APPENDIX

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12754
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20895-DMM-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEMON DOMINIQUE THOMPSON,

Defendant-Appellant.

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

(January 5, 2021)

Before WILSON, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

Defendant-Appellant Kemon Thompson appeals both his conviction, pursuant to a guilty plea, and 96-month sentence for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).[1]

I.

On appeal, Thompson first argues that his conviction for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), is invalid and must be dismissed because the predicate offense upon which that conviction was based—Hobbs Act robbery—does not qualify as a "crime of violence" under the elements clause or residual clause of 18 U.S.C. § 924(c)(3).

A.

We review de novo whether a crime constitutes a "crime of violence" under 18 U.S.C. § 924(c). *Steiner v. United States*, 940 F.3d 1282, 1288 (11th Cir. 2019) (per curiam).

Under 18 U.S.C. § 924(c)(1)(A), it is a violation to brandish a firearm during and in relation to a crime of violence. 18 U.S.C. § 924(c)(1)(A)(ii). The statute defines "crime of violence" in two subparts—the first is known as the elements

[1] Thomas also appeals the district court's determination that his prior nolo contendere plea to possession with intent to sell marijuana, with adjudication withheld, constituted a "conviction" for the purposes of applying the career offender sentencing enhancement under U.S.S.G. § 4B1.1(a). Because we find the district court's application of the career offender sentencing enhancement was in error and Thompson's sentence should be vacated, we need not address this issue.

clause, and the second is known as the residual clause. *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). For the purposes of § 924(c)(3), a crime of violence is "an offense that is a felony" and either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

While the Supreme Court invalidated 18 U.S.C. § 924(c)(3)'s residual clause in *Davis* for being unconstitutionally vague, it left intact § 924(c)(3)'s elements clause. *Davis*, 139 S. Ct. at 2335–36; *see Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019). Under our precedent, Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)'s elements clause. *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016) (per curiam); *see United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019), *and abrogated in part on other grounds by Davis*, 139 S. Ct. at 2323–25, 2336 (2019) (holding that Hobbs Act robbery categorically satisfies 18 U.S.C § 924(c)'s definition of a "crime of violence").

B.

Here, Thompson's conviction for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), was predicated

upon two Hobbs Act robbery offenses. These constitute "crimes of violence" under our precedent. *See In re Fleur*, 924 F.3d at 1340–41. "We are bound by prior panel decisions unless or until we overrule them while sitting *en banc*, or they are overruled by the Supreme Court." *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011). Accordingly, we affirm Thompson's conviction.

II.

Thompson also challenges his 96-month sentence, arguing that Hobbs Act robbery does not qualify as a "crime of violence," under the definition provided in U.S.S.G. § 4B1.2(a), for the purposes of being designated a career offender. Thompson argues that our intervening decision in *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020), means that the district court's determination that he qualified for career offender status constitutes plain error and should be reversed.

A.

We review de novo whether a defendant's prior conviction qualifies as a "crime of violence" under U.S.S.G § 4B1.2(a). *See United States v. Rosales-Bruno*, 676 F.3d 1017, 1020 (11th Cir. 2012). However, when a defendant fails to object to an error before the district court, we review the argument for plain error. *United States v. Hall*, 314 F.3d 565, 566 (11th Cir. 2002). Under this standard, the appellant must prove: (1) an error occurred; (2) the error was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness or integrity of the

judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). "In most cases, a determination of whether error affects a substantial right turns upon whether it affected the outcome of the proceedings." *Hall*, 314 F.3d at 566.

"[W]hether a legal question was settled or unsettled at the time of trial, it is enough that an error be 'plain' at the time of appellate consideration for the second part of the four-part *Olano* test to be satisfied." *Henderson v. United States*, 568 U.S. 266, 279 (2013) (internal quotation marks omitted and alterations accepted). An incorrect calculation of a Sentencing Guideline affects a defendant's substantial rights. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (finding that a defendant seeking appellate review of an unpreserved Sentencing Guidelines error need not make any further showing of prejudice beyond the fact that an erroneous, and higher, Guidelines range was applied at sentencing). Furthermore, the failure to correct such a plain Guidelines error seriously affects "the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018).

Hobbs Act robbery does not qualify as a "crime of violence" under U.S.S.G. § 4B1.2(a) and therefore cannot serve as a predicate offense for a career offender sentencing enhancement. *Eason*, 953 F.3d at 1195. The Guideline sentence for a conviction based on a violation of 18 U.S.C. § 924(c), when the defendant does not qualify as a career offender under U.S.S.G. § 4B1.1, is the minimum term of

imprisonment required by statute. *See* U.S.S.G. § 2K2.4. A conviction pursuant to 18 U.S.C. § 924(c)(1)(A)(ii) carries a minimum term of imprisonment of 84 months.

B.

Here, the district court's determination that Hobbs Act robbery is a crime of violence for purposes of the career offender sentencing enhancement under U.S.S.G. § 4B1.1 was plain error. While Thompson's case was on appeal, we held that Hobbs Act robbery does not constitute a crime of violence under the Sentencing Guidelines. *See Eason*, 953 F.3d at 1188–89, 1195. Thus, Thompson has demonstrated that the error is plain. *See Henderson*, 568 U.S. at 279. This erroneous application of the career offender sentencing enhancement resulted in an incorrect, and higher, Guidelines range being applied at Thompson's sentencing—a Guidelines range of 262 to 327 months' imprisonment as opposed to the correct 84 months' imprisonment. Thus, the error affected Thompson's substantial rights and the fairness, integrity, and public reputation of the judicial proceedings. *See Rosales-Mireles*, 138 S. Ct. at 1909–1911.

Having satisfied the elements for plain error review under *Olano*, we vacate Thompson's sentence and remand for resentencing without the career offender Guideline enhancement under U.S.S.G. § 4B1.1.

AFFIRMED IN PART, VACATED IN PART, REMANDED.

A-2

838 Fed.Appx. 438
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Rahshard STEPHERSON, Defendant-Appellant.

No. 18-12545
|
Non-Argument Calendar
|
(December 16, 2020)

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 1:17-cr-20895-DMM-2, Donald M. Middlebrooks, J., of conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and brandishing firearm while committing crime of violence. Defendant appealed.

Holdings: The Court of Appeals held that:

evidence was sufficient to support convictions for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery;

district court did not abuse its discretion by denying defendant's motion for new trial based on victim's inconsistent testimony;

evidence of prior Florida robbery conviction was admissible other-acts evidence; and

district court's error in classifying defendant as career offender under Sentencing Guidelines was plain.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

Attorneys and Law Firms

***439** Carol Herman, Jason Wu, Assistant U.S. Attorney, Daniel Matzkin, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff - Appellee

Curt Obront, Obront Corey, PLLC, Miami, FL, for Defendant - Appellant

Rahshard Jovan Stepherson, Pro Se

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:17-cr-20895-DMM-2

Before GRANT, LUCK, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

At 2:30am on a Friday morning, Ijan Van Wyk walked with a friend down Ocean Drive in Miami Beach. The two had just ***440** spent several hundred dollars at South Beach bars and were in search of another one to spend their remaining cash. That night, Van Wyk carried an iPhone, a wallet with two bank cards, $30–$60 in cash, and a $6,000 wristwatch. A few hours later, he went home empty-handed. He and his friend were robbed at gunpoint.

A jury convicted Rahshard Stepherson of the robbery, finding him guilty of one count of conspiracy to commit Hobbs Act robbery, one count of Hobbs Act robbery, and one count of brandishing a firearm while committing a crime of violence. The district court determined that Stepherson was a career offender pursuant to U.S.S.G. § 4B1.1 and sentenced him to 360 months' imprisonment. Stepherson now challenges his conviction and sentence. We affirm in part and reverse in part.

I.

Van Wyk, an Australian tourist, traveled to the United States to visit his long-distance girlfriend in Miami. The night before his scheduled departure, he went out for drinks in Miami Beach with a friend-of-a-friend, Will Hardy. They visited "around five" bars, spending about $200 each. Around 2:30am, they left one bar and began searching for another.

As they walked down Ocean Drive, they ran into three men. The men offered them weed; they declined. They told the men that they were "just looking for another bar to go to." "Follow us," the men responded, "we can show you the way."

Naively, Van Wyk and Hardy followed the men about a block down Ocean Drive and into an alley. One of the men opened a door and they followed him into a fire escape. Immediately, Van Wyk sensed that "something wasn't right." But he was boxed in on both sides.

One of the men—who Van Wyk later identified as Stepherson—"manhandled [them] into the fire escape." When Hardy pushed back, Stepherson pulled out and cocked a pistol. Van Wyk screamed at Hardy to settle down. But as Hardy kept resisting, Stepherson pressed the gun into his neck and stomach and then into Van Wyk's stomach.

Stepherson told Hardy, "[N]----, I ain't playing," and "pulled the magazine out" of the pistol to show Hardy and Van Wyk the live rounds inside. The men then demanded that Van Wyk and Hardy go with them to an ATM to withdraw cash. Stepherson left with Hardy, leaving Van Wyk in the stairwell. A few minutes later, they returned.

Stepherson pointed the gun at Van Wyk and robbed him of his personal possessions, while another robbed Hardy. Altogether, the robbers took Van Wyk's iPhone, a wallet with two bank cards, $30–$60 in cash, and a $6,000 wristwatch and Hardy's two cell phones and cash.

Stepherson and the other two men then exited the fire escape, leaving Van Wyk and Hardy alone. Once they were gone, Van Wyk and Hardy escaped to the street. They fled to a nearby police station and reported that they had just been robbed at gunpoint.

The police arrested Stepherson and his two co-defendants, Kemon Thompson and Vidyapati El, in connection with the robbery and a grand jury charged them each with four counts: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). While Stepherson's co-defendants elected to plead guilty, Stepherson went to trial. The jury found him guilty of three of the four counts—acquitting ***441** him only of Hobbs Act robbery against Hardy.

Stepherson moved for a new trial, but the district court denied that motion. The court then sentenced him to 360 months' imprisonment. He now appeals his convictions and his sentence.

II.

We review a preserved challenge to "the sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the verdict." *United States v. Schier*, 438 F.3d 1104, 1107 (11th Cir. 2006). But when the defendant raises a claim challenging the sufficiency of the evidence on a ground not argued below, we review the new claim for plain error only. *United States v. Joseph*, 709 F.3d 1082, 1093 (11th Cir. 2013). Under plain error review, before we can correct an error not raised at trial, there must be "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Baker*, 432 F.3d 1189, 1202–03 (11th Cir. 2005) (quotation omitted).

We review a preserved challenge to an evidentiary ruling for abuse of discretion. *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008). And we also apply abuse of discretion review to the denial of a motion for a new trial. *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1312 (11th Cir. 2013). But we review de novo questions of statutory interpretation, as well as the district court's interpretation and application of the Sentencing Guidelines. *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009); *United States v. Gibson*, 434 F.3d 1234, 1243 (11th Cir. 2006).

III.

A.

Stepherson was convicted of both Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. The Hobbs Act prohibits "extortion, and attempts or conspiracies to extort, that 'in any way or degree obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce.' " *United States v. Kaplan*, 171 F.3d 1351, 1354 (11th Cir. 1999) (quoting 18 U.S.C. § 1951(a)) (alterations

in original). This case focuses on the commerce element. For Hobbs Act conspiracy, the government must prove that the defendant's scheme "*would have* affected interstate commerce," while a substantive violation of the Hobbs Act requires proof of "an actual effect on interstate commerce." *United States v. Diaz*, 248 F.3d 1065, 1084 (11th Cir. 2001). Stepherson insists that the government presented insufficient evidence that his robbery of Van Wyk was likely to affect or had an actual effect on interstate commerce. Because he raises this issue for the first time on appeal, we review for plain error.

The Hobbs Act defines "commerce" broadly, covering "all commerce between any point in a State ... and any point outside thereof." 18 U.S.C. § 1951(b)(3). And the Supreme Court's interpretation of the Hobbs Act has followed the statute's broad terms, recognizing that the Act manifests Congress's intent to "use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). To that end, our Court has held that though convictions ***442** under the Act require proof of an effect on interstate commerce, the "effect need not be substantial, and even a minimal impact on interstate commerce is enough to support a Hobbs Act conviction." *United States v. Smith*, 967 F.3d 1196, 1209 (11th Cir. 2020) (quotation omitted).

The Hobbs Act most commonly applies to robberies of businesses. But robberies of individuals may also qualify. In *Diaz*, we identified three types of circumstances where a robbery of an individual would affect commerce, such as when "(1) the crime depletes the assets of an individual who is directly engaged in interstate commerce; (2) the crime causes the individual to deplete the assets of an entity engaged in interstate commerce; *or* (3) the number of individuals victimized or the sums involved are so large that there will be a cumulative impact on interstate commerce." *Diaz*, 248 F.3d at 1085. These are merely examples—an "effective barometer for measuring a defendant's actions and their effect on interstate commerce"—but *Diaz* is not a restrictive test. *Smith*, 967 F.3d at 1208 (quotation omitted). Instead, to determine whether robbery of an individual qualifies under the Hobbs Act, we must make a "fact-specific inquiry into the directness and likely extent of any impact on interstate commerce." *Id*. (quotation omitted).

The government's case rests on an inference that Van Wyk *would have* spent more money in the hours leading up to his departure from the United States, so he was likely interrupted from engaging in interstate commerce. Stepherson argues that we have never held that such a hypothetical connection to interstate commerce can qualify for Hobbs Act robbery.

But even if that's so, neither have we held that such a connection falls outside the Hobbs Act's broad net. And that proves fatal to Stepherson's appeal. Recall that we are reviewing this argument for plain error and for an error to be "plain enough for the plain error rule, an asserted error must be clear from the plain meaning of a statute or constitutional provision, or from a holding of the Supreme Court or this Court." *United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010). Stepherson has identified no case from this Court or the Supreme Court that place these minimal effects on interstate commerce outside prosecution under the Hobbs Act. So we cannot say that the error below was plain.

B.

Stepherson next insists that there was insufficient evidence to convict him because the government's main witness—the victim, Van Wyk—"presented two alternative statements for the same crime," one at the police station and one at trial. Such inconsistencies, he believes, rendered Van Wyk not credible. He also argues that because of this inconsistent testimony, the district court should have granted him a new trial.

Credibility decisions, though, are matters for the jury, and when we are reviewing a challenge to the sufficiency of the evidence, we assume that the jury made all credibility decisions "in the way that supports the verdict." *United States v. Thompson*, 473 F.3d 1137, 1142 (11th Cir. 2006). Even though Van Wyk's story differed in some respects—which he admitted during cross-examination—the jury "by their verdict, at the very least, found [him] to be a credible witness." *See United States v. Bazemore*, 41 F.3d 1431, 1435 n.9 (11th Cir. 1994).

Nor did the district court err in denying Stepherson's motion for a new trial based on Van Wyk's inconsistent testimony. ***443** When a defendant moves for a new trial based on the weight of the evidence, the court "need not view the evidence in the light most favorable to the verdict," but "may weigh the evidence and consider the credibility of the witnesses." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). At the same time, such motions are "not favored." *Id*. at 1313. Courts are instructed to "grant them sparingly and with caution, doing so only in those really exceptional cases,"

where the evidence weighs "heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id*. Indeed, courts have granted new trials based on the weight of the evidence "only where the credibility of the government's witnesses had been impeached and the government's case had been marked by uncertainties and discrepancies." *Id*.

True, portions of Van Wyk's testimony conflicted with what he originally told the police. For instance, Van Wyk originally told the police that he was forced into the alley by a large man with dreadlocks—Stepherson's co-defendant, Vidyapati El. But a video presented at trial showed that Van Wyk entered the alley voluntarily. Yet despite these minor inconsistencies, Van Wyk's testimony was consistent in other important respects—including his description of the robbers and the items stolen, and his testimony about one the robbers threatening him with a gun.

Moreover, it was corroborated by other testimony and evidence. A surveillance video showed Van Wyk and Hardy entering the alley with Stepherson and two other men, Stepherson leaving with Hardy, and then all three robbers leaving for good, with Van Wyk and Hardy fleeing shortly after. Stepherson even identified himself and his co-defendant, El, in this surveillance video. And police officers corroborated other parts of Van Wyk's account, such as the time and place that he reported the robbery at the police station.

We are not persuaded that Van Wyk's testimony was, on the whole, not credible. And the government's case was hardly "marked by uncertainties and discrepancies," making it a "miscarriage of justice" to allow the jury's verdict to stand. *Martinez*, 763 F.2d at 1313. The district court therefore did not abuse its discretion by denying Stepherson a new trial. [1]

C.

Stepherson also believes that the district court abused its discretion by admitting evidence of a "dissimilar uncharged Florida robbery conviction" which occurred ten years before the instant offense. He claims that the government improperly used this evidence as "character assassination, showing propensity and bad character," in a prejudicial manner. We disagree.

Under Rule 404(b) of the Federal Rules of Evidence, the government may not provide evidence of a crime or conviction to "prove a person's character" as a way of showing that the person acted in conformity with that character. Fed. R. Evid. 404(b)(1). But it may offer this evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). This Court has created a three-prong test to determine the admissibility of 404(b) evidence: (1) the evidence ***444** must be relevant for some reason other than proving the defendant's character; (2) the "act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act"; and (3) the "probative value of the evidence must not be substantially outweighed by its undue prejudice" or by "confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *United States v. Matthews*, 431 F.3d 1296, 1310–11 (11th Cir. 2005) (quotation omitted); Fed. R. Evid. 403. The government's evidence meets all three prongs.

Though Stepherson's briefing seems to focus on why this evidence did not confirm his "identity" under Rule 404(b), the government actually used the earlier conviction to prove intent. Stepherson, by pleading not guilty, made "intent a material issue which imposes a substantial burden on the government to prove," which it may do by providing "qualifying Rule 404(b) evidence." *United States v. Edouard*, 485 F.3d 1324, 1345 (11th Cir. 2007) (quotation omitted). When the government offers a prior conviction to prove intent, "its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses." *Id*. (quotation omitted). If the state of mind for both offenses is the same, the first prong of the Rule 404(b) test is satisfied. *Id.* Here, the elements for Florida robbery and Hobbs Act robbery are very similar, except for the added commerce element in the Hobbs Act. *Compare* Fla. Stat. § 812.13(1), *with* 18 U.S.C. § 1951(b)(1). And the two acts require the same state of mind, namely, an intent to knowingly take someone else's property by means of actual or threatened force or violence. *See United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002); Fla. Stat. § 812.13(1).

Next, because the parties stipulated that the prior conviction occurred, this "eliminated the government's burden to produce evidence" of the conviction. *United States v. Hardin*, 139 F.3d 813, 817 (11th Cir. 1998). So the second prong was satisfied.

The government also satisfied the third prong, because the probative value of admitting the conviction was not outweighed by prejudice. We have "generally held" that a prior conviction is "highly probative" if the prior offense requires the same intent as the charged offense and if "these acts are proximate in time to the charged offenses." *Baker*, 432 F.3d at 1205 (quotation omitted). The two offenses did share the same intent requirement, and, while there was a ten-year gap between the Florida conviction and this charged offense, the significance of this intervening time period is diminished because Stepherson was in prison for six of those years. *See United States v. LeCroy*, 441 F.3d 914, 926 (11th Cir. 2006). Furthermore, the district court "cured any possible unfair prejudice" by the Court's repeated limiting instructions to the jury that Stepherson's conviction could only be considered for the limited purpose of determining intent. *See United States v. Brown*, 665 F.3d 1239, 1248 (11th Cir. 2011) (cleaned up). We therefore cannot say that the district court abused its discretion by admitting the government's Rule 404(b) evidence.

D.

Stepherson's final challenge to his convictions is that he was wrongly convicted of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), because he insists that Hobbs Act robbery is not a predicate offense. But as Stepherson himself acknowledges in his brief, this argument is squarely foreclosed by our precedent. *See* ***445** *United States v. St. Hubert*, 909 F.3d 335, 351–52 (11th Cir. 2018); *In re St. Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016).

E.

Stepherson raises one final objection—this time, to his sentence. At sentencing, the district court classified Stepherson as a career offender under U.S.S.G. § 4B1.1(a)(2). But to qualify for this enhancement, the defendant's current offense must be either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a)(2). And this Court recently determined that Hobbs Act robbery is *not* a "crime of violence" as defined under the Sentencing Guidelines. *United States v. Eason*, 953 F.3d 1184, 1194–95 (11th Cir. 2020). Stepherson raises *Eason* for the first time on appeal, so we review for plain error. This error, though, was plain and affected Stepherson's substantial rights. *See United States v. Jones*, 743 F.3d 826, 829–30 (11th Cir. 2014) (an "intervening decision by this Court or the Supreme Court squarely on point may make an error plain" (quotation omitted)); *Molina-Martinez v. United States*, —— U.S. ——, 136 S. Ct. 1338, 1346–47, 194 L.Ed.2d 444 (2016). Moreover, a "faulty enhancement" seriously affects the fairness, integrity, and public reputation of judicial proceedings. *United States v. Bankston*, 945 F.3d 1316, 1320 (11th Cir. 2019). The government also admits that Stepherson's career offender sentence must be vacated. We will therefore vacate and remand to the district court for resentencing.

* * *

The evidence presented at trial was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that Stepherson was guilty of conspiring to commit and committing Hobbs Act robbery. And we reject Stepherson's other arguments against his convictions. However, the district court did err in classifying Stepherson as a career offender under the Sentencing Guidelines. We therefore affirm Stepherson's convictions, vacate his sentence, and remand for resentencing.

AFFIRMED in part, VACATED in part, and REMANDED.

All Citations

838 Fed.Appx. 438

Footnotes

1 In passing, Stepherson also seems to suggest that he is entitled to a new trial because of the jury's supposedly inconsistent verdicts—acquitting him of robbing Hardy while convicting him of robbing Van Wyk. But a "jury's

verdicts are insulated from review on the ground that they are inconsistent, as long as sufficient evidence supports each finding of guilt." *United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015) (cleaned up).

End of Document

A-3

O70.3
Interference with Commerce by Robbery
Hobbs Act – Racketeering
(Robbery)
18 U.S.C. § 1951(a)

It's a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

"Property" includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. But it must prove that the natural

consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. See also *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that the Court in *Thomas* suggested that specific intent is not an element under § 1951).

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g.*, *Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 405 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11th Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

A-4

2.70

[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE, OR FEAR
18 U.S.C. § 1951(a) (HOBBS ACT)

The defendant is charged in count _____ with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Property" includes money and other tangible and

intangible things of value that are transferable – that is, capable of passing from one person to another.

"Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.

"Force" means an act capable of causing physical pain or injury to another person. This requires more than the slightest offensive touching, but may consist of only the degree of force necessary to inflict pain.

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

Comment

In *Sekhar v. United States*, 570 U.S. 729 (2013), the Supreme Court interpreted the term "property" under the Hobbs Act to mean something of value that can be exercised, transferred, or sold. *Id.* at 736. The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. 18 U.S.C. § 1951(b)(2). Thus, the property, whether tangible or intangible, must actually be "obtained" in order for there to be a violation. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did not "obtain or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act).

The Tenth Circuit has consistently upheld the Hobbs Act as a

permissible exercise of the authority granted to Congress under the Commerce Clause, both in the context of robbery, *United States v. Shinault*, 147 F.3d 1266, 1278 (10th Cir. 1998), and extortion, *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996). It also has made clear that only a *de minimis* effect on commerce is required, *United States v. Wiseman*, 172 F.3d 1196, 1214–15 (10th Cir. 1999), and has upheld a trial court's refusal to instruct that a substantial effect is required, *United States v. Battle*, 289 F.3d 661, 664 (10th Cir. 2002).

The court seems to have struggled with the language that "commerce . . . was actually or potentially . . . affected" and that the government can meet its burden by evidence that the defendant's actions caused or "would probably cause" an effect on interstate commerce. In *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), the court observed that use of the words probable and potential "while perhaps not the best way to explain to the jury the interstate commerce requirement, did not constitute error." *Id.* at 1229. In *United States v. Wiseman*, *supra*, the court upheld an instruction which stated, in pertinent part, that the government could meet its burden by evidence that money stolen for businesses "*could* have been used to obtain such foods or services" from outside the state, as opposed to "would" have been so used. *Id.* at 1215 (emphasis in original). The court, citing *Nguyen*, held that the instruction was not prejudicial because only a potential effect on commerce is required. *Id.* at 1216. The Tenth Circuit continues to approve instructions requiring proof of actual, potential, *de minimis* or even just probable effect on commerce. *See United States v. Curtis*, 344 F.3d 1057, 1068–69 (10th Cir. 2003).

The Tenth Circuit has concluded that the force element in Hobbs Act robbery requires "violent force," as defined in *Johnson v. United States*, 559 U.S. 133, 139–40 (2010). *See United States v. Melgar-Cabrera*, 892 F.3d 1053, 1064–65 (10th Cir. 2018). Accordingly, the jury should be instructed that "force" means an act "capable of causing physical pain or injury to another person." *United States v. Jefferson*, 911 F.3d 1290, 1299 (10th Cir. 2018).

Use Note

When the government's evidence is that the robbery or extortion actually affected commerce, the words "potentially," "probably" and "could" can be eliminated from the instruction.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.