# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

March 17, 2021

**Before**

DIANE S. SYKES, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-1622

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

DUPRECE JETT,
*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 16-cr-00001

Tanya Walton Pratt,
*Judge.*

## ORDER

On consideration of the petition for rehearing and rehearing en banc filed on March 2, 2021, no judge in regular active service has requested a vote on the motion for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing en banc is **DENIED**.

In the

# United States Court of Appeals

## For the Seventh Circuit

Nos. 19-1622 & 19-1673

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

DUPRECE JETT and DAMION MCKISSICK,

*Defendants-Appellants.*

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cr-00001 — **Tanya Walton Pratt**, *Judge.*

ARGUED OCTOBER 27, 2020 — DECIDED DECEMBER 15, 2020

Before SYKES, *Chief Judge,* and KANNE and ST. EVE, *Circuit Judges.*

ST. EVE, *Circuit Judge.* A jury convicted Duprece Jett and Damion McKissick of Hobbs Act conspiracy and attempted robbery. In a previous appeal, we reversed the defendants' attempted-robbery convictions and remanded for resentencing on the conspiracy count. *United States v. Jett*, 908 F.3d 252 (7th Cir. 2018). The defendants now appeal from their resentencings. They claim the district court erred under the

intimidation," *id.* § 2113(a). The government alleged four "overt acts" for Count 1: the three completed robberies and the attempted robbery that preceded the defendants' arrest. Before trial, the defendants moved for a special verdict form requiring the jury to find unanimously that the defendants had committed one of the overt acts, and to agree on which overt act they had committed. The district court denied the motion.

At trial, the government introduced a range of evidence, including: surveillance footage of the three robberies; text messages between Jett and McKissick from the night before the attempted robbery; cell-tower data placing the defendants near the robberies; testimony that the bright orange vests that the robbers wore during the first robbery matched Jett's work clothes; evidence of burnt items found at McKissick's home, including ski masks, gloves, and a backpack, all of which matched the robbers' gear; evidence that the defendants' DNA was found on a ski mask, backpack, and airsoft pistol recovered from the stolen car that McKissick and Walker had used to flee from officers; incriminating statements that McKissick made at the police station; and an incriminating phone call between McKissick and his wife. The government did not produce an eyewitness who could identify Jett or McKissick as the robbers. The jury convicted the defendants on both counts.

**B. Initial Sentencings**

Following their convictions at trial, the district court sentenced Jett and McKissick to 293 months' imprisonment. McKissick received 203 months on Count 1 and 90 months on Count 2, to run consecutively for a total of 293 months. Jett received 209 months on Count 1 and 84 months on Count 2,

argument that the district court erred in refusing to instruct the jury on overt acts because "a Hobbs Act conspiracy does not have an overt-act requirement." *Id.* at 265. We remanded with instructions for the district court to enter a judgment of acquittal on Count 2 and resentence the defendants. *Id.* at 276.

Like the district court, we remarked at various times on the strength of the evidence against Jett and McKissick at trial. We did so, for example, when rejecting the defendants' argument that the admission of certain expert testimony required a new trial:

> The evidence against Jett and McKissick on Count 1 was plenty persuasive without [the expert's] interpretation of the text messages. The government needed only to prove that they conspired to commit bank robbery, and it admitted surveillance footage that a jury could easily conclude showed Jett and McKissick actually committing the bank robberies together. Cell-phone data further confirmed that both men were in the area of the check-and-cash locations around the times they were robbed. The government also introduced evidence of burned items matching what the robbers used at McKissick's home and McKissick's incriminating statements at the stationhouse.

*Id.* at 267.

**D. Resentencings**

On remand for resentencing on Count 1, a probation officer calculated the defendants' advisory Guidelines ranges as 188 to 235 months. Although Count 2 was gone, the probation

reasonable doubt, and very strong direct and circumstantial evidence of Mr. Jett's participation in the conspiracy and all of these acts in the conspiracy." It then summarized the trial evidence. Because "the evidence at trial was sufficient to show that Mr. Jett and Mr. McKissick and Mr. Walker were co-conspirators in these—in the conspiracy," the court overruled Jett's grouping objection. The court similarly overruled McKissick's grouping objection and found that the evidence supported his commission of each conspiracy: "[C]learly, the evidence supports a conspiracy of the three robberies which were completed, as well as the conspiracy to commit a fourth robbery."

After overruling the defendants' objections, the court adopted the probation officer's recommended advisory Guidelines range of 188 to 235 months for both defendants. Jett asked the court to sentence him "within the sentencing guidelines, at the low end, where he would have been sentenced—or where he was sentenced the last time." McKissick asked for a within-Guidelines sentence.

The court sentenced both defendants to 230 months' imprisonment on Count 1. The court's explanation for the defendants' new sentences was essentially the same as its explanation for the defendants' first sentences. Both times, the court referenced various § 3553(a) factors but focused heavily on the seriousness of the offenses and the defendants' criminal histories and personal characteristics.

At Jett's resentencing, the court remarked yet again on the strength of the evidence, saying, "the Court is 100 percent certain that Mr. Jett conspired with Mr. McKissick and Walker and participated in these acts, these crimes. And the Court is confident of his participation and involvement in the three

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

USSG § 1B1.2, comment. (n.4). When adding § 1B1.2(d) and the application note to the Guidelines in 1989, the Sentencing Commission explained that § 1B1.2(d) requires a judge to make findings beyond a reasonable doubt. USSG App. C, Vol. I, ¶ 75. The rationale was that "[a] higher standard of proof should govern the creation of what is, in effect, a new count of conviction." *Id.*

We have not previously addressed whether USSG § 1B1.2(d) requires a sentencing judge to apply the reasonable-doubt standard. Every other circuit to address the issue has held that it does. *United States v. Jones*, 699 F. App'x 325, 326 (5th Cir. 2017) (per curiam); *United States v. Bradley*, 644 F.3d 1213, 1300 (11th Cir. 2011); *United States v. Robles*, 562 F.3d 451, 455 (2d Cir. 2009) (per curiam); *United States v. Smith*, 267 F.3d 1154, 1160 (D.C. Cir. 2001); *United States v. Jackson*, 167 F.3d 1280, 1285 (9th Cir. 1999); *United States v. Conley*, 92 F.3d 157, 168 (3d Cir. 1996).

We join those circuits today and hold that USSG § 1B1.2(d) requires a sentencing judge to use the reasonable-doubt standard, and not merely the preponderance-of-the-evidence standard, to decide if a defendant conspired to commit each "object offense" of the conspiracy. Application Note 4 to

The district court's Guidelines error was harmless because the court made clear that it would have imposed the same sentence on each defendant even if the higher reasonable-doubt standard applied. The court said so explicitly for Jett, commenting at his resentencing that there was "evidence beyond a reasonable doubt ... of Mr. Jett's participation in the conspiracy and all of these acts in the conspiracy," such that "the conduct for the entirety of the conspiracy" was covered under § 1B1.2(d). At the same hearing, the court said it was "100 percent certain that Mr. Jett conspired with Mr. McKissick and Walker and participated in these acts, these crimes." The court's comments leave no doubt that it would have applied the same grouping analysis for Jett if it had correctly found that § 1B1.2(d) requires the reasonable-doubt standard.

The same holds true for McKissick, even though the court never explicitly said that there was evidence beyond a reasonable doubt that he had committed all four conspiracies. The court commented repeatedly at the defendants' initial sentencing hearings and at their resentencings on the strength of the evidence against McKissick. At McKissick's initial sentencing, the court said it had "no doubt, whatsoever, that Mr. McKissick was the robber that was identified" at trial. At his resentencing, the court found that "clearly, the evidence supports a conspiracy of the three robberies which were completed, as well as the conspiracy to commit a fourth robbery." Finally, the court commented at Jett's resentencing that it was "100 percent certain that Mr. Jett conspired *with Mr. McKissick* and Walker and participated in these acts, these crimes." (Emphasis added).

552 U.S. 38, 50 (2007). "[I]t is not our role to justify a sentence that lacks a sufficient explanation with our best guess for why the court imposed the sentence that it did." *United States v. Titus*, 821 F.3d 930, 935 (7th Cir. 2016).

Again, the parties dispute whether plain-error or de novo review applies. We need not resolve this dispute because there was no error, let alone plain error.

The defendants rely on our recent decision in *United States v. Ballard*, 950 F.3d 434 (7th Cir. 2020), for the proposition that a district court must explain a difference between an initial sentence and subsequent sentence on the same count. In *Ballard*, we held that the district court "committed procedural error by not providing an adequate explanation for the major upward departure from the Guidelines range on resentencing." *Id.* at 437. At the defendant's first sentencing, his advisory Guidelines range was 180 to 210 months. *Id.* at 435. The district court imposed a sentence of 232 months—a 10% upward departure. *Id.* at 436. The defendant appealed, and we vacated his sentence because the district court had erroneously applied a sentencing enhancement. *Id.* On remand, without the sentencing enhancement, the defendant's advisory Guidelines range was much lower: 33 to 41 months. *Id.* Citing the same § 3553(a) factors, the district court sentenced the defendant to 108 months' imprisonment. *Id.* That was a 160% upward departure. *Id.* The defendant again appealed, and we agreed with him that the district court had failed to adequately explain its sentence. *Id.* at 437. First, "[t]he court provided no explanation for why consideration of the same factors warranted a much greater departure on resentencing." *Id.* at 437. Second, "regardless of the proportional difference between the first and second sentencing departures, a 160

district court had already sentenced the defendants on Count 1. That is because, with Count 2 gone, the sentencing calculus changed. The advisory Guidelines range was also different, which further altered the calculus. Put simply, there is no legal basis for the defendants' argument that the district court had to give them the same sentences on Count 1 at resentencing or explain the difference. The district court did not err by failing to explain why the defendants' new sentences on Count 1 did not match their initial sentences on Count 1. *See United States v. Kappes*, 782 F.3d 828, 864 (7th Cir. 2015) (noting that sentencing judges need not address meritless mitigation arguments at sentencing).

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.