965 F.3d 642
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Cortez Maurice CRUMBLE, Defendant - Appellant

No. 19-2197
|
Submitted: June 19, 2020
|
Filed: July 13, 2020

Synopsis
Background: Defendant was convicted in the United States District Court for the District of Minnesota, Ann D. Montgomery, Senior District Judge, 2019 WL 8402575, of being felon in possession of ammunition, and he appealed.

Holdings: The Court of Appeals, Gruender, Circuit Judge, held that:

[1] district court did not commit plain error as result of its failure to instruct jury that it had to find that defendant knew he belonged to relevant category of persons barred from possessing ammunition;

[2] district court did not abuse its discretion in permitting government to present photos of individual frames of surveillance video that were prepared by its forensic video analyst; and

[3] defendant's above-Guidelines 63-month sentence was not substantively unreasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (9)

[1] **Criminal Law** Necessity of Objections in General

To establish plain error, defendant must prove (1) error, (2) that is plain, and (3) that affects substantial rights.

[2] **Criminal Law** Elements of offense and defenses

District court did not commit plain error in prosecution for being felon in possession of ammunition as result of its failure to instruct jury that it had to find that defendant knew he belonged to relevant category of persons barred from possessing ammunition, where defendant had previously been convicted for being felon in possession of ammunition and served 60 months' imprisonment. 18 U.S.C.A. §§ 922(g)(1), 924(a)(2).

1 Cases that cite this headnote

[3] **Criminal Law** Preliminary proceedings
Criminal Law Discovery and disclosure

District court's decision not to exclude evidence for failure to comply with discovery obligations is reviewable for abuse of discretion, and subsidiary factual findings are reviewed for clear error. Fed. R. Crim. P. 16.

[4] **Criminal Law** Failure to produce information

District court did not abuse its discretion in permitting government to present photos of individual frames of surveillance video that were prepared by its forensic video analyst in prosecution for being felon in possession of ammunition, even though photo exhibit was subject of expert testimony and was not disclosed until less than one week prior to trial, where government timely provided defendant with full video, there was no evidence that pictures were manipulated such that they did not accurately represent video, and analyst prepared photos by using free software available to public. Fed. R. Crim. P. 16.

[5] **Criminal Law** Sentencing

Court of Appeals considers sentence's substantive reasonableness under deferential abuse-of-discretion standard.

[6] **Criminal Law** Sentencing

When considering whether sentence is substantively reasonable, Court of Appeals takes into account totality of circumstances, including extent of any variance from Guidelines range.

[7] **Criminal Law** Sentencing

Court of Appeals' review of sentence's substantive reasonableness is narrow, and it is unusual case when it reverses district court sentence as substantively unreasonable.

[8] **Sentencing and Punishment** Nature, degree or seriousness of offense

Sentencing and Punishment Nature, degree, or seriousness of other misconduct

Sentencing and Punishment Existing social ties and responsibilities

Weapons Possession after conviction of crime

Defendant's above-Guidelines 63-month sentence for being felon in possession of ammunition was not substantively unreasonable, even though district court found that defendant was "really important person" in his family and that he had some "good" in him, where court highlighted seriousness of offense, noting that it was "fortuitous that no one was hurt" during shooting, observed that defendant had prior conviction for crime involving firearm in dangerous situation, and concluded that above-guidelines sentence was warranted because he had not been deterred adequately after 60-month sentence for first firearm conviction. 18 U.S.C.A. §§ 922(g)(1), 924(a)(2), 3553(a).

[9] **Sentencing and Punishment** Manner and effect of weighing or considering factors

District court has wide latitude to weigh statutory sentencing factors in each case and assign some factors greater weight than others in determining appropriate sentence. 18 U.S.C.A. § 3553(a).

***644** Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

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Cortez Maurice Crumble, Pro Se.

Douglas Micko, Douglas Olson, Assistant Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Minneapolis, MN, for Defendant - Appellant.

Before GRUENDER, WOLLMAN, and KOBES, Circuit Judges.

Opinion

GRUENDER, Circuit Judge.

Cortez Crumble appeals his conviction in light of *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), and he argues that the district court[1] abused its discretion in making an evidentiary ruling and imposed a substantively unreasonable sentence. We affirm.

1 The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

A grand jury returned an indictment against Crumble for being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The charges stemmed from his involvement in a shooting outside a bar. At Crumble's trial, the Government relied on video footage of the event from the bar's surveillance system. The Government also introduced photos of individual frames of the surveillance video, which were prepared by a forensic

video analyst, to show that Crumble possessed and discharged a firearm outside the bar. According to the Government, it introduced the photos so "a specific frame could be examined at leisure, without having to pause the video at trial at a precise moment." Crumble objected to the photos, but the district court overruled his objection. After hearing all the evidence, the jury returned a guilty verdict.

At sentencing, the district court found a total offense level of 18 and a criminal history category of IV, resulting in an advisory sentencing guidelines range of 41 to 51 months' imprisonment. The district court sentenced Crumble to 63 months' imprisonment. Crumble appeals his conviction, the district court's decision to admit the photos, and his sentence. We consider each argument in turn.

[1] Crumble first argues that we should reverse his conviction in light of *Rehaif*. —— U.S. ——, 139 S. Ct. 2191. In that case, "the Supreme Court concluded that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he *knew he belonged to the relevant category of persons barred from possessing a fire* ***645** *arm*." *United States v. Davies*, 942 F.3d 871, 873 (8th Cir. 2019) (internal quotation marks omitted). Here, the relevant category is anyone "who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year." § 922(g)(1). "Because [Crumble] failed to challenge the lack of a jury instruction regarding his knowledge of his felony status, we review his claim for plain error." *United States v. Hollingshed*, 940 F.3d 410, 415 (8th Cir. 2019). Crumble thus must prove "(1) an error, (2) that is plain, and (3) that affects substantial rights." *Davies*, 942 F.3d at 873.

[2] The Government concedes that the first two elements of the plain error standard are satisfied but argues that Crumble cannot show the error affected his substantial rights. We agree given that Crumble was previously convicted for being a felon in possession of ammunition and served 60 months' imprisonment. *See* *Hollingshed*, 940 F.3d at 415-16 (finding that a defendant who had served approximately four years' imprisonment could not show that any error affected his substantial rights); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (finding that, following *Rehaif*, the defendant could not show that his substantial rights were affected in part because the defendant had prior convictions for being a felon in possession of a firearm and for being a felon in possession of ammunition).

Crumble argues, based on 18 U.S.C. § 921(a)(20), that he could have reasonably believed that a safe harbor applied to him such that he no longer *knew* he had been convicted of a crime punishable by imprisonment for a term exceeding one year.[2] But he offers no evidence to show that was the case here. It is Crumble's burden to prove that his substantial rights were affected by the *Rehaif* error. *See* *Davies*, 942 F.3d at 873. To do so, he must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* Merely identifying a defense theory—a possibility—is not sufficient to show a reasonable *probability* of success without any evidence that the defense theory would, in fact, apply in this case. We thus conclude that Crumble has not met the plain error standard.

2 That statute provides that "[a]ny conviction which has been expunged[ ] or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter ...." 18 U.S.C. § 921(a)(20).

Crumble next argues that the district court improperly allowed the Government to present photos of individual frames of the surveillance video in violation of Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 requires, upon a defendant's request, that the Government give the defendant a written summary of expert testimony, the results of a scientific experiment if it is material to the defense, and any other documents or photographs that are material to preparing the defense. Fed. R. Crim. P. 16(a)(1)(E)-(G). Crumble requested Rule 16 evidence, and the district court granted his motion, imposing a deadline for expert disclosures two weeks before trial.

Crumble thus argues, as he did before the district court, that the Government violated its Rule 16 obligations because the photo exhibit was the subject of expert testimony and disclosed less than a week prior to trial. The district court disagreed, concluding that no violation occurred because the forensic video analyst did not create "new or additional evidence" when preparing the photos. The district court observed that the defense "had the full version of the video"

and that what the analyst did was "relatively routine in the ***646** forensic video world." According to Crumble on appeal, the Government's production to him of the video was not sufficient to meet the Rule 16 requirement because the photos were manipulations of the video that could have changed what was pictured in the video frame.

[3] **[4]** "The district court's decision not to exclude evidence under Rule 16 is reviewable for abuse of discretion. Subsidiary factual findings are reviewed for clear error." *United States v. Spotted Elk*, 548 F.3d 641, 660 (8th Cir. 2008) (citation omitted). Here, Crumble does not dispute that the Government timely provided him with the full video, nor does he offer any evidence to show that the pictures were manipulated such that they do not accurately represent the video. And the forensic video analyst testified that she prepared the photos by using a free software available to the public to download. In other words, anyone could have prepared photos from the surveillance video, which provides at least some support for the conclusion that the photos were not new evidence. *Cf.* *United States v. McCourt*, 468 F.3d 1088, 1092 (8th Cir. 2006) (noting that "a video is nothing more than a series of still images shown in rapid succession to create the illusion of motion"). The forensic video analyst later combined the photos into a single PDF document using Adobe Acrobat, a software that is also available to the public but requires payment. The district court credited the analyst's testimony and reasoned that the photos did not constitute new evidence, meaning providing the defense with the full video was sufficient notice. It reasoned further that the defense could question the analyst about how she created the photos during cross examination. The district court's decision to admit the photos, based on the above reasoning, does not amount to an abuse of discretion.

Finally, Crumble argues that his sentence is substantively unreasonable because the district court did not properly weigh the relevant sentencing factors. In particular, he argues the district court gave too much weight to the dangerous nature of his offense and to his prior record.

[5] **[6]** **[7]** We consider the substantive reasonableness of the sentence under a deferential abuse-of-discretion standard. *United States v. Timberlake*, 679 F.3d 1008, 1011 (8th Cir. 2012). When considering whether a sentence is substantively reasonable, we "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). "Our review of the substantive reasonableness of a sentence is narrow ... and it is the unusual case when we reverse a district court sentence ... as substantively unreasonable." *United States v. Whitlow*, 815 F.3d 430, 436 (8th Cir. 2016) (internal quotation marks omitted).

Here, the district court carefully considered the 18 U.S.C. § 3553(a) factors, including both the mitigating and aggravating factors. The district court noted that Crumble was a "really important person" in his family and that he has some "good" in him. The district court also highlighted the seriousness of the offense, noting that it was "fortuitous that no one was hurt" during the shooting outside the bar. It observed additionally that Crumble had a prior conviction for a crime involving a firearm in a dangerous situation and concluded that an above-guidelines sentence was warranted because Crumble had not been deterred adequately after a 60-month sentence for the first firearm conviction.

[8] **[9]** The foregoing demonstrates that the district court considered Crumble's circumstances ***647** and imposed a sentence that it believed was consistent with the goals of sentencing. "The district court has wide latitude to weigh the § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence." *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009); *see also* *United States v. White*, 506 F.3d 635, 645 (8th Cir. 2007) ("Pursuant to § 3553(a), a district court may consider factors already taken into account in calculating the advisory guideline range."). In light of the district court's explanation of its reasons for the sentence imposed, this is not the "unusual case" when we reverse a sentence as substantively unreasonable. *See Whitlow*, 815 F.3d at 436.

We affirm.

All Citations

965 F.3d 642

 App. B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CR 18-17 ADM/KMM

UNITED STATES OF AMERICA, Plaintiff, v. (1) CORTEZ MAURICE CRUMBLE, a/k/a "Bruiser," (2) CEDRIC LAMONT BERRY, JR., a/k/a "Ced," Defendants.	**INDICTMENT** 18 U.S.C. § 922(g)(1) 18 U.S.C. § 924(a)(2) 18 U.S.C. § 924(d)(1) 18 U.S.C. § 2461(c)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1
(Felon in Possession of Ammunition)

On or about November 23, 2017, in the State and District of Minnesota, the defendant,

CORTEZ MAURICE CRUMBLE,
a/k/a "Bruiser,"

having been previously convicted of the following crimes, each of which was punishable by imprisonment for a term exceeding one year:

Offense	**Place of Conviction**	**Date of Conviction (On or About)**
1st Degree Drug Possession	Dakota County, MN	May 21, 2007
Receiving Stolen Property	Hennepin County, MN	May 1, 2008
Prohibited Person in Possession of a Firearm	Hennepin County, MN	July 14, 2011

did knowingly possess in and affecting interstate and foreign commerce ammunition, namely, Magtech .40 caliber ammunition, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT 2
(Felon in Possession of Ammunition)

On or about November 23, 2017, in the State and District of Minnesota, the defendant,

CEDRIC LAMONT BERRY, JR.,
a/k/a "Ced,"

having been previously convicted of the following crimes, each of which was punishable by imprisonment for a term exceeding one year:

Offense	**Place of Conviction**	**Date of Conviction (On or About)**
1st Degree Aggravated Robbery	Hennepin County, MN	November 8, 2012
Prohibited Person in Possession of a Firearm	Hennepin County, MN	November 26, 2012
5th Degree Drug Possession	Hennepin County, MN	October 14, 2016
5th Degree Drug Possession	Hennepin County, MN	July 12, 2017

did knowingly possess in and affecting interstate and foreign commerce ammunition, namely, Hornady .40 caliber ammunition, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATIONS

Counts 1–2 of this Indictment are hereby realleged and incorporated as if fully set forth herein by reference, for the purpose of alleging forfeitures pursuant to Title 18, United

States Code, Sections 924(d)(1), in conjunction with Title 28, United States Code, Section 2461(c).

As a result of the forgoing offenses, the defendants shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1), any firearm or ammunition involved in or used in any knowing violation of Sections 922(g) and 924(a), all in violation of Title 18, United States Code, Sections 922(g)(1), 924(e)(1), and 924(d)(1), in conjunction with Title 28, United States Code, Section 2461(c).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

In the
United States Court of Appeals
For the Eighth Circuit

No. 19-2197

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORTEZ MAURICE CRUMBLE,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Minnesota

BRIEF OF APPELLANT

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District of Minnesota

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(612) 664-5858

Counsel for Defendant-Appellant

SUMMARY OF THE CASE

Appellant Cortez Crumble was charged with "knowing" possession of ammunition by a "felon"-18 U.S.C. § 924(g)(1) & § 924(a)(2)-primarily based upon surveillance camera recordings. This appeal raises three reversible errors—

(1). Elements and defenses: At the time of trial through final judgment, the rule of this Circuit was that the "knowing" qualifier of the above crime applied to the possession element, but not the felon-status element. Hence, the prior circuit rule stated an incorrect formulation of the charged elements, and also precluded an ignorance-of-status defense. Intervening Supreme Court authority abrogates this rule. Under the plain-error test, this should be corrected on direct appeal.

(2). Remedy for late disclosure: After the relevant discovery deadline had expired and shortly before trial, the government disclosed a multi-photo exhibit purporting to accurately partition the surveillance video into component frames. The disclosure was made too late for the defense to evaluate the evidence, and prepare impeachment or rebuttal material to meet it. The district court should have remedied the late disclosure, via continuance or exclusion.

(3). Substantive reasonableness: The above-Guidelines sentence imposed was the product of improper weighing and is thus substantively unreasonable.

This case involves complex legal issues and a sizeable record. Oral argument would thus be helpful to the Court, and 10 minutes per side should suffice.

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TABLE OF ABBREVIATIONS

Abbreviation	Description
DCD	District Court Docket Entry (D. Minn. No. 18-17)
Def. Add.	Addendum to Brief of Defendant-Appellant
FRAP	Federal Rules of Appellate Procedure
FRCrP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
Gov. Ex.	Trial exhibit offered by government
PSR	Presentence Investigation Report
SHT	Transcript of sentencing hearing
TT	Transcript of jury trial

JURISDICTIONAL STATEMENT

Defendant-Appellant Cortez Crumble was charged by indictment filed in United States District Court for the District of Minnesota, No. 18-17. (DCD 1). Crimes against the United States were alleged, thus implicating the district court's original jurisdiction. 18 U.S.C. § 3231. The Honorable Ann D. Montgomery, Senior United States District Judge, presided at all proceedings relevant to this appeal, including jury trial and sentencing. (DCD 117-121, 133).

The district court entered its sentencing judgment on May 28, 2019, (DCD 169), and Mr. Crumble filed his notice of appeal on June 7 of that same year, (DCD 171), which was timely under FRAP 4(b). This Court has jurisdiction to decide the present appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I.

At the time of trial and judgment, the law of this circuit provided the essential elements of the charged § 922(g) & § 924(a)(2) ammunition-possession offense *did not require* the government to allege or show the defendant knew his statutorily prohibited status. By extension, the circuit rule was that ignorance of said status was not a valid defense to the charge. After the district court entered its judgment, the Supreme Court issued a contrary decision, *i.e.*, holding the elements of the above charge *do require* the government to allege and prove beyond a reasonable doubt that the defendant knew his statutorily prohibited status. Does the intervening authority constitute an error that should be corrected on this direct appeal?

Most apposite authorities speaking to the issue—

Rehaif v. United States, 139 S. Ct. 2191 (2019)
United States v. Kind, 194 F.3d 900 (8th Cir. 1999)
United States v. Lomax, 87 F.3d 959 (8th Cir. 1996)
United States v. Barthman, 919 F.3d 1118 (8th Cir. 2019)

(cont'd on next page)

II.

Whether the district court abused its discretion in permitting the government to present a multi-photo exhibit purporting to isolate individual frames of a continuous surveillance video recording, where the multi-photo-frame exhibit: (a) was not supplied to the defense until the eve of trial and thus disclosed too late to provide meaningful opportunity to impeach or rebut; (b) it is now known that the evidence is impeachable and rebuttable by means of technical and scientific expertise; and (c) the evidence was integral to the government's theory of the case.

Most apposite authorities speaking to the issue—

United States v. Sims, 776 F.3d 583 (8th Cir. 2015)
FRCrP 16

III.

Whether the district court improperly weighed the plenary sentencing factors and offered an inadequate explanation for the significant above-Guidelines sentence imposed here, such that the sentence must be deemed substantively unreasonable

Most apposite authorities speaking to the issue—

Gall v. United States, 552 U.S. 38 (2007)
United States v. Dautovic, 763 F.3d 927 (8th Cir. 2014)
United States v. Singh, 877 F.3d 107 (2d Cir. 2017)

STATEMENT OF THE CASE[1]

In this case, the government charged Defendant-Appellant Cortez Crumble with "knowing[]" possession of ammunition by a "felon," allegedly in violation of 18 U.S.C. § 922(g)(1) & § 924(a)(2). (DCD 1 at 1-2). The government's theory of the case was that Mr. Crumble and his co-defendant Cedric Berry did not merely possess ammunition at some time; rather, the government's theory was that the defendants did so in connection with a shooting incident at the parking area of a Minneapolis bar. (TT at 37-39). The government was unable to call a single eyewitness to substantiate this highly conspicuous and public event, but rather relied almost entirely upon video recordings extracted from the bar's Closed Circuit Television (CCTV) surveillance camera system.[2] (*See* TT at 370). The sum and substance of the government's trial evidence may be stated as follows—

A. The Broadway Pub

This case involves a gunfire incident that occurred at approximately 1:00 a.m. on November 23, 2017, at a Minneapolis establishment called the Broadway Pub

[1] Parenthetical citations to the record are described in the Table of Abbreviations, which may be found in the tables preceding the body of this brief.

[2] Because trial video exhibits were so central to this case, Mr. Crumble anticipates the proposed submission of a video-media appendix, to be deferred after both parties submit principal briefs. *See* FRAP 30(c)(1) & (e). Should it appear that such a deferred appendix will be helpful to the Court, Mr. Crumble will assemble the proposed appendix and offer the appropriate motion for submission.

("Pub"). (*See, e.g.,* TT at 49-56). The Pub is located in a densely populated urban environment, and on the night in question the place was filled with patrons. (*E.g.*, TT at 59-60; Gov't Ex. 3A at 00:00 to 03:50). The parking lot, adjacent streets, and sidewalks were densely trafficked as well. (*See, e.g.,* Gov't Ex. 3A at 4:45 to 6:30). All of this was demonstrated by trial testimony, (*e.g.,* TT at 49-67), as well as the CCTV surveillance recordings introduced at trial, (*e.g.*, Gov't Ex. 3A).

The bar implements very tight security protocols. (*See* TT at 59-68). According to employees, the Pub retains private security guards stationed at the entrances, and also patrolling the main floor and outdoor parking area. (TT at 59-62). The Pub forbids the carrying of dangerous weapons into the building, and security personnel conduct pat-down or electronic wand searches of anyone who enters. (TT at 62-63, 77-78). The Pub also maintains multiple CCTV security cameras—17 in all—to monitor and record events occurring both inside the building and the immediate area outside the building. (TT at 56-57, 63-66, 274).

On the night in question, Defendant-Appellant Mr. Crumble could be found mingling amongst the many late-night revelers within the Pub. (*See, e.g.,* TT at 285-87 & Gov't Ex. 3A at 1:00 to 3:30). Also present was Mr. Crumble's acquaintance and co-defendant, Cedric Berry. (TT at 225, 240-41 & Gov't Ex. 3B).

All was well until approximately 1:00 a.m., at which point an "altercation"—perhaps better described as a bar-room brawl—erupted amongst some patrons on the

main floor. (TT at 228, 287-89; Gov't Ex. 3A at 3:40 to 4:20; Gov't Ex. 3B at 0:00 to 0:20). The fisticuffs are described next.

B. The indoor brawl

The government did not produce any eyewitnesses to present a firsthand account of the fight, but rather relied upon a police officer's description of the scene as captured by the Pub's interior security cameras. (TT at 228, 287-89; Gov't Ex. 3A at 3:40 to 4:20; Gov't Ex. 3B at 0:00 to 0:20).

The video recordings depict numerous patrons of the Pub that night. (Gov't Ex. 3A at 3:40 to 4:20; Gov't Ex. 3B at 0:00 to 0:20). The testifying officer said the video depicts Mr. Berry (and many others) engaged in a bar-room brawl with unnamed opponents. (TT at 288; Gov't Ex. 3A at 3:40 to 4:20; Gov't Ex. 3B at 0:00 to 0:20).

As for Mr. Crumble, he is shown to be a non-participant in the brawl. (TT at 285-86; Gov't Ex. 3A at 4:00 to 4:30). Rather, Mr. Crumble is seen on the periphery to break things up, and then assisting a person who was apparently injured in the scuffle. (TT at 285-86, 288-89; Gov't Ex. 3A at 4:00 to 4:30).

Once the action breaks, Mr. Berry is seen leaving the Pub building for the outdoor area. (TT at 288; Gov't Ex. 3B at 0:20 to 0:30). The officer said that Mr. Berry soon re-entered the building, only this time Mr. Berry was carrying a firearm in his hand. (TT at 242 & Gov't Ex 3B at 1:10 to 1:15). As already noted, the Pub

prohibits weapons of this type. (TT at 59-63, 77-78). So, upon spotting the weapon, the private security personnel intercepted Mr. Berry and escorted him to the exit, into the outdoor pedestrian and parking area. (TT at 243 & Gov't Ex. 3B at 1:20 to 1:35).

It is this outdoor area, and the events that ensued, that were the main sources of contention at trial as described next.

C. The outdoor shooting

As already mentioned, the Pub is situated in a densely-populated urban area, with significant vehicular and foot traffic on the surrounding thoroughfares. (*See, e.g.*, Gov't Ex. 3A & 3B). The building is located at the corner of a city block, with busy streets and sidewalks running along the east side of the property, as well as the south side. (*See, e.g.*, Gov't Ex. 2, 3A & 3B). Adjacent to the building is a parking area running along the north and west sides of the building, with points of entry and exit to the surrounding streets. (*See, e.g.*, Gov't Ex. 2, 3A & 3B). The government presented this overhead photo of the property:

(Gov't Ex. 2).[3]

As already mentioned, the Pub placed a number of CCTV surveillance cameras outside the building to monitor the Pub's parking area and other outdoor surroundings. (*E.g.*, TT at 55-56). At trial, the government presented video recordings generated by these cameras, purportedly depicting events that occurred in these outdoor areas following the indoor brawl just described. (Gov't Ex. 3A & 3B). To narrate events, the government offered the testimony of its Minneapolis police case agent, Adam Lepinski. (TT at 125-26, 210-19, 234-44).

[3] The original of this photo appears in multi-color format, which may appear as such on the Court's electronic docketing system. However, the booklet version will appear in grayscale. The undersigned does not believe the format matters with respect to the exhibit as used here, as its purpose is merely to give the reader a visual understanding of how the outdoor area of the Pub is laid out. This is particularly helpful when viewing the surveillance video exhibits, to orient the viewer when attempting to determine how the action progresses. (*See, e.g.*, Gov't Ex. 3A & 3B).

According to the government's police witness, after being ejected from the Pub with gun in hand, the video depicts Mr. Berry milling about the middle of the above outdoor parking area. (TT 242-43; Gov't Ex. 3B at 1:10 to 2:20). Mr. Berry then settles into the rear seating area of a vehicle which is parked at the north parking area, with the door wide open. (Gov't Ex. 3B at 1:10 to 2:20).

The officer said another person—not identified by the police officer or anyone else at trial—can be seen on the east end of the parking area. (TT at 236-37).

The officer testified that the video depicts a sport utility vehicle (SUV) turning into the east entrance of the parking area. (TT at 236; Gov't Ex. 3B at 6:05 to 6:15).

As the SUV is entering the parking lot, the officer claimed to see "lights" appear to emanate near the unidentified person on the east end of the parking area—"near where the [unidentified] man is running." (TT at 236-37).

Over defense objection, the district court permitted the government to show Officer Lepinski a multi-frame pictorial exhibit, purportedly slicing the continuous video into single isolated frames, or multiple "still photographs." (TT at 238-39 & Gov't Ex. 32). According to the officer, the exhibit shows that a "flash of light" can be seen emanating from the aforementioned figure in three such frames, numbered 65, 74, and 83 on the relevant exhibit. (TT at 239-40 & Gov't Ex. 32 at 65, 74, 83).

The police-witness goes on to say that the video depicts the SUV hastening, through the parking area to the southwest exit depicted above. (TT at 243; Gov't Ex. 3A at 6:15 to 6:25; Gov't Ex. 3B at 2:15 to 2:25). According to the officer, Mr. Berry can be seen firing shots from the above-referenced handgun and toward the SUV as it makes its way through the parking area. (TT at 243-44; Gov't Ex. 3B at 2:15 to 2:25 & 2:35 to 2:45).

This was all the government offered as to direct evidence of the shooting itself. Despite the very public venue with numerous passers-by in this dense urban environment, the government did not offer any eyewitness testimony as to which person or persons fired a gun in the Pub's parking area that night. No bystanders. No confederates. No alleged victims. No one at all.

Rather, the government relied entirely upon indirect evidence gathered during a police investigation, described next.

D. Immediate police investigation

Minneapolis police soon received reports of the Pub parking lot shooting, and dispatched officers and support personnel to investigate. (*E.g.*, TT at 80-81).

1. Collection of bullet fragments

A city-employed forensic investigator named Elizabeth Reischel arrived on the scene to comb the parking lot for potential evidence. (TT at 80-82). Ms. Reischel discovered fragments of firearm ammunition—*e.g.*, cartridge casings which many firearms eject upon discharge—strewn about the Pub's parking area. (TT at 88-92). Using her own methodology, she divided the casings into three groupings, as illustrated in this overhead image offered by the government:

(Gov't Ex. 6).[4]

According to Ms. Reischel, she collected 9 casings from the eastern sidewalk area, labeled Group 1 above. (TT at 90). She collected 3 casings from the center of the parking lot, labeled Group 2. (TT at 90-91). And she collected 8 casings from the western side of the lot, labeled Group 3. (TT at 90-91).

[4] As with the earlier pictorial reproduction, the original is in multi-color format which may appear as such in the electronic version of this brief. But in the booklet version of the brief, this photo will appear in grayscale.

After having collected the casings, Ms. Reischel brought them to her laboratory to "swab . . . for DNA." (TT at 94-95). That is to say, attempt to extract biological material from the casings, which might later be further tested to determine whether that material contains a unique DNA profile which matches a particular person. (*See* TT at 108-23). She did not attempt to extract fingerprints from the casings. (TT at 102).

2. DNA testing

Ms. Reischel did the above-referenced DNA swabbing by group as laid out above. (TT at 103-04). That is to say, she would put Group 1 of casings through the swabbing process, then did the same for Group 2, and again for Group 3. (TT at 105).

The resulting samples were then sent to another laboratory for DNA analysis. (TT at 113). As indicated above, this laboratory tested three swabs, each sample representing one of the designated groups above. (TT at 113). In this case, the technician was tasked to determine whether the DNA swabs would match a "known sample" obtained from the person of Mr. Berry, and also a "known sample" obtained from the person of Mr. Crumble. (TT at 114).

The upshot of all this, is that the testing revealed a match with Mr. Berry as to biological material found on some of the casings. (TT at 115). However, there was no match as to Mr. Crumble. (TT at 115-16, 121).

E. Police investigation of Mr. Berry

The subsequent police investigation revealed a large amount of evidence indicating that Mr. Berry had discharged a firearm toward the SUV on the night in question—

1. DNA identification

As just related, the police investigation revealed a DNA match with biological material gleaned many of the recovered bullet fragments, and the DNA profile of Mr. Berry. (TT at 115). This, of course, suggests that Mr. Berry had had some physical contact with the recovered bullet fragments, presumably left behind as remnants of the shooting incident at issue here.

2. Pub surveillance video

As described above, the police obtained CCTV recordings from the Pub's security staff. (*E.g.*, TT at 211-12). As described above, according to the government's police-witness, the video depicts Mr. Berry right in the thick of the indoor bar fight. (TT at 288; Gov't Ex. 3A at 3:40 to 4:20; Gov't Ex. 3B at 0:00 to 0:20).

It shows Mr. Berry leaving the building, returning with a firearm in hand, and then being ejected by security staff while armed with that same gun. (TT at 242-43, 288; Gov't Ex. 3B at 0:20 to 0:30, 1:10 to 1:35).

It shows Mr. Berry—presumably still armed—milling about the middle of the above outdoor parking area. (TT 242-43; Gov't Ex. 3B at 1:10 to 2:20). And then settling into the rear seating area vehicle which is parked at the north parking area, with the door wide open. (Gov't Ex. 3B at 1:10 to 2:20).

And crucially, it shows Mr. Berry firing shots from the above-referenced handgun and toward the SUV, as the vehicle hastens through the parking area. (TT at 243-44; Gov't Ex. 3B at 2:15 to 2:25 & 2:35 to 2:45).

3. Trash pull

Suspecting Mr. Berry of involvement in the above shooting incident, the police watched his place of residence, and intercepted the trash left outside for normal refuse pickup. (TT at 149-50). Officers found a receipt for an establishment called Bill's Gun Shop, a firearms dealer. (TT at 150).

4. Gun shop surveillance video

The police went to the gun shop, and there obtained yet more video surveillance recordings. (TT at 150). This video showed a female companion of Mr. Berry purchasing ammunition, while Mr. Berry was in the shop. (TT at 150-51).

5. Guilty plea

Given all of this evidence, prior to this trial Mr. Berry entered a guilty plea under the terms of a plea agreement. (DCD 83-84). However, Mr. Berry did not

supply any evidence implicating Mr. Crumble in the above shooting, and did not testify at trial. (TT, *passim*).

F. Police investigation of Mr. Crumble

As to Mr. Crumble, the police investigation was far less fruitful.

1. DNA identification

As already mentioned, the police obtained bullet fragments from the Pub parking lot, and employed DNA identification techniques upon these items. (*Supra* Statement of the Case § D). This resulted in no match with Mr. Crumble, *i.e.*, DNA testing revealed no biological material on the bullet fragments which would suggest prior contact with the person of Mr. Crumble. (TT at 115-16, 121).

2. Pub surveillance video

Unlike Mr. Berry's clear and prominent participation in the events at issue, the Pub's CCTV recordings are well below conclusive as to Mr. Crumble.

The recordings show Mr. Crumble on the periphery of the indoor brawl, trying to break things up and then assisting a person who was apparently injured in the scuffle. (TT at 285-86, 288-89; Gov't Ex. 3A at 4:00 to 4:30).

The recordings show Mr. Crumble remained inside the building, as Mr. Berry left and returned with a gun in hand. (TT at 290). After Mr. Berry is ejected, Mr. Crumble can be seen leaving the building as well, and walking in the parking area

and eastern sidewalks for a time. (TT at 290; Gov't Ex. 3B at 1:30 to 1:50; Gov't Ex. 3A at 4:35 to 5:40).

As Mr. Berry settles into the back seat of a parked vehicle—in clear view of the camera—Mr. Crumble walks along the east sidewalk with several other people and disappears from view. (Gov't Ex. 3B at 1:45 to 2:05; Gov't Ex. 3A at 5:30 to 5:45). And when the SUV at issue pulls into the parking area, the person who apparently is moving toward the vehicle cannot be identified from the video. (Gov't Ex. 3A at 6:05 to 6:15).

The video then cuts to another angle, in which Mr. Crumble can be seen hastening into the parking area with arm extended, after which he appears to amble toward a parked car at regular pace. (Gov't Ex. 3A at 6:17 to 6:30). But no one could testify that Mr. Crumble even had a firearm at this time, much less discharged any such weapon.

3. Vehicle search-seizure

In December 2017, the Minneapolis police spotted Mr. Crumble as a passenger in a vehicle which was traveling along a public street. (TT at 126-27). The police stopped the vehicle, confiscated it, and conducted a search-seizure at the impound lot. (TT at 128-32). Found inside the vehicle was a "pamphlet"—*i.e.*, advertising literature—distributed by the aforementioned Bill's Gun Shop. (TT at 132-33, 136-37).

4. Mobile device + social media

In addition to the pamphlet, during the above search-seizure the police seized a mobile communication device. (TT at 137-39). The police searched the digital contents of this device, and found that the electronic memory contained images and other information about firearms, (TT at 261-66), as well as ammunition, (TT at 272). According to the police-witness, this device was linked to an electronic social media account controlled by Mr. Crumble, along with postings that apparently occurred close in time to the shooting incident at issue here. (TT at 266-72).

5. Search-seizure at Mr. Crumble's residence

The police conducted a search-seizure of Mr. Crumble's residence. Of note here, they seized a pair of multi-colored pants, which it appeared that Mr. Crumble was wearing at the Pub on the night of the above-described shooting incident.[5] (TT at 248-49).

[5] At trial, the government presented what was offered as expert evidence within the meaning of FRE 702, in the vein of matching the pants seized from Mr. Crumble's home with the above video recordings. (*See* TT at 295-314). The district court permitted this presentation, a ruling which is dubious under the test of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). However, such video identification was not the major controverted issue at trial. Rather, the main question was whether the video showed Mr. Crumble possessing a firearm loaded with ammunition. And as discussed here, the video recordings were decidedly inconclusive on that score.

6. Trial

Unlike Mr. Berry who eventually pleaded guilty, Mr. Crumble declined to do so on the (far lesser) strength of this evidence. And instead he took the matter to trial as described next.

G. Charge and trial

1. Charged offense

As already mentioned, on the strength of the above investigation the government charged both Mr. Crumble and Mr. Berry with "knowing[]" possession of ammunition by a "felon"[6] in violation of 18 U.S.C. § 922(g)(1) & § 924(a)(2). (DCD 1).

At the time of the indictment was returned—extending through trial and district court judgment—the rule of this circuit was the "knowing" qualifier applied only to the possession element of this charged offense, but not the "felon" element. *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999). And circuit law also maintained that Mr. Crumble was not permitted to advance an ignorance-of-status defense. *United States v. Lomax*, 87 F.3d 959, 962 (8th Cir. 1996). Hence, Mr. Crumble entered into a common stipulation in cases of the type,[7] *i.e.*, a stipulation presented to the jury that:

> The parties stipulate and agree that prior to November 23[], 2017, Cortez Maurice Crumble had been convicted of at least one offense punishable by a term of imprisonment exceeding one year and was thus prohibited from possessing ammunition on November 23[], 2017.

(TT at 257).[8]

As mentioned earlier, Mr. Berry entered a guilty plea before the trial proceedings described here. (DCD 83-84). Mr. Berry did not implicate Mr. Crumble, nor provide testimony at trial.

2. Government case-in-chief & single-frame exhibit

For its case-in-chief, the government presented all of the evidence described earlier, relying especially heavily upon video recordings extracted from the Pub's security camera system.

Mr. Crumble registered a number of objections to the government's evidentiary presentation, but in particular the defense objected to the presentation of a multi-photographic array which purports to break the continuous video

[6] The actual statute does not use the generic term "felon" to describe the statutorily prohibited status at issue, but rather prohibits ammunition possession to anyone "who has been convicted in any court" of a "crime punishable by imprisonment for a term exceeding one year." § 922(g)(1). The latter term is further defined in 18 U.S.C. § 921(a)(20), which will be discussed later in this brief.

[7] *See Old Chief v. United States*, 519 U.S. 172 (1997).

[8] It should be observed that this stipulation addresses only the *fact of prior conviction and prohibited status*. It does not address the question of whether Mr. Crumble *knew* or *misapprehended* this prohibited status—the issue presented in this appeal.

surveillance footage into isolated frames of still photos. (Gov't Ex. 32; TT at 167-193).

The government relied upon this exhibit very heavily, to claim that it showed flashes of light—later characterized as "muzzle flashes"—emanating from a very fuzzy image on the video. (TT at 174-75 & 236-40; Gov't Ex. 32 at 65, 74, 83).

The rationale for the objection was that, although the government had earlier supplied continuous video to the defense, it has just recently revealed this purported frame-by-frame breakdown of the video, in violation of federal discovery rules. (TT at 169-71).

The government expert offered the exhibit as a true depiction of events that night, and the defense simply did not have the expertise to determine whether that conclusion was accurate or impeachable. (TT at 170-72). Further study and possibly a defense expert would be necessary, said the defense. (TT at 172). Accordingly, the defense sought exclusion of the exhibit, or in the alternative of a continuance of trial to fairly meet the late-disclosed evidence. (TT at 172).

The district court overruled the objection, and permitted the government to rely heavily upon the frame-by-frame pictorial exhibit as laid out above. (TT at 192-93 & 238-39).

3. Formulation of essential elements

At the close of evidence and final arguments, the district court instructed the jury as to the elements of the charged § 922(g) & § 924(a)(2) crime as follows:

> *One:* The defendant had been previously convicted of a felony, that is, a crime punishable by imprisonment for more than one year;
>
> *Two:* The defendant thereafter knowingly possessed ammunition, namely, Magtech .40 caliber ammunition; and
>
> *Three:* the ammunition was transported across a state line at some time during or before the defendant's possession of it.

(DCD 122 at 22; *accord* TT at 433-34). There was no objection to the instruction, (*see* TT at 366-69), as the formulation conformed with then-prevailing and longstanding law of this circuit. *E.g., United States v. Cowling*, 648 F.3d 690, 700 (8th Cir. 2011) & *Manual of Model Criminal Jury Instructions—Eighth Circuit* § 6.18.922A (Westlaw 2018).

H. Verdict and sentencing

After this, the jury deliberated for some time, even submitting written questions to the district court. (DCD 126-127). Ultimately, the jury returned a verdict finding Mr. Crumble guilty of the § 922(g)(1) & § 924(a)(2) charge. (DCD 128; TT at 447).

The district court ordered a presentence investigation. (TT at 449). The probation office filed its presentence investigation report and suggested determinations under the United States Sentencing Guidelines. (PSR at 3-12, 18).

Mr. Crumble registered objections to these suggested Guidelines findings, (PSR at A.1), and the district court ultimately agreed with the defense that his advisory Guidelines sentencing range should be 41 to 51 months of official imprisonment, (SHT at 3-4).

The defense requested that the district court impose a 37-month sentence as a downward variance. (SHT at 7). In support, the defense cited: (i) Mr. Crumble's good performance while on pretrial home custody; (ii) the recent tragic death of his life partner and mother of his children, resulting in Mr. Crumble taking a much larger role in child-rearing and home life; (iii) support of family and friends; and (iv) amenability to substance use treatment. (SHT at 5-7).

However, the district court made an upward variance from the advisory Guidelines range, imposing a 63-month term of imprisonment. (SHT at 11). The district court did acknowledge all the above positive aspects of Mr. Crumble, but opted for the upward owing to the jury finding of guilt under the government's theory of the case (*i.e.*, a shooting), and a similar prior conviction. (SHT at 9-11).

Mr. Crumble now brings this appeal, seeking reversal and remand for the reasons discussed in the balance of this brief.

SUMMARY OF THE ARGUMENT

In this case, Defendant-Appellant Cortez Crumble was charged with "knowing" possession of ammunition by a "felon." 18 U.S.C. § 924(g)(1) & § 924(a)(2). In attempting to substantiate the charge at trial, the government relied primarily upon rather grainy video recordings extracted from a private surveillance camera system. This appeal raises three reversible errors—

(1). Elements and defenses: At the time of trial through final judgment, the rule of this Circuit was that the "knowing" qualifier of the above crime applied to the possession element, but not the felon-status element. Hence, the prior circuit rule stated an incorrect formulation of the charged elements, and also precluded an ignorance-of-status defense. Intervening Supreme Court authority abrogates this rule. Under the plain-error test, this should be corrected on direct appeal.

(2). Remedy for late disclosure: After the relevant discovery deadline had expired and shortly before trial, the government disclosed a multi-photo exhibit purporting to accurately partition the surveillance video into component frames. The disclosure was made too late for the defense to evaluate the evidence, and prepare impeachment or rebuttal material to meet it. The district court should have remedied the late disclosure, via continuance or exclusion.

(3). Substantive reasonableness: The above-Guidelines sentence imposed was the product of improper weighing and is thus substantively unreasonable.

ARGUMENT

I. This Court should correct the pervasive legal error at issue here, implicating the essential elements of the charged crime and the defenses available to the accused.

In this case, the government charged Mr. Crumble with a violation of § 922(g)(1) (possession of ammunition by a person previously convicted of a crime "punishable by imprisonment for a term exceeding one year"), paired with § 924(a)(2) ("knowing" violation resulting in 10-year maximum penalty). (DCD 1).

The district court used the following formulation as the essential elements of the §§ 922(g)(1) & 924(a)(2) charge at issue:

> ***Element 1:*** The defendant had been previously convicted of a felony, that is, a crime punishable by imprisonment for more than one year;
>
> ***Element 2:*** The defendant thereafter knowingly possessed ammunition, namely, Magtech .40 caliber ammunition; and
>
> ***Element 3:*** the ammunition was transported across a state line at some time during or before the defendant's possession of it.

(DCD 122 at 22 (headings added); *accord* TT at 433-34).

This formulation conformed with then-prevailing circuit law. *United States v. Cowling*, 648 F.3d 690, 700 (8th Cir. 2011); *accord, e.g., Manual of Model Criminal Jury Instructions—Eighth Circuit* § 6.18.922A (Westlaw 2018). What's more, then-prevailing circuit law specifically provided that the "knowing" facet applied to the

possession of ammunition in Element 2, but was not to be applied to the prohibited status of Element 1. *E.g., United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999).

But after the district court rendered its judgment and while this appeal was pending, the Supreme Court issued its decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The holding of that case is:

> [I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

Id. at 2200.

As can be seen, this holding directly contradicts the prevailing circuit law as to the essential elements of a § 922(g)(1) & § 924(a)(2) charge, which existed at the time of Mr. Crumble's trial and which was used to secure his conviction and imprisonment. *Compare Rehaif*, 139 S. Ct. at 2200, *with Kind*, 194 F.3d at 907.

The question becomes, then, how this Court should resolve a direct appeal in which intervening authority significantly modifies the prevailing circuit law as to the essential elements of the charged statute, as well as the available defenses. At least in this case, this Court should correct the error and grant Mr. Crumble a new trial for the reasons outlined below.

A. Standard of review

As already mentioned, at the time this case was initiated via indictment through final judgment below, there existed a solid wall of circuit authority as to the

elements of the § 922(g)(1) & § 924(a)(2) charge at issue here. Specifically, it had long been held that the "knowing" *mens rea* qualifier applied to the "possession" element (Element 2 above), but not the "felon" status element (Element 1). *Kind*, 194 F.3d at 907; *accord, e.g., United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010) (citing cases).

What's more, then-prevailing circuit law held that a defendant was precluded from mounting a defense to such a charge based upon circumstances in which the accused might reasonably be confused about his status as a person "who has been convicted" of a "crime punishable by imprisonment for a term exceeding one year" as stated in § 922(g)(1). *See United States v. Lomax*, 87 F.3d 959, 962 (8th Cir. 1996) (holding that district court properly prevented the defendant from presenting an "ignorance defense" with respect to § 922(g)(1) status on ground that he believed his civil rights had been restored, given circuit rule cited above).

As just demonstrated, the Supreme Court's *Rehaif* decision abrogates the above circuit rules. *See* 139 S. Ct. at 2200. And it is equally clear that Mr. Crumble may rely upon the this new and intervening rule on this direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

However, given the above binding circuit precedent, understandably no objection was registered to the district court below. And the Supreme Court has said that even in these circumstances—*i.e.*, when a lack of objection is entirely

understandable due to a solid wall of binding circuit authority—a reviewing court should nevertheless apply plain error review. *See Johnson v. United States*, 520 U.S. 461, 463-66 (1997). As discussed next, under this standard Mr. Crumble's conviction must be reversed, and the Court should remand for a new trial.

B. This Court should correct the error

Assuming that plain-error review is to be applied here, the standard requires an examination of these factors or prongs:

(1). *Error:* Whether there was a non-waived[9] error—*i.e.*, a "deviation from a legal rule"—with respect to the proceedings below.

(2). *Plain:* Whether the legal error is "clear or obvious" rather than "subject to reasonable dispute."

(3). *Substantial Rights:* Whether the legal error "affected the appellant's substantial rights," which ordinarily means it "affected the outcome of the district court proceedings."

(4). *Fairness & Integrity:* Assuming the above prongs are satisfied, whether the reviewing court should exercise its discretion to remedy the error, "discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings."

[9] The Supreme Court has explained that "waiver" must be distinguished from "forfeiture." *See United States v. Olano*, 507 U.S. 725, 733 (1993). Waiver is the "intentional relinquishment or abandonment of a known right," such as entering a guilty plea under the terms of a plea agreement to avoid the risks of trial. *See id.* Forfeiture, by contrast, is mere "failure to make the timely assertion of a right." *Id.* Here, the defendant did not register objections during the proceedings below due do prevailing circuit authority, and did not have access to the *Rehaif* decision which had not yet been issued. Hence, this case involves arguable forfeiture, but not waiver.

United States v. Barthman, 919 F.3d 1118, 1120-21 (8th Cir. 2019) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)) (internal punctuation in snippet quotes omitted). Each one of these factors counsel strongly favor of correcting the pervasive and significant error at issue here, *i.e.*, a change in the statutory elements and permissible defenses owing to an intervening decision by the United States Supreme Court.

1. The proceedings below evince pervasive legal error.

As already discussed, all actors in the proceedings below—the district court, the government, and the defense—relied upon binding circuit to the effect that the "knowing" aspect of the § 922(g)(1)-§ 924(a)(2) charge applied only to the possession element (Element 2 above), but *not* the felon-status element (Element 1). *Kind*, 194 F.3d at 907. Further, this same rule meant that Mr. Crumble was forbidden from defending the charge on the ground that he did not know (or was ignorant or confused) about his prohibited status. *See Lomax*, 87 F.3d at 962.

As it turns out, the above circuit rules are now known to be incorrect, *i.e.*, a "deviation from a legal rule" which was subsequently announced by the Supreme Court in its *Rehaif* decision. 139 S. Ct. at 2200. The Supreme Court has held that in such circumstances, a party is entitled to invoke the intervening rule on direct appeal. *See Johnson*, 520 U.S. at 467. And the intervening change in law is deemed "error"

within the meaning of the plain-error test. *Id.* Hence, the first prong of the test is met here.

2. The error is plain in light of the intervening authority.

For the same reasons as stated above, the error below is "plain" in the sense that it is no longer subject to reasonable dispute in light of the intervening *Rehaif* decision. *See Barthman*, 919 F.3d 1120-21. Here again, the Supreme Court has said: "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal-it is enough that the error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 468. That is precisely the situation in this case, and so the legal error at issue is "plain" for the purposes of the plain-error test.

3. The error adversely affected substantial rights.

The error at issue here is not merely one of misstatement of essential elements to jury—though of course that alone constitutes a major error of law. Rather, as shown above, the error prevented Mr. Crumble from mounting a defense to these very serious criminal charges. That is to say, the error (*i.e.*, the binding circuit law) precluded Mr. Crumble from putting on a defense to the effect that ***he did not know or reasonably misapprehended*** his prohibited status. *See Lomax*, 87 F.3d at 962.

For example, for purposes of § 922(g)(1) charged here, the term "crime punishable by imprisonment exceeding one year" is subject to the following proviso:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. ***Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter***, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (emphasis added).

Under the pre-*Rehaif* circuit rule, Mr. Crumble would not be able to invoke this provision as a defense if it could be shown as a matter of law that there was no expungement, set-aside, pardon, or restoration of civil rights. *See Lomax*, 87 F.3d at 962. But after *Rehaif*, Mr. Crumble would be entitled to defend on the ground that he had cause to *reasonably believe* that one of these safe harbors applied to him, *i.e.*, to show that he did not "know" of his § 922(g)(1) status at the time of the alleged possession. For example, by presenting a letter from a state official to the effect that his civil rights had been restored (without mentioning that the restoration does not apply to firearm possession). *See* Minn. Stat. § 609.165 (discussing restoration of civil rights and exceptions after discharge of conviction).

In this sense, the error at issue here denied Mr. Crumble notice of the true nature of the charge leveled against him, the permissible defenses to that charge, and the capacity to put on a complete defense. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (discussing right to mount a complete defense to charges). Thus, the pervasive error here appears to fall under the category of "structural error,"

broadly defined as one which "affects the framework within which the trial proceeds." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citation and punctuation omitted). And this is to say nothing of the remaining panoply of rights to the accused under the Fifth and Sixth Amendments, including the right to a fair notice of the charge via indictment, the right to acquittal absent a proof beyond a reasonable doubt as to all essential elements of the charged crime, and so on.

That is to say, all players in the trial below—the district court, the government, and the defendant—were under the reasonable impression that the government needn't show the defendant knew of his § 922(g)(1) status, *Kind*, 194 F.3d at 907, and that the defendant could not defend based upon ignorance of his § 922(g)(1) status, *Lomax*, 87 F.3d at 962. Hence, there was no governmental or defense investigation of status ignorance, and no development of this issue at trial. The trial was therefore structurally flawed, and so this factor counsels in favor of this Court's correction on plain error review.

4. The error seriously affects the fairness, integrity, and reputation of federal judicial proceedings.

For the final plain-error review factor, the Supreme Court instructs that an appellate court consider whether the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (citations and internal punctuation omitted). Ordinarily, this factor is met where there exists a "risk of unnecessary deprivation of liberty." *Rosales-Mireles v. United States*, 138 S. Ct.

1897, 1908 (2018); *accord, e.g., United States v. Lara-Ruiz*, 721 F.3d 554, 559 (8th Cir. 2013) (fourth factor met due to "loss of liberty resulting from erroneous increase in the mandatory minimum sentence, without the requisite jury finding").

Here, as already discussed, Mr. Crumble did have a record of prior convictions, and at trial he stipulated that one or more of these convictions met the legal definition of "felon" status under § 922(g)(1). (TT at 257). But this says nothing about whether Mr. Crumble *knew* of his prohibited status, or was reasonably confused about it. Through the fault of no one and in reliance upon circuit law, this question was never explored before and during trial. Hence, this record presents an unacceptable risk that Mr. Crumble has been erroneously convicted of a serious offense, and is now suffering an unnecessary loss of liberty. Under such circumstances, this Court should exercise its discretion, correct the error discussed herein, and remand to the district court for a new trial.

It is particularly appropriate for this Court to correct the error in this case, as the government's evidentiary presentation as to Mr. Crumble was quite thin as discussed in the Statement of the Case above. And as shown next, the government also relied heavily upon a purported freeze-frame of the CCTV video recordings, which is now known to be of doubtful authenticity. And which was disclosed too late for the defense to mount an effective rebuttal.

II. The district court should have excluded the multi-photo exhibit and accompanying evidence, or otherwise should have granted a continuance to permit the defense to impeach or rebut the evidence.

Despite the very public and conspicuous setting of the shooting with many eyewitnesses around, the government was not able to call a single witness to testify about the shooting incident at issue. Attempting to rectify the situation, the government relied upon CCTV recordings as a substitute. (*See* Gov't Ex. 3A & 3B). This case demonstrates why such a technique can be less-than-optimal.

Of particular note here, the CCTV recordings show Mr. Crumble walking along the sidewalk to the east of the of Pub building along with many others, until the camera loses sight of the group. (Gov't Ex. 3B at 1:45 to 2:05; Gov't Ex. 3A at 5:30 to 5:45). And as the unidentified SUV pulls into the parking lot, the recordings seem to show a figure moving toward the vehicle. (*See, e.g.*, Gov't Ex. 3A at 6:05 to 6:15). Though the image is grainy and inconclusive at best. (*See, e.g.*, Gov't Ex. 3A at 6:05 to 6:15).

Apparently recognizing this problem, less than a week prior to trial, the government notified the defense of intent to offer what might be termed a freeze-frame exhibit of portions of the CCTV recordings. (TT at 169-70; Gov't Ex. 32). According to the government's law enforcement/expert witness, this exhibit merely partioned the continuous video into constituent frames of still photographs. (TT at 179-81, 190). The government relied heavily on this exhibit, claiming that certain

of the still photos showed flashes of light emanating from a blurry figure on the eastern sidewalk. (TT at 354-56). And the government claimed the blurry figure was Mr. Crumble, and that the points of light were "muzzle flashes" from a gun being fired by Mr. Crumble. (TT at 354-56).

As it turns out, the government's claims in this regard were and are suspect, to put it charitably. This would have been discovered in time for rebuttal or impeachment at trial, had the government complied with the discovery rules under Rule 16 of the Federal Rules of Criminal Procedure (FRCrP). And the defense did request exclusion of the freeze-frame evidence, or in the alternative a continuance to gather the materials needed to fairly impeach or rebut the evidence. (TT at 172-73). But the district court declined to take any action at all, and instead overruled the defense objection and remedial request. (TT at 192-93). The result was severe prejudice to the defense, and a verdict that is subject to grave doubt.

A. Standard of review

Under the pretrial discovery provisions FRCrP 16, upon a defendant's request the government is required to supply the defense with, *e.g.*: (i) a written summary of expected testimony of any FRE 702 expert witness; (ii) the results of any scientific test when "the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial"; and (iii) any other document or object which is material to the preparing the defense or which the government intends to

use in its case-in-chief at trial. FRCrP 16(a)(1)(D)-(F). Failure to comply may be remedied by numerous means, including a continuance of trial proceedings, or a prohibition upon as to the use of the undisclosed evidence. FRCrP 16(d)(2).

Here, the defense made the applicable FRCrP 16 requests long before trial. (DCD 36 & 41). And the district court had granted the motions, including a deadline for expert disclosures three (3) weeks prior to trial. (DCD 67 at 2).

The multi-photo exhibit at issue here was the subject of expert testimony, and disclosed less than a week prior to trial. (*See* TT at 171-72 & 191). The defense objected, requesting exclusion of the evidence or a continuance. (TT at 172-73). But the district court denied the requested relief entirely. (TT at 192-93). Hence, a contemporaneous objection was made, and the question is fully preserved for this Court's appellate review.

Under these circumstance, this Court review the district court's chosen discovery ruling and remedy for abuse of discretion. *United States v. Sims*, 776 F.3d 583, 585 (8th Cir. 2015).

B. Failure to remedy the discovery violation was abuse of discretion.

This Court has said that to determine whether a given discovery remedy (or lack thereof) constitutes an abuse of discretion, the relevant factors for consideration are: (1) the reason(s) for the delay in production of evidence, including bad faith; (2) whether the defendant was prejudiced; and (3) whether a lesser sanction would

secure future compliance. *Sims*, 776 F.3d at 585-86. Here, the district court imposed no remedy at all, and thus the final item is not applicable. So the analysis hinges upon the initial pair of factors, as follows:

1. Reason for delay

The government did not give a reason for its delay in supplying the defense with the multi-frame exhibit, (Gov't Ex. 32), but rather claimed there was no violation at all because the defense already had the continuous video recording from which it was derived, (*see* TT at 173-77). The defense countered that this was not merely a "slowed down" version of the continuous video, but rather a new document created by the government's expert very recently. (TT at 177).

The government's video-splicing and exhibit-creating expert witness, Alison Murray, confirmed that she had used publicly available computer software to "extract the individual frames [of the video recording] as sequential images" into the new multi-frame document at issue. (TT at 180-81, 187-88). The expert witness attested that the multi-photo document was "a true and accurate depiction of each of the frames of the original video." (TT at 190).

The district court accepted all of this, saying the discovery problem was "not particularly significant since the defense has had the full version of the video." (TT at 193). The district court also concluded that there were no "serious concerns" about

any alterations to the original video, by way of the open-access computer software used here or for any other reason. (TT at 193).

However, if the up-to-date scientific literature has any validity at all, the district court was overly credulous in its assessment. The literature indicates that images extracted from CCTV recordings frequently contain distortions owing to a wide range of case-specific factors, *e.g.*, camera placement and environment, frame-rate of recording versus playback, storage and reproduction of images, and a great many others. *See, e.g.*, Sickiner et al., "Forensic image analysis—CCTV distortion and artefacts," *Forensic Science Int'l* at 77-85 (2018).

What this means is that an apparent dot of light that appears on a single frame extracted from a continuous video does not necessarily reflect the real-life scene the CCTV system purports to be recording. Rather, the light might be a distortion caused by ambient light in the environment. Or be a by-product of some defect in the recording, storage, and playback process. Or be caused by a glitch in software used to isolate individual frames of the continuous video recording. *See id.*

The defense knew none of this at trial, and freely confessed its ignorance on these highly technical topics. (TT at 171-72). And this technical ignorance was precisely why the defense said it needed a continuance, or exclusion of the evidence. (TT at 171-73). At a minimum, the defense needed time to acquire the skill and knowledge to probe the potential defects in the government's newly disclosed

exhibit. Instead, the district court was overly credulous in accepting the government's untested presentation, claiming that the new exhibit did nothing more than slice the existing video into isolated constituent frames. As just shown, the scientific literature indicates that processing the video recording—including by software programs used here—can and often does generate a product that contains new distortions that did not exist before.

Hence, the frame-by-frame exhibit at issue here was new expert evidence, to be used in the government's case in chief. It was disclosed well beyond the discovery deadline. And as discussed next, the late disclosure severely prejudiced the defense.

2. Prejudice to defendant

According to the government's video expert who created the frame-by-frame exhibit, the document was created approximately October 12, 2018. (TT at 186-87). Trial proceedings commenced on November 5, 2018—more than three weeks later. (*See* DCD 117). In other words, it does appear that the government could have met the three-weeks-prior-to-trial deadline for disclosure of this document, had it chosen to do so. But for reasons that are not explained in the record, the government delayed until October 30 or 31 of 2018—less than a week prior to trial. (TT at 191-92). The unexplained and unjustified delay alone suggests prejudice to the defendant and consequent need for a discovery remedy.

More to the substance, the government repeatedly emphasized the importance of the frame-by-frame exhibit, (Gov't Ex. 32), to its case. (TT at 175). The government explained that "if the jury doesn't have" the exhibit, then one of them might miss the dots of light which the government characterized as "muzzle flashes." (TT at 175). And indeed, the government relied heavily upon the frame-by-frame exhibit in its closing, saying this:

> Ladies and gentlemen, if a picture is worth a thousand words, then the value of the video cannot be measured. It's worth entire libraries. These videos tell you exactly what happened that night. How can you be sure that it happened that way? You can see the muzzle flashes. If you look carefully at this area, he's going to come around. You have to have quick eyes, but you will see three very clear muzzle flashes as he runs around the car. Now, I'm going to play that one more time for now.
>
> And it's hard to see on that screen. And if, like me, you need a little help, we have Government Exhibit 32. Government Exhibit 32, you will have it on disk and it's a series of still frames captured from that video. And if you go through this carefully, you can see exactly what happened frame by frame.
>
> Bam. Look in the -- look in the upper right-hand corner of the car, and you can see the muzzle flash. Bam. Second one. Bam. Right in the middle of the car this time. And then the third one. Bam.
>
> As you go into the jury deliberation room, ladies and gentlemen, I am going to ask you to look at that disk, Government Exhibit 32. Scroll through these yourself. And if you look carefully at your computer screen, you will be able to see those muzzle flashes as clear as day, once you know what you are looking for. They are on frames 65, 74 and 83.

(TT at 354-55).

This passage encapsulates the severe prejudice to the defense, stemming from the government's discovery violation here.

First, it is immediately noticeable how strongly and uncritically the government urges the jury panel to look upon the recording. "A picture is worth a thousand words." "You will be able to see those muzzle flashes as clear as day." Jurors are naturally inclined to believe video evidence uncritically, and the government certainly encouraged that impulse. Had there been time and opportunity to rebut the evidence with the above scientific information concerning distortions in CCTV images, the defense could have and would have upended the illusion of certainty that the government encouraged.

Second, the above passage shows how heavily the government relied upon the frame-by-frame exhibit for its claim that points of light were actually "muzzle flashes" from a gun held by Mr. Crumble. Had the defense the opportunity to rebut the video evidence with science, then the jury would know that it could not rely upon the government's representation in this regard. That the purported "muzzle flashes" might in actuality be ambient lights, or distortions born of the recording and playback process. That a picture is not necessarily "worth a thousand words," but rather can mislead and supply a wholly distorted view of reality.

Last, the passage shows the government using the exhibit almost like an instant replay booth of sporting event—claiming that a reduced speed version of

reality that permits an objective view of the situation. Here again, had the defense had an opportunity for rebuttal, the jury would have known that this exhibit was not necessarily analogous to an instant replay booth at all. Rather, it would have been known that frames might well contain distortions that convey a false picture, and that the government was unwise to rely so heavily upon such evidence in its attempt to condemn a man to criminal conviction and penalty.

On that last point, it is important to reiterate the thinness of the government's case against Mr. Crumble here. No eyewitnesses were produced to testify that Mr. Crumble fired a gun on the night in question. This despite many persons walking about the streets and sidewalks that night. And Mr. Berry, who pled guilty before trial, did not testify against Mr. Crumble. The case against Mr. Crumble was thin, and the frame-by-frame evidence was crucial to the government. The exhibit should have been disclosed, so that the defense could effectively impeach it or rebut it.

This was not done, and hence there is a cloud of uncertainty over this conviction—a natural concern that the conviction is based upon pseudoscience, or at least incomplete science. There was a discovery violation here. It was highly prejudicial to the defense. And the district court abused its discretion in declining to remedy the violation via a continuance or exclusion of the proposed evidence. For this additional reason, this Court should reverse and remand for a new trial.

III. The upward-variance-enhanced sentence imposed here must be deemed substantively unreasonable.

In this case, the district court determined the correct sentencing range under the United States Sentencing Guidelines was 41 to 51 months of official imprisonment, (SHT at 3-4). Mr. Crumble sought a downward variance from this range, citing his good performance on pretrial home custody, his increased involvement in child-rearing following the untimely death of his partner, and his amenability to substance-use treatment. (SHT at 5-7). Instead, the district court imposed an upward variance to a 63-month term of imprisonment—approximately 50% above the bottom of the Guidelines range. (SHT at 11). Given all the circumstances and the district court's explanation, this was an abuse of discretion.

A. Standard of review

This Court reviews the substantive reasonableness of a sentence under an abuse-of-discretion standard, regardless of the presence or absence of any defense objection. *United States v. Smith*, 795 F.3d 868, 872 (8th Cir. 2015). Accordingly, as to this final issue on appeal, the proper standard for this Court's review is abuse-of-discretion. *See id.*

B. The sentence was substantively unreasonable

When evaluating a district court's chosen sentence, the Supreme Court has instructed that reviewing courts must look at the result substantively as well as procedurally. *Gall v. United States*, 552 U.S. 38, 51 (2007). This inquiry requires the reviewing court to "take into account the totality of the circumstances," which includes the existence and extent of any sentencing variance imposed. *Id.* And a reviewing court is to "give due deference" to the district court's weighing of 18 U.S.C. § 3553(a) sentencing factors. *Id.*

"[S]ubstantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions." *United States v. Dautovic*, 763 F.3d 927, 934 (8th Cir. 2014) (punctuation and citations omitted); *see also, e.g., United States v. Singh*, 877 F.3d 107, 116-22 (2d Cir. 2017) (upward variance from 15-21 month Guideline range to 60-month sentence imposed substantively unreasonable, as this was a significant variance based upon dubious rationales in fact-finding and weighing of plenary factors).

Here, the sentencing court offered a very brief rationale for the upward variance, citing the dangers inherent in a public shooting incident, as well as Mr. Crumble's prior record. (SHT at 10). But as already shown, the government's evidence as to Mr. Crumble's actual involvement in the shooting incident was thin at best. And it is fair to wonder whether Mr. Crumble was convicted based upon a

freeze-frame exhibit that was never subjected to a full-and-fair testing of the adversarial process, due to the late disclosure described in the prior section.

As for Mr. Crumble's prior record, that is what the Guidelines criminal history category is designed to capture. And the district court provided no rationale as to why the enhanced Guidelines range owing to the criminal history category was insufficient for the purposes of accounting for a prior offense record.

In sum, then, the district court's weighing decisions here were not reasonable. And the significant upward variance was not appropriately justified. The sentence must therefore be reversed, as substantively unreasonable.

CONCLUSION

For all these reasons, Mr. Crumble requests that the Court reverse the district court, and remand for further proceedings.

Dated: August 23, 2019

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

UNITED STATES OF AMERICA, Appellee,	)	Appeal No. 19-2197
v.	)	**CERTIFICATE OF COMPLIANCE AND OF VIRUS FREE ELECTRONIC BRIEF**
CORTEZ MAURICE CRUMBLE, Appellant.	)	

I hereby certify that the Brief of Appellant filed in contains 9,933 words, excluding the table of contents, table of citations, statements with respect to oral argument, addendum and certificates of counsel and service, as counted by the word-processing system (Microsoft Word) used to generate the brief. The brief otherwise complies with the type-volume limitations and typeface requirements set forth in F.R.A.P. 32(a)(7)(B) and (C) and Eighth Circuit Rule 28A(c).

I also certify that the electronic brief has been scanned for viruses and is virus free.

Dated: August 23, 2019

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

United States of America, Appellee,

v.

Cortez Maurice Crumble, Appellant.

Appeal No. 19-2197

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the Federal Defender for the District of Minnesota and that on August 23, 2019 she served the following documents electronically through CM/ECF to the below-listed party:

A. Brief of Appellant;
B. Certificate of Compliance (bound in brief).

Thomas Calhoun-Lopez, AUSA

s/ Sandra L. Seim

No. 19-2197
Criminal

In the United States Court of Appeals
For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

v.

CORTEZ MAURICE CRUMBLE,

APPELLANT.

Appeal from the
United States District Court for the
District of Minnesota

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

This is a direct appeal from a criminal conviction in the District of Minnesota. Defendant Cortez Maurice Crumble was convicted by a jury of unlawfully possessing ammunition as a felon. He appeals his conviction and his sentence. He makes three arguments: 1) he argues that the district court committed plain error in instructing the jury, citing intervening Supreme Court authority changing the elements of the offense; 2) he argues that the district court abused its discretion when it determined that the United States had not committed a discovery violation; and 3) he argues his sentence is substantively unreasonable.

These issues are fully developed and sufficiently presented in the parties' briefs. Accordingly, the United States does not believe that oral argument would significantly aid this Court in its resolution of this appeal and does not request oral argument. Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF THE ISSUES

I. At this trial, Crumble did not ask the district court to instruct the jury that it was required to find that he knew he was a felon to convict him. Subsequently, the Supreme Court issued its opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held knowledge of status is an element of a § 922(g)(1) offense. In light of the fact that evidence was admitted at trial that Crumble had previously pleaded guilty in state court and admitted to having possessed a firearm as a felon, has Crumble shown that the district court's instructions affected his substantial rights?

Neder v. United States, 527 U.S. 1 (1999)
United States v. Olano, 507 U.S. 725 (1993)

II. The United States provided a prompt and timely copy to Crumble of surveillance video showing him firing a gun at a fleeing vehicle. As part of its disclosure of trial exhibits, the United States provided Crumble an exhibit it intended to offer that captured each frame of that video on a separate page. Crumble alleged a discovery violation. After an evidentiary hearing, the district court found no violation had occurred, as Crumble had had the full version of the video, and the frame-by-frame, still photographs did not create new or additional evidence. Has Crumble shown that the district court clearly erred in finding there was no discovery violation?

Amadeo v. Zant, 486 U.S. 214 (1988)

III. Crumble possessed ammunition in this case while firing multiple gun shots at a fleeing car following a bar fight. In light of the danger that his firing of the weapon posed to the public, and the fact that a prior 60-month sentence for unlawfully possessing a firearm did not deter him, the district court varied by 12 months, to a sentence of 63 months' imprisonment. Has Crumble shown

that the district court abused its discretion and imposed a substantively unreasonable sentence?

United States v. San-Miguel, 634 F.3d 471 (8th Cir. 2011)

STATEMENT OF THE CASE

I. The shooting.

In the early morning hours of November 23, 2017, Crumble was at a bar in Minneapolis, Minnesota. (Presentence Investigation Report (PSR) ¶¶ 7–9.) His co-defendant, Cedric Berry, was also there. (*Id.*) Crumble and Berry got involved in a fight that broke out inside the bar. (*Id.*) Following the fight, both Crumble and Berry left the bar. (PSR ¶¶9–10.) They went to the bar's parking lot and fired a total of 20 shots at a car as it fled from the bar. (PSR ¶¶ 7, 10.) Crumble and Barry left the scene of the crime in the same car. (PSR ¶ 10.)

Neither Crumble's nor Berry's firearms were recovered. (PSR ¶ 7.) However, officers of the Minneapolis Police Department found 20 discharged cartridge casings from the .40 caliber firearms Crumble and Berry used. (*Id.*) Officers also recovered surveillance video from the bar, which showed Crumble and Berry firing on the fleeing vehicle. (PSR ¶ 10.)

II. Crumble and Barry are indicted, and Crumble proceeds to trial.

On January 23, 2018, Berry and Crumble were charged with unlawfully possessing, as felons, the .40 caliber ammunition[1] they used in the shooting. (Indict., DCD 1.)

The case against Crumble relied substantially upon video footage from the bar's surveillance system that showed Crumble and Berry firing pistols at the fleeing car. (Gov't Ex. 3A–3B.) The United States provided a timely copy of this video to Crumble in discovery. (Trial Tr. (TT) 176, Nov. 5–8, 2018.)

Prior to trial, a forensic video analyst from the Minneapolis Police Department reviewed the video and compared it with items of clothing seized from Crumble's residence and with tattoos on Crumble's person. (TT 296–314.) The United States offered this evidence to establish that Crumble was in fact the person caught on surveillance video inside the bar and shooting at the vehicle outside the bar. As the analyst was being called as an expert in video forensic, the United States provided timely notice of her testimony, as well as

[1] Because neither firearm was recovered, the United States did not charge either defendant with unlawfully possessing firearms.

a written summary of the testimony the United States intended to offer, pursuant to Fed. R. Crim. P. 16(a)(1)(G).

Because of the speed with which Crumble produces the firearm and fires the shots in the video, the forensic video analyst volunteered to create an exhibit that would capture each frame on a separate piece of paper. (TT 179–80; Gov't Ex. 32.) That way, a specific frame could be examined at leisure, without having to pause the video at trial at a precise moment. (TT 16–17.)

Excerpt from Gov't Ex. 32. Crumble can be seen on the right in red pants. A firearm can be seen in his left hand in this still frame.

The United States elected to offer this series of stills as an exhibit at trial and provided a copy to Crumble, along with other all other trial exhibits the United States intended to offer, on October 30, 2019. (TT 169.) Trial commenced on November 5, 2019. (TT 1.) On the first morning of trial, Crumble objected to the exhibit, Government Exhibit 32.[2] (TT 15.)

Crumble's objection was based on the exhibit's authenticity. (*Id.*) He argued that the frames-per-second of the video did not match the frames used in the exhibit. (*Id.*) The district court asked for further information concerning Crumble's allegation that the frames-per-second issue called into question the authenticity of the exhibit and deferred ruling until the next morning. (TT 17.)

The next morning, Crumble changed his tack and instead argued that, by turning the exhibit over on October 30, 2019, the United States had committed a discovery violation. (TT 169–73.) Crumble argued that the series of still frames were not disclosed to him until after the discovery deadline. (TT 169–70.) Crumble asked the district

[2] Crumble also objected to another exhibit, which the parties were able to resolve.

court, United States District Judge Ann D. Montgomery, to exclude Gov't Ex. 32, or to grant a continuance. (TT 172.)

The United States called as a witness the forensic video analyst who created the exhibit, Alison Murray. (TT 179–191.) Ms. Murray testified that she created the stills using computer programs that anyone in the public at-large is able to download and use on any computer. (TT 180–81.) She also addressed Crumble's concern about the frames-per-second issue and explained why there was no discrepancy. (TT 181–86.)

At the conclusion of Ms. Murray's testimony, the district court found no discovery violation had taken place. (TT 193.) The district court pointed out that "the defense has had the full version of the video," and that "the pivotal nature of the video in the trial has been known for some time." (*Id.*) The district court also found that nothing that Ms. Murray did "created new or additional evidence." (*Id.*) Rather, her actions in creating the stills amounted to "fairly nowadays routine use of" the two computer programs. (*Id.*) As such, the district court denied Crumble's motion to exclude the evidence. (*Id.*)

At the conclusion of trial, consistent with the requests of both Crumble (Def. Proposed Jury Instruct., DCD 108 at 5) and the United States (Gov't Proposed Jury Instruct., DCD 99 at 32), the district court instructed the jury that the elements of the offense were:

> One, that the defendant has been previously convicted of a felony, that is, a crime punishable by imprisonment for a term of more than one year;
>
> Two, that the defendant thereafter knowingly possessed ammunition, namely, Magtech .40 caliber ammunition; and
>
> Three, the ammunition was transported across a state line at some point during or before the defendant's possession of it.

(TT 433–34.)

The jury found Crumble guilty of the sole count of the indictment charging him with unlawfully possessing ammunition as a felon. (Verdict, DCD 128.)

III. Crumble is sentenced to 63 months

On April 11, 2019, Crumble's presentence investigation report (PSR) was issued. (PSR F.2.) The PSR determined Crumble's total offense level to be 19, in criminal history category IV, yielding an advisory range of imprisonment of 46–57 months in prison. (PSR ¶¶ 33, 49, 87.) At Crumble's sentencing hearing, the district court

disagreed with some of the PSR's determinations,[3] and found his total offense level to be 18, yielding an advisory range of imprisonment of 41–51 months' imprisonment. (Sent. Tr. (ST) 4, May 28, 2019; Statement of Reasons (SoR), DCD 170 at 1.) The district court then sentenced Crumble to 63 months' imprisonment, varying upward from the high-end of the range by 12 months. (ST 11; SoR § VIII.)

In sentencing Crumble, the district court acknowledged that Crumble had good qualities and was important to his sons and his family. (ST 9–10.) However, the district court pointed out that the sentence must be guided in this case by "the seriousness of the offense." (ST 10.) The district court pointed out that Crumble had exposed people to great danger by discharging the firearm in public, and that "it was incredibly fortuitous that no one was hurt." (ST 10.) At the same time, the district court pointed out that Crumble's prior 60-month sentence for possessing a firearm had not deterred him:

[3] The PSR applied a five-level upward adjustment pursuant to U.S.S.G. § 2A2.2(b)(2)(A) because Crumble discharged a firearm in an aggravated assault. (PSR ¶ 25.) Judge Montgomery declined to adopt this determination, and instead applied a four-level upward adjustment because Crumble possessed the ammunition in connection with another felony offense pursuant to U.S.S.G. § 2K2.1(b)(1). (ST 4; SoR 1.)

> [Y]ou had a prior incident involving a firearm in a dangerous situation, got a . . . five-year sentence and that didn't seem to change the path that you were taking with regard to crime and your involvement with people that are in the world of crime and not contributing positively to society.

(ST 10.)

The district court therefore found that a sentence of 63 months was necessary to "keep the community safe" and serve "as just punishment for the offense involved." (SoR § VIII.) Specifically, the district court explained,

> [B]ecause of the seriousness of the crime, the discharge of the firearm on multiple occasions, the large number of casings found, as well as significant to the court is the fact that a 60-month prior sentence did little, if anything, to deter the conduct in this case. So I think it needs to be something more than 60 months. And I've made it as limited as I can under the circumstances and feel that within the dictates of Title 18, Section 3553(a), it is sufficient, but not more than necessary, to accomplish the objectives of justice.

(ST 13-14.)

This appeal of conviction and sentence follows.

SUMMARY OF THE ARGUMENT

Crumble raises three issues on appeal: 1) he argues that his conviction must be vacated because the district court plainly erred in failing to instruct the jury, absent a request from the defense, that Crumble must know of his prohibited status to be convicted; 2) he argues that Judge Montgomery abused her discretion in finding that the United States did not commit a discovery violation; and 3) he argues that Judge Montgomery abused her discretion in sentencing him to 63 months' imprisonment, which represents a 12-month upward variance from his Guidelines range.

A. Crumble cannot prove that the *Rehaif* error affected his substantial rights or warrants a new trial.

Crumble cannot establish that, on plain error review, a new trial is warranted. In a break from longstanding, uniform circuit court precedent, the Supreme Court in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), interpreted § 922(g) as requiring knowledge of status as an essential element of the offense. The district court's understandable failure to instruct on that element was plainly erroneous, but it did not affect Crumble's substantial rights. Evidence

was admitted at trial that Crumble knew he was a felon and that he was prohibited from possessing a firearm.

Furthermore, even if Crumble could show that the error affected his substantial rights, he has not shown that the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. In the first place, the United States did not offer evidence—such as full plea documents, sentencing transcripts, and the length of his prior sentence—because Crumble stipulated to his prohibited status. Evidence of his knowledge of prohibited status would have violated *Old Chief*, which prior to *Rehaif*, required the government to accept a defendant's stipulation as to his criminal history and precluded such potentially inflammatory evidence from being admitted against him at trial. Under those circumstances, Crumble cannot show that a serious injury to the fairness and integrity of the proceedings would result by sustaining his conviction.

Furthermore, Crumble served a prior 60-month sentence for unlawfully possessing a firearm. There can be no question in this case that, had the knowledge-of-status element been known to the parties, the government could have easily proven it. *Rehaif* requires proof that

§ 922(g)(1) defendants know they were convicted of a crime punishable by over 12 months. Where the defendant in fact served well over 12 months (here, 60 months) for a prior conviction, the fairness and integrity of the judicial proceedings is not in doubt. Crumble should not obtain relief as a function of the Supreme Court's concern for violators who (unlike him) may be genuinely non-culpable.

B. The district court did not clearly err when it found that the government did not violate its discovery obligations.

Crumble has not shown that the district court clearly erred in making its finding that no discovery violation had taken place. The district court considered Crumble's allegation that the United States had committed a discovery violation, held an evidentiary hearing, and properly dismissed the argument. The evidence that Crumble claims violated discovery—a series of still frames from a video he received months before—did not create new or additional evidence. In fact, Crumble himself could have easily created the still frames through routine use of publicly available software.

C. Crumble cannot show his sentence is substantively unreasonable.

Crumble argues that the district court failed to properly weigh sentencing factors. However, he fails to articulate how the district court erred. The district court weighed the aggravating and mitigating factors in Crumble's case and determined that an upward variance was warranted because Crumble exposed the public to great danger by discharging a firearm in public without regard to bystanders, he shot several times, and he was not deterred by a previous 60-month sentence for committing a similar, violent offense. Crumble has not shown that the district court abused its discretion. The district court's judgment should be affirmed.

ARGUMENT

I. Crumble has not met his burden to show that the omission of the knowledge-of-element instruction satisfies plain error review.

A. Standard of review and legal framework

When a defendant fails to "explicitly object" to a jury instruction, this Court reviews for plain error. *United States v. Fast Horse*, 747 F.3d 1040, 1041 (8th Cir. 2014). Plain error exists where there is "(1) an error, (2) that was 'plain,' (3) 'affects substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 1042 (internal quotation marks omitted). A defendant bears the burden of persuasion to show that his substantial rights were affected. *United States v. Rice*, 449 F.3d 887, 894 (8th Cir. 2006). This burden is a "critical" factor. *Id.*; *United States v. DeRosier*, 501 F.3d 888, 899 (8th Cir. 2007).

"In order to affect substantial rights, the error must have been prejudicial." *United States v. Kent*, 531 F.3d 642, 647 (8th Cir. 2008). "An error is prejudicial if the defendant shows a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *Id.* at 656 (brackets in original). The standard

is higher than preponderance of the evidence. *Id.* "The defendant's burden is to satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Id.* (internal quotation marks omitted).

"Appellate review under the plain-error doctrine . . . is circumscribed," and the power to reverse under this standard is used "sparingly." *Jones v. United States*, 527 U.S. 373, 389 (1999). "It is the rare case in which an improper jury instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *see also United States v. Beck*, 250 F.3d 1163, 1166 (8th Cir. 2001) (noting plain error review is "extremely narrow" and "limited."). "The question is 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *United States v. Smith*, 450 F.3d 856, 859 (8th Cir. 2006) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)) (ellipses in original).

B. Crumble cannot show the *Rehaif* error had any effect on the outcome of his trial or any effect on the reputation, fairness, or integrity of the judicial proceedings.

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court, breaking with every circuit court to have considered the issue, held that a defendant's knowledge "that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)" is an element of a § 922(g) offense. After *Rehaif*, the government must prove that the defendant "knew he had the relevant status when he possessed" the firearm, 139 S. Ct. at 2194—i.e., "that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. This requirement does not demand proof that the defendant specifically knew that he was legally prohibited from possessing a firearm. Rather, the government must only prove that the defendant knew, at the time he possessed the firearm, that he had one of the statuses described in § 922(g). As pertinent here, under § 922(g)(1), the defendant must know that his prior conviction was punishable by more than one year of imprisonment. In cases such as this where a defendant actually spent time in prison, this element is easy to establish.

The United States agrees with Crumble that, in light of the Supreme Court's ruling in *Rehaif*, the absence of a knowledge-of-status instruction is error that is "'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997). Crumble has not met his burden, however, to show that the other two prongs of the plain error standard are met.

1. Crumble's substantial rights were not affected

The two remaining prongs of the plain error test are that the error prejudiced Crumble and that, if the error is left uncorrected, the integrity of the proceeding would seriously be cast in doubt. To establish prejudice, Crumble must show that the omission of the knowledge-of-status element affected his "substantial rights"—that is, he must show that, but for the omission of the instruction, the outcome of his trial would have been different. *See Kent*, 531 F.3d at 656. This test considers the entire record at trial and "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19 (1999). In this case, the record at trial established that Crumble knew of his prohibited status—which is to say, that he was a felon.

Crumble has not shown, therefore, that but for the omitted instruction, he would have been acquitted.

At the outset, Crumble entered into a stipulation that forecloses his argument on appeal. He stipulated that he was a felon. (Gov't Ex. 34.) Namely, Crumble stipulated that, prior to the charged possession, he "had been convicted of at least one offense punishable by a term of imprisonment exceeding one year, and was thus prohibited from possessing ammunition on [the offense date]." (Gov't Ex. 34.) While knowledge was not specifically spelled out in the stipulation, a jury reasonably could infer, based on common sense and experience, that he knew he had been convicted of that felony. *See*, *e.g.*, *United States v. Ruiz*, 412 F.3d 871, 885–86 (8th Cir. 2005) (noting that juries could infer knowledge from circumstantial evidence, "particularly if the government must prove highly subjective elements such as intent or knowledge").

What's more, Crumble's stipulation did not stand alone. Pursuant to Federal Rule of Evidence 404(b), the district court admitted a certified copy of Crumble's petition to plead guilty in Hennepin County to a prior firearms case. (TT 348–49; Gov't Ex. 28.)

Crumble signed the petition. (Gov't Ex. 28.) And in it, he admitted he "possessed a loaded firearm after being convicted of a felony." (*Id.*) Though this was admitted for the limited purposes outlined in Federal Rule of Evidence 404(b), the jury could also have considered it to determine Crumble's knowledge of his prohibited status had that issue been considered relevant by the district court or the parties at that time.

This is especially true in light of the fact that Crumble never denied—in any form, at any level, to any police officer, witness, juror, or court—that he knew he was a felon. This Court has held that erroneous instructions are harmless where a defendant does not seriously dispute the relevant issue. *See*, *e.g.*, *United States v. DeRosier*, 501 F.3d 888, 899 (8th Cir. 2007). *DeRosier* involved a prosecution of wire fraud affecting a financial institution. *Id.* at 891. The jury instructions included only the basic elements of wire fraud, and failed to include the element that the fraud affected "a financial institution." *Id.* at 899. Applying the plain error standard, this Court found that the error was harmless because "[i]t was not truly disputed whether DeRosier's criminal actions affected [a financial institution]."

Id. ; *see also United States v. Poitra*, 648 F.3d 884, 888 (8th Cir. 2011) (finding a misstatement of the elements of the Sex Offender Registration and Notification Act harmless because Poitra "did not dispute the Government's claim that he failed to update his registration").

As in *DeRosier*, there was no dispute in this case that Crumble knew he was a felon. As noted, he admitted he had a previous conviction of possessing a firearm "after being convicted of a felony." (Gov't Ex. 28.) Moreover, he has a lengthy criminal history that includes prison sentences that exceed one year. *See* PSR ¶¶ 38 (receiving stolen property sentenced to "serve 1 year 1 day custody"); 40 (sentenced for felony third degree drug possession and misdemeanor driving under the influence and sentenced to serve 60 days, then 120 days following probation violation; the 1 year and 1 day following second probation violation); 46 (sentenced to serve 60 months for being a prohibited person in possession of firearm). Under these circumstances, there was no prejudice to Crumble in the failure to instruct the jury that he must have known his prior convictions carried maximum penalties in excess of one year.

2. The omission did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding.

Finally, Crumble is not entitled to relief unless he shows that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Fast Horse*, 747 F.3d at 1042. A plain error affecting substantial rights does not, without more, satisfy the . . . standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *United States v. Olano*, 507 U.S. 725, 736-37 (1993).

The Supreme Court has reminded appellate courts to resist the "reflexive inclination" to reverse unpreserved errors. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Instead, forfeited errors should be remedied only where "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 736. "The final prong of plain-error review is formidable and requires a showing of more than simple prejudice." *United States v. Poitra*, 648 F.3d 884, 889 (8th Cir. 2011). This Court has discretion whether to correct a forfeited error. *Olano*, 507 U.S. at 735. But it should do so only to correct "egregious" errors. *Id.* The error here was

not egregious because any gap in the trial evidence stems from Crumble's tactical choices and would not avail for him on remand. He has not met this burden.

In *Old Chief v. United States*, 519 U.S. 172, 180 (1997), the Supreme Court held that, where a defendant in a § 922(g)(1) prosecution offers to stipulate to his felon status, the "probative value" of evidence about his conviction(s) "is substantially outweighed by the danger of unfair prejudice," requiring its exclusion under Rule 403. Since *Old Chief*, defendants have had the choice whether to (1) hold the government to its burden of proving the status element or (2) stipulate to felon status and thereby prevent the government from offering additional evidence about the prior convictions.

Crumble took the latter path, precluding evidence—such as plea documents, sentencing transcripts, or the names of his prior offenses—that would have proved both felon status and knowledge thereof. He now asserts that the United States' evidence was insufficient to prove knowledge of status. Beyond being incorrect, that complaint does not state a serious injury to the proceedings' fairness, integrity, or reputation, as the United States' inability to adduce

evidence about Crumble's criminal record was directly attributable to his own tactical choices at trial. *See United States v. Shwayder*, 312 F.3d 1109, 1122 (9th Cir. 2002) ("Where such tactical behavior is likely, we should take great care before exercising our discretion to reverse for plain error.").

Finally, vacatur would be both unjust and futile here. In *Rehaif*, the Court expressed concern for defendants "who, due to lack of knowledge, did not have a wrongful mental state," offering as examples "an alien who was brought into the United States unlawfully as a small child" and "a person who was convicted of a prior crime but sentenced only to probation." 139 S. Ct. at 2197–98. Crumble, in contrast, is a thrice-convicted felon who has served multiple stints in prison, including a 60-month sentence for possessing a firearm as a felon, from which he was released in 2016. (PSR ¶¶ 38, 40, 46.) He should not obtain relief as a function of the Supreme Court's concern for violators who (unlike him) may be genuinely non-culpable.

And because Crumble has no conceivable defense as to knowledge of status—and, thus, no likelihood of acquittal on the omitted element at a hypothetical retrial—"there is no basis for

concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' Indeed, it would be the reversal of a conviction such as this which would have that effect." *Johnson*, 520 U.S. at 470.[4] His conviction should stand.

II. The district court did not clearly err in finding there was no violation of the government's discovery obligations.

The defendant asserts that the district court abused its discretion in refusing to suppress Government Exhibit 32, which was a series of still photographs that were created from surveillance video, Government Exhibit 28. He argues that the still photographs were untimely disclosed when the government turned them over, along with other all other trial exhibits the United States intended to offer, on October 30, 2019, rather than by the discovery deadline of February 9, 2018. (TT 169; DCD 15—Arraignment Order.) He continues that, because of the alleged late disclosure, the government should have

[4] If this Court does exercise its discretion to remediate the instructional error, the appropriate relief is remand for retrial. *See United States v. Weems*, 49 F.3d 528, 531 (8th Cir. 1995) (retrial not barred by double jeopardy where the government failed to prove an element of the offense that, at the time of trial, did not need to be proved);*see also United States v. Ellyson*, 326 F.3d 522, 534 (4th Cir. 2003); *United States v. Robinson*, 505 F.3d 1208, 1225 (11th Cir. 2007).

been precluded from introducing the still photos at trial. His arguments lack merit.

A. Standard of review

The factual question of whether the government violated its discovery obligations under Federal Rule of Criminal Procedure 16 is reviewed for clear error. *See, e.g.*, *Amadeo v. Zant*, 486 U.S. 214, 224 (1988) (reviewing trial court's finding on question of whether prosecution concealed evidence for clear error); *United States v. Manthei*, 979 F.2d 124, 126 (8th Cir. 1992) ("Since application of Rule 16 depends on the factual determination of whether the statement was a 'statement of the defendant', the standard of review as to this question should be the clearly erroneous standard."); *accord United States v. Shepard*, 462 F.3d 847, 861 (8th Cir. 2006) ("When considering a district court's ruling regarding a rule of criminal procedure, 'we review the district court's legal conclusions de novo and its findings of fact for clear error.'") (quoting *United States v. Vanhorn*, 296 F.3d 713, 719 (8th Cir. 2002) (internal marks omitted by *Shepard* court)). If the government failed to comply with the court's discovery order, this Court reviews the district court's sanctions for abuse of

discretion. *E.g.*, *United States v. Altman*, 507 F.3d 678, 680 (8th Cir. 2007).

B. The district court did not clearly err in finding no discovery violation.

The district court properly found that the United States did not commit a discovery violation in its disclosure of Government Exhibit 32 because the exhibit was nothing new but was merely a manipulation of a previously-disclosed video. (TT 193.) That finding was well supported by the record and was not clearly erroneous.

After a hearing in which the forensic video analyst who created the exhibit testified, the district court found that nothing that the analyst did "created new or additional evidence." (*Id.*) Rather, her actions in creating the stills amounted to "fairly nowadays routine use of" the two computer programs. (*Id.*) The district court noted that "the defense has had the full version of the video," and that "the pivotal nature of the video in the trial has been known for some time." (*Id.*) Crumble could have created the same exhibit himself using the publicly available software himself if he had cared to. By the same token, he could have requested additional information about the exhibit, or consulted his own expert, in the days between the

disclosure of the exhibit and the beginning of trial. He chose not to do so. Indeed, as the district court noted, the issues raised by Crumble in the course of trial were "more appropriate for cross-examination as to how [the process of taking the stills] was done." (TT 192.)

Excerpt from Gov't Ex. 32. Crumble can be seen on the right in red pants. A firearm can be seen in his left hand in this still frame.

Crumble has not met his burden to show that the district court clearly erred in its ruling. Instead, Crumble's argument rests upon a fundamental misinterpretation of the district court's ruling. His argument presupposes that the United States violated discovery; he then argues that the district court's remedy for the violation was

insufficient. (Def. Br. 35–41, applying standards evaluating district courts' remedies for discovery violations.) This argument fails to recognize that the district court found that no discovery violation had taken place at all—Government Exhibit 32 did not constitute new evidence, but rather was simply an exhibit that anyone with a computer could have created. (TT 193.)

As such, the entire framework of Crumble's analysis is inapposite. He alleged at trial that the United States committed a discovery violation, and the district court, having heard testimony, disagreed. There is no sanction to review (that is, whether Government Exhibit 32 should have been excluded) because the district court did not find any sanctionable conduct.

A factual finding will only be found to be clearly erroneous when this Court has a "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Crumble does not dispute that he received a copy of the surveillance video within the timeframe provided by the court's discovery order. The district court had evidence that confirmed that the government witness' manipulation of that video was readily and

publically available. Based on these facts, there was no clear error in finding that Government Exhibit 32 was "nothing new" and, therefore, need not have been disclosed sooner. Crumble's argument should be summarily dismissed.

III. The district court did not abuse its discretion at sentencing.

The district court in this case varied upward 12 months from Crumble's 41-to-51-month Guidelines range and imposed a 63-month term of imprisonment. Crumble claims the court abused its discretion by failing to properly weigh the various § 3553(a) factors. (Def. Br. 43.) That is not a meaningful claim of sentencing error, and the district court's judgment should be affirmed.

A. Standard of review and legal framework

This Court reviews sentences for substantive reasonableness using an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Crumble has the burden of establishing that, after consideration of the Section 3553(a) factors, his sentence is too harsh. *United States v. Bolden*, 596 F.3d 976, 984-85 (8th Cir. 2010). "[A] district judge who favors a tough sentence is entitled to the same

degree of deference as a district court judge who opts for a lesser sentence." *United States v. Deegan*, 605 F.3d 625, 634 (8th Cir. 2010).

A sentencing court abuses its discretion in determining a sentence if it "(1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment." *United States v. Borromeo*, 657 F.3d 754, 756 (8th Cir. 2011). Crumble claims an error of the third type—an unreasonable weighing of proper factors.

In reviewing for substantive reasonableness, this Court gives "great deference to the district court." *United States v. Jones*, 701 F.3d 327, 330 (8th Cir. 2012). The district court does not abuse its discretion by weighing the mitigating and aggravating factors differently than the defendant would have liked. *United States v. Hall*, 825 F.3d 373, 375 (8th Cir. 2016) ("[T]he mere fact that the court could have weighed the sentencing factors differently does not amount to an abuse of discretion."). To be sure, this Court has often said: "'[I]t will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as

substantively unreasonable.'" *See, e.g.*, *United States v. Shuler*, 598 F.3d 444, 447 (8th Cir. 2010) (quoting *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc)).

B. The district court's sentence

Crumble's substantive reasonableness claim cannot survive the legal standards that apply on appeal. Considering that Crumble endangered human life by shooting at a fleeing car in public, firing multiple rounds without regard to the safety of any bystanders, and that a prior 60-month sentence for unlawfully possessing a firearm was insufficient to deter him from further illegally possessing firearms and ammunition, the upward departure of 12 months to 63 months was not an abuse of discretion.

Crumble cites as a basis for his substantive reasonableness arguments that the evidence of his guilt is "thin at best," and he invites this Court to "wonder" whether he might have been convicted if Government Exhibit 32 had not been admitted. (Def. Br. 43–44.) His argument misses the mark.

The government's theory of the case was predicated entirely upon the fact that Crumble shot at a car—the jury could not have

convicted Crumble without finding that he discharged the gun outside the bar. Crumble's issue is his guilty verdict, not his sentence.[5] In effect, he would have this Court remand the case so that the district court will sentence him as if he may not, in fact, be guilty. This is not a valid basis to overturn a sentence because the weight of the evidence is not a proper § 3553(a) factor. The jury returned a verdict of guilty, and the district court sentenced him for his crime.

Crumble also argues that his criminal history was adequately captured in the criminal history category of the United States Sentencing Guidelines. (Def. Br. 44.) He then claims that the district court provided "no rationale" as to why the sentence should be higher than the Guidelines. (*Id.*) This claim is refuted by the record. The district court noted correctly that Crumble had used a dangerous weapon in the offense and that "it was incredibly fortuitous that no one was hurt." (ST 10; SoR § V.C.)

[5] Notably, Crumble has not challenged the sufficiency of the evidence to support his conviction. Nor would such a challenge have any merit in light of the video evidence that clearly depicts him shooting a gun.

The district court also appropriately weighed other sentencing factors pursuant to 18 U.S.C. § 3553(a), particularly the fact that a prior 60-month prison sentence for his prior possession of a firearm had failed to deter him from possessing a firearm and ammunition in the instant offense. (ST 10.) Moreover, that prior conviction and his instant offense conduct demonstrate Crumble's penchant for using firearms in violent, life-threatening ways, not merely to possess them. Here, he shot numerous rounds at an occupied vehicle in a public space—an area that Crumble himself characterizes as "a densely-populated urban area." (*E.g.*, Def. Br. 7.) The prior possession of a firearm offense arose out of a brutal attack on his girlfriend. (PSR ¶ 46.) He beat her unconscious and, when she regained consciousness, shot a gun in the presence of her children. (*Id.*) The facts of both convictions speak volumes as to Crumble's dangerousness. Crumble cannot credibly claim that the district court did not provide a rational for its sentence (and does not, in fact, make a procedural challenge to his sentence).

To the extent that Crumble has a disagreement with the district court's exercise of its discretion, that is not a basis upon which to find

that a sentence was unreasonable. *See, e.g.*, *United States v. Ruiz-Salazar*, 785 F.3d 1270, 1273 (8th Cir. 2015). The district court has wide latitude to weigh the various § 3553(a) factors in each case and assign some factors greater weight than others. *United States v. San-Miguel*, 634 F.3d 471, 476 (8th Cir. 2011); *United States v. Reynolds*, 643 F.3d 1130, 1136 (8th Cir. 2011). As this Court noted in *United States v. Wisecarver*, 644 F.3d 764, 774 (8th Cir. 2011), a district court's choice to assign greater weight to the nature and circumstances of an offense than to the mitigating characteristics of a defendant is well within the "wide latitude" the district court enjoys to weigh the various § 3553(a) factors. *See also United States v. Farmer*, 647 F.3d 1175, 1180 (8th Cir. 2011). "After all, the sentencing judge is in the best position to find facts and judge their import under § 3553(a) in the individual case." *United States v. Wilcox*, 666 F.3d 1154, 1157–58 (8th Cir. 2012) (internal quotations omitted).

Crumble has not shown that the district court abused its discretion in its assessment of the § 3553(a) factors, much less that it made a clear error of judgment in assessing them. The district court

did not abuse its discretion in sentencing Crumble, and its judgment should be affirmed.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 6,611 words proportionally spaced. The brief was prepared using Microsoft Word 2016.

Dated: September 16, 2019

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