NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

WALTER JORDAN,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, **WALTER FREEMAN JORDAN,** pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
March 12, 2020.

Respectfully submitted,
/s/Yolanda Jarmon
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QUESTIONS PRESENTED

I. On Appeal WALTER JORDAN argued that the erroneous admission of hearsay evidence that he was the brother of one of the co-defendants caught leaving the robbery at issue in this case constituted reversible error.

The Fifth Circuit held that the error in admitting testimony that Jordan and Wise were brothers was harmless error because substantial evidence supported the jury's verdict that Jordan was guilty of aiding and abetting robbery, during which a firearm was used absent the testimony regarding the relationship between Nico Wise, Jordan's brother and Jordan.

In light of the foregoing, the question presented is as follows:

Did the admission of the unrefuted inadmissible hearsay evidence constitute harmful error. Because the proper application of Federal Rule of Evidence 403 and Federal Rule of Criminal Procedure 52(a) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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PRAYER

The petitioner, **WALTER FREEMAN JORDAN**, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on **December 13, 2019.**

OPINIONS BELOW

The original judgment **United States v. WALTER FREEMAN JORDAN, Cr. No.4:17:CR:316-001(S.D. Tex. August 16, 2018)** is attached as **(Exhibit A).** On December 13, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Jordan's convictions. **United States v. Walter Freeman Jordan, 945 F.3d 245(5th Cir. 2019)(affirmed). (Exhibit B).**

On appeal, Jordan argued that: (1) the evidence was insufficient to sustain the convictions; (2) the district court erred in admitting testimony that identified co-defendant Nico Wise and Jordan as brothers; and (3)that the district court erred in admitting testimony of co-defendants' testimony regarding their own guilty pleas. Id. at 251.

The Fifth Circuit held that the evidence was sufficient to sustain the jury verdicts as to the convictions. Id. at 254-257. The Fifth Circuit also held that the error in admitting testimony that Jordan and Wise were brothers was harmless error because substantial evidence supported the jury's verdict that Jordan was

guilty of aiding and abetting robbery, during which a firearm was used absent the testimony regarding the relationship between Nico Wise, Jordan's brother and Jordan. Id. at 258. The Fifth Circuit also held that the district court did not plainly err in admitting testimony of co-defendants guilty pleas because *inter alia* defense counsel also cross-examined the co-defendants about their guilty pleas and sought to impeach them for their cooperation with the government. Id. at 258-259

No petition for rehearing was filed.

JURISDICTION

On December 13, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

Federal Rule of Evidence 403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Criminal Procedure 52(a)

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

A. Course of Proceedings And Facts

Walter Freeman Jordan, III Defendant-Appellant (Hereinafter "Jordan") along with several co-defendants was charged in a Two-Count Indictment with Count One, Aiding and Abetting Armed Credit Union Robbery in violation of 18 U.S.C. §§ 2113(a), (d)(2). (ROA.41-42). Jordan was charged in Count Two with Aiding and Abetting the Brandishing of a Firearm During and in Relationship to a Crime of Violence which may be prosecuted in a court of the United States, in this case, Credit Union Robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. (ROA.41-42). A notice of forfeiture was included in the criminal indictment. (ROA.43).

The Trial

The charges in this case arose because on July 25, 2017, three masked men entered the First Community Credit Union in the Cinco Ranch area of Katy, Texas and robbed it. Two of the robbery suspects were in question on the date of trial, Jordan and his brother Johnathan Nico Wise. (ROA.1254). The Government's theory of the case is that on January 25, 2017, when the credit union was robbed, Jordan must have been one of the robbers inside of the credit union, because a cell phone ending in 6601 that was being

monitored by law enforcement, was picked up by cell towers in the area near the credit union. The Government claims that the cell phone number is associated with Jordan. (ROA.1289).

Jordan's Defense was that he had no participation in the crimes charged whatsoever. The phone numbers attributed to him that were monitored in the Third Ward area and Cinco Ranch area were not in his possession during the times the charged crimes were committed.

July 24, 2017, the Day Before the Robbery

Houston Police Department ("HPD") Officer B. Thaler Testified for Government. She testified that on July 24, 2017, the day before the credit union robbery, she was monitoring a phone number ending in 6601. (ROA.723). Officer Thaler believed that telephone number to be associated with Jordan. Thaler determined that the number ending in 6601 seemed to be heading west from the Third Ward Area of Houston, Texas and then it eventually returned to the Third Ward Area.

HPD officer K. Richards testified for the Government. Richards testified that he was working on July 24, 2017. He traveled to Katy, Texas in an unmarked car that day as a result of the rolling surveillance. (ROA.747-748,795). He associated a maroon Volkswagon Jetta with a cellphone. He followed the maroon Volkwagon Jetta to Katy, Texas and back to Third Ward. He saw, Jordan get out of the Volkswagon Jetta. (ROA.749-751,796-797).

July 25, 2017, the Day of the Robbery

The officers continued to monitor the device associated with the telephone number ending in 6601. (ROA.723). The telephone associated with 6601 moved to the Third Ward area early in the morning on July 25, 2017. HPD had video surveillance available from the Third Ward area on Greenmont Street, located in the Third Ward area where they had a pole camera. This pole cam was displayed on a computer and manipulable by remote control, including movement and zoom. (ROA.789). Thaler initially observed a black stolen Toyota Tundra pick-up truck and a silver Malibu owned by Co-Defendant Jaylen Loring. (ROA.712-713,716-717,733). In addition, HPD had approximately twenty unmarked cars in the area to assist. (ROA.736).

Officer Thaler testified that the stolen Tundra was present at the Greenmont address on July 25, 2017. A silver Malibu owned by Jaylen Loring was there as well. (ROA.712,717). The officers began conducting rolling surveillance on vehicles that left Greenmont on July 25, 2017. The vehicles ended up in the Cinco Ranch area of Katy, Texas. (ROA.720). Using the monitoring capability, Officer Thaler determined that the phone number 6601 was in the area as well near the First Community Credit Union. (ROA.723-724). Officer Thaler saw the Malibu pull out onto Cinco Ranch Boulevard and the vehicle was eventually stopped by law enforcement. (ROA.726). Thaler then traveled north on Grand Parkway to assist with another vehicle officers had stopped.

(ROA.727). Thaler traveled back to the bank and was asked to prepare a search warrant for an apartment located at 1255 North Post Oak. (ROA.728). Office Thaler testified that she continued to get updates on the phone ending in 6601 and believed the phone to be in the car that was involved in a chase after the credit union robbery. (ROA.730).

Officer K. Richards testified that he was conducting surveillance again on July 25, 2017. He was monitoring a pole cam that morning. There was a silver Chevy Malibu and a black Toyota Tundra on Greenmont Street in Third Ward. (ROA.751). He observed people, with no association with the crimes alleged, coming and going in the area and walking near the houses as well. (ROA.790). He believed the person in the video to be Jordan and testified that Jordan got into the silverer Malibu. A silver Rogue was also surveilled that morning. (ROA.743). He had no idea who got out of the silver Rogue. (ROA.744). He testified that he saw Jordan getting out of a pick up truck. However, he also testified that he could not get close-ups of the people walking by and that the videos were not clear. (ROA.790-791).

Four vehicles were seen leaving the Greenmont Street. (ROA.792). The cars were observed heading out to the Cinco Ranch are of Katy, Texas. One of the confessed credit union robbers, Anderson was in the red Volkswagen Jetta. (ROA.791). The Toyota Tundra truck left the area as well. (ROA.791). Officer K. Richards testified that he could not see who got into the Toyota Tundra truck. (ROA.792). The

truck was obscured by a tree and therefore Richards did not even know how many people got into the Tundra Truck.

Officer K. Richards testified that the officers followed the cars in marked and unmarked cars. Officers spent about 50 minutes circling the First Community Credit Union bank. He observed a maroon Volkswagen Jetta in a driveway facing the bank and blocking traffic. The Jetta would circle and return to the bank periodically. (ROA.759). He also observed a silver Nissan Rogue pull up across the street into a Fidelity strip center facing the bank. He repositioned himself behind the Rogue so that he could trail it if it pulled. Richards observed the black Tundra pull into the bank. Three males initially got out and ran in towards the bank's front doors. Shortly thereafter another man ran in after the three. (ROA.762).

According to Officer Richards, as soon as the men who went into the bank, returned to the black Tundra, they headed towards Highway 99 and the silver Rogue immediately backed up and started to trail up Highway 99 also. (ROA.762-763). Officer Richards called for marked units to stop the Tundra and he stayed with the Rogue. Two people were ordered out of the Rogue. (Rogue 763).

He then pursued another vehicle. The chase lead to an apartment complex at 1225 North Post Oak. (ROA.764). The officers learned that Jordan's brother, Terrance Jordan lived in an apartment in that building. (ROA.765).

HPD Officer P. Chaffin testified for the Government. He testified that he assisted Officer Richard the morning of July 25, 2019 with rolling surveillance of a silver Rogue, silver Malibu, black Toyota Tundra, and a maroon Volkswagen Jetta. (ROA.799,802). The vehicles traveled in formation on Highway 99 and exited Cinco Ranch Blvd. When the vehicles exited Cinco Ranch Blvd., they broke formation and drove around various parking lots. Law enforcement observed the vehicles for about an hour moving around the exit near the First Community Credit Union. (ROA.806). Officer Chaffin parked across the street from the credit union and set up a Sony hand-held camera. (ROA.807,818). He observed four individuals wearing gloves and masks get out of the truck. (ROA.820). Their faces were covered and he could not identify them. (ROA.821-822). He could not determine if anyone exiting the truck had a gun (ROA.822-823). He could not determine their nationality or gender because of the hoodies, masks, and gloves. (ROA.823).

Officer Chaffin observed the robbers exit the credit union and return to the truck. (ROA.809). Chaffin testified that the windows in the Tundra truck were tinted and he could not see inside the vehicle. Therefore, he could not have known how many people were in the vehicle as he initially reported. (ROA.815). In fact, Officer Chaffin didn't know who was inside the vehicle. (ROA.816).

The Robbery

M. Williams, a float teller for First Community Credit Union testified for the Government. (ROA.833). Williams testified that

around 1:00 p.m., she saw someone jump over the teller counter. (ROA.835). The individual's face and hands were covered. (ROA.836). Eventually three robbers came inside the credit union. (ROA.837). One of the robbers had a cellphone. (ROA.838). The robbers were able to access two drawers. (ROA.842). They took fake bait money, $300 dollars in $20 dollar bills. (ROA.843). When she could not get the vault open, one of the robbers struck a bank employee. A third robber jumped over the counter and showed her a black semiautomatic .45 in his waistband. (ROA.844). She heard a fourth person come in and yell, "The cops are down the street." The robbers then fled. (ROA.847). Williams could not identify any of the robbers because they were all covered up. (ROA.848).

N. Osborne, the Assistant Vice-President of the First Community Credit Union testified for the Government. He was working in the credit union on the day of the robbery. (ROA.849-850). He testified that the credit union is federally insured. (ROA.851). The robber asked him to open the vault, but he could not. (ROA.857). Osborne was hit over the head with an unknown object and told that he was stalling. (ROA.858). The robbers then yelled out to a third robber in the lobby who then jumped the counter. Osborne saw a weapon in the third robber's waist band. (ROA.859). Someone yelled that the cops were coming and then the robbers ran out the door. (ROA.859-860). The robbers took $8,000.00 in bait bills. (ROA.860,865). Osborne could not identify any robbers.

Mr. J. Nolan stopped at the bank on his lunch hour on July 25, 2017. He did not enter the bank because someone was waiving a gun in his face. He went back to his vehicle and called the police. (ROA.870). He could not identify the person waiving the gun because the face was covered. (ROA.871).

J. Loring, a cooperating witness testified for the Government and was hoping to get less time for aiding and abetting the credit union robbery. (ROA.875-877,949-950). She testified that she met Jordan four days to a week before the robbery on Instagram. (ROA. 879). According to Loring, Jordan asked her to serve as a look out for the robbery. She agreed to serve as a look out even though she had only known him for such short amount of time. (ROA.883-884). She went inside the bank to serve as the look out. (ROA.908). When asked why she would do such a thing, she stated, "I made a mistake." (ROA.884). She testified that she was driving the silver Malibu, one of the four vehicles surveilled in this case. (ROA.882). She did not know any of the other co-defendants in this case. (ROA.879). She testified that she followed the black Tundra truck. (ROA.887). She testified that although Jordan was in the truck on the day of the robbery, she was unable to see who drove the Tundra or who got into the Tundra on the day of the robbery as the cars left to rob the credit union. ROA.887,894, 904,940-941).

Loring stated that she received a phone call from Jordan and he said "Follow us." At no time did she see Jordan on a telephone once the cars left Greenmont Street for Katy, Texas. (ROA.906). As a

matter of fact, Loring testified that she heard lots of voices on the phone. (ROA.907). Loring stated that when the cars arrived to Cinco Ranch, they all went different ways. (ROA.908). According to Loring, it was Jordan who told her that the robbery would occur at the First Community Credit Union. (ROA.909). Once the robbery was completed, officers apprehended here in the silver Malibu and seized her phone. (ROA.916).

D. Anderson, a co-defendant with a criminal record testified for the Government as well. Like Loring, he entered a plea of guilty to the robbery hoping to receive a reduced sentence. (ROA.953-953). He testified that he knew Jordan from the neighborhood. (ROA.954). According to Anderson on the morning of July 25, 2017 Jordan asked him to assist in a robbery. (ROA.990-992).

After the robbery

On cross-examination, Officer Richards testified that the cell phone the Government associates with Jordan ending in 6601 was actually found in one of the robbers, Raymond Pace's pocket. (ROA.793-794). Officer Helm also testified that the phone was found in Pace's pocket. (ROA.1257).

HPD Officer C. Calderon testified for the Government. Officer Calderon conducted a stop on the Nissan Rogue after the robbery. (ROA.1012). Deandre Santee was driving the Rogue and Johnathon Wise was the passenger. (ROA.1013).

(ROA.757). Officer Calderon recovered three phones from the Rogue: (1) a black Iphone found loose on the driver's seat; (2) a phone

with white casing taken off of Johnathon Wise; and (3) a black Samsung connected to a charger and found in the center console of the cup holder on the passenger side. (ROA.1025,1038,1041). The phone taken off of Wise was placed on the passenger seat after the fact by Officer Lomardo. (ROA.1025,1038). Calderon delivered the phones to Officer Thaler. (ROA.1018).

HPD Officer A. Flores testified that he pursued the black Tundra after the robbery. However he could not identify who was in the Tundra. (ROA.1048). The driver drove the Tundra into a fence line and the occupants exited the Tundra and ran. ROA.1051). The front passenger, Raymond Pace, was crushed between the Tundra and a wall. (ROA.1051,1054). Officer Flores knocked a phone that Pace was using at the time out of Pace's hand. (ROA.1056). There was a Springfield Armory .45 semiautomatic pistol underneath the front passenger seat. (ROA.1056-1058). The remaining three occupants ran toward an apartment complex. (ROA.1051).

Officer Helms testified for the Government. He was the lead investigator in the case. (ROA.1220-1221,1242). Officer Helms testified that one suspect, Bonner, was caught at the apartment complex. He testified that three males came out of the apartment at 1255 North Post Oak. At the time of trial one suspect remained at large. (ROA.1249-1250)

Officer A. Carmona testified for the Government. He testified that he assisted officers on July 25, 2017. He arrived at the apartment complex where the black Tundra stopped. Officer Flores

was with the black Toyota Tundra. Carmona saw that a paper license plate was over the hard plates of the Tundra. Gloves were taken from the passenger side and he saw the pistol underneath the passenger seat. Carmona saw bloody clothing on the ground.

Officer Carmona saw a back pack on a ledge between the second and third floor of "building 1" of 1255 North Post Oak that day. The back pack had two gloves: one white and one blue, another pair of gloves, a Nike hoodie, a T-shirt and pink cloth. The backpack also contained a white pillow case, with $7,900 and some change, about $8,000 in it. It was the bait money from the robbery. (ROA.1220). He interviewed a witness, Ms. Alexander and then executed a search warrant on apartment 1224 of the complex. (ROA.1170).

When executing a search warrant on the apartment, Officer Carmona found a pair of Jordan's (shoes) and several wet hooded clothes in the washing machine. (ROA.1171). Some of the clothing found appeared to be the same clothing worn by robbers and seen in the video evidence shown at trial. (ROA.1173-1178).

Helms, the lead investigator testified over Defense objections that Johnathon Wise, Terrance Jordan and Petitioner are brothers. (ROA.1210-1214). Of the forty-four pieces of evidence collected in the case, he only sent off five pieces of evidence for testing. (ROA.1244,1247). He submitted gloves and a black T-shirt to the Houston Institute of Forensic Sciences. (ROA.1247-1248,1251,1263) No DNA analysis or testing had occurred by the time of trial.

(ROA.1216-1219). No latent print analysis on the Tundra had occurred by the time of trial. (ROA.1252).

After a three-day jury trial before the Honorable Keith P. Ellison, United States District Judge for the Southern District of Texas, Houston Division, Jordan was found guilty on all counts on August 10, 2018. (ROA.233-234).

The Sentence

The 2016 Guidelines were used in this case. (ROA.11807). The PSI set the Base Offense Level at a level 34. (ROA.11808). Count One was treated as though it was the only Count of conviction The base offense level was set at 20 pursuant to U.S.S.G § 2B3.1.(a),18 U.S.C. §§ 2 and 2113(a) and (d). A two-level increase was added pursuant to U.S.S.G § 2B3.1.(b)(1) because the property of a financial institution or post office was taken, or the taking of such property was an object of the offense. (ROA.11807). Jordan lodged no objection to this enhancement.

A two-level enhancement was applied under U.S.S.G. § 2B3.1(b)(3)(A) applied because "a victim sustained bodily injury." (ROA.11808). At sentencing and in written objections, Jordan argued against the two-level assessment explaining that the alleged victim did not seek medical treatment. (ROA.1512-1514,11788-11789). The objection was denied. (ROA.1514).

Jordan also argued against a four-level enhancement applied for abduction to facilitate commission of the offense, pursuant to U.S.S.G. § 2B3.1(b)(4)(A). (ROA.11808). The enhancement was

applied because bank employees were moved against their will and one employee was moved to the vault area of the bank. Jordan argued that the enhancement should not apply because the bank manager/vice-president simply turned around and walked a few feet to the back of the bank to the vault area. (ROA.1514-1517,11789). The objection was denied. (ROA.1517).

Jordan objected to a one-level enhancement applied pursuant to U.S.S.G. § 2B3.1(b)(7)(B). for the loss of the "stolen" pickup truck alleged to be $23,000 in value. (ROA.1517-1519,11789-11790,11808). The objection was sustained and the sentencing point calculation was reduced by one point. (ROA.1519).

Jordan objected to the two-level enhancement applied under U.S.S.G § 3C3.1.2 for recklessly creating a substantial risk of death or serious bodily injury to someone else while fleeing from the police. (ROA.11808). He argued that there was no credible evidence that he was the driver of the getaway car. Furthermore, there was no evidence that he directed, solicited, encouraged or otherwise aided the driver of the getaway car to flee the police. (ROA.11790-11791). The objection was denied. (ROA.1525).

Jordan objected to the four-level enhancement applied under U.S.S.G § 3B1.1(a) alleging that he was an organizer or leader of the robbery crew. (ROA.11808). Jordan argued that there was no credible evidence that he was the organizer or the leader of the robbery. (ROA.1523-1525,11791). The objection was denied. (ROA.1525).

Jordan received a total of 21 criminal history points resulting in a Criminal History Category VI pursuant to U.S.S.G. Chapter 5 part A. With a Total Offense Level of 34 and a Criminal History Category of VI, the guidelines range was set at 262-327 months under Chapter 5 Part A. However the maximum sentence for Count One, the credit union robbery, in this case is set at 25 years. See U.S.S.G § 18 U.S.C. §§ 2 and 2113(a) and (d). (ROA.1533-1534).

Jordan was sentenced to 262 months imprisonment for Count One. He was sentenced to 82 months imprisonment for Count Two to be served consecutively with Count One for a total of 349 months of incarceration. (ROA.244,1539). He was sentenced to a five-year term of supervised release as to each count to be served concurrently with each other. (ROA.245,1539). A special assessment fee of $100 was imposed as to each count for a total of $200.00. (ROA.247,1540). The restitution was set at $401.00 to be paid jointly and severally with co-defendants. (ROA.247-248,1540). The court ordered Jordan to participate in a mental health program to the extent authorized by law. He was also ordered to participate in substance abuse treatment as required by probation. (ROA.1540).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving Aiding and Abetting Armed Credit Union Robbery in violation of 18 U.S.C. §§ 2113(a), (d)(2) and Aiding and Abetting the Brandishing of a Firearm During and in Relationship to a Crime of Violence which may be prosecuted in a court of the United States, in this case, Credit Union Robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. (ROA.41-42). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASON FOR GRANTING THE WRIT

This Court should grant certiorari in this case in order to determine whether admitting inadmissible hearsay evidence as to Jordan's familial relationship with co-Defendant Nico Wise constitute to harmless error. Because the proper application of Federal Rule of Evidence 403 and Federal Rule of Criminal Procedure 52(a) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit

In the Fifth Circuit, evidentiary ruling are reviewed for an abuse of discretion subject to the harmless error rule. United States v. Dunigan, 555 F.3d 501 (5th Cir. 2009). An abuse of discretion occurs when a ruling is grounded in a legal error or a clearly erroneous analysis of the evidence. In Re Sealed Appellant, 194 F.3d 666,670 (5th Cir. 1999). Under this analysis, "[a]ny error, defect irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). "Under a harmless error analysis, the issue is whether the guilty verdict actually rendered in this trial was surely unattributable to the error." United States .v Cornett, 195 F.3d (5th Cir. 1999)(internal citations and quotation marks omitted). "Thus, the error will not require reversal if 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" Id. citing Sullivan v. Louisiana, 508 U.S.275,279 (1993)). The burden of proving harmlessness falls to the Government. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967; United States v. Olano, 507 U.S 725,741 (1993).

In this case, the government failed to prove harmlessness. On Appeal and at trial Jordan argued that the district court abused its discretion when it admitted testimony that Co-Defendant Wise was his brother. Jordan specifically objected to the lack of foundation for this testimony stating "no foundation has been laid." (ROA.1210-1213). There was none from the witness only a bare assertion from the prosecutor, outside the presence of the jury, to the Court that, "Mr. Wise stated to this officer that he was, in fact, Walter Jordan's brother (ROA.1211-12112). However, the Officer never testified to this and there was no evidence or proof before the Court that such a statement was made prior to its admission.

There were also no details about the circumstance of the alleged statement in evidence or in the prosecutor's argument, e.g., when it was made, where it was made, who else was present, what exactly was said, or whether the statement was custodial or recorded. No evidence or argument at all was before the court indicating the alleged statement was reliable.

Preliminary questions about whether evidence is admissible must be decided by the Court, and such matters are established by a preponderance of evidence standard. Fed. R. EVID. 104(a); See also Bourjaily v. United States, 483 U.S.171,175-176 (1987). "If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue." FED. R. EVID. 104 advisory committee's note to the 1972 proposed rule. Even where a defendant's own statement is offered, the Government must prove by a

preponderance of evidence that the statement was made to the witness. United States v. Lang ("Lang"), 364 F.3d 1210 (10th Cir. 2004), cert. granted, judgment vacated on other grounds, 543 U.S. 1108 (2005), and opinion reinstated in relevant part, United States v. Lang ("Lang II"), 405 F.3d 1060,1061 (10th Cir. 2005).

There was simply no evidence before the trial court that Wise ever made the statement prior to its admission. It is axiomatic that what lawyers say is not evidence and an offer of proof by counsel is only allowed after a ruling excluding evidence, not before. See FED R. Evid. 103 (a)(2). Thus, the evidence was inadmissible under any rule of evidence, not merely FRE 803 (19).

Jordan also argued at trial and on appeal that the testimony regarding the alleged familial relationship between himself and Wise was inadmissible hearsay pursuant to Federal Rule of Evidence 802. After Jordan's objections were overruled, HPD Sgt. Helms testified that Wise and Jordan were brother (ROA.1213-1214). The following discussion occurred:

> **Prosecutor:** And can you tell me whether or not there is a blood relationship between Walter Jordan and Johnathon Nico Wise?
>
> **Witness:** There is.
>
> **Prosecutor:** And what is that?
>
> **Witness:** They are brothers.

(ROA.1213-1214). This was the sole evidence of this relationship. The Government did not introduce certified copies of birth certificates, court decrees, vital statistics or other documentary

or testimonial evidence of the alleged relationship. Sgt. Helms's testimony was completely dependent on an inadmissible extrajudicial conversation at an unknown time and place. His testimony was inadmissible hearsay.

The District Court observed, this was hearsay. (ROA.1212). It was an out of court statement being offered for the truth of the matter asserted, that co-defendant Wise was Jordan's brother. Unless subject to an exception, hearsay is inadmissible. FED. R. EVID. 802. The question, as the trial judge noted, was "whether an exception applies." (ROA.1212).

Overruling hearsay objections, the district court admitted Helm's testimony pursuant to the Government's argument that the evidence fell within the hearsay exception for reputation concerning personal or family history. The exception relied upon by the prosecution and the Court, Federal Rule of Evidence 803 (19) provides:

> **(19) Reputation, Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage-or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage or similar facts of personal or family history.**

Reputation testimony under 803 (19) requires a reliable foundation. The Third Circuit, in one of the few cases that considered this exception, concluded that to admit reputation evidence, the proponent must establish that reputation testimony "arises from

sufficient inquiry and discussion among persons with personal knowledge of the matter" to constitute trustworthy reputation. Blackburn v. United Parcel Serv., Inc., 179 F.3d 81, 100-01 (3d Cir.1999). Yet, no evidentiary foundation at all was laid in this case. Moreover, the evidence came not from one of Jordan's family members, associates, or the community, but from a police officer who gave no testimony at all as to the basis for his statement prior to admission.

Jordan argued that even if some predicate had been laid, Sgt. Helms testimony failed to meet the rigor of Blackburn or other cases because there was no evidence he spoke to any third parties (or anyone else) about the reputation in the community. "[T]he family history exception under Federal Rule of Evidence 803 (19) was inapplicable because [Appellant's] statement do not reflect the reputation.... among [his] family associates, or community ... only represent the beliefs of [Appellant]." United States v. Escobar, 594 Fed. Appx.920, 922 (9th Cir.2014); See also United States v. Jean-Baptiste, 166 F.3d 102, 110 (2d Cir. 1999) ("[Rule 803(19)] [plainly contemplates that members of a family may testify with regard to the common understanding as to the birth of another family member.").

The prosecution had previously tried and failed to get this type of evidence about co-defendant Wise and Jordan from Anderson, but Anderson didn't know. The prosecution later got this information from Helms with no foundation and over defense counsel's

objection. There was simply no legal or factual basis for the admission of this evidence by the District Court and the Government used it to convict Jordan.

Jordan also objected under FRE 403. (ROA.1212) FRE 403 allows the court to "exclude relevant evidence if it probative values is substantially outweighed by a danger of...unfair prejudice, confusing the issues or misleading the jury." FED. R. EVID. 403. The unfair prejudice from testimony that Jordan and Wise were brothers substantially outweighed its probative values precisely because it allowed the prosecution to substitute this relationship for evidence of actual participation or conduct by Jordan as argued in the preceding section. Wise was apprehended in the Nissan Rogue leaving the scene of the robbery. (ROA.1013). There is no evidence that Jordan was apprehended leaving the scene of the robbery in either of the four vehicles. The District Court abused its discretion in overruling the 403 objection and admitting the evidence.

In its opinion in this case, the Fifth Circuit held that, on appeal, the government waived its right to argue that no error occurred. However, the court went on to hold that the government had not forfeited its argument as to whether the error was harmless. United States v. Jordan, 945 F.3d 245 at 257. The Fifth Circuit also held that the error in admitting testimony that Jordan and Wise were brothers was harmless error because substantial evidence supported the jury's verdict that Jordan was guilty of aiding and

abetting robbery, during which a firearm was used absent the testimony regarding the relationship between Nico Wise, Jordan's brother and Jordan. Id. at 258. "When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case" (citing Chapman, 386 U.S., at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705)); Arizona v. Fulminante, 499 U.S. 279, 295-296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). That is exactly what the Fifth Circuit does here. This Court, however, has the power to review the record de novo in order to determine an error's harmlessness. In so doing, it must be determined whether the government has met its burden of demonstrating that the" error "did not contribute to [defendant's] conviction." The government did not meet its burden in this case.

The evidence introduced stating that Wise and Jordan were brothers was prejudicial to Jordan. There is no evidence that Jordan ever discussed using a weapon with anyone in this case. The evidence showed that one of the robbers had a weapon in their waistband, but there was no testimony that Jordan had the weapon at issue in this case. There was no evidence that Jordan knew that a weapon would be used in the robbery. No phone records or physical evidence linked Jordan to the charged offenses. Therefore, Jordan was convicted on the basis that he was related to someone who was apprehended leaving the scene of the robbery. Therefore, the Fifth Circuit erroneously concluded that the admission of the testimony

regarding Wise and Jordan's familial relationship amounted to reversible error.

The district Court's rulings to admit this evidence vitiated Jordan's substantial and fundamental rights to affair trial. Therefore, this Court should reverse all counts of conviction as to Jordan.

This Court should grant certiorari in this case in order to determine whether this inadmissible evidence of Jordan's familial relationship with a co-defendant amounted to harmless error. Because the proper application of Federal Rule of Evidence 403 and Federal Rule of Criminal Procedure 52(a) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner **WALTER FREEMAN JORDAN** respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: March 12, 2020.

Respectfully submitted,

/s/Yolanda Jarmon
YOLANDA E. JARMON
Attorney of Record for Petitioner
2429 Bissonnet # E416
Houston, Texas 77005
Telephone: (713) 635-8338
Fax: (713) 635-8498

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

WALTER FREEMAN JORDAN,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, **On March 12,2020,** she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, **Certified Mail No. 7018 2290 0001 46560 1237,** return receipt requested, and depositing the envelope in the United States Postal Service located at 3740 Greenbriar Drive, Houston, TX 77098 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco
Solicitor General of the United States

Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

/s/Yolanda Jarmon
YOLANDA E. JARMON

E:\JORDAN, WALTER\JORDAN CERT.DOC

APPENDIX

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA
V.
WALTER FREEMAN JORDAN III

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:17CR00516-001**
USM NUMBER: 28991-479

☐ See Additional Aliases.

Neal Davis, III
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 and 2 on January 25, 2018, after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2113(a), (d), and § 2	Armed bank robbery, aiding and abetting	07/25/2017	1
18 U.S.C. § 924(c)(1)(A)(ii) and § 2	Carrying and brandishing a firearm during and in relation to a crime of violence	07/25/2017	2

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 10, 2018
Date of Imposition of Judgment

Keith P. Ellison
Signature of Judge

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

August 15, 2018
Date

Exhibit A

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 346 months.
This term consists of TWO HUNDRED AND SIXTY-TWO (262) MONTHS as to Count 1, and EIGHTY-FOUR (84) MONTHS as to Count 2, to run consecutively per statute, for a total of THREE HUNDRED AND FORTY-SIX (346) MONTHS.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 5 years.
This term consists of FIVE (5) YEARS as to each of Counts 1 and 2, to run concurrently.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a mental-health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the cost of the program, if financially able.

You must participate in an inpatient or outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer.

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

☐ See Additional Special Conditions of Supervision.

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00		$401.00

A $100 special assessment is ordered as to each of Counts 1 and 2, for a total of $200.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
First Community Credit Union		$401.00	

☐ See Additional Restitution Payees.

TOTALS	$0.00	$401.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $200.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

Payment of the total criminal monetary penalties shall be due as follows: The defendant shall make a lump sum payment of $200 due immediately, balance due in 25% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant's restitution obligation shall not be affected by any payments that may be made by other defendants in this case, except that no further payment shall be required after the sum of the amounts paid by all defendants has fully covered all the compensable losses.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**
Walter Freeman Jordan, III, 4:17CR00516-001	$401.00	$401.00	
Jaylen Christine Loring, 4:17CR00516-002	$401.00	$401.00	
Daryl Carlton Anderson, 4:17CR00516-003	$401.00	$401.00	

☒ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: **WALTER FREEMAN JORDAN III**
CASE NUMBER: **4:17CR00516-001**

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Deandre Bendard Santee, 4:17CR00516-004	$401.00	$401.00	
Johnathan Nico Wise, 4:17CR00516-005	$401.00	$401.00	
Raymond Demond Pace, 4:17CR00516-006	$401.00	$401.00	
Zelmer Samuel Bonner, 4:17CR00516-007	$401.00	$401.00	

United States v. Jordan, 945 F.3d 245

Copy Citation

United States Court of Appeals for the Fifth Circuit

December 13, 2019, Filed

No. 18-20564

Reporter

945 F.3d 245 * | 2019 U.S. App. LEXIS 36888 ** | 2019 WL 6794479

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. **WALTER** FREEMAN **JORDAN**, III; JOHNATHON NICO WISE, Defendants-Appellants.

Prior History: [**1] Appeals from the United States District Court for the Southern District of Texas.

Core Terms

robbery, district court, credit union, phone, firearm, argues, robbers, co-defendants, sentence, harmless, enhancement, brandished, gun, guilty plea, weapon, advance knowledge, arrested, plainly, teller, aiding and abetting, aggravated, reduction, abetting, driving, lookout, driver, guilt, sufficient to support, use of a firearm, convictions

Case Summary

Overview

HOLDINGS: [1]-Defendants were properly found guilty of aiding and abetting aggravated credit union robbery under 18 U.S.C.S. § 2113 because the testimony of accomplices alone was sufficient to support the verdict and, even if it wasn't circumstantial evidence linking defendants to the robbery was sufficient; [2]-Defendant was properly found guilty of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence under 18 U.S.C.S. § 924(c) because whether defendant ever held the pistol was irrelevant given his role in the robbery; [3]-Admission of evidence of accomplices' guilty pleas was not plain error where a limiting instruction was given, the evidence served a proper purpose, the prosecution did not linger on the evidence, and defendant sought to use the pleas to impeach the accomplices.

Outcome

Convictions and sentences affirmed.

▼ LexisNexis® Headnotes

Exhibit B

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Sufficiency of Evidence
Evidence > Weight & Sufficiency

HN1 De Novo Review, Sufficiency of Evidence

Issues regarding sufficiency of the evidence are largely fact-based questions that the appellate court reviews de novo. And the court must affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Importantly, this means that the court's review is limited to whether the jury's verdict was reasonable, not whether the court believes it to be correct. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Evidence > Weight & Sufficiency

HN2 Evidence, Weight & Sufficiency

The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Evidence > Weight & Sufficiency

HN3 Evidence, Weight & Sufficiency

A guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face. For testimony to be incredible it must be unbelievable on its face. Testimony is incredible, as a matter of law, if it relates to facts that the witness could not possibly have observed or events that could not have occurred under the laws of nature. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

HN4 Deferential Review, Credibility & Demeanor Determinations

A jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

HN5 Deferential Review, Credibility & Demeanor Determinations

It is not the court's role, under the standard of review for sufficiency of the evidence, to second-guess the determinations of the jury as to the credibility of the evidence. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence
View more legal topics

HN6 Harmless & Invited Error, Evidence

The appellate court reviews evidentiary rulings for an abuse of discretion, subject to the harmless error rule. An abuse of discretion occurs when a ruling is grounded in a legal error or based on a clearly erroneous analysis of the evidence. But even if such an error occurs, the court will not reverse if the guilty verdict was unattributable to the error-the harmless error rule. More like this Headnote

Shepardize - Narrow by this Headnote (0)

View more legal topics

HN7 **Preservation for Review, Abandonment**

Under Fed. R. App. P. 28(a)(8)(A) and 28 (b), appellee's brief must include contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellee relies. The court treats inadequately-briefed arguments as abandoned. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN8 **Harmless & Invited Error, Evidence**

It is well established that error in admitting evidence will be found harmless when substantial evidence supports the same facts and inferences as those in the erroneously admitted evidence. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence
View more legal topics

HN9 **Harmless & Invited Error, Evidence**

Evidentiary rulings are normally reviewed for abuse of discretion, subject to the harmless error rule. But where the defendant did not object to the admission of testimony regarding an accomplice's guilty plea in the district court, the appellate court instead reviews the issue for plain error to determine whether the testimony seriously affected defendant's substantial rights. To make this determination, the court should consider (1) whether a limiting instruction was given; (2) whether there was a proper evidentiary purpose for introduction of the guilty plea; (3) whether there was an improper emphasis on or use of the plea as substantive evidence; and (4) whether the introduction was invited by defense counsel. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Admissibility at Trial
View more legal topics

HN10 **Guilty Pleas, Admissibility at Trial**

A defendant will not be heard to complain of the admission of another's guilty plea when he attempts to exploit the evidence by frequent, pointed, and direct references to the codefendant's guilty plea. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery

HN11 **Crimes Against Persons, Robbery**

To be sure, presence at the scene of a robbery and close association with those involved are insufficient factors alone; nevertheless, they are relevant factors for the jury, and coupled with the collocation of circumstances, they may permit a jury to infer that an individual participated in the crime. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

HN12 **Preservation for Review, Exceptions to Failure to Object**

A manifest miscarriage of justice occurs where the record is devoid of evidence pointing to guilt or contains evidence on a key element of the offense that is so tenuous that a conviction would be shocking. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Trials > Motions for Acquittal

HN13 Trials, Motions for Acquittal

To preserve an issue for de novo review, a defendant must specifically raise the issue in making his Fed. R. Crim. P. 29 motion. Where a defendant asserts specific grounds for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Appeals > Standards of Review

HN14 Appeals, Standards of Review

The court, not the parties, determines the proper standard of review. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
View more legal topics

HN15 Standards of Review, Abuse of Discretion

The appellate court normally reviews jury instructions for an abuse of discretion, granting the district court substantial latitude in describing the law. However, where the defendant failed to object to the omission of a Rosemond instruction at trial, the court reviews instead for plain error. To demonstrate plain error, Wise must show that (1) an error occurred; (2) the error was clear and obvious, not subject to reasonable dispute; and (3) the error affected his substantial rights. An error is clear and obvious if controlling circuit court or Supreme Court precedent has clarified that the action, or inaction, is an error. If the appellate court determines that all three factors are met, the court has the discretion to remedy the error-discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Accessories > Aiding & Abetting
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HN16 Accessories, Aiding & Abetting

In Rosemond v. United States, the U.S. Supreme Court held that the defendant could not be found guilty of aiding and abetting a drug trafficking crime with the use of a firearm-a violation of 18 U.S.C.S. § 924(c)-unless the jury found that he had prior knowledge that his confederates would carry a gun because § 924(c) requires both that (1) a drug trafficking or other violent crime occur; and (2) a firearm be used in the process. Even though a defendant does not have to perform an act in pursuit of each element of the crime, the defendant does have to intend for each element to occur. And that intent can only be demonstrated where the defendant had advance knowledge-knowledge that enables him to make the relevant legal (and indeed, moral) choice-of the aggravating factor. In other words, a defendant can only be guilty as an aider or abettor of a § 924(c) offense if he had an opportunity to either alter the plans so that a firearm would not be used or withdraw from the firearm-infused enterprise altogether. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN17 Accessories, Aiding & Abetting

Rosemond v. United States created a general rule that when a combination crime is involved, an aiding and abetting conviction requires that the defendant's intent go to the specific and entire crime charged. But there is one important caveat to this general rule. The Supreme Court expressly declined to answer whether a defendant must have had advance knowledge of the aggravating offense if it is a natural and probable consequence of the predicate crime. So it remains an open question. More like this Headnote

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Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

courts did not commit plain error in failing to give a Rosemond instruction because neither the Fifth Circuit nor the Supreme Court has explicitly ruled that such an instruction is necessary. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review
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HN19 Standards of Review, Clearly Erroneous Review
The district court's interpretation of the U.S. Sentencing Guidelines is reviewed de novo, and its factual findings are reviewed for clear error. Under clear-error review, a finding of fact will only be reversed if it is implausible in light of the record as a whole. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

HN20 Commission of Another Crime, Elements
While "brandishing" can mean as little as displaying part of a firearm or making the presence of the firearm known in order to intimidate, "otherwise using" a weapon includes pointing the weapon at an individual in a specifically threatening manner. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > Adjustments & Enhancements
View more legal topics

HN21 Sentencing Guidelines, Adjustments & Enhancements
As with the application of an enhancement, the appellate court also reviews the district court's decision not to apply a sentencing reduction de novo on the law, but for clear error on the facts. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > Downward Departures

HN22 Departures From Guidelines, Downward Departures
A "minimal participant" for purposes of a sentence reduction is one who is plainly among the least culpable of those involved in the conduct of a group, U.S. Sentencing Guidelines Manual § 3B1.2, cmt., application n. 4, while a minor participant is one who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal, § 3B1.2, cmt., application n. 5. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > Downward Departures

HN23 Departures From Guidelines, Downward Departures
In assessing whether to reduce a defendant's sentence for his role in a crime, a district court should consider, among other things: (i) the defendant's understanding of the scope and structure of the criminal activity; (ii) the defendant's participation in planning or organizing the criminal activity; (iii) the defendant's decision-making authority or influence; and (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts. U.S. Sentencing Guidelines Manual § 3B1.2, cmt., application n. 3(C). More like this Headnote

Shepardize - Narrow by this Headnote (0)

For **WALTER** FREEMAN **JORDAN**, III, Defendant - Appellant: Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

For JOHNATHON NICO WISE, Defendant - Appellant: Quentin Tate Williams, Hilder & Associates, P.C., Houston, TX.

Judges: Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

Opinion by: DON R. WILLETT

Opinion

[*251] DON R. WILLETT, Circuit Judge:

Walter Freeman **Jordan**, III and Johnathon Nico Wise were found guilty, along with several co-defendants, of aiding and abetting aggravated credit union robbery in violation of 18 U.S.C. § 2113(a), (d)(2). **Jordan** was additionally found guilty of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), (c)(2). They both appeal their convictions and sentences.

Jordan argues that (1) there was insufficient evidence to sustain his conviction; (2) the district court erred in permitting testimony that identified **Jordan** and Wise as brothers; and (3) the [**2] district court erred in permitting co-defendants' testimony regarding their own guilty pleas. Wise similarly argues that (4) there was insufficient evidence to support his conviction; and (5) the district court erred in permitting testimony that identified **Jordan** and Wise as brothers. He additionally argues that (6) the district court plainly erred in failing to give a *Rosemond* instruction; (7) the district court clearly erred in applying a sentencing enhancement for the use of a firearm; and (8) the district court clearly erred in denying a Guidelines reduction for Wise's allegedly minimal role in the robbery.

We AFFIRM the convictions and sentences.

[*252] I. Background

Because **Jordan** and Wise both challenge the sufficiency of the evidence, it's necessary for us to dive into the record to understand what evidence was before the jury. We read the facts in the light most favorable to the jury's verdict. 1

A. The Robbery

On July 24, 2017, the Houston Police Department was investigating **Walter Jordan** and monitoring a phone number—ending in 6601—attributed to him. By following cell tower signals, 2 officers observed the phone move from the Third Ward of Houston to the Cinco Ranch area. At the same time, [**3] surveilling officers followed **Jordan** as he drove a maroon Volkswagen Jetta from the Third Ward of Houston to the Cinco Ranch area. Both the phone and **Jordan** then traveled back to the Third Ward, at which point officers saw **Jordan** exit the Jetta.

The next morning, officers observed the phone move from its usual nighttime location earlier than usual, prompting them to begin surveillance on Greenmont Street. There, they identified a silver Chevrolet Malibu, black Toyota Tundra, silver Nissan Rogue, and the maroon Jetta that **Jordan** had been driving the day before. **Jordan**, Wise, and others moved between the vehicles over the course of a couple of hours, and eventually, all four cars filed out in formation. As the four vehicles pulled off of Greenmont, heading west, officers followed in unmarked vehicles.

The vehicles drove to the Cinco Ranch area—the same area that **Jordan** had traveled to the day before. The four cars under surveillance then "scrambled." The fleet of about twenty officers initially followed the cars moving in various directions but then set up posts at different locations around the area. From their respective posts, the officers were able to continue observing the vehicles' [**4] movements. The 6601 phone was in the Cinco Ranch area at this time as well, with the signal bouncing between two nearby towers.

Officers noticed that the four cars seemed to be focused on First Community Credit Union. Each car spent about fifty minutes either parked—facing the credit union—or circling various streets that ultimately led back to the credit union. Eventually, the Tundra pulled into a parking spot in front of the credit union, and three men exited the truck and ran inside. A fourth man followed shortly after. Because the men's faces and hands were covered, officers were unable to physically identify them.

robbers proceeded to go through the tellers' drawers, ultimately collecting money from two, including "bait bills."[3] The robbers then attempted to get into the vault, striking one bank employee when he failed to open it. When a teller informed them that she **[*253]** didn'tt know the vault combination either, one of the robbers lifted his shirt, revealed [**5] the gun in his waistband, and instructed her to get back on the ground. Shortly after, another person came into the credit union and shouted, "The cops are down the street." The robbers jumped back over the teller counter and fled the credit union. On their way out, one of the robbers pointed a gun at a customer attempting to enter the credit union, prompting the customer to turn around and return to his car.

After the robbers returned to the Tundra and began driving away, the Rogue, Jetta, and Malibu—which had been parked in various spots near the credit union—followed. Officers in marked vehicles followed the Tundra, while officers in unmarked vehicles stopped the others. Deandre Santee and Wise occupied the Rogue, Daryl Anderson occupied the Jetta, and Jaylen Loring occupied the Malibu. All four were detained.

Meanwhile, the officers' pursuit of the Tundra and its four occupants continued. The cars flew down the highway at speeds around 130 miles per hour until the Tundra exited. After it was off the highway, the Tundra made numerous turns, flew through red lights, and drove into oncoming traffic, eventually hitting a dead end. With nowhere left to turn, the Tundra's driver slammed [**6] on his breaks, and the passengers jumped out of the still-moving vehicle and began to flee on foot. One passenger—Raymond Pace—was not fast enough to get out of the Tundra's way and was crushed between the front bumper and a fence; officers called for medical assistance and placed Pace under arrest. The three other passengers continued running toward an apartment complex at the fence line.

Officers learned that **Jordan**'s brother, Terrance,[4] lived in the apartment complex and promptly obtained a search warrant for his unit. With resistance, officers were able to make their way into the apartment.[5] Inside, they noticed still-wet hoodies in the washing machine that had the same markings as the ones worn by the robbers and a shoebox with a gun and pair of gloves that matched the gloves worn by the robbers. Outside of the unit, but still in the apartment complex, officers located a backpack on a small balcony between the second and third floors, which contained hoodies and gloves that matched the ones worn by the robbers and a pillowcase with cash, including the credit union's bait bills. Back at the Tundra, officers catalogued, among other things, gloves and a pistol found underneath the front [**7] passenger seat. They also retrieved a phone off of Pace that matched the 6601 number affiliated with **Jordan**, and another three phones were retrieved from inside the Rogue, one of which matched another phone number affiliated with **Jordan**. Phone records later confirmed that these phones were engaged in multiple calls with one another throughout the robbery.

[*254] B. The Trial Testimony

Anderson and Loring, two of the individuals arrested in companion cars, testified against **Jordan** and Wise at trial. During direct examination, the prosecutor elicited testimony that both had pled guilty to aiding and abetting the robbery of the First Community Credit Union. They both also acknowledged that their goal in testifying was to reduce their sentences.

In his testimony, Anderson acknowledged his past convictions for giving a false name to a police officer, possessing a controlled substance, and displaying a false license plate. He then went on to explain his relationship with **Jordan**. Anderson told the jury that he had known **Jordan** most of his life and that, on the morning of the robbery, **Jordan** had enlisted his help in being a lookout during the robbery. At first, Anderson refused and left Greenmont Street [**8] with his "good friend," Santee. But then **Jordan** called him and begged for his help, promising that Anderson's only role would just be as "some extra eyes." Anderson agreed to be a lookout, and **Jordan** filled him in on the details. Santee and Anderson then sat in Santee's Rogue, and Santee asked what he was supposed to do. Anderson didn't give Santee any specific instructions but told him just to follow. Minutes later, Wise, who had been in the Jetta, got into the Rogue with Santee. Anderson got into the Jetta. **Jordan** entered the driver's seat of the Tundra. And the cars set off for the credit union. En route, those in the Tundra, Jetta, and Rogue engaged in a three-way call. The purpose of the call wasn't to chat, but to keep one another informed if any cops came into view or trouble arose. The driver of the Malibu, a woman who Anderson didn't know, joined the call as well; she let them know the credit union was all clear. Anderson testified that the Tundra then parked in front of the credit union, those in the Tundra went into the bank for ten to fifteen minutes, and then they came back out and fled. Anderson attempted to follow them, but was soon cut off by unmarked police vehicles [**9] and placed under arrest.

Loring testified that she met **Jordan**, also known as Wacko, on Instagram about a week before the robbery when he messaged her about the opportunity to make quick money. They met a couple of times over that week, and **Jordan** filled her in on his plan. Loring testified that **Jordan** was the driver of the Tundra on the day of the robbery and that **Jordan** called her during their drive to the credit union to say, "Follow us," which she did in her Malibu. She continued to hear

wasn't inside—it wasn't. The Tundra then pulled into the parking lot, and the to-be robbers went inside. Loring remained on the phone throughout. She then saw the men leave the credit union, get back in the Tundra, and pull out. Loring attempted to follow, but she was quickly pulled over and arrested.

In addition to Loring and Anderson, numerous officers testified. Among them was Sergeant David Helms, who provided testimony regarding the evidence collected at the scene, [**10] forensic testing, and the relationship of the defendants. Specifically, he testified, over defense counsel's objections, that Wise and **Jordan** were brothers. During cross examination, defense counsel confirmed that Sergeant Helms acquired this knowledge during the course of the investigation and that neither **Jordan** nor Wise "tr[ied] to hide it from [him]."

C. The Verdict and Sentence

The defense moved for judgment of acquittal at the close of the Government's **[*255]** case-in-chief, which the district court denied, and the case was left with the jury. The jury found that **Jordan** and Wise were guilty of aiding and abetting aggravated credit union robbery, in violation of 18 U.S.C. § 2113(a), (d)(2). It additionally found **Jordan** guilty of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), (c)(2).

Jordan and Wise were later sentenced by the district court, with their offense levels calculated using the 2016 Guidelines Manual. The district court sentenced **Jordan** to 262 months' imprisonment on Count One and 84 months' on Count Two, to run consecutively for a total of 326 months' incarceration.

Wise's base offense level was 20. Among other enhancements, he received a 6-level [**11] increase because a firearm was used in the commission of the robbery. Wise objected to this enhancement and others and also argued that his offense level should be reduced because he played a minimal role in the crime. The district court overruled Wise's objection to the use-of-a-firearm enhancement and denied his request for a role-reduction. Over defense counsel's request for a punishment of 60 months' imprisonment, the district court imposed a term of 121 months'.

Jordan and Wise now appeal.

II. Discussion

A. Jordan's Claims on Appeal

1. The evidence was sufficient to support the jury's finding of guilt against Jordan.

HN1 Issues regarding sufficiency of the evidence are largely fact-based questions that we review de novo.[6] And we "must affirm a conviction if, after viewing the evidence and all reasonable inferences 'in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[7] Importantly, this means that our review is "limited to whether the jury's verdict was *reasonable*, not whether we believe it to be *correct*."[8]

Jordan argues that the evidence is insufficient to support a [**12] finding of guilt because the Government's case impermissibly "pile[d] inference upon inference" and there was no DNA or fingerprint evidence to link **Jordan** to the crimes.[9] His argument is unavailing. As the Government notes, the testimony of Anderson and Loring alone is sufficient to warrant a guilty verdict against **Jordan** on the first count—aiding and abetting robbery.[10] Anderson testified that **Jordan** enlisted his **[*256]** help in the robbery, was the driver of the Tundra, and was on the phone with him throughout the robbery. Loring also testified that **Jordan** enlisted her help in the robbery, was the driver of the Tundra, and was on the phone with her throughout the robbery. This testimony is substantial enough, on their face, to demonstrate that **Jordan** was involved in the robbery of the credit union.

Jordan argues that Anderson and Loring's testimony cannot support his conviction because they are incredible.[11] ***HN4*** However, "[t]he jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses."[12] And, despite **Jordan**'s assertion in his reply brief, none of Loring or Anderson's statements were so outside the realm of possibility that no juror could have [**13] believed them.[13] **Jordan**'s counsel had every opportunity to impeach both Anderson and Loring for their previous acts of dishonesty and any inconsistencies in their testimony, and the jury independently weighed that testimony and determined that the evidence was sufficient to support a finding of guilt. We do not second-guess such findings.[14]

vehicle that was used as a lookout during the robbery; a phone associated with **Jordan** moved in the same direction as **Jordan** the day before the robbery, and then that phone was used during the robbery and found on a co-defendant; and the bait bills and clothing worn by the robbers were found in or around **Jordan**'s brother's apartment complex immediately after the robbery. From this evidence alone, a reasonable juror could conclude that **Jordan** participated in the robbery.[15]

As for the second count—aiding and abetting the brandishing of a firearm during and in relation to a crime of violence—the evidence [**14] also supports conviction. Anderson and Loring's testimony **[*257]** demonstrates that **Jordan** played a leadership role in organizing the robbery. Witnesses testified that a gun was brandished at a teller and pointed at a customer. A pistol was found in the Tundra driven by **Jordan**. And another gun was found in a shoebox at **Jordan**'s brother's apartment under gloves resembling those used in the robbery. From this evidence, a reasonable jury could, and did, conclude that **Jordan** was aware that a firearm would be brandished in the commission of the robbery.

Jordan argues that the evidence is insufficient to link him to the crime because the pistol in the car was not loaded and his fingerprints weren't on the weapon.[16] However, whether **Jordan** ever held the pistol is of no moment because "[w]hover commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[17] And the jury made a specific finding that **Jordan** had advance knowledge that a firearm would be used by someone during the crime. Given **Jordan**'s role in the robbery, that a firearm actually was brandished in the credit union and pointed at a customer, and that **Jordan** [**15] was driving the car that housed a pistol, the jury's guilty verdict was reasonable.

2. If the district court erred in admitting testimony that Jordan and Wise are brothers, the error was harmless.

HN6 We review evidentiary rulings for an abuse of discretion, subject to the harmless error rule.[18] An abuse of discretion occurs when a ruling is grounded in a legal error or based on a clearly erroneous analysis of the evidence.[19] But even if such an error occurs, we will not reverse if the guilty verdict was unattributable to the error—the harmless error rule.[20]

Jordan argues that the district court erred in admitting Officer Helms' testimony regarding his relationship to Wise because the court lacked proper foundation and the testimony was more prejudicial than probative. The Government, however, did not respond to these arguments other than to say, "No error occurred, alternatively, any error was harmless."[21] Failing to provide any reasoning or law to support its statement that "[n]o error occurred," the Government has abandoned this argument.[22]

Though the Government has forfeited its argument as to whether an error occurred, it has not waived its argument as to whether the error was harmless. As the [**16] Government notes, the testimony was harmless because it did not have a "substantial **[*258]** and injurious effect or influence in determining the jury's verdict."[23] Before Officer Helms' testimony was presented, the jury had already heard testimony from two co-defendants who described **Jordan**'s involvement in the robbery and from other officers who had traced **Jordan**'s phone along the robbery route and described the clothing and bait bills found at the apartment complex of **Jordan**'s other brother, Terrance. Because this substantial evidence supports the conclusion that **Jordan** was guilty of aiding and abetting robbery, during which a firearm was used—absent information about a relationship between **Jordan** and Wise—any error was harmless.[24]

3. The district court did not plainly err in admitting evidence that Loring and Anderson pleaded guilty.

HN9 Evidentiary rulings are normally reviewed for abuse of discretion, subject to the harmless error rule.[25] But **Jordan** did not object to the admission of testimony regarding Loring and Anderson's guilty pleas in the district court, so we instead review the issue for plain error to determine whether the testimony "seriously affected [**Jordan**'s] substantial rights."[26] [**17] To make this determination, we should consider (1) whether a limiting instruction was given; (2) whether there was a proper evidentiary purpose for introduction of the guilty plea; (3) whether there was an improper emphasis on or use of the plea as substantive evidence; and (4) whether the introduction was invited by defense counsel.[27]

First, the jury was specifically instructed that "[t]he fact that an accomplice has entered a plea of guilty to the offense charged is not evidence of guilt of any other person." Second, the introduction of the guilty pleas served a proper evidentiary purpose: it "' blunt[ed] the sword' of anticipated impeachment" by revealing the witnesses' "blemished reputation[s]" before the defense could do so, avoiding the appearance of "an intent to conceal."[28] Third, the

counsel cross-examined both Loring and Anderson about their guilty pleas and sought to impeach them for their cooperation with the Government.[29] We have held [**18] that HN10 "a defendant will not be heard to complain of [the] admission [of another's guilty plea] when he . . . attempts to exploit the evidence by frequent, pointed, and direct references to the [codefendant's] **[*259]** guilty plea."[30] Here, the defense did just that.

Because each factor weighs against a finding that **Jordan**'s rights were seriously affected, the district court did not plainly err in admitting the testimony.

* * *

A review of the record and relevant case law demonstrates that **Jordan** was convicted on the basis of sufficient evidence; the admission of evidence regarding his relationship to Wise was, at worst, harmless error; and the district court did not plainly err in admitting testimony of Anderson and Loring's guilty pleas.

B. Wise's Claims on Appeal

4. The evidence was sufficient to support the jury's finding of guilt against Wise.

Wise argues that the evidence was insufficient to support his conviction in two respects: first, that there was no evidence Wise "aided and abetted"; second, that there was no evidence Wise had advance knowledge that a weapon would be used. We review the first argument de novo,[31] but we review the second argument for a manifest miscarriage of justice.[32] Both are [**19] unavailing.

Wise first argues that the jury only received evidence that he was *present* during the robbery, but that it did not receive any evidence that Wise *participated*. HN11 To be sure, "presence at the scene and close association with those involved are insufficient factors alone; nevertheless, they are *relevant* factors for the jury,"[33] and coupled with the "collocation of circumstances," they may permit a jury to infer that an individual participated in the crime.[34] Wise's argument asks us to assume that the jury ignored one of its key roles—making rational inferences—which we cannot do.[35]

Wise was observed moving between the robbery vehicles the morning of the crime before getting into the passenger seat of the Rogue—where Santee, who didn't have any details about the robbery, was the driver—and leaving for the credit union. Wise was later arrested in the Rogue, which was trying to follow the Tundra in its flight from the scene of the crime, and a phone that was used to place calls to the co-defendants during the robbery was found in Wise's seat. Viewing "all reasonable inferences in the light most favorable to the prosecution,"[36] a reasonable juror [**20] could conclude that Wise participated in the robbery, either by informing Santee of the details of the operation, serving as a lookout, manning the phones, or all three. In fact, it borders on fantasy to conclude that Wise would have ridden in the car throughout the crime without looking for the presence of cops or participating **[*260]** in the phone calls; such a conclusion goes against the "common knowledge of the natural tendencies and inclinations of human beings,"[37] and it cannot be sincerely considered.

Wise also argues that there was insufficient evidence to support his conviction because aggravated credit union robbery is a "combination crime," requiring both (1) a credit union robbery to occur and (2) an assault or threat to the life of another person to occur by use of a dangerous weapon or device. As such, he argues, the jury was required to find both elements beyond a reasonable doubt[38] but no evidence was offered to show that Wise had advance knowledge that an assault or threat to life would occur. Even assuming that the jury was required to find advance knowledge, Wise did not raise this issue in making his motion for a judgment of acquittal, so it was not properly preserved for [**21] de novo review on appeal.[39] HN12 Instead, we should review for a manifest miscarriage of justice.[40] A manifest miscarriage of justice occurs where "the record is devoid of evidence pointing to guilt or contains evidence on a key element of the offense that is so tenuous that a conviction would be shocking."[41]

Though the evidence of Wise's guilt is more circumstantial than evidence connecting **Jordan** to the crime, the record is not so devoid of evidence that his guilty conviction is "shocking." For instance, Wise was observed moving between the four robbery vehicles the morning of the crime and communicating with various co-defendants. He ultimately switched vehicles with Anderson, who had been brought into the plan only that morning, so that he would be in the same car as Santee, who didn't have any details about the robbery. The evidence also demonstrates that Wise was on a conference call with the co-defendants throughout the commission of the robbery, and he was ultimately arrested in a vehicle following the fleeing Tundra after the robbery was completed. Witnesses testified that one bank employee was assaulted during the robbery; another [**22] employee was threatened, albeit implicitly, when one **[*261]** of the robbers brandished his firearm; and a gun was pointed at a bank customer when he tried to enter the credit union. Guns were

co-defendants would be carrying weapons in the commission of the robbery, and that those weapons would be used to threaten or assault those the robbers confronted.[42]

5. If the district court erred in admitting testimony that Jordan and Wise are brothers, the error was harmless.

As with **Jordan**'s claim on this issue, Officer Helm's testimony regarding the relationship between **Jordan** and Wise was harmless as to Wise because it did not have a "substantial and injurious effect or influence in determining the jury's verdict."[43] Wise's participation in the robbery becomes no more or less true because of his relationship to **Jordan**.[44] With or without a brotherly connection, Wise was still observed moving between the vehicles prior to the robbery, seen entering the Rogue [**23] to join newly-recruited Santee before the cars left for the robbery, and arrested in the Rogue after the robbery. And whether Wise is **Jordan**'s brother makes it no more or less likely that Wise dialed the co-defendants from the phone found in his seat or acted as a lookout instead of passively, innocently sitting in the car. Because this substantial evidence supports the conclusion that Wise was guilty of aiding and abetting aggravated robbery, regardless of any information about a relationship between **Jordan** and Wise, any error was harmless.

6. The district court did not plainly err in failing to give a* Rosemond *instruction.

HN15 We normally review jury instructions for an abuse of discretion, granting the district court "substantial latitude in describing the law";[45] however, because Wise failed to object to the omission of a *Rosemond* instruction at trial, we review instead for plain error.[46] To demonstrate plain error, Wise must show that (1) an error occurred; (2) the error was clear and obvious, not subject to reasonable dispute; and (3) the error affected his substantial rights.[47] An error is clear and obvious **[*262]** if controlling circuit court or Supreme Court precedent has clarified that the [**24] action, or inaction, is an error.[48] If we determine that all three factors are met, we "ha[ve] the *discretion* to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[49]

Wise argues that the district court erred in failing to instruct the jury that, to find Wise guilty, they must also find that he had advance knowledge that a firearm would be used—a *Rosemond* Instruction***HN16*** . In *Rosemond v. United States*, the Supreme Court held that a defendant could not be found guilty of aiding and abetting a drug trafficking crime with the use of a firearm—a violation of 18 U.S.C. § 924(c)—unless the jury found that he had prior knowledge that his confederates would carry a gun because § 924(c) requires both that (1) a drug trafficking or other violent crime occur; and (2) a firearm be used in the process.[50] Even though a defendant *does not* have to *perform an act* in pursuit of each element of the crime, the Court held that the defendant *does* have to *intend* for each element to occur.[51] And, the Court clarified, that intent can only be demonstrated where the defendant had advance knowledge—"knowledge that enables him to [**25] make the relevant legal (and indeed, moral) choice"—of the aggravating factor.[52] In other words, a defendant can only be guilty as an aider or abettor of a § 924(c) offense if he had an opportunity to either alter the plans so that a firearm would not be used or withdraw from the firearm-infused enterprise altogether.[53]

HN17 We have since interpreted *Rosemond* to have created a general rule that "when a combination crime is involved, an aiding and abetting conviction requires that the defendant's intent 'go to the specific and entire crime charged.'"[54] But there is one important caveat to this general rule. In *Rosemond*, the Supreme Court expressly declined to answer whether a defendant must have had advance knowledge of the aggravating offense if it is a "natural and probable consequence" of the predicate crime.[55] The Court acknowledged that some authorities suggest that advance knowledge is not necessary in those circumstances, but "because no one contend[ed] that a § 924(c) violation is a natural and probable consequence of simple drug trafficking[,] . . . [the Court] express[ed] no view on the issue."[56] So it remains an open question.

Which brings us back to our case. ***HN18*** In a series of unpublished opinions, [**26] panels of this court have held that district courts did not commit plain error in failing to give a *Rosemond* instruction because neither this court nor the Supreme Court has explicitly ruled that such an instruction is necessary.[57] **[*263]** Wise argues that we, in *United States v. Baker*, have since ruled that a *Rosemond* instruction is required in cases such as this one.[58] However, *Baker* was amended and superseded on panel rehearing.[59] In the amended opinion, we "[did] not address Baker's challenge to the jury instructions under *Rosemond*."[60] This case therefore does not assist in our review and reinforces that an open question remains. Because the law is not clearly settled, the district court could not have plainly erred in failing to give a *Rosemond* instruction.

7. The district court did not clearly err in applying a six-level Guideline enhancement for the use of a firearm.

HN19 The district court's interpretation of the Sentencing Guidelines is reviewed de novo, and its factual findings are reviewed for clear error.[61] Under clear-error review, a finding of fact will only be reversed if it is "implausible in light of the record as a [**27] whole."[62]

Wise argues that the district court clearly erred in applying a six-level enhancement for "otherwise us[ing]" of a firearm during the credit union robbery. He makes two primary arguments: (1) the use of a firearm was not reasonably foreseeable to Wise and (2) at most, Wise should have only received a five-level enhancement because a firearm was brandished, not "otherwise used."

Wise argues that the district court erred in finding that the use of a firearm was reasonably foreseeable[63] to Wise because the Government did not offer any testimony from co-defendants regarding a plan to use weapons. However, for the same reasons that the evidence was sufficient to support a finding that Wise aided and abetted aggravated robbery, the district court had sufficient evidence to conclude that the use of a firearm was reasonably foreseeable to Wise. As discussed, Wise was seen moving between the robbery vehicles and communicating with the various **[*264]** co-defendants prior to the crime, he was on a conference call with all of the co-defendants before and during the robbery, he was arrested in one of the robbery vehicles immediately after the crime, and multiple guns were found in close proximity to [**28] other robbery-related evidence. From this, it is reasonable to conclude that the use of a firearm was foreseeable to Wise.

Even absent this specific evidence, the nature of credit union robbery and Wise's complicity in that robbery alone may be sufficient to support the district court's finding. For instance, in *United States v. Burton*, we held that the district court did not err in applying a six-level sentencing enhancement where the defendant was present during an armed robbery, even though he did not physically possess the weapon, "given the nature of bank robbery," which is, by its nature, a violent crime.[64] As in *Burton*, the district court here did not commit clear error.

Wise further argues that, even if it was reasonably foreseeable that a firearm would play a role during the robbery, he should have only received a five-level enhancement, not six, because the firearm was only brandished, not otherwise used. However, this argument is belied by the facts and the law. Though a gun was brandished at the bank teller, testimony at trial revealed that the robbers also pointed a gun in a customer's face on their way out of the credit union. The distinction between "brandishing" [**29] and "otherwise using" is essential.[65] ***HN20*** While brandishing "can mean as little as displaying part of a firearm or making the presence of the firearm known in order to intimidate,"[66] otherwise using a weapon includes pointing the weapon at an individual in a specifically threatening manner.[67] Because the robbers here did both—brandished and otherwise used a gun—during the commission of the robbery, the district court did not err in applying a six-level enhancement to Wise's sentence.

8. The district court did not clearly err in denying Wise's request for a Guidelines reduction for his role in the robbery.

HN21 As with the application of the six-level enhancement, we also review the district court's decision not to apply a sentencing reduction de novo on the law, but for clear error on the facts.[68]

Wise argues that he should have received a three-point reduction in his sentence because he was a "minimal participant" in the crime, or, at least, he should have received a two-point reduction because he was a "minor participant." ***HN22*** A minimal participant is one who is "plainly among the least culpable of those involved in the conduct of a group,"[69] while a minor participant is one who "is less culpable than [**30] most other participants in the criminal activity, but whose role could not be described as minimal."[70] Wise argues that either definition can be applied to him because "the evidence show[s] [that Wise] was nothing more than a passenger who recruited no one, scouted nothing, planned **[*265]** nothing, directed no one, drove nothing, spoke to no one, and never got out of the car."[71] And, in any event, Wise argues, the evidence shows that the co-defendants played much more substantial roles than Wise, such as by driving the vehicles, entering the bank as a robber, or even entering the bank as a lookout.

HN23 In assessing whether to reduce a defendant's sentence for his role in a crime, a district court should consider, among other things: (i) the defendant's understanding of the scope and structure of the criminal activity; (ii) the defendant's participation in planning or organizing the criminal activity; (iii) the defendant's decision-making authority or influence; and (iv) "the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts."[72]

Santee, and Loring, based on Wise's movement between the vehicles and because he switched cars with Anderson and instead rode with Santee—a newly recruited and uninformed confederate; (ii) Wise was at least somewhat involved in the planning or organizing of the details of the robbery based on his communication with the co-defendants and that he rode with the least informed confederate during the crime; and (iii) Wise's participation was at least equal to the other lookouts' who followed the Tundra—he too kept an eye out for police officers, maintained communication throughout the crime, and attempted to flee from the scene. As Wise notes, the Government did not provide evidence that Wise had decision-making authority. But, even without such evidence, the other three factors support the district court's finding that Wise was not a minimal or minor participant. Therefore, the district court did not clearly err in declining to grant a point reduction based on Wise's role in [**32] the criminal activity.

* * *

A review of the record and relevant case law demonstrates that Wise was convicted on the basis of sufficient evidence; the admission of evidence regarding his relationship to **Jordan** was, at worst, harmless error; the district court did not plainly err in failing to give a *Rosemond* instruction; and the district court did not clearly err in applying a six-level enhancement for the "otherwise use" of a firearm or in not applying a two- or three-level reduction for Wise's role in the crime.

Conclusion

Neither **Jordan** nor Wise has shown any reversible error, and their convictions and sentences are AFFIRMED.

Footnotes

1 *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc).

2 To track the cell phone, officers received updates from the service provider that showed which cell tower the phone was using to transmit data, which provided officers with the phone's general location at any given time.

3 "Bait bills" are fake monies that tellers log, according to numbers printed on the bills, every time they close out their drawers. These bills allow financial institutions and police officers to track stolen money.

4 Though it is undisputed that **Jordan** and Terrance are brothers, and there is testimony that **Jordan** and Wise are brothers, there is no evidence to suggest that Terrance and Wise are related by blood.

5 In its brief, the Government asserts that **Jordan** was engaged in a standoff with SWAT officers at the apartment and, after hours of negotiations, surrendered. However, this information does not seem to have been provided to the jury but instead was only included in **Jordan**'s PSR. At one point, defense counsel asked Officer Helms whether "three males came from out of that apartment." Officer Helms confirmed that was correct and also confirmed that "[o]nly one of those males [was] charged." The charged male was not identified during this testimony. Because the circumstances of **Jordan**'s arrest were not before the jury, we do not consider them in our review.

6 *United States v. Oti*, 872 F.3d 678, 686 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1988, 201 L. Ed. 2d 249 (2018).

2d 560 (1979)).

8 *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001) **HN2** (emphasis added); *see also United States v. Terrell*, 700 F.3d 755, 760 (5th Cir. 2012) ("The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt.").

9 *See* **Jordan**'s Br. at 25 (quoting *United States v. McDowell*, 498 F.3d 308, 314 (5th Cir. 2007)).

10 *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994) **HN3** ("[A] guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face.").

11 For instance, **Jordan** argues that Loring's testimony is incredible because she claimed that she thought robbery would be "easy," agreed to serve as a lookout after knowing **Jordan** for about a week and without "too much conversation" with him, and because there are inconsistencies in her statements. He argues that Anderson's testimony is incredible because he was testifying in hopes of receiving a reduced sentence, has a criminal record, and has inconsistencies in his statements.

12 *United States v. Scott*, 892 F.3d 791, 797 (5th Cir. 2018) (internal quotation omitted).

13 *See United States v. Cravero*, 530 F.2d 666, 670 (5th Cir. 1976) (noting that for "testimony to be incredible it must be unbelievable on its face"); *see also United States v. Gadison*, 8 F.3d 186, 190 (5th Cir. 1993) (noting that testimony is incredible, as a matter of law, if it relates to facts that the witness could not possibly have observed or events that could not have occurred under the laws of nature).

14 *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005) **HN5** ("It is not our role, . . . under our standard of review for sufficiency of the evidence, to second-guess the determinations of the jury as to the credibility of the evidence.").

15 **Jordan** argues that because the phone was not found on him, but was found on a co-defendant, there is insufficient evidence to support a finding of guilt. However, the jury is permitted to make reasonable inferences from circumstantial evidence, and one such reasonable inference is that, if a co-defendant was using **Jordan**'s phone in the commission of a robbery, **Jordan** was a participant. Even if this evidence alone is not sufficient to warrant a guilty verdict, this evidence considered alongside the significant other circumstantial evidence is.

16 **Jordan** does not explain why it is relevant whether the weapons were loaded, but, presumably, he is arguing that, if the weapons weren't loaded, they weren't dangerous. However, "we find it unrealistic to require proof that the gun was actually loaded or that the perpetrator of the crime was disposed to use the weapon. The use of a gun is per se sufficient . . . ." *United States v. Parker*, 542 F.2d 932, 934 (5th Cir. 1976).

18 *United States v. Dunigan*, 555 F.3d 501, 507 (5th Cir. 2009).

19 *United States v. Garcia*, 530 F.3d 348, 351 (5th Cir. 2008).

20 *United States v. Cornett*, 195 F.3d 776, 785 (5th Cir. 1999).

21 Government's Br. at 40-41.

22 ***HN7*** Fed. R. App. P. 28(a)(8)(A), (b) (noting that appellee's brief must include "contentions and the reasons for them, with citations to the authorities and parts of the record on which the [appellee] relies"). *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir. 1989) (treating inadequately-briefed arguments as abandoned).

23 *United States v. Demmitt*, 706 F.3d 665, 670 (5th Cir. 2013).

24 ***HN8*** *See United States v. El-Mezain*, 664 F.3d 467, 526 (5th Cir. 2011) ("It is well established that error in admitting evidence will be found harmless when . . . substantial evidence supports the same facts and inferences as those in the erroneously admitted evidence.").

25 *Dunigan*, 555 F.3d at 507.

26 *United States v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990).

27 *Id.*

28 *United States v. Marroquin*, 885 F.2d 1240, 1246-47 (5th Cir. 1989) (quoting *United States v. Borchardt*, 698 F.2d 697, 701 (5th Cir. 1983)).

29 For example, defense counsel questioned Loring about the timing of her guilty plea and whether she received any promises from the Government in exchange for her testimony. Counsel also questioned Anderson about his guilty plea, eliciting testimony that "[e]verybody's pled guilty except [**Jordan** and Wise]" and emphasizing that if Anderson didn't help the Government, "[he'd] be looking at a lot of time."

[31] *Oti*, 872 F.3d at 686.

[32] *McDowell*, 498 F.3d at 312-13.

[33] *United States v. Sanchez*, 961 F.2d 1169, 1174 (5th Cir. 1992).

[34] *Id.* (quoting *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988)); *see also Foy v. Donnelly*, 959 F.2d 1307, 1315 (5th Cir. 1992) (citations omitted) (acknowledging that "uncoerced presence at robbery amounts to very strong showing of intent"); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd*, 462 U.S. 356, 103 S. Ct. 2398, 76 L. Ed. 2d 638 (1983) ("It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . .").

[35] *Vargas-Ocampo*, 747 F.3d at 301.

[36] *Id.*

[37] *United States v. Gamez-Gonzalez*, 319 F.3d 695, 698 (5th Cir. 2003).

[38] The jury was instructed that, to find a defendant guilty of aggravated robbery, it must find each of the following elements beyond a reasonable doubt: (i) the defendant took money from another; (ii) the money belonged to or was in the possession of a federal credit union at the time of the taking; (iii) the defendant took the money by means of force, violence, and intimidation; and (iv) the defendant assaulted and put in jeopardy the life of someone with the use of a dangerous weapon in the course of taking the money. It was further instructed that, to find a defendant guilty of *aiding and abetting* aggravated robbery, it must find that: (i) "the offense of Credit Union Robbery" (meaning the above-described crime) "was committed by someone"; (ii) the defendant associated with the crime; (iii) the defendant purposefully participated in the crime; and (iv) the defendant acted to make the crime successful.

[39] *McDowell*, 498 F.3d at 312-13 ***HN13*** (noting that to preserve an issue for de novo review, a defendant must specifically raise the issue in making his Rule 29 motion); *see also United States v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007) ("Where, as here, a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count." (internal quotation omitted)).

[40] *McDowell*, 498 F.3d at 313; *see also id.* (noting that, even though the Government incorrectly stated that the standard of review was de novo, ***HN14*** the court, not the parties, determines the proper standard of review).

42 *See, e.g.*, Parker, 542 F.2d at 934 (finding evidence sufficient where co-defendant brandished firearm during robbery); United States v. Escamilla, 590 F.2d 187, 191 (5th Cir. 1979 (finding evidence sufficient where co-defendant attended planning meetings related to the armed robbery); *see also* Foy, 959 F.2d at 1316 (finding defendant guilty of two armed robberies where the gun used belonged to defendant's father and defendant drove the getaway car after the second robbery, even though no direct evidence connected the defendant to the first robbery); Whitmore v. Maggio, 742 F.2d 230, 232 (5th Cir. 1984) (finding evidence sufficient where co-defendant fired a gun in front of defendant the morning of the robbery).

43 Demmitt, 706 F.3d at 670.

44 *See* El-Mezain, 664 F.3d at 526 ("It is well established that error in admitting evidence will be found harmless when . . . substantial evidence supports the same facts and inferences as those in the erroneously admitted evidence.").

45 United States v. Sertich, 879 F.3d 558, 562 (5th Cir. 2018).

46 United States v. McClatchy, 249 F.3d 348, 357 (5th Cir. 2001).

47 Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

48 *Id.*

49 *Id.* (alteration in original) (quoting United States v. Olano, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).

50 572 U.S. 65, 77, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014). The Court "coin[ed] a term . . . combination crime" to describe § 924(c) because "[i]t punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm." *Id.* at 75.

51 *Id.* at 78.

52 *Id.*

53 *Id.*

55 572 U.S. at 76 n.7.

56 *Id.*

57 *See, e.g.*, *United States v. Gibson*, 709 F. App'x 271, 274 (5th Cir. 2017); *United States v. Saunders*, 605 F. App'x 285, 289 (5th Cir. 2015) (holding that, even assuming jury charge was inadequate under *Rosemond*, court had not committed plain error because "it was reasonably foreseeable that [co-conspirator] would bring a firearm to a bank robbery" because "[b]ank robberies are violent crimes, which often require [confrontation]"); *see also Hughes v. Epps*, 561 F. App'x 350, 354 n.4 (5th Cir. 2014) (holding that *Rosemond* did not apply to cases involving robbery under Mississippi law because the Mississippi Supreme Court has held that the use of a firearm is a natural and probable consequence of simple robbery). *But see United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978) ("[I]n a prosecution for aiding and abetting armed bank robbery, the government must establish not only that the defendant knew that a bank was to be robbed and became associated with and participated in that crime, but also that the defendant 'knew that (the principal) was armed and intended to use the weapon[] and intended to aid him in that respect.'" (quoting *United States v. Short*, 493 F.2d 1170, 1172 (9th Cir. 1974)). *Longoria* was decided nearly thirty years before *Rosemond* and does not confront the "natural and probable consequence" theory.

58 912 F.3d 297, 314-15 (5th Cir.), *superseded by United States v. Baker*, 923 F.3d 390 (5th Cir. 2019).

59 *Baker*, 923 F.3d 390.

60 *Id.* at 406.

61 *United States v. Lawrence*, 920 F.3d 331, 334 (5th Cir. 2019).

62 *United States v. Griffith*, 522 F.3d 607, 611-12 (5th Cir. 2008).

63 U.S. Sentencing Guidelines Manual (U.S.S.G.) § 1B1.3 (2016). ("[A] defendant is held responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.").

64 126 F.3d 666, 679 (5th Cir. 1997); *see also id.* (suggesting that a defendant may be held accountable for the use of a firearm even if he is merely the driver of the getaway car (citing U.S.S.G. § 1B1.3 cmt. 4(B)(i)).

65 *Dunigan*, 555 F.3d at 505.

67 *Id.*

68 *United States v. Sanchez-Villarreal*, 857 F.3d 714, 721 (5th Cir. 2017).

69 U.S.S.G. § 3B1.2, cmt. 4.

70 U.S.S.G. § 3B1.2, cmt. 5.

71 Wise Br. at 51.

72 U.S.S.G. § 3B1.2, cmt. 3(C).