United States Court of Appeals
For the Eighth Circuit

No. 19-3334

United States of America

Plaintiff - Appellee

v.

Jamerl M. Wortham

Defendant - Appellant

No. 19-3431

United States of America

Plaintiff - Appellee

v.

Anthony B. Williams, also known as AB

Defendant - Appellant

Appeals from United States District Court
for the Western District of Missouri - Kansas City

Submitted: November 17, 2020
Filed: March 3, 2021

Before COLLOTON, ARNOLD, and KELLY, Circuit Judges.

ARNOLD, Circuit Judge.

Some years ago, Jamerl Wortham and Anthony Williams went on an overnight crime spree in Kansas City, resulting in their conviction for carjacking (18 U.S.C. § 2119), distributing PCP (21 U.S.C. § 841(a)(1), (b)(1)(C)), and possessing a short-barreled shotgun in furtherance of those offenses (18 U.S.C. § 924(c)(1)(A), (B)(i)). They both assert that the district court[1] instructed the jury incorrectly on the distribution charge, while Wortham maintains in addition that the evidence was insufficient to establish that he aided and abetted the principal offenses. We affirm.

On the night in question, Williams, Wortham, and an unidentified third man (often called C.J.) began their criminal activities by stealing a Jaguar automobile and driving it to a hotel where they observed a woman, M.M., sitting on a curb. She was drunk, crying, and waiting for an Uber driver to give her a ride. An FBI agent testified that Wortham had told him that Williams put his arm around M.M. and steered her into the stolen Jaguar. M.M. could not recall how she ended up in that car with the men.

The three men then drove themselves and M.M. to an area containing standalone ATM machines. Around two o'clock in the morning, two women in a Toyota pulled up to one of the ATMs to deposit cash they had earned earlier in the

[1]The Honorable Brian C. Wimes, United States District Judge for the Western District of Missouri.

Williams and Wortham challenge the district court's jury instruction on the charge of distributing PCP. The court instructed the jury that, to find the defendants guilty of distributing PCP, the evidence must show, in relevant part, that they intentionally transferred PCP "to another." Williams and Wortham maintain that by not specifying in the instruction who the recipient of the distribution was—whether Y.C., M.M., or both—the court violated their rights to a unanimous jury verdict and to a grand jury indictment. They also say that the court's instruction constructively amended their indictment.

We think, however, that Williams and Wortham waived any arguments they may have had regarding the jury instructions. First of all, they and the government jointly proposed the instruction at issue. When defendants specifically request a particular instruction, including one they jointly propose with the government, they cannot later assert on appeal absent an objection that the instruction was given in error. *See United States v. Tillman*, 765 F.3d 831, 836 (8th Cir. 2014). Williams and Wortham maintain nonetheless that the district court didn't actually give the proposed instruction. But their argument is misleading. It is true that the district court modified a different part of the proposed instruction, but it did not modify the part of the instruction that Williams and Wortham now complain about. With respect to that part, the district court instructed the jury exactly as they proposed.

Williams and Wortham also suggest that the instruction wasn't problematic when they proposed it pretrial, and so they did not knowingly waive any challenge to it. They contend that the difficulty arose only when the evidence at trial showed there was more than one drug distributee, and thus more than one drug distribution. But the indictment expressly alleges that the men forced Y.C. and M.M. to smoke PCP, and so the problem of which Williams and Wortham now complain was fully apparent at the time they jointly proposed the instruction. So we decline to review their challenge to the instruction they asked the district court to give.

the defendant indeed had advance knowledge "from his failure to object or withdraw" from the crime "after a gun was displayed or used." *Id.* at 78 n.9.

We begin with Wortham's convictions for carjacking and carrying a gun in furtherance of a carjacking. We have no difficulty concluding that he took an affirmative act that furthered the offense: The evidence is overwhelming that he supplied the shotgun used to ensure the victims' compliance. The real question is whether the evidence is sufficient to show that Wortham intended to facilitate a carjacking as opposed to some other offense. Wortham maintains that he and Williams planned an ATM robbery, not a carjacking, and so he did not intend to facilitate a carjacking. He contends that it was only after the robbery attempt was foiled (presumably, it seems, because Y.C. deposited cash into the ATM instead of withdrawing it), that Williams and C.J. unexpectedly resorted to a carjacking.

But there is a good deal of circumstantial evidence in the record from which the jury could reasonably infer that Wortham intended to facilitate a carjacking. First of all, we have reviewed a video recording of the carjacking, and it's hardly clear that Williams and C.J. resorted to a carjacking only after their robbery attempt had been foiled. Within a matter of seconds after approaching the women, the men had ordered them into the backseat and hopped inside their car. Even though they had just missed getting Y.C.'s cash, as she had seconds earlier deposited it into the ATM machine, T.J. testified that she still had a bag of cash to deposit and that Williams and C.J. were going through it as they ordered the women into the back of the Toyota. A jury could reasonably conclude that, by taking the car despite having secured a bag of cash, the men had intended something more than a robbery from the outset.

It is also significant that the video appears to show that Wortham parked the Jaguar just inches behind the Toyota. If the men intended only a robbery, it would make scant sense to pull that close to the Toyota since, when they returned to the Jaguar with their loot, the driver would be prevented from making a swift, clean

record, we think it reasonable for a jury to infer that Wortham had intended to facilitate the carjacking.

The dissent offers alternative explanations for these events and concludes that "the government's evidence in support of Wortham's carjacking charge was equivocal and therefore insufficient for a reasonable jury to find that he committed each of the elements of the offense." In the first place, we don't think that the government's evidence was equivocal. Even if it were, since "there is an interpretation of the evidence that would allow a reasonable jury to find the defendant[s] guilty beyond a reasonable doubt," we will not disturb the jury's verdict on this count. *See United States v. Hensley*, 982 F.3d 1147, 1154 (8th Cir. 2020). What is more, "[w]e cannot reject a jury's conclusions merely because the jury may have chosen the arguably weaker of two contradictory, albeit reasonable, inferences." *See United States v. Galloway*, 917 F.3d 631, 635 (8th Cir. 2019).

The evidence that Wortham aided and abetted drug distribution is admittedly thinner, but it is nonetheless sufficient to support his conviction for distributing PCP and possessing a short-barreled shotgun in furtherance of that crime. By supplying the shotgun in question and driving the car when the distributions occurred, Wortham facilitated the offense. The question, once again, is whether he intended to do so. He maintains that Williams alone distributed the PCP and that no evidence showed he had the requisite foreknowledge that Williams would do that.

T.J. affirmed, however, that Wortham appeared comfortable with Williams distributing the drugs and that he did not try to stop Williams. Y.C. agreed and added that Wortham, C.J., and Williams were "all working together" at this time. In fact, she said that "they" pulled out a PCP-laden blunt because M.M. was "very distressed," and so "they" asked the women to smoke it. The evidence also showed that Wortham himself had been smoking PCP earlier in the day and was even doing so immediately before Williams passed the blunt to the women. Y.C. explained, "So it did start off

the intent of facilitating the offense's commission." Rosemond v. United States, 572 U.S. 65, 71 (2014). This demands that the defendant do more than just "associate himself with the venture" in some way. Id. at 81 n.10 (cleaned up). He must "participate in it as in something that he wishes to bring about and seek by his action to make it succeed." Id. (cleaned up). Put another way, "the government must prove that the defendant had a purposeful attitude, defined as affirmative participation which at least encourages the perpetrator." United States v. Rolon-Ramos, 502 F.3d 750, 758 (8th Cir. 2007) (cleaned up).

The government's evidence in support of the count for aiding and abetting the distribution of PCP was limited. As the court points out, Wortham was driving the Toyota while Williams sat in the backseat with the women and, according to their testimony, forced Y.C. and M.M. to smoke PCP. Wortham also supplied the shotgun, which remained on the floor in the front seat. And T.J. and Y.C. agreed with the prosecutor's broad statement at trial that "all of the men in the car appear[ed] comfortable with [Williams forcing the women to smoke]" and were "all working together." Missing from the trial record, however, is evidence that Wortham intended these actions, or inactions, to facilitate the distribution of PCP to either Y.C. or M.M.

To the contrary, T.J. testified that it was Williams who "pulled out the drugs." She said that Williams "asked us if we smoked, I said no, and then he proceeded to smoke it and made [Y.C.] and [M.M.] smoke with him." Even when the prosecutor used the word "they" in his questioning ("How did they make them smoke?" and "So you said they made [Y.C.] and the other young lady smoke?"), T.J. answered using the singular "he," referring to Williams. She testified that "[h]e told [M.M.] to puff it. She tried to pretend like she did, and he was like that wasn't good enough, and he didn't think that she puffed it so he told her to actually puff it. And then he did the same thing to [Y.C.]." At no point during this portion of her testimony did T.J. mention Wortham or C.J., the third man involved in the crimes, either by name or by other reference. Y.C., in turn, did not name any defendant in particular during her

"aiding and abetting each other and others, did knowingly and intentionally distribute a mixture or substance containing phencyclidine ("PCP")," on or about April 9, 2016. The court then instructed the jury that the underlying offense of distributing PCP has two elements: (1) "the defendant intentionally transferred a mixture or substance containing [PCP] . . . *to another*," and (2) "knew that [he] transferred a controlled substance." (emphasis added). Though we have held that "the identity of the distributee is not an essential element of the offense charged," United States v. Cosby, 529 F.2d 143, 146 (8th Cir. 1976), that case and United States v. Martin, 482 F.2d 202 (1973), upon which Cosby relies, arguably stand only for the proposition that the government need not identify the distributee by name in the indictment. See Martin, 482 F.2d at 204 ("Martin finally contends that the indictment was fatally defective in that it failed to reveal the name of the purchaser of the narcotics. There is no merit to this contention."); Cosby, 529 F.2d at 146 ("[T]he identity of the distributee is not an essential element of the offense charged, and the government is not required to identify the distributee in the indictment."). But even if the government does not have to prove the identity of the distributee, this does not mean that it may establish the elements of the crime by presenting evidence of multiple distributions to different individuals, thus permitting different jurors to reach different conclusions about which of the distributions actually occurred. See United States v. Karam, 37 F.3d 1280, 1286 (8th Cir. 1994) (explaining that "[t]he principal vice of a duplicitous indictment is that the jury may convict a defendant without unanimous agreement on the defendant's guilt with respect to a particular offense").

Here, though the superseding indictment's distribution count alleged only that Wortham and Williams distributed PCP to an unidentified, singular distributee, at trial the government presented evidence of two separate distributions of PCP to two different individuals. The government first elicited testimony that one or both of the defendants forced M.M. to smoke PCP, and then that one or both of the defendants forced Y.C. to smoke PCP. This amounts to evidence of two intentional transfers of PCP "to another." The jury was not instructed that it had to identify which of the

vacating both Wortham's and Williams's convictions on this count, as well as the accompanying § 924(c) counts.

Although a closer call, I also agree with Wortham that the government did not present sufficient evidence to permit a reasonable jury to find him guilty beyond a reasonable doubt of carjacking. The jury was instructed that to convict Wortham of aiding and abetting on this count it had to find that Wortham: (1) "[knew] carjacking was being committed or going to be committed," (2) "had enough advance knowledge of the extent and character of the carjacking that he was able to make the relevant choice to walk away," (3) "knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the carjacking," and (4) "intended someone to carjack the victim." I agree that the government's evidence was not inconsistent with an inference that Wortham intended the carjacking. But such evidence is not proof beyond a reasonable doubt that he knew the carjacking was going to happen or that he meant for his actions to help the other men complete the crime.

For example, I am not persuaded that a reasonable jury could conclude from the fact that Wortham parked the Jaguar directly behind the Toyota that he understood the plan all along was to take the Toyota. It is just as plausible that Wortham pulled up immediately behind the Toyota to ensure the other two men would be able to reach their intended victims before they fled. And putting the Jaguar in reverse would not necessarily preclude a quick getaway from the otherwise empty bank drive-through. Further, though Wortham confessed to planning a robbery, in that same confession he explained that the other two men had not mentioned anything about kidnaping anyone and that the plan had been for them to rob their victims and get back in the Jaguar. Wortham's conduct after the carjacking is relevant, but on this record it is insufficient to support the verdict. He was not charged with accessory after the fact of a carjacking but with aiding and abetting the crime of carjacking itself. "The presumption of innocence operates to remind the jury that the government has the burden to prove each element of the offense *beyond a reasonable doubt*." United

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA

v.

ANTHONY B. WILLIAMS

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **4:16-CR-00144-02-BCW**
§ USM Number: **32082-045**
§ **David Harold Johnson, CJA**
§ Defendant's Attorney

THE DEFENDANT:

☒ was found guilty by a jury on February 14, 2019 of Counts 1, 2, 4, 6, 3, 5, 7, 9, 12, 14, 8, 10, 11, 13, 15, 16 and 17 of the Superseding Indictment after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1201(a)(1), (c) and 18 U.S.C. 3559(c)(1) – Conspiracy to Commit Kidnapping	04/09/2016	1
18 U.S.C. §§ 1201(a)(1), and 2; and 18 U.S.C. 3559(c)(1) – Kidnapping	04/09/2016	2, 4, 6
18 U.S.C. §§ 924(c)(1)(A), (B)(i), and 2; and 18 U.S.C. 3559(c)(1) – Possession of a Short-Barreled Shotgun in Furtherance of a Crime of Violence or Drug Trafficking Crime	04/09/2016	9, 12, 14
18 U.S.C. §§ 2119, and 2; and 18 U.S.C. 3559(c)(1) – Carjacking	04/09/2016	8
18 U.S.C. §§ 1951(a), and 18 U.S.C. 3559(c)(1) – Conspiracy to Commit Hobbs Act Robbery	04/09/2016	10
18 U.S.C. §§ 1951(a), and 2; and 18 U.S.C. 3559(c)(1) – Attempted Hobbs Act Robbery	04/09/2016	11
21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2 – Distribution of Phencyclidine	04/09/2016	13
18 U.S.C. §§ 922(g)(1), 924(a)(2) – Felon in Possession of a Firearm	04/09/2016	15
26 U.S.C. §§ 5841, 5861(d), 5871, and 18 U.S.C. § 2 – Possession of an Unregistered Firearm	04/09/2016	16
26 U.S.C. §§ 5842, 5861(h), and 5871; and 18 U.S.C. § 2 – Possession of a Firearm with Obliterated Serial Number	04/09/2016	17

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts 3, 5, and 7 of the Indictment were dismissed on 9/17/2019 – See Doc. # 146.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 25, 2019
Date of Imposition of Judgment

/s/Brian C. Wimes
Signature of Judge

JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT
Name and Title of Judge

October 25, 2019
Date

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3431

United States of America

Appellee

v.

Anthony B. Williams, also known as AB

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cr-00144-BCW-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 16, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans