Latasha Stahlecker, who was a witness at trial.

24 Q. And do you know what text messages those were?

25 A. To my recollection, on page two would be the

1 phone number in the center paragraph, center section, I
2 think it's ending with 7023.

3 Q. And that would be phone number 1-605 --

4 A. Yes.

5 Q. -- 360-7023?

6 A. That's correct.

7 MS. MAMMENGA: No further questions.

8 THE COURT: Mr. Engels?

9 | **CROSS-EXAMINATION**

10 Q. (BY MR. ENGELS) Mr. Fair, do you have Exhibit 1
11 in front of you?

12 A. I do. I have a copy of it.

13 Q. Can you turn to the last page of that?

14 A. Page five?

15 Q. Yeah.

16 A. Yes, sir.

17 Q. Is there a sentence highlighted in the middle of
18 page five that begins with "He"?

19 A. About halfway down, "He is supposed"?

20 Q. Yeah. Would you read that?

21 A. That's -- yeah. You want me to read the
22 highlighted portion?

23 Q. Sure.

24 A. "He is supposed to be on the phone with tay right
25 now but the RAT is tellin mike n everyone in that pod

1 that i am the one snitching when i nvr spoke to cops."

2 Q. Okay. So from that does it appear that
3 Mr. Hemsher is trying to clarify some misconceptions?

4 A. It could be clarifying misconceptions, yes.

5 Q. And there's nothing in here about any violence
6 being committed, is there?

7 A. There's no description of violence, no.

8 MR. ENGELS: That's all the questions I
9 have.

10 THE COURT: When you say that Mike Spath is
11 a career criminal and violent person, what is his past?

12 A. I reference that not in the reference of
13 requirement three, prior crimes, but I'm aware generally
14 of his convictions and his arrests for felony drugs.
15 I'm aware of numerous arrests regarding firearms
16 possession. I'm also aware -- if I can get into
17 particulars, I'm aware of an incident involving a
18 videotaped assault in which he was assaulting an
19 individual on videotape that resulted in an
20 investigation of a possible missing person or deceased
21 person. They found that person to be alive, but were
22 unable to get any -- any description or information on
23 why that person was being assaulted by Mr. Spath.

24 THE COURT: And you referenced arrests. Are
25 any of those convictions?

1 A. I'm not certain which ones are convictions. I do
2 know he has a federal conviction just recently.

3 THE COURT: For?

4 A. Firearms is my understanding. Again, I wasn't
5 the case agent so I apologize I don't know particulars.

6 THE COURT: Ms. Mammenga, anything further?

7 MS. MAMMENGA: No, Your Honor.

8 THE COURT: Anything further, Mr. Engels?

9 MR. ENGELS: For this witness, no.

10 THE COURT: You can be excused then.

11 Any other witnesses?

12 MS. MAMMENGA: No, Your Honor.

13 THE COURT: Mr. Engels, any witnesses?

14 MR. ENGELS: No, Your Honor.

15 THE COURT: Argument? Ms. Mammenga?

16 MS. MAMMENGA: Yes, Your Honor. Under
17 Application Note 4(A) of U.S. Sentencing Guidelines
18 Section 3C1.1, the Commission lists several examples of
19 covered conduct under the obstruction of justice
20 enhancement. And 4(A) states that threatening,
21 intimidating, or otherwise unlawfully influencing a
22 co-defendant, witness, or juror, directly or indirectly,
23 or attempting to do so is under that covered conduct
24 that the enhancement contemplates.

25 In this case we believe that Mr. Hemsher was

1 attempting to intimidate Mr. Wingler and Mr. Marshall
2 who were folks that cooperated against him during this
3 case. While he did not appear to have direct contact
4 with Wingler and Marshall, he was certainly making
5 efforts as shown in these text messages to have
6 individuals know that Wingler and Marshall were the
7 folks that testified against him or proffered against
8 him with law enforcement.

9 And he certainly wanted to make sure that it
10 was known to Mike Spath that Matt Marshall had
11 cooperated against him. Particularly notable is line
12 one of page five of Government's Exhibit 1 which states,
13 "And make sure u are smart about everything u say
14 because all the phone calls are recorded and txts are
15 saved and just explain how u know that marshals a RAT"
16 when he's telling Amber Weber to get ahold of Mike
17 Spath.

18 The Government submitted prior to this
19 hearing to defense counsel and the Court the unreported
20 United States vs. Brisbin case, where the defendant had
21 phone conversations with his mother about potentially
22 posting his PSR on Facebook. In this case the Eighth
23 Circuit held that it was reasonable to infer that the
24 defendant intended to intimidate or threaten people
25 named in the PSR by that action. That PSR never made it

1 to Facebook. There were no direct threats made to
2 anyone via that PSR posting action in this case and the
3 district -- and the Eighth Circuit held that giving the
4 defendant an obstruction of justice enhancement was
5 reasonable under that conduct.

6 I think that in this case Mr. Hemsher's
7 conduct of actually going out and making sure people
8 knew who the snitches against him were rises to a level
9 ahead of what happened in Brisbin. And for these
10 reasons we believe that he should receive an obstruction
11 of justice enhancement.

12 THE COURT: Mr. Engels?

13 MR. ENGELS: Thank you, Your Honor.

14 Ms. Mammenga did hand me this Brisbin case
15 before this hearing started today. I haven't had a
16 chance to read the whole thing, but looking at the head
17 note, the Brisbin case is distinguished from
18 Mr. Hemsher's case because Mr. Brisbin apparently
19 expressed desire to harm his -- the witnesses against
20 him and post his PSR on social media. Your Honor, none
21 of that happened in this particular case.

22 In fact, if you look at page five of the
23 Government's Exhibit 1, Mr. Hemsher wrote, "He is
24 supposed to be on the phone with tay right now but the
25 RAT is telling mike n everyone in that pod that i am the

1 | one snitching when i nvr spoke to cops."

2 Of all the texts in this particular exhibit,
3 that's the only one that really expresses a reason why
4 my client wanted to get ahold of Mike Spath. And that
5 was to clarify a misconception that the co-defendants
6 were saying my client was the one that was talking and
7 Mr. Hemsher apparently wanted people to know that, no,
8 what those people are saying is not correct.

9 There's nothing in here that says I want to
10 hurt those people. There's nothing in here that says I
11 want to have -- hire Mike Spath to hurt those people.
12 What's in this exhibit is he wanted people in the other
13 pods to know that Wingler and Marshall were casting
14 false aspersions as to Mr. Hemsher.

1 THE COURT: Well, I see two threads through
2 the text messages. One is at the bottom of page three
3 where the Defendant says, "No problem homie i got you
4 like you gots me i wouldnt snitch for you but i would do
5 this so i hella appreciate you being willing to do it
6 for me." Which I think the Defendant is communicating
7 that he wants someone to not testify against him because
8 he wouldn't testify against that person which could be
9 including supporting perjury.

10 The other thread that I see through here is
11 on the top of page five, the Defendant sends a text
12 saying, "And make sure u are smart about everything u
13 say because all the phone calls are recorded and txts
14 are saved and just explain how u know that marshals a
15 RAT."

16 That combined with about a third of the way
17 down on page four an outbound message from Mr. Hemsher
18 saying, "Need tay to get ahold of mike or you get ahold
19 of mike and let him know that matthew marshal is a
20 fuckin snitch. Hes rule 35 and proffering im still set
21 4 trial."

22 Then there's communications about how to get
23 ahold of Mike. At the bottom of page four it says don't
24 text him, that he should be called. Those things are
25 altogether indicate that Mr. Hemsher was telling someone

1 to get ahold of Mike Spath to make sure that he knew
2 that Marshall was a snitch, to have the conversation
3 orally so there wouldn't be a text or any written
4 document of what was said.

5 In light of Mr. Spath's background, I think
6 it's certainly clear that the reason that they wanted to
7 communicate that information to Spath was so that Spath
8 could take some action regarding Marshall being a
9 snitch.

10 So after considering all of the evidence, I
11 find that it does fall under 3C1.1, Application Note
12 4(A), threatening, intimidating, or otherwise unlawfully
13 influencing a witness, directly or indirectly, or
14 attempting to do so. I find that the Government has met
15 the burden of proof and that the two-level increase for
16 obstruction should be applied.

17 In light of that ruling, the total offense
18 level is a 26 and the Defendant's in Criminal History
19 Category VI, which makes the advisory guideline range
20 120 to 150 months in custody; supervised release is one
21 to three years on each count. The Defendant is not
22 eligible for probation. And I should change the
23 guideline range is 120 months because the statutory --
24 120 to 150 months because there are two counts. The
25 fine range is \$25,000 to \$250,000; restitution is not

1 applicable; and there's a 100 special assessment on each
2 count for a total of \$200.

3 Counsel, do you both agree based on my
4 rulings?

5 MS. MAMMENGA: Yes, Your Honor.

6 MR. ENGELS: Yes, Your Honor.

7 THE COURT: Mr. Engels, before I have you
8 speak, I did review a number of letters that were
9 written on behalf of the Defendant. Letters from Shelly
10 Wallman, Justine Hruska, Brenda Haan, Latasha
11 Stahlecker, and Kayla Taylor. And I also read the
12 Defendant's Motion for Downward Variance and the
13 Defendant's Sentencing Memorandum.

14 Anything else that I should have reviewed
15 that I haven't identified?

16 MS. MAMMENGA: Not from the Government, Your
17 Honor.

18 MR. ENGELS: No, Your Honor.

19 THE COURT: Mr. Engels, would you like to
20 speak on behalf of your client?

21 MR. ENGELS: Yes. Your Honor, we believe
22 that the guideline range as expressed by the Court today
23 is excessive and beyond what's needed for
24 rehabilitation, for protection of the public and the
25 other guides for sentencing, Your Honor.

1 We're asking the Court to consider granting
2 a downward variance in the guidelines and sentencing
3 Mr. Hemsher only to an amount of time which the Court
4 feels is necessary to rehabilitate him.

5 As you can see, Your Honor, from the letters
6 that you received, Mr. Hemsher has a lot of good
7 qualities. He's participated in fundraisers for the
8 community. He has a great support network here in Sioux
9 Falls. He also has three young children here, two of
10 which were born after the time that he was incarcerated
11 on these particular charges.

12 So, Your Honor, we're asking the Court to
13 vary downward. And we had hoped that the Court would
14 find a lower range on the sentencing guidelines than
15 what the Court has ruled today. But we are still asking
16 the Court to sentence Mr. Hemsher to a time period in
17 the range of about four or five years and give him the
18 opportunity to go through the drug treatment in -- while
19 he's in prison and address his other issues that he has,
20 Your Honor.

21 And without belaboring the fact, that's what
22 we're asking the Court to consider doing, impose a
23 sentence in the range of about four to five years.
24 Thank you.

25 THE COURT: Thank you. Mr. Hemsher, did you

1 want to say anything?

2 THE DEFENDANT: No, Your Honor.

3 THE COURT: And I see you've got some family
4 or friends here. Did any of you want to say anything?
5 If you could come up and use the podium then I can hear
6 you better. And if you'd start out with your name.

7 CODY GARTEMAKER: Cody Gartemaker. I've
8 know Nicholas Hemsher for roughly six years now. I did
9 not get a chance to write a letter to you for support.
10 I just want the judge and the whole court to know that
11 I've had my fair share of troubles with the Court in my
12 past and Nicholas Hemsher is the one person that's
13 helped me get my life back on track. I've been out,
14 I've been off papers for over a year now. Like I said,
15 he's like my brother. He's helped keep me out of
16 trouble. I've never seen him once be a violent person.
17 Like he's always been a stand-up guy, always been trying
18 to keep me on the right path. So I hope that you show
19 some remorse on him and help him better himself instead
20 of just lock him away. That's all I have to say. Thank
21 you, Your Honor.

22 THE COURT: Thank you.

23 SHELLY GONZALES: Hello, Your Honor.

24 THE COURT: Hi.

25 SHELLY GONZALES: My name is Shelly

1 Gonzales. I'm Nicholas's mom. I do ask the Court to
2 please take into account the sentence guideline that his
3 attorney suggested. I know that he's worked very hard
4 at being a productive person. He was doing -- he had
5 his own business at the time that -- you know, prior to
6 this taking place. He turned himself in when he found
7 out that there was an issue and it just happened to be
8 just right after my mom passed. And he came back
9 directly after the funeral and he's been in jail since
10 then. He's done everything that's been asked of him to
11 do. So I do ask that you please show leniency on his
12 sentencing. Thank you.

13 THE COURT: Thank you.

14 CATHRYN JARAGOSKE: I'm Cathryn Jaragoske.
15 I'm Nicholas's grandma. And deep down Nicholas is a
16 good kid. He -- when he is with the right people he
17 lives the right way. He's tried keeping the riffraff
18 out. They get him anyway. He has taken falls for
19 people that he shouldn't have. I have seen that. I
20 wanted to go to court when that happened but he asked me
21 not to. But he is a good kid. He has a good heart.
22 And, yes, he may have to be shown the right way to do
23 things because he doesn't always do what we tell him to.
24 But he's not bad enough to have a terrible sentence.
25 And I hope you keep that in mind. Thank you.

1 THE COURT: Thank you.

2 CHRISTY JARAGOSKE: Hi. My name is Christy
3 Jaragoske. I'm Nicholas's aunt. And like Cathy said,
4 he's really deep down a good kid. He's helped me a lot
5 and he's always there when I need him. Kind of lost
6 contact over the years as we grew older, we kind of
7 don't be as close. I ask that with his sentence that
8 counseling begin as soon as the sentence begins. And I
9 know with the prison system a lot of rehabilitation due
10 to the funds don't start until the end of the
11 sentencing, and I think that's why a lot of people
12 reoffend. And I just ask that the counseling when he
13 gets there start immediately. And I appreciate some
14 leniency and hope he gets the help to continue to be a
15 good person. And thank you for listening.

16 THE COURT: Thank you.

1 loves his father. And when I see Nick around Oliver I
2 do see that Nick loves his son. I think Nick should at
3 least have the opportunity to get to know his kids
4 before they grow up and become adults and before they
5 get to the point where they can make their own decisions
6 based on just what's on papers about him. They should
7 get to know who he is through their eyes, not through
8 the court system and not through papers. Thank you.

9 THE COURT: Thank you.

10 MELANIE JOHNSON: Hi, I'm Melanie Johnson,
11 Nicholas's cousin. I've known him my whole life. We've
12 been more like brother and sister growing up together.
13 Just a few years ago my brother -- my oldest brother got
14 arrested and went to prison and Nick has always been
15 there for me. And he's been there to help me with my
16 son. And overall he is a really good person. Yeah,
17 everybody has their downfalls, everybody makes their
18 mistakes in life and some people more than others. But
19 that doesn't make them a bad person. And he has been
20 pretty active in Oliver's life. Sorry, I'm really
21 nervous right now. I would just ask a little bit of
22 leniency. I know his rap sheet isn't the best. But he
23 is still a really amazing person and has done a lot of
24 good for a lot of people. So I hope you consider that
25 today. Thank you.

1 THE COURT: Thank you. Ms. Mammenga?

2 MS. MAMMENGA: Your Honor, in this case the
3 Court was able to hear the testimony at trial and see
4 all of the evidence. The conduct here was really
5 potentially dangerous and very troubling. To be in
6 possession of this many stolen firearms, nothing good
7 was going to happen. If those guns got stolen that
8 money was not going for anything good. It was probably
9 going for drugs, it was probably going to get more
10 firearms to keep trafficking. Having stolen firearms
11 out in the community this Court knows is incredibly
12 dangerous and this Defendant helped perpetrate that.

13 There's been no acceptance of responsibility
14 here. As we've discussed today, there was an attempt to
15 threaten and intimidate witnesses, no regard for those
16 -- the safety of those individuals whatsoever. And in
17 looking at this Defendant's PSR, he's got an obscenely
18 long criminal history; an obscenely long criminal
19 history for someone whose 55 years old, and this
20 Defendant is 27. He's got 19 criminal history points.
21 This isn't something that's seen in this Court all the
22 time.

23 In just generally reading the PSR there
24 seems to be some dissonance between his admissions to
25 Ms. Schenkel and what his actual history is too in

1 discussing his mental health and other juvenile
2 adjudications.

3 For these reasons we don't believe this is a
4 Defendant who is entitled to a downward variance and we
5 would ask that 120 months be imposed as his sentence on
6 both counts. Thank you.

7 THE COURT: Mr. Hemsher, when I decide a
8 sentence I look at a number of different things. First,
9 I start by looking at your background. And I can tell
10 that growing up you had a really rough time. Your home
11 life was extremely difficult. And I think because of
12 that you started getting into trouble in school when you
13 were fairly young. You have a history while you were a
14 juvenile of being in and out of the Brady Academy,
15 Springfield Academy, period of time when you were
16 homeless, period of time when you ran away.

17 And it's really unfortunate that when you
18 were in the juvenile system that you weren't able to
19 overcome the things that kept getting you into trouble.
20 And I don't know if it was a lack of resources within
21 the juvenile correction system or -- or what. But, in
22 any event, as an adult you continued to get into
23 trouble.

24 You've got a significant number of burglary
25 convictions, a significant number of failure to appear

1 convictions, receiving stolen property, intentional
2 damage to property, drug convictions, which puts you at
3 the point where you have 21 criminal history points.
4 Somebody who's 27 that's already in the highest criminal
5 history category is really concerning to me.

6 Over the years I've found that the higher
7 somebody's criminal history category is the more likely
8 they are to reoffend. And that's borne out by all of
9 the data that the Sentencing Commission has looked at.

10 You're really at a point now at 27 where
11 you've got to decide where you want to take the rest of
12 your life. There are times in your life when you've
13 been drug free, that you've done some incredible things.
14 You had your own business. You were involved in a
15 fundraiser for the children's hospital. You've held
16 jobs in addition to being self-employed.

17 So like your family has said, if you can
18 keep away from drugs and away from people that are a bad
19 influence on you, you've got a huge potential for doing
20 good things in the future. But if you don't do that, if
21 you keep hanging out with people that are using drugs
22 and people that are getting into trouble with the law,
23 you're basically giving yourself a life sentence. It's
24 going to be on an installment plan where you do bits and
25 pieces of it here and there, but that's basically where

1 you're going to take your life. So you've got to figure
2 out how you want to live the rest of your life.

3 You've got a -- anybody that can run their
4 own business successfully like you have -- got a huge
5 amount of potential, but you're just going to dribble it
6 all away if you keep hanging out with people that are
7 getting into trouble because that's what will happen to
8 you.

9 In deciding your sentence today, because you
10 are in Criminal History Category VI, I think that a
11 sentence within the advisory guideline range is
12 appropriate. But I'm going to sentence you at the
13 bottom of that range.

14 And I'm going to recommend to the Bureau of
15 Prisons that you be allowed to participate in their
16 intensive alcohol and drug treatment program. It's a
17 program that other people who have participated in have
18 learned a lot from and have told me it's one of the
19 better drug treatment programs that they've been
20 through. So I hope that you listen in that program and
21 once you're finished with your time in custody that you
22 apply everything that you learned so that you can keep
23 yourself on the straight and narrow.

24 The thing that struck me the most when I
25 read about your background is your relationship with

1 Oliver, that you've tried to be a great dad to him and
2 spend a lot of time with him. And that's probably the
3 most important thing that you can do as a dad. So I
4 hope that you keep in touch with him, be a good father
5 to him and to your other two kids.

6 At this time I'm going to state the
7 sentence, but I won't impose it until counsel has had an
8 opportunity to state any objection. Mr. Hemsher, would
9 you please stand.

10 Under the statutory and constitutional
11 authority vested in this Court, it's the Judgment of the
12 Court that the Defendant, Nicholas Ryan Hemsher, is
13 hereby committed to the custody of the Bureau of Prisons
14 to be imprisoned for a term of 120 months on Count 3 and
15 120 months on Count 4 to run concurrent.

16 You have a history of substance abuse in
17 your background and I think you'd be an excellent
18 candidate for the Bureau of Prisons substance abuse
19 treatment program. And I recommend that you be allowed
20 to participate in that program.

21 When you're released from prison, you'll be
22 on supervised release for a term of three years on each
23 count, such terms to run concurrently.

24 Within 72 hours of being released from the
25 custody of the Bureau of Prisons, you'll need to report

1 in person to the probation office in the district where
2 you're released.

3 While you're under supervision, you must not
4 commit another federal, state, or local crime; you must
5 not unlawfully possess a controlled substance; you must
6 submit to one drug test within 15 days of being released
7 from prison, and at least two periodic drug tests
8 thereafter as determined by the Court; you must
9 cooperate in the collection of DNA; and comply with the
10 standard conditions that have been adopted by this Court
11 and the following special conditions; you must
12 participate in and complete a cognitive behavioral
13 training program as directed by the probation office;
14 you must undergo in-patient, out-patient, psychiatric,
15 or psychological treatment as directed by the probation
16 office, and take any prescription medication that's
17 deemed necessary by the treatment provider; you must
18 reside and participate in a residential reentry center
19 as directed by the probation office and be classified as
20 a prerelease case; you must not consume any alcoholic
21 beverages or intoxicants, and you must not frequent
22 establishments whose primary business is the sale of
23 alcoholic beverages; you must participate in a program
24 approved by and at the direction of the probation office
25 for treatment of substance abuse; and you must submit a

1 sample of blood, breath, or bodily fluids at the
2 discretion or upon the request of the probation office;
3 you must submit to a warrantless search your person,
4 residence, place of business, or vehicle at the
5 discretion of the probation office.

6 I find that you do not have the ability to
7 pay a fine so the fine is waived, but you will need to
8 pay the special assessment of \$100 for each count for a
9 total of \$200, which is due immediately.

10 Counsel, are either of you aware of any
11 reason why the sentence can't be imposed as I stated?

12 MS. MAMMENGA: No, Your Honor.

13 MR. ENGELS: No, Your Honor.

14 THE COURT: Then it will be so imposed. And
15 you may be seated.

16 Mr. Hemsher, you have the right to appeal so
17 if you think there were any errors made you can file a
18 notice of appeal with the Clerk of Court's office within
19 14 days from today and another court will review what I
20 did. Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Anything further from either
23 side?

24 MS. MAMMENGA: No, Your Honor.

25 MR. ENGELS: Couple things, Your Honor.

1 Mr. Hemsher's been in custody since the beginning of
2 July of last year and I'm wondering if we can -- if the
3 Court would work into the sentence credit for that time.

4 THE COURT: The Bureau of Prisons determines
5 the amount of credit.

6 MR. ENGELS: Okay. And I'm wondering if the
7 Court might recommend custody for Mr. Hemsher in
8 Minnesota so he's at least close enough for family to be
9 able to visit.

10 THE COURT: I do recommend that the Bureau
11 of Prisons place the Defendant at a facility as close to
12 South Dakota as possible.

13 MR. ENGELS: Thank you, Your Honor.

14 THE COURT: Seeing nothing else, we'll be
15 adjourned. Thank you.

16 (End of proceedings at 10:56 a.m.)

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF HUGHES)
3)
4)

CERTIFICATE

4 I, Leslie Hicks, Notary Public and Registered
5 Professional Reporter in and for the State of South
6 Dakota, do hereby certify that the Transcript of the
7 Sentencing Hearing contained on the foregoing pages 1
8 through 35, inclusive, were reduced to stenographic
9 writing and thereafter transcribed; that said
10 proceedings commenced on May 15, 2017, in the Courtroom
11 of the United States District Courthouse, Sioux Falls,
12 South Dakota, and that the foregoing is a full, true and
13 complete transcript of my shorthand notes of the
14 proceedings had at the time and place above set forth.

15 Dated this 20th day of June, 2017.

16

17

18 /s/ Leslie Hicks
19 Leslie Hicks
20 Registered Professional Reporter
21 225 S. Pierre Street, #413
22 Post Office Box 7147
23 Pierre, South Dakota 57501
24 (605) 945-4612
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2189

United States of America

Appellee

v.

Nicholas Ryan Hemsher

Appellant

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:16-cr-40070-KES-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 03, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans