No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATHON NICO WISE,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Quentin Tate Williams
Counsel of Record for Petitioner
HILDER & ASSOCIATES, P.C.
819 Lovett Blvd.
Houston, TEXAS 77006
(713) 655-9111 (Office)
(713) 655-9112 (fax)
tate@hilderlaw.com

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UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA
V.
JOHNATHON NICO WISE

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:17CR00516-005**

USM NUMBER: 28994-479

☐ See Additional Aliases.

Quentin Tate Williams
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 on January 22, 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) and (d) and § 2	Armed bank robbery, aiding and abetting	07/25/2017	1

☐ 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

Signature of Judge

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

August 16, 2018
Date

DEFENDANT: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 121 months.
This term consists of ONE HUNDRED TWENTY-ONE (121) MONTHS as to Count 1.

☐ 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: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 3 years.
This term consists of THREE (3) YEARS as to Count 1.

☐ 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: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

SPECIAL CONDITIONS OF SUPERVISION

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: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$100.00		$401.00

☐ 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: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

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 $100.00 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

Balance due in installments of 25% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be due in equal monthly installments of $25 to commence 60 days after release from imprisonment to a term of supervision.

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**
4:17CR00516-001 - Walter Jordan Freeman III	$401.00	$401.00	
4:17CR00516-002 - Jaylen Christine Loring	$401.00	$401.00	
4:17CR00516-003 - Daryl Carlton Anderson	$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: **JOHNATHON NICO WISE**
CASE NUMBER: **4:17CR00516-005**

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**
4:17CR00516-004 - Deandre Bendard Santee	$401.00	$401.00	
4:17CR00516-005 - Johnathon Nico Wise	$401.00	$401.00	
4:17CR00516-006 - Raymond Demond Pace	$401.00	$401.00	
4:17CR00516-007 - Zelmer Samuel Bonner	$401.00	$401.00	

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20564

D.C. Docket No. 4:17-CR-516-1

United States Court of Appeals
Fifth Circuit
FILED
December 13, 2019
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WALTER FREEMAN JORDAN, III; JOHNATHON NICO WISE,

Defendants - Appellants

Appeals from the United States District Court for the
Southern District of Texas

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

Certified as a true copy and issued as the mandate on Apr 23, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20564

United States Court of Appeals
Fifth Circuit
FILED
December 13, 2019
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

WALTER FREEMAN JORDAN, III; JOHNATHON NICO WISE,

Defendants–Appellants.

Appeals from the United States District Court
for the Southern District of Texas

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

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 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.

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, 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

[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.

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' 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.

Once inside the credit union, two of the men jumped over the teller counter, demanded that the tellers get on the ground, and asked where the money was kept. One teller was then instructed to get back up and unlock her drawer; the 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.

[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.

When a teller informed them that she didn't know the vault combination either, one of the robbers lifted his shirt, revealed 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 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 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.

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

[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.

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 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 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 other voices during the drive, as though the phone was on speaker, but no one was speaking directly to those on the phone call. The only voice she recognized was Jordan's. At his direction, Loring went into the bank to ensure security 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, 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 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 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.

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]

[6] *United States v. Oti,* 872 F.3d 678, 686 (5th Cir. 2017), *cert. denied,* 138 S. Ct. 1988 (2018).

[7] *Vargas-Ocampo*, 747 F.3d at 301 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[8] *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001) (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.").

Jordan argues that the evidence is insufficient to support a 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 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] 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 believed them.[13] Jordan's counsel had every opportunity to impeach

[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) ("[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.*

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]

And even if Anderson and Loring's testimony wasn't credible, the other evidence presented at trial is sufficient to support a guilty verdict. Officers observed Jordan drive to and from the location of the robbery the day before the robbery in a 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 also supports conviction. Anderson and Loring's testimony 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

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) ("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.

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 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.

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]

[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).

[17] 18 U.S.C. § 2(a).

[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).

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 Government notes, the testimony was harmless because it did not have a "substantial 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.

[21] Government's Br. at 40–41.

[22] 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] *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.").

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] 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 prosecution did not linger on the fact that the witnesses had pled guilty, but it merely acknowledged the pleas, and then revealed to the jury that both witnesses were testifying for the purpose of receiving a reduced sentence. Fourth, defense 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 that "a defendant will not be heard to complain

[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

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."[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 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*. To be sure, "presence at the scene and close association with those involved are insufficient factors alone; nevertheless, they are *relevant* factors

"[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."

[30] *Leach*, 918 F.2d at 467.

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

[32] *McDowell*, 498 F.3d at 312–13.

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 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 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

[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 (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).

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 de novo review on appeal.[39] 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

[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 (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, the court, not the parties, determines the proper standard of review).

[41] *United States v. McIntosh*, 280 F.3d 479, 483 (5th Cir. 2002) (quotation omitted) (brackets omitted).

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 employee was threatened, albeit implicitly, when one 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 later retrieved from the Tundra and from Jordan's brother's apartment in a shoebox with other robbery paraphernalia. Based on this evidence, a reasonable jury, without being manifestly unjust, could conclude that Wise was aware that his 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

[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.

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 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.

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 if controlling circuit court or Supreme Court precedent has clarified that the action, or inaction, is an error.[48] If we determine that all three factors are met, we "ha[ve] the *discretion* to remedy

[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 (2009).

[48] *Id.*

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. 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 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]

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

[49] *Id.* (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

[50] 572 U.S. 65, 77 (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.*

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. In a series of unpublished opinions, 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] 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*

[54] *United States v. Carbins*, 882 F.3d 557, 566 (5th Cir. 2018) (quoting *Rosemond*, 572 U.S. at 75).

[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).

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.

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 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

[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.").

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 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 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" and "otherwise using" is essential.[65] While brandishing "can mean as little as displaying part of a

[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.

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.

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." 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 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 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

[66] *Id.* (internal quotation omitted).
[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.

than Wise, such as by driving the vehicles, entering the bank as a robber, or even entering the bank as a lookout.

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]

From the evidence presented, and despite Wise's contentions otherwise, the court could reasonably conclude that: (i) Wise had at least as much, if not more, knowledge about the scope and structure of the crime than Anderson, 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

[72] U.S.S.G. § 3B1.2. cmt. 3(C).

not clearly err in declining to grant a point reduction based on Wise's role in 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.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20564

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WALTER FREEMAN JORDAN, III; JOHNATHON NICO WISE,

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

PER CURIAM:

Johnathon Nico Wise moves for panel rehearing on the theory that we erred in applying a heightened "manifest injustice" standard of review though Wise failed to preserve his sufficiency of the evidence claim in the district court.[1] He argues that, because the law was unsettled at the time he filed his

[1] In the alternative, Wise argues that his Rule 29 motion sufficiently preserved the error for de novo review. We reject this argument for the same reasons provided in *United States v. Jordan*, 945 F.3d 245, 260 (5th Cir. 2019).

Rule 29 motion for judgment of acquittal,[2] he was not required to raise the error in the district court in order to preserve de novo review on appeal. But the law in this circuit is well-established to the contrary: "To preserve *de novo* review . . . a defendant must specify at trial the particular basis on which acquittal is sought so that the Government and district court are provided notice." *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). Failure to do so insufficiently preserves a claim for appeal, and "our review is only for a manifest miscarriage of justice." *Id.* In *United States v. Suarez*, we clarified that claims not preserved in a Rule 29 motion are reviewed for plain error, which requires the defendant to demonstrate that a legal error occurred "that affects his substantial rights and seriously affects the fairness, integrity, or public reputation of the judicial proceedings." 879 F.3d 626, 630 (5th Cir. 2018) (internal quotations and alterations omitted). In reviewing a sufficiency of the evidence claim, this "exacting standard" is only satisfied, such that relief should be granted, if "the defendant shows 'a manifest miscarriage of justice.'" *Id.* at 631 (quoting *McDowell*, 498 F.3d at 312).

Neither the Supreme Court nor this court provides an exception to this rule where the defendant failed to preserve an argument because the basis for the argument was a matter of unsettled law at the time of trial. *See, e.g.*, *Johnson v. United States*, 520 U.S. 461 (1997) (reviewing for plain error even though the law changed between time of trial and appeal); *United States*

[2] Wise incorrectly represents that he could not have raised his argument before the district court. Wise filed his Rule 29 motion for judgment of acquittal on February 8, 2018. We published our opinion in *United States v. Carbins*, the case that Wise argues settled the relevant law, on February 15, 2018. 882 F.3d 557 (5th Cir. 2018). Over a month later—on March 23, 2018—the district court heard oral argument on Wise's Rule 29 motion. Wise does not represent that he made any effort to make the district court aware of *Carbins* by filing an amended motion, requesting leave to file supplemental briefing, or by raising *Carbins* during oral argument, even though the law was undoubtedly settled at that time. *See* Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.").

v. Escalante-Reyes, 689 F.3d 415 (5th Cir. 2012) (en banc) (reviewing for plain error where law was unsettled at the time of trial, but was settled at the time of appeal, because defendant failed to preserve objection); *see also* Fed. R. Crim. P. 52(b). Therefore, we correctly applied a "manifest injustice" standard in reviewing Wise's claim on appeal.

IT IS ORDERED that the petition for rehearing, as to Johnathon Nico Wise, is DENIED.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	**§**	
	§	
	§	
VS.	**§**	**4:17-CR-00516-5**
	§	
	§	
JOHNATHON NICO WISE	**§**	

WISE'S RULE 29 MOTION FOR ACQUITTAL
OR IN THE ALTERNATIVE A NEW TRIAL PURSUANT TO FRCP 33

TO THE HONORABLE U.S. DISTRICT JUDGE KEITH P. ELLISON:

COMES NOW JOHNHATHON NICO WISE, one of the defendants in the above entitled and numbered case pursuant to Federal Rules of Criminal Procedure 29(c) and 33, and moves for a judgment of acquittal on Count 1 and alternatively a new trial and in support thereof shows:

I. PROCEDURAL HISTORY

1. Defendant Wise was charged in Count 1 of the Indictment with Aiding & Abetting Aggravated Bank Robbery in violation of 18 U.S.C. §§ 2113(a), (d), 2. Dkt. No. 54. After a trial by jury beginning on January 22, 2018, Wise was convicted on January 25, 2018. Dkt. No. 161.

2. Defendant's previous oral Rule 29 Motion was denied on January 24, 2018. *See* "Minute Entry" for that date.

II. STANDARD OF REVIEW

A. Generally

3. "A motion for judgment of acquittal challenges the sufficiency of the evidence to convict." *United States v. Lucio*, 428 F.3d 519, 522 (5th Cir. 2005). "[T]he relevant question is whether, after viewing the evidence 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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

4. Although the district court (or an appellate court) should "not lightly overturn a jury's finding, [it] must not hesitate to overturn a jury verdict when it is necessary to 'guard against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt.' " *United States v. Jackson*, 700 F.2d 181, 183 (5th Cir. 1983) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126, 130 (1976)).

5. There is a palpable difference between evidence which gives rise only to "reasonable speculation" and that establishing proof beyond reasonable doubt. *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008). Proof beyond reasonable doubt will sustain a conviction; proof showing only reasonable suspicion will not. *Id.* "[A] verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly

attenuated piling of inference on inference." *United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996). "Needless to say, to demonstrate sufficiency, the Government 'must do more than pile inference upon inference.'" *United States v. McDowell*, 498 F.3d 308, 314 (citing *United States v. Maseratti*, 1 F.3d 330, 337 (5th Cir.1993).

6. The evidence against the Defendant is insufficient to sustain the conviction of Wise for aiding and abetting an aggravated bank robbery.

B. Aiding & Abetting

7. "In order to convict a defendant of aiding and abetting a crime under 18 U.S.C. § 2, 'the Government must prove (1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed.'" *United States v. Sorrells*, 145 F.3d 744, 753 (5th Cir. 1998) (quoting *United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991)).[1] In other words, "[t]here must be evidence that he engaged in some affirmative conduct designed to aid in the success of the venture with knowledge that his actions would assist the perpetrator...." *United States v. Cowart*, 595 F.2d 1023, 1031 (5th Cir.1979).

8. Inherent to aiding and abetting sufficiency analysis is the requirement that the substantive offense is itself, be proven. *See United States v. McDowell*, 498 F.3d

[1] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

308, 313 (5th Cir. 2007) ("the Government must prove: the elements of the substantive offense occurred; and the defendant 'associate[d] himself with the venture, . . . participate[d] in it as something . . . he wishe[d] to bring about, . . . [and sought] by his actions to make it succeed.'" (brackets and ellipses in original) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

9. As a result, Defendant's conviction requires that "he must have aided and abetted each material element of the alleged offense." *United States v. Lombardi*, 138 F.3d 559, 561 (5th Cir.1998) (internal citations omitted). That did not occur in this case.

10. "To prove the offense of bank robbery under § 2113(a), 'the government must demonstrate that: an individual or individuals used force and violence or intimidation to take or attempt to take from the person or presence of another money, property, or anything of value belonging to or in the care, custody, control, management or possession of any bank.'" *United States v. Gibson*, No. 15-20757, slip op. at 4 (5th Cir. October 4, 2017) (quoting *United States v. Ferguson*, 211 F.3d 878, 883 (5th Cir. 2000)).[2] [3] "'The punishment may be when, in committing or

[2] Available at http://www.ca5.uscourts.gov/opinions/unpub/15/15-20757.0.pdf

[3] "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; …Shall be fined under this title or imprisoned not more than twenty years, or both" 18 U.S.C. 2113(a).

attempting to commit the offense, the defendant assaults another person or puts in jeopardy the life of another person by the use of a dangerous weapon or device," thereby committing aggravated bank robbery under §2113(d)." *Id.*[4]

11. There was insufficient evidence to prove Wise aided or abetted the elements of the substantive offense of bank robbery or the enhancement in this case.

III THE EVIDENCE AGAINST WISE

12. Only a handful of the government's seventeen witnesses provided any evidence regarding Wise, and even that scintilla was ambiguous and circumstantial at best. There was no direct evidence from any source, including either cooperator. Instead, the Government's "proof" of Wise aiding and abetting was no more than suspicion or speculation requiring the jurors to pile inference upon inference from evidence that:

- Johnathon Wise was present on Bremond Street for several hours prior to the robbery with his co-defendants and others;
- Johnathon Wise was a passenger in a Nissan Rogue automobile operated by co-defendant Santee which travelled from Bremond Street to the robbery scene in Katy in conjunction with vehicles operated by other co-defendants;
- The Nissan's driver, Santee, was directed by co-defendant Anderson to follow a deputy sheriff near the scene during the approximately one hour the vehicles drove around the scene and parked before the robbery while Wise was a passenger in the Nissan;

[4] "(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both." 18 U.S.C. 2113(d).

- Santee parked the Nissan across the street from the robbery prior to its occurrence and drove it away at the conclusion of the robbery while Wise was still a passenger;

- A Samsung telephone linked to co-defendant Walter Freeman Jordan, III, was located by officers after the robbery and arrest of Wise and Santee in a cup-holder on the passenger side of the center console of the Nissan;

- This Samsung was connected for more than an hour, from the time of departing Bremond Street to the conclusion of the robbery, to at least three other phones, including the two cooperating witnesses, who testified it sounded to them like other phones on that group call were on speaker;

- Johnathon Nico Wise and Walter Freeman Jordan, III, are brothers.

13. No rational trier of fact could have found Wise guilty beyond a reasonable doubt from this evidence. Instead, they could only convict if they took the suspicions aroused by this evidence and piled inference upon inference from them until they reached a conviction.

14. Additional descriptions of the evidence below are based upon counsel's belief of what the record will reflect.

A. HPD Officer B. Thaler

15. The first witness called to testify at trial by the government, was Officer B. Thaler of the Houston Police Department. She testified that she was involved in an investigation of Co-defendant Walter Jordan, III, *not* Wise. As part of that investigation, on July 24, 2017, the day before the robbery, she identified the phone

number ***-***-4116 associated with Walter Jordan moving west from Third Ward. Thaler contacted Officer K. Richards who attempted to conduct live surveillance.

16. Thaler then testified regarding her surveillance on July 25, 2017, for a brief time of the "pole cam" on Bremond Street and what she observed without identifying anyone before also turning it over to K. Richards.

17. Thaler finally testified that she received possession of three (3) cellular telephones recovered from the Nissan by Officer Calderon after the arrest of Santee and Wise on July 25, 2017, and turned those phones over to another officer.

B. Officer K. Richards

18. Following Thaler, Officer K. Richards testified he personally saw Walter Jordan *alone* in a maroon Volkswagen Jetta on July 24, 2017, the day before the robbery. At that time, he located Walter Jordan from Officer Thaler's real time phone tracking of Walter Jordan's phone from Third Ward to Katy and back.

19. There is no evidence from any source or witness, and it was not even argued, that Johnathon Wise participated in the trip to the area of the First Community Credit Union in Katy on July 24, 2017.

20. The following day, July 25, 2017, Officer Richards stated he parked behind the Nissan Rogue (in which Wise was a passenger) in the parking lot across the street from the First Community Credit Union, later stopped it, and participated in the arrest of Santee and Wise. Nevertheless, Officer Richards did not relate any

particular activity within the Nissan during the robbery and could not identify anyone from the Nissan in the courtroom, not even Wise.

C. Officer S. Chaffin

21. Officer Chaffin testified that he also parked across the street from the First Community Credit Union on July 25, 2017. Before and during the robbery Chaffin operated a handheld camera and his body worn camera. But, he made no effort to videotape any vehicle other than the Toyota Tundra and its occupants, who entered the bank and then fled.

D. Bank Employees

22. Several bank employees testified about what occurred inside the First Community Credit Union from their memories as aided by security footage. This evidence only involved the four occupants of the Toyota Tundra, and therefore not Johnathon Wise, other than that at least one witness testified a robber appeared to be on a telephone with others.

E. Co-Defendant J. Loring

23. Ms. J. Loring, a co-defendant, testified for the Government regarding her recruitment and direction by Walter Jordan, individually, and her role in entering the bank to check for security at his request. She never met or mentioned Johnathon Wise.

24. Immediately before the robbery, Ms. Loring was on a telephone call with unfamiliar voices and that it sounded to her like a "party line" or that phone(s) may have been on speaker. She knew no other voice besides Walter Jordan's.

25. Ms. Loring clicked over at one point to another call, but she did not testify as to any specific instructions or planning that occurred on the group call with Walter Jordan. To the contrary, Loring testified that "nothing was said about robbery on [the] call" and nobody was "directly saying" anything.

26. Regardless, because Ms. Loring was not in the other vehicles, she cannot have known whether one, two, or all three other telephones on the call were on speaker and who in any other vehicle may have been participating.

E. Co-Defendant Anderson

27. In addition to Ms. Loring, co-defendant D. Anderson also testified for the Government. Mr. Anderson testified that he had never met Johnathon Wise before in his life. Anderson said he was recruited to the robbery by Walter Jordan, and then he, Anderson, recruited his close friend Deandre Santee.

28. According to Mr. Anderson on cross-examination, Walter Jordan gave him instructions about the robbery individually, never in a group.

29. At one point, Anderson and Santee left Bremond Street in separate cars, but later returned together in the Nissan Rogue after agreeing to the robbery. There were

no other phones besides theirs in the Nissan when Anderson left it. He drove the Jetta to the robbery.

30. While driving the Jetta, Anderson said he was on a call with Santee for "the whole ride" to the robbery for an hour to an hour and a half. Anderson testified he told Santee the bank location he learned from Walter Jordan and also gave Santee, the driver of the Rogue, instructions to follow a sheriff's deputy near the bank.

31. Although it was argued in closing by the prosecution, Wise disputes that Anderson testified that Wise drove the Volkswagen Jetta to a gas station from Bremond Street earlier in the morning. Even if Wise had, it does not follow that Wise would have known that the Jetta was to be used by anyone in a bank robbery later that day or that he agreed to participate in it.

F. Officer Calderon

32. Houston Police Officer Calderon testified that he recovered three phones from the Nissan after Santee and Wise's arrest: a black colored iPhone from the driver's seat; a black Samsung charging in the passenger side cup holder of the center console; and a white Samsung from the passenger seat. He gave them to Officer Thaler.

G. Officer Lombardo

33. Houston Police Officer Lombardo testified that he personally arrested Johnathon Wise without incident and removed the white Samsung cellular phone

from his pocket (which was placed on the passenger seat from which Calderon removed it).

H. HPD Sergeant D. Helms

34. After sponsoring the service provider records (call activity and tower location) for telephones associated with Anderson, Loring, Pace, Santee, Walter Jordan (2), and T. Jordan (but none for J. Wise) admitted as Government Exhibits 45-51, HPD Sgt. D. Helms testified that:

- the white Samsung cellular phone recovered from Johnathon Nico Wise had the telephone number ***-***-9812 and was activated on July 24, 2017;
- the gold colored Samsung cellular phone recovered from co-defendant Pace has the telephone number ***-***-6601 and is actually Walter Jordan's, though the account is in the name of a Ms. A.R., a woman in a relationship with Walter Jordan;
- the black Samsung cellular phone found in the Nissan Rogue console has the telephone number ***-***-2498 and is linked to Walter Jordan, though the account is also in the name A.R., though the user was identified with an email containing Walter Jordan's nickname, "WACKO.BREMOND@*****.com"
- the black Apple iPhone recovered from co-defendant Santee has the telephone number ***-***-9897;
- Johnathon Wise and Walter F. Jordan, III, are brothers.

I. Officer J. Taylor

35. The only expert witness noticed by the prosecution and final witness called was Houston Police Department Officer J. Taylor of the Criminal Intelligence Division.

36. After explaining cell tower technology, Officer Taylor testified regarding the visual aids he created from the cellular telephone provider records provided by the Government his presentations presented as Government Exhibits 52a, 52b, and 52c as summaries of voluminous records. These included the locations of cell tower activations by the phones associated with Walter Jordan (2), Terrence Jordan, Ms. Loring, Mr. Anderson, Mr. Pace, Mr. Santee, Mr. Bonner, and Mr. Delane on July 24-25, 2017. Officer Taylor also testified that the white phone recovered from Johnathon Wise was activated the day before the robbery. But his Exhibits 52a, 52b, and 52c do not include any calls to or from it on either day.

37. Officer Taylor's testimony and exhibits 52a, 52b, and 52c, related that the telephone associated by Sgt. Helms with the number ending *2498 and recovered in the center console of the Nissan Rogue was on a lengthy call with other defendants from approximately half-past eleven to one o'clock in the afternoon of July 25, 2017.

38. Importantly, Officer Taylor did not associate a picture of Wise with the phone number *2498 on July 25, 2017, as he did with other phones and defendants. Instead, he linked it with a photo of the Nissan Rogue. Moreover, on the exhibit illustrating call activity for the day before, July 24, 2017, Officer Taylor illustrated *2498 with a picture of Walter Jordan, III. *Compare* Gov't Ex. 52a, 52b, and 52c.

39. It is axiomatic that the telephone records alone do not identify the actual participants or content of any call or text message.

IV. REQUEST FOR JUDGMENT OF ACQUITTAL

40. The conviction of Johnathon Nico Wise rests on mere suspicion, speculation, conjecture, and on an overly attenuated piling of inference on inference from the miniscule evidence presented against him.

41. The evidence against Johnathon Nico Wise is insufficient to support his conviction. No rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt even viewing the evidence in the light most favorable to the verdict. As a result, Defendant requests a judgment of acquittal on all counts pursuant to Federal Rule of Criminal Procedure 29(c).

V. ALTERNATIVE MOTION FOR NEW TRIAL

42. Rule 29(c) of the Federal Rules of Criminal Procedure permits a defendant to move for a Judgment of Acquittal, or renew such Motion after a guilty verdict. Pursuant to Rule 29(d)(1), if a Court enters a Judgment of Acquittal after a jury verdict, the Court must also conditionally determine whether any Motion for a New Trial should be granted if the Judgment of Acquittal is either vacated or reversed on appeal.

43. Accordingly, in the alternative, Johnathon Nico Wise respectively requests that a new trial be granted because the verdict is a) against the weight of the evidence, b) Wise was prejudiced by the suggestion on the cumulative video exhibits

(Government Exhibits 1A-1U) that he was a gang member and this a gang crime which should not have been admitted; and c) in the "interest of justice."

44. Wise incorporates by reference the arguments heretofore advanced relative to legal insufficiency of the evidence. Unlike with respect to a Rule 29 motion for acquittal, "[t]he trial judge may weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial." *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997) (citing *Tibbs v. Florida*, 457 U.S.31, 37-38, 102 S.Ct. 2211, 2215-16, 72 L.Ed.2d 652 (1982)). "Consequentially, a review of a motion for new trial is reviewed under a more lenient standard than a motion for judgment of acquittal." *Id.*

45. Given the thin circumstantial evidence against Wise, the repeated suggestion to the jury through testimony and Government Exhibits 1A thru 1U that this was an HPD "gang task force" investigation allowed the jury to infer that this was a "gang crime" and the Defendants, including Wise, members of the same criminal street gang, no evidence of which was presented nor could be.[5] This incorrect inference allowed the jurors to conclude that Johnathon Wise was associated with the others,

[5] HPD Sgt. Helms admitted at the probable cause and detention hearing that the only information indicating Johnathon Wise is associated with any gang is his alleged participation in *this* robbery. *See* Dkt. 107 at pg. 99:21-25, 100:1-10.

shared their criminal intent, and actively participated in the bank robbery, and thus convict him in the absence of sufficient evidence.

46. This was the subject of a Rule 403 [6] objection by Wise and the Court's single oral limiting instruction was insufficient to cure the unfair prejudice caused and misleading impression left by the *repeated* display of the video containing the "HPD GANG" caption prominently on Government Exhibits 1A thru 1U throughout the entire trial from beginning to end. These approximately twenty minutes of pole cam video clips were displayed to the jury dozens of times over the course of the trial including replays and pauses. For example, the below excerpt from Gov't. Ex. 1Q shows Johnathon Wise by the Jetta immediately below the caption "HPD GANG TSG GPC12,"

[6] "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." Fed. R. Evid. 403.

58. The prominence of the caption and the repetition thereof underscore the unfair prejudice and misleading conclusion – that Johnathon Wise is a gang member and this was a gang crime, thus he had to have been an active participant in it, as a gang member.

59. It was improperly argued in closing that "they [HPD] are out there for a reason" further underscoring the inference of gang activity and extraneous illegal conduct not admitted at trial.

60. Moreover, these pole cam video exhibits were cumulative with what the witnesses, including both cooperators, testified transpired on Bremond street according to their own observations. They were not the sole or even the best source of whatever probative value they possessed and thus should have been excluded.

61. Although Wise is firmly convinced the evidence is legally insufficient to support the verdict and that the jury verdict was contrary to the weight of the evidence, this Court is invested with broad discretion in making its decision whether to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice. *Robertson* at 1118. "[A] new trial ordinarily should not be granted 'unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict.'" *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011)(citations omitted). In this instance, both apply.

62. Wise was denied his right to a fair trial by the Government's repeated and unfairly prejudicial presentation inferring that this robbery was a gang crime and Wise a gang member, thus improperly providing the association and participation elements of aiding and abetting to jurors where there was no actual evidence thereof.

63. For the foregoing reasons, Johnathon Wise should be granted a new trial.

PRAYER

Wherefore, premises considered, Defendant, JOHNATHON NICO WISE respectfully requests that a judgment of acquittal be granted, or, in the alternative, that his motion for new trial be granted.

HILDER & ASSOCIATES, P.C.

/s/ Q. Tate Williams
Q. Tate Williams
tate@hilderlaw.com
State Bar No. 24013760
819 Lovett Blvd.
Houston, Texas 77006-3905
Telephone (713) 655-9111
Facsimile (713) 655-9112

ATTORNEY FOR DEFENDANT
JOHNATHON NICO WISE

CERTIFICATE OF SERVICE

This is to certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this the Defendant Johnathon Nico Wise's FRCP 29(c) Motion for Judgment of Acquittal and alternatively for new trial via the USDC Southern District's CM/ECF system on February 6, 2018

/s/Q. Tate Williams
Q. TATE WILLIAMS

No. 18-20564

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

WALTER FREEMAN JORDAN, III; JOHNATHON NICO WISE,

Defendants – Appellants

On Appeal from
United States District Court for the Southern District of Texas
4:17-CR-516-5

BRIEF OF DEFENDANT-APPELLANT JOHNATHON NICO WISE

HILDER & ASSOCIATES, P.C.

By: /s/ *Quentin Tate Williams*
Quentin Tate Williams
State Bar No. 24013760
819 Lovett Boulevard
Houston, Texas 77006
Telephone (713) 655-9111
Facsimile (713) 655-9112
tate@hilderlaw.com

Attorney for Defendant - Appellant, Johnathon Nico Wise

TABLE OF CONTENTS

Claim Two argues that the District Court plainly erred by not instructing the jury that Wise had to have advance knowledge of the aggravating facts of the offense.

Claim Three argues that the district court abused discretion by allowing a Police Officer to present inadmissible vidence that Wise was the brother of Walter Jordan over objections.

Claim Four contends, that the 6-level *Guideline* enhancement for the otherwise use of a firearm was clearly erroneous under U.S.S.G. § 2B3.1.

Claim Five contends, that the District Court clearly erred in not awarding Wise a mitigating role reduction under U.S.S.G. § 3B1.2 according to the preponderance of the evidence.

ARGUMENT

I. Evidence That Wise Aided & Abetted Aggravated Credit Union Robbery Was Constitutionally Insufficient.

The evidence that Wise aided and abetted this aggravated credit union robbery was legally insufficient. It is undisputed that Appellant did not go into the credit union and rob anyone. The only evidence before the jury was that Johnathon Nico Wise was a *passenger* in a vehicle that travelled in conjunction with other vehicles from Third Ward to Katy, Texas; remained a passenger as that vehicle drove around

the area and parked in a grocery store parking lot as the First Community Credit Union across the street was robbed by Walter Jordan and others; and was still a passenger shortly thereafter when it left, all while one of three phones in the vehicle was in communication with the robbers and others. There was no evidence that Wise was more than merely present at the scene of a crime with knowledge of its occurrence, which is insufficient to sustain a conviction under the law.

Tellingly, in its closing argument, the Government never articulated an act Wise took in furtherance of the robbery. Instead, prosecutors relied on his mere presence and knowledge, coupled with his alleged sibling relationship with Walter Jordan to pile inference upon inference to obtain a conviction. This was revealing as there was no evidence of any affirmative act by Wise to which they could direct the jury's attention.

A. Standard of Review

When a court considers sufficiency of the evidence, "[t]he relevant question is whether, after viewing the evidence 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." *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court reviews "de novo the district court's denial of [their Federal Rule of Criminal Procedure] 29 motion for a judgment of acquittal." *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007). In determining the sufficiency of the evidence for any element, the

court considers the evidence, all reasonable inferences drawn therefrom, and all credibility determinations in the light most favorable to the prosecution. *United States v. Ramos–Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008).

B. Discussion

"To prove the offense of bank robbery under § 2113(a), 'the government must demonstrate that: an individual or individuals used force and violence or intimidation to take or attempt to take from the person or presence of another money, property, or anything of value belonging to or in the care, custody, control, management or possession of any bank.'" *United States v. Gibson,* 709 Fed.Appx. 271, 273 (5th Cir. 2017) (quoting *United States v. Ferguson*, 211 F.3d 878, 883 (5th Cir. 2000)).[1] "The punishment may be enhanced when, in committing or attempting to commit the offense, the defendant assaults another person or puts in jeopardy the life of another person by the use of a dangerous weapon or device," thereby committing aggravated bank robbery under §2113(d)." *Id.*[2]

[1] "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; …Shall be fined under this title or imprisoned not more than twenty years, or both" 18 U.S.C. 2113(a)

[2] "(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both." 18 U.S.C. 2113(d).

"In order to convict a defendant of aiding and abetting a crime under 18 U.S.C. § 2, 'the Government must prove (1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed.'" ***United States v. Sorrells,*** 145 F.3d 744, 753 (5th Cir. 1998) (quoting ***United States v. Gallo,*** 927 F.2d 815, 822 (5th Cir. 1991)).[3] Association means that the defendant shared in the criminal intent of the principal." *Sorrels,* 753 (quoting *United States v. Salazar,* 66 F.3d 723, 729 (5th Cir. 1995). "Participation means that the defendant engaged in some affirmative conduct designed to aid the venture. Although relevant, mere presence and association are insufficient to sustain a conviction of aiding and abetting." *Id.* In other words, "[t]here must be evidence that he engaged in some affirmative conduct designed to aid in the success of the venture with knowledge that his actions would assist the perpetrator...." *United States v. Cowart,* 595 F.2d 1023, 1031 (5th Cir.1979).

Inherent to aiding and abetting sufficiency analysis is the requirement that the substantive offense is itself, be proven. *See* ***United States v. McDowell***, 498 F.3d 308, 313 (5th Cir. 2007) ("the Government must prove: the elements of the substantive offense occurred; and the defendant 'associate[d] himself with the

[3] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

venture, . . . participate[d] in it as something . . . he wishe[d] to bring about, . . . [and sought] by his actions to make it succeed.'" (brackets and ellipses in original) (quoting ***Nye & Nissen v. United States***, 336 U.S. 613, 619 (1949)). As a result, Defendant's conviction requires that he '" must have aided and abetted each material element of the alleged offense[s].'" *United States v. Morrison,* 833 F.3d 491, 501 (5th Cir. 2016)(brackets in original)(quoting *United States v. Lombardi,* 138 F.3d 559, 561 (5th Cir.1998). That did not occur in this case.

Proof beyond a reasonable doubt will sustain a conviction; proof showing only reasonable suspicion will not. *Newman v. Metrish,* 543 F.3d 793 (6th Cir. 2008). "[A] verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference." *United States v. Pettigrew,* 77 F.3d 1500, 1521 (5th Cir. 1996). "Needless to say, to demonstrate sufficiency, the Government 'must do more than pile inference upon inference.'" *United States v. McDowell,* 498 F.3d 308, 314 (5th Cir. 2007)(citing *United States v. Maseratti,* 1 F.3d 330, 337 (5th Cir. 1993). Yet, that is exactly what occurred in this case.

The Government piled inference upon inference to gain conviction as the record contained *no* evidence that Wise took any act at all to aid or abet the offense. The circumstantial evidence might raise the inference that Wise was aware that a bank robbery was planned or afoot, there was no evidence that Wise had foreknowledge that firearms or force would be used or that he participated by

affirmative conduct designed to aid the venture or sought by action to make the robbery succeed.

1. There Was No Evidence Wise Participated by Engaging in Some Conduct Designed to Aid the Venture

The Government made no showing of any action by Wise at all, other than entering the Nissan Rogue, let alone affirmative conduct designed to aid the venture together with knowledge his actions would do so.

a. There was No Evidence Wise Cased the Credit Union

There was no evidence Wise participated in the planning of the scheme to rob the credit union. No police officer identified Appellant as having participated in the casing of the credit union the day before the robbery. Wise was not identified as having been in contact with the co-defendants during Walter Jordan's scouting trip the day before by the cellular phone analyst. ROA.1319-1325. It was, instead, Walter Jordan and others. ROA.1319-1325.

b. There was No Evidence Wise was Involved in Planning

There was also no evidence Wise was involved in recruiting or giving instructions to anyone else or planning anything. Both Anderson and Loring testified that Walter Jordan recruited them to the robbery and told them where to go and what to do. ROA.961-962, 879. Walter gave these instructions to Anderson alone in an alley while Wise was out in the street. ROA.967-970. He did this one-

on-one, not in a group. ROA.997. Jordan changed into dark clothes during those instructions. ROA.970. Then, Anderson sat in the Rogue and told Santee while Wise was in the street. ROA.971-972. Government did not endeavor to elicit any testimony from Anderson at all about Wise because, as Anderson said, he had never met him before in his life. ROA.954, 996. Similarly, Walter gave Loring instructions the night before, in her car, and over the phone. ROA.886-887, 906. She did not know anyone other than Walter Jordan and he was the only one she interacted with during the planning and execution. ROA.879. There is no evidence that Wise even put any clothing in a car, as Anderson did. ROA.969.

c. Wise Did Not Drive to or From the Credit Union

Wise did not operate any of the motor vehicles in the drive to the robbery, during the robbery, or afterwards. Instead, he was a passenger in a vehicle driven by Deandre Santee when they left Greenmont Street. ROA.972-974. When they were stopped and arrested after the robbery, he was still a passenger. ROA.1013. As a passenger, there is no evidence at all that he had any control or management over where the vehicle went, where it parked, or when it left. There is only evidence that he was along for the ride.

d. There was No Evidence Wise on any Calls

Although there was evidence of telephone calls between various persons and vehicles on the drive to Katy and during the robbery, there was no evidence

Appellant Wise participated in those calls. Loring only knew Walter's voice. ROA.907. Even then, she said no one was "directly saying anything" about the robbery while she was on the call. ROA.906-907.

Anderson said he had been "on the phone with Mr. Santee…[t]he whole ride." ROA.978. He does not mention Wise at all. When asked what the Rogue was doing, he said "[j]ust following me, as I told him to do." ROA.979. Then, when asked about why the Rogue, which was driven by Santee, followed a deputy's car, Anderson said, "I told him if she -- the car was going, where the cop car was going." ROA.981. Anderson cannot have been referring to Wise because Wise was not driving and Anderson had already testified that he was on the phone with Santee the whole ride.

Even the HPD cell phone expert, J. Taylor, admitted he could not say who was actually making calls or physically had a handset or that a particular phone equaled a particular person. ROA.1349, 1353-1354. Importantly, although he used photographs of other defendants in his presentation exhibit when referring to the phone call activity, he used a picture of the Rogue vehicle when referring to the phone 2498 on July 25, 2017. ROA.1319-1320, 1329, 1332-1334, 1353. He could not dispute that that 2498 phone could be associate with Deandre Santee. ROA.1348-1349. Moreover, the Government chose not to introduce the records from Wise's own white iPhone, which was active that day and found on him, or show that Wise's phone had been used for any purpose. ROA.1040-1041, 1239, 1314-1315.

e. Wise Did Not Go Into the Credit Union

Police and Anderson testified the robbers who went into the credit union came from the Toyota Tundra. ROA.762, 982. Thus, there was no evidence that Wise, a passenger in the Nissan, ever entered the Tundra or the credit union.

2. There was No Evidence that Wise Sought by Action to Make the Venture Succeed.

The argument that the Government failed to prove the third element is to the third element of aiding and abetting is the same as the foregoing argument showing failure to prove the second element. The evidence was only that Wise was a passenger in the Nissan Rogue and that a telephone in the Rogue – which Anderson said he used to talk to Santee - was on a call with others for approximately an hour during the trip to the credit union or robbery. Nothing put the phone in Wise's hand or his voice on the phone. The Government could not even offer any direct evidence that Wise participated in any of the phone calls during the relevant time period. Nothing put any instruments of the crime in Wise's hands either. Nor was there any evidence of how Wise would share in the fruits of the crime. There was no evidence that Wise actually looked out for anyone.

The Government put on no evidence that Wise took any action at all. There was evidence that Anderson instructed Santee to look for or follow police. Santee was the driver of the Nissan Rogue in which Appellant was a passenger. Anderson

said he was on a call with Santee. There was no evidence that Wise was on any phone call with the others or that he said anything at all. Instead, Loring testified that she spoke to Walter and Anderson testified that he spoke to Santee about what to do.

3. There was No Evidence that Wise had Advance Knowledge that Firearms or Force Would be Used

"[W]hen a combination crime is involved, an aiding and abetting conviction requires that the defendants' intent 'go to the specific and entire crime charged.'" *United States v. Carbins*, 882 F.3d 557, 565 (5th Cir. 2018)(citing *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 1248, 188 L.Ed.2d 248 (2014)). Aggravated Credit Union robbery is a combination offense or is equivalent to such an offense, including 924(c) because it requires that (1) a credit union robbery occur; and (2) that an assault or threat to the life of another person occurs by use of a dangerous weapon or device. *Gibson*, supra at 273; 18 U.S.C. § 2113. This requires a second crime to occur during or in relation to the first, i.e. robbery. Thus, Appellant was required to have advance knowledge and intent to aid and abet those aggravating facts. *Cf. Id.* at 274 (finding no plain error where defendant plead guilty to aggravated bank robbery but was not admonished that he was admitting to foreknowledge of the presence of the firearm). There was no evidence that Wise did. In fact, there was no evidence from any source, including surveilling police or

cooperating witnesses Anderson and Loring, that dangerous weapons were seen anywhere or were mentioned on Greenmont street prior to the robbery. Even his presence in a separate vehicle from which no firearms were recovered and operated by a man receiving second hand instructions does not raise the inference of foreknowledge. Thus, Wise could not have aided or abetted this element of the offense as enhanced and no rational juror could have found otherwise.

4. No Rational Juror Could Have Convicted Wise on this Evidence

No rational juror could have found based on the evidence that Wise took any affirmative action to participate or cause the venture to succeed. The evidence did not even raise an inference supporting either of the prongs necessary to prove aiding and abetting – neither participation nor action – this Court should reverse the judgement of conviction on Count One.

II. The Trial Court Plainly Erred in Not Giving a *Rosemond* Instruction

The Instructions to the Jury failed to require that Appellant have advance knowledge that a firearm would be used. *See* ROA.12080-12083. Appellant did not object to the jury instructions in this case. However, since the trial this Circuit has issued a ruling that demonstrate that this was plain error.

The instructions should have read in the "Aiding and Abetting," section "You must find ….Fifth: That the defendant actively participated in the criminal venture