

APPENDIX A

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 16-4166

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA N. WRIGHT,

Defendant - Appellant.

No. 16-4180

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAMAIN STANDBERRY,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:15-cr-00102-HEH-1; 3:15-cr-00102-HEH-2)

Submitted: September 1, 2020

Decided: September 2, 2020

Before AGEE and QUATTLEBAUM, Circuit Judges, and Thomas S. KLEEH, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Mark Diamond, Richmond, Virginia; Joseph R. Winston, LAW OFFICES OF JOSEPH R. WINSTON, Richmond, Virginia, for Appellants. Dana J. Boente, United States Attorney, Richard D. Cooke, Stephen E. Anthony, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joshua Nathaniel Wright and Tramaine Tre'quan Standberry were convicted of interference with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951 (2018), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(a)(ii) (2018). On appeal, Wright and Standberry* contend (1) that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) (2018); (2) that the district court erred by instructing the jury that Hobbs Act robbery is a crime of violence under § 924(c); (3) that the district court abused its discretion by finding by a preponderance of the evidence that they had committed two robberies of which they had not been convicted, and varying upwardly in each of their sentences to reflect that conduct; (4) that the district court clearly erred by finding they had committed an abduction within the meaning of the Sentencing Guidelines; (5) that the district court clearly erred in refusing to grant Wright a sentence reduction for acceptance of responsibility; and (6) that Wright's 276-month upward variant sentence is substantively unreasonable. For the following reasons, we affirm.

Wright and Standberry first argue that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) and thus cannot serve as a predicate offense for their 18 U.S.C. § 924(c)(1)(A) convictions. This argument is foreclosed by our decision in *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019).

* We deny Standberry's motion to file a pro se supplemental brief.

Wright and Standberry next argue that the district court erred by instructing the jury that Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3). “We review a district court’s decision to give a particular jury instruction for abuse of discretion” and “whether a jury instruction incorrectly stated the law de novo.” *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir.), *cert. denied*, 139 S. Ct. 130 (2018). We “must determine whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *Id.* at 89 (internal quotation marks omitted). We have reviewed the record and the relevant legal authorities and conclude the district court did not abuse its discretion in instructing the jury.

Third, both Wright and Standberry argue the district court erred by varying upwardly to account for robberies of which the jury had acquitted them or for which they had not been charged. A sentencing court is free to consider acquitted or uncharged conduct in calculating a defendant’s Guidelines range. *See United States v. Lawing*, 703 F.3d 229, 241 (4th Cir. 2012). Acknowledging this fact, Wright and Standberry argue that in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the sentencing court can only consider such conduct under a reasonable doubt standard, rather than under the preponderance standard established in *Lawing*, or must at least use a higher standard of proof when imposing a significant upward variance. However, we have continually held that “a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence.” *United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009); *see also United States v. Slager*, 912

F.3d 224, 233 (4th Cir.) (“When sentencing courts engage in fact finding, preponderance of the evidence is the appropriate standard of proof.” (internal quotation marks omitted)), *cert. denied*, 139 S. Ct. 2679 (2019). Accordingly, we conclude that “[t]his argument is too creative for the law as it stands.” *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008).

Fourth, both Wright and Standberry argue that the district court improperly applied a four-level enhancement for abduction under the Sentencing Guidelines. See U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A) (2018). The Government bears the burden to prove by a preponderance of the evidence that a sentencing enhancement applies. *United States v. Steffen*, 741 F.3d 411, 414 (4th Cir. 2013). “In assessing whether a sentencing court properly applied the Guidelines, we review the court’s factual findings for clear error and its legal conclusions de novo.” *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (internal quotation marks omitted). Clear error occurs when we are “left with the definite and firm conviction that a mistake has been committed.” *United States v. Harvey*, 532 F.3d 326, 337 (4th Cir. 2008) (internal quotation marks omitted).

A victim is “abducted” if he is “forced to accompany an offender to a different location.” USSG § 1B1.1 cmt. n.1(A). We have adopted a “flexible, case by case approach to determining when movement to a different location has occurred,” *Osborne*, 514 F.3d at 390 (internal quotation marks omitted). In addition, the Supreme Court has held that accompaniment “must constitute movement that would normally be described as from one place to another, even if only from one spot within a room or outdoors to a different one,” but does not require movement across “large distances.” *Whitfield v. United States*, 574

U.S. 265, 268 (2015); *see also Osborne*, 514 F.3d at 388 (explaining that “movement within the confines of a single building can constitute movement to a different location” (internal quotation marks omitted)). “[E]ven a temporary abduction can constitute an abduction for purposes of the [S]entencing [G]uidelines.” *United States v. Nale*, 101 F.3d 1000, 1003 (4th Cir. 1996). We have reviewed the record and relevant legal authorities and conclude the district court did not clearly err in finding that Wright and Standberry abducted the store employees within the meaning of the Sentencing Guidelines.

Fifth, Wright challenges the district court’s decision not to grant him a two-level reduction for acceptance of responsibility. “We review a district court’s decision concerning an acceptance-of-responsibility adjustment for clear error” and accord “great deference to the district court’s decision because the sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility.” *United States v. Dugger*, 485 F.3d 236, 239 (4th Cir. 2007) (brackets and internal quotation marks omitted); *see* USSG § 3E1.1 cmt. n.5 (same). To qualify for the two-level acceptance of responsibility reduction, “a defendant must prove to the court by a preponderance of the evidence that he has clearly recognized and affirmatively accepted personal responsibility for his criminal conduct.” *United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017) (internal quotation marks omitted). “This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.” USSG § 3E1.1, cmt. n.2. However, “[i]n rare situations,” including “where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt,” such as a “constitutional challenge to

statute,” the “defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct.” *Id.* We have reviewed the record on this point and conclude that the district court did not clearly err in finding Wright had not clearly accepted responsibility for the robbery for which he was convicted.

Finally, Wright argues his sentence is unreasonable because it is longer than he would have received had the court applied a career offender enhancement under the Guidelines. We review criminal sentences for reasonableness “under a deferential abuse-of-discretion standard.” *United States v. Lynn*, 912 F.3d 212, 216 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 140 S. Ct. 86 (2019). In evaluating a sentencing court’s calculation of the advisory Guidelines range, “[w]e review the district court’s factual findings for clear error and legal conclusions de novo.” *United States v. White*, 850 F.3d 667, 674 (4th Cir.), *cert. denied*, 137 S. Ct. 2252 (2017). We have reviewed the record on this point and find that Wright’s sentence is procedurally and substantively reasonable.

Accordingly, we affirm the judgments of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA

v.

JOSHUA N. WRIGHT,
Defendant.

Case Number: 3:15CR00102-002

USM Number: 85750-083

Defendant's Attorney: W. Barry Montgomery, Esq.

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts 4 and 5 of the Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Offense Class</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951 and 2	INTERFERENCE WITH INTERSTATE COMMERCE BY ROBBERY	Felony	4/29/2015	4
18 U.S.C. § 924(c) and 2	CARRYING AND USING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	Felony	4/29/2015	5

On motion of the United States, the Court has dismissed the original Indictment as to defendant JOSHUA N. WRIGHT.

As pronounced on March 11, 2016, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall 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.

Her /s/
Henry E. Hudson
United States District Judge

Dated: March 17, 2016

Case Number: 3:15CR00102-002
Defendant's Name: WRIGHT, JOSHUA N.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SEVENTY-SIX (276) MONTHS. This term consists of ONE HUNDRED NINETY-TWO (192) MONTHS on Count 4 and EIGHTY-FOUR (84) MONTHS on Count 5, to be served consecutively.

The defendant shall receive credit for time served from April 29, 2015.

The Court makes the following recommendations to the Bureau of Prisons:

- 1) Educational courses and vocational training;
- 2) Designate defendant to FCI Petersburg or another facility near his family.

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

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

Case Number: 3:15CR00102-002
Defendant's Name: WRIGHT, JOSHUA N.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS. This term consists of THREE (3) YEARS on each of Counts 4 and 5, to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Case Number: 3:15CR00102-002
Defendant's Name: WRIGHT, JOSHUA N.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

- 1) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than \$25.00, starting 60 days after supervision begins until paid in full.
- 2) The defendant shall abide by any special conditions deemed appropriate and set by the probation officer at the inception of supervision.

Case Number: 3:15CR00102-002
Defendant's Name: WRIGHT, JOSHUA N.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Page 6.

	<u>Count</u>	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	4	\$100.00	\$0.00	\$0.00
	5	\$100.00	\$0.00	\$0.00
TOTALS:		\$200.00	\$0.00	\$0.00

FINES

No fines have been imposed in this case.

Case Number: 3:15CR00102-002
Defendant's Name: WRIGHT, JOSHUA N.

SCHEDULE OF PAYMENTS

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

The special assessment and restitution shall be due in full immediately.

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. 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.

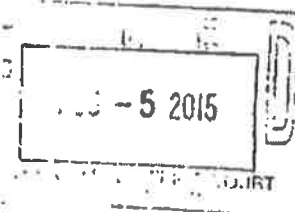
Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

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

SEE Consent Order of Forfeiture entered by the Court on March 14, 2016.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 3:15-CR-102
)	
TRAMAINE T. STANDBERRY)	18 U.S.C. §§ 1951(a) and 2
)	Robbery Affecting Commerce
and)	(Counts 1, 3, and 4)
)	
JOSHUA N. WRIGHT,)	18 U.S.C. §§ 924(c) and 2
)	Possess a Firearm in Furtherance
Defendants.)	Of a Crime of Violence
)	(Counts 2 and 5)

AUGUST 2015 TERM - At Richmond

*** [AMENDED] SUPERSEDING INDICTMENT**

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Interference with Interstate Commerce by Robbery)

At all times material to this Superseding Indictment the Valero Fas Mart, located at 338 E. Williamsburg Road, Henrico, Virginia, was a commercial entity engaged in the provision of goods and services in interstate and foreign commerce and an industry that affects interstate commerce.

On or about the 4th day of April, 2015, in the Eastern District of Virginia, and elsewhere, defendants, TRAMAINE T. STANDBERRY and JOSHUA N. WRIGHT, did unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in such commerce, as those terms are defined in Title 18, United States Code, Section 1951, that is, by unlawfully taking and obtaining property consisting of United States Currency and other property belonging to Valero Fas Mart, located at 338 E. Williamsburg Road, Henrico, Virginia, from the person of and

*** Amended in open court 12/4/2015 on motion of the Government**

in the presence of a Valero Fas Mart employee, A. M., against the employee's will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said employee's person, that is by brandishing and discharging a firearm and demanding from the employee money and other property belonging to the business, and aided and abetted one another in doing so.

(In violation of Title 18, United States Code, Sections 1951 and 2).

COUNT TWO

(Carrying and Using a Firearm During and in Relation to a Crime of Violence)

On or about the 4th day of April, 2015 in the Eastern District of Virginia and within the jurisdiction of this Court, TRAMaine T. STANDBERRY and JOSHUA N. WRIGHT, during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, to wit: interference with interstate commerce by robbery, as charged in Count One of this Superseding Indictment, which Count is incorporated by reference herein, did knowingly and unlawfully carry and use by brandishing and discharging firearms, one of which was a Rock Island Armory, .45 semiautomatic pistol, serial number R1A1455797, and aided and abetted one another in doing so.

R1A1355397

WGM

(In violation of Title 18, United States Code, Sections 924(c) and 2).

COUNT THREE

(Interference with Interstate Commerce by Robbery)

At all times material to this Superseding Indictment the Grab 'N Go, located at 1581 Darbytown Road, Henrico, Virginia, was a commercial entity engaged in the provision of goods and services in interstate and foreign commerce and an industry that affects interstate commerce.

On or about the 6th day of April, 2015, in the Eastern District of Virginia, and elsewhere, defendants, TRAMaine T. STANDBERRY and JOSHUA N. WRIGHT, did unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in such commerce, as

those terms are defined in Title 18, United States Code, Section 1951, that is, by unlawfully taking and obtaining property consisting of United States Currency and other property belonging to Grab 'N Go, located at 1581 Darbytown Road, Henrico, Virginia, from the person of and in the presence of a Grab 'N Go employees, M.R.S. and M.M.M., against the employees' will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said employees' persons, that is by brandishing a firearm and demanding from the employees money and other property belonging to the business, and aided and abetted one another in doing so.

(In violation of Title 18, United States Code, Sections 1951 and 2).

COUNT FOUR

(Interference with Interstate Commerce by Robbery)

At all times material to this Superseding Indictment the 7-Eleven convenience store, located at 3600 Mechanicsville Turnpike, Henrico, Virginia, was a commercial entity engaged in the provision of goods and services in interstate and foreign commerce and an industry that affects interstate commerce.

On or about the 29th day of April, 2015, in the Eastern District of Virginia, and elsewhere, defendants, TRAMaine T. STANDBERRY and JOSHUA N. WRIGHT, did unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in such commerce, as those terms are defined in Title 18, United States Code, Section 1951, that is, by unlawfully taking and obtaining property consisting of United States Currency and other property belonging to 7-Eleven, located at 3600 Mechanicsville Turnpike, Henrico, Virginia, from the person of and in the presence of 7-Eleven employees, T. D. H. and A. W., against the employees' will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said employees'

persons, that is by brandishing a firearm and demanding from the employee money and other property belonging to the business, and aided and abetted one another in doing so.

(In violation of Title 18, United States Code, Sections 1951 and 2).

COUNT FIVE

(Carrying and Using a Firearm During and in Relation to a Crime of Violence)

On or about the 29th day of April, 2015 in the Eastern District of Virginia and within the jurisdiction of this Court, TRAMaine T. STANDBERRY and JOSHUA N. WRIGHT, during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, to wit: interference with interstate commerce by robbery, as charged in Count Four of this Superseding Indictment, which Count is incorporated by reference herein, did knowingly and unlawfully carry and use by brandishing firearms, to wit: a Rock Island Armory, .45 semiautomatic pistol, serial number ^{RIA1355397} ~~RIA1455797~~, and an Interarms 9mm semiautomatic pistol, serial number 1112858, and aided and abetted one another in doing so.

(In violation of Title 18, United States Code, Sections 924(c) and 2).

FORFEITURE ALLEGATION

Pursuant to Rule 32.2 Fed. R. Crim. P., the defendant is hereby notified that upon conviction of any of the offenses alleged in Counts One, Three, or Four of this Superseding Indictment, the defendant shall forfeit any property, real or personal, which constitutes or is derived from any proceeds traceable to the offense charged; and any firearm or ammunition involved in or used in any knowing violation of the offense charged.

The defendant is further notified that upon conviction of either offense alleged in Counts Two or Five of this Superseding Indictment, the defendant shall forfeit any firearm or ammunition involved in or used in any knowing violation of the offense charged.

Property subject to forfeiture includes, but is not limited to the following:

a Rock Island Armory, .45 semiautomatic pistol, serial number R1A1455797;

RIA1355397 *ssu*

an Interarms 9mm semiautomatic pistol, serial number 1112858; and *WBM MBM*

any accompanying ammunition.

If the property subject to forfeiture cannot be located, the United States will seek an order forfeiting substitute assets.

(In accordance with Title 18, United States Code, Section 981(a)(1)(C), incorporating Title 28, United States Code, Section 2461; and Title 18, United States Code, Section 924, incorporating Title 28, United States Code, Section 2461.)

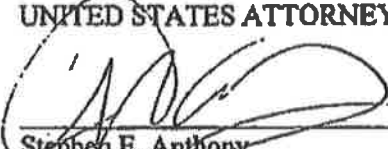
A TRUE BILL

Pursuant to the E-Government Act,
the original of this page has been filed
under seal in the Clerk's Office

FOREPERSON

DANA L. BOENTE
UNITED STATES ATTORNEY

By:


Stephen E. Anthony

Peter S. Duffey

Assistant United States Attorneys