United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 2, 2022
Lyle W. Cayce
Clerk

No. 18-10235

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID MATTHEWS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-121-1

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

Before JONES, HAYNES, and COSTA, *Circuit Judges*.

PER CURIAM:*

David Matthews challenges his sentence for being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 265 months because it concluded that Matthews's

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

three convictions for Texas robbery and two convictions for Texas burglary of a habitation qualify as violent felonies and, as a result, the Armed Career Criminal Act's 15-year mandatory minimum applied. In 2020, this court summarily affirmed the district court. *United States v. Matthews*, 799 F. App'x 300 (5th Cir. 2020), *vacated*, 141 S. Ct. 2782 (2021). Matthews sought a writ of certiorari from the Supreme Court.

In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court held that a criminal offense that requires only a *mens rea* of recklessness cannot qualify as a "violent felony" for purposes of sentence enhancement under ACCA's elements clause. *Id.* at 1834 (plurality op.); *id.* at 1835 (Thomas, J., concurring). One form of Texas robbery, robbery-by-injury, requires only a *mens rea* of recklessness. TEX. PENAL CODE § 29.02(a)(1). The other form of Texas robbery, robbery-by-threat, requires an intentional or knowing *mens rea*. TEX. PENAL CODE § 29.02(a)(2). The Supreme Court granted Matthews's petition for certiorari, vacated this court's judgment, and remanded for further consideration. *Matthews v. United States*, 141 S. Ct. 2782 (2021).

This court recently held that the Texas robbery statute is divisible and that a robbery-by-threat conviction qualifies as a "violent felony" under ACCA's elements clause. *United States v. Garrett*, No. 17-10516, 2022 WL 214472, at *3-4 (5th Cir. Jan. 25, 2022). At least one of Matthews's robbery convictions is for robbery-by-threat. That conviction, when combined with his two qualifying burglary convictions, *see United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc), makes him an armed career criminal. We therefore AFFIRM.

United States Court of Appeals for the Fifth Circuit

No. 18-10235

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID MATTHEWS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-121-1

ON PETITION FOR REHEARING EN BANC

Before JONES, HAYNES, and COSTA, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 3, 2020
Lyle W. Cayce
Clerk

No. 18-10235
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID MATTHEWS,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-121-1

Before KING, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

David Matthews appeals his 265-month sentence for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He argues that his prior convictions for Texas robbery and Texas burglary of a habitation are not categorically violent felonies under the Armed Career Criminal Act (ACCA), but concedes that these issues are foreclosed by *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), *petition for cert. filed*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(U.S. Feb. 18, 2020) (No.19-7731), and *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), *petition for cert. filed* (U.S. Oct. 3, 2019) (No. 19-6186). The Government has moved for summary affirmance or, alternatively, an extension of time to file a brief.

Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Matthews's arguments are foreclosed by *Herrold*, 941 F.3d at 182, and *Burris*, 920 F.3d at 945, 948. In *Burris*, this court concluded that robbery-by-threat and robbery-by-injury under Texas Penal Code § 29.02 both require the "'use, attempted use, or threatened use of physical force'" and are violent felonies under § 924(e)(2)(B)(i)'s force clause. *Burris*, 920 F.3d at 945, 948, 958 (quote at 945). In *Herrold*, this court held that Texas burglary is "generic burglary" and is a violent felony under the ACCA. *Herrold*, 941 F.3d at 182. Thus, the argument that Matthews's Texas robbery and burglary convictions are not violent felonies is foreclosed, and summary affirmance is proper. *See Groendyke Transp., Inc.*, 406 F.2d at 1162

In light of the foregoing, the Government's motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED. Matthews's motion to stay is DENIED.

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA	§	
v.	§	Case Number: 4:17-CR-121-A(01)
DAVID MATTHEWS	§	

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Frank Gatto. The defendant, DAVID MATTHEWS, was represented by Federal Public Defender through Assistant Federal Public Defender Taylor Wills Edwards Brown.

The defendant pleaded guilty on September 1, 2017 to the 1 count indictment filed on July 19, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

Title & Section / Nature of Offense	Date Offense Concluded	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2) Felon in Possession of Firearm	03/10/2017	1

As pronounced and imposed on February 14, 2018, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of $100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 265 months. The sentence of 265 months shall run concurrently with any sentence under pending Case Nos. 1492368D, 1490525D, and 1494081D in the 396th District Court of Tarrant County, Texas, and Case No. 1490526 in Tarrant County Criminal Court No. 3, because they are related to the instant offense.

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

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years and that while on supervised release, the defendant shall comply with the following conditions:

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

2. The defendant shall not unlawfully possess a controlled substance.

3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.

5. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least $25 per month.

6. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least $25 per month.

7. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

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

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.

4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.

6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his dependents and meet other family responsibilities.

8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.

13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.

14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 14th day of February, 2018.

JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

_____

_____

_____

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

UNITED STATES of America, Plaintiff—Appellant/Cross-Appellee,

v.

David Lee GARRETT, Defendant—Appellee/Cross-Appellant.

No. 17-10516

United States Court of Appeals,
Fifth Circuit.

FILED January 25, 2022

Background: Defendant entered a guilty plea in the United States District Court for the Northern District of Texas, Sam A. Lindsay, J., to possession of firearm by felon, and at sentencing, defendant's prior Texas conviction for simple robbery was not treated as predicate violent felony under force clause of Armed Career Criminal Act (ACCA). Cross-appeals were taken. The Court of Appeals, 810 Fed.Appx. 353, affirmed the conviction, vacated the sentence, and remanded for resentencing. The Supreme Court granted certiorari, vacated the judgment, and remanded.

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

(1) Texas simple-robbery statute is divisible, and thus, modified categorical approach can be applied when determining whether prior conviction qualifies as violent felony under the ACCA's force clause, and

(2) Texas offense of simple robbery, based on intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death, qualifies as violent felony under the ACCA's force clause.

Judgment of Court of Appeals reinstated; remanded for resentencing.

1. Criminal Law ⚿1139

Whether a crime is a predicate violent felony, for an enhanced sentence under the Armed Career Criminal Act (ACCA), is a question of law reviewed de novo. 18 U.S.C.A. § 924(e)(2)(B).

2. Sentencing and Punishment ⚿1262

To determine whether a defendant's prior conviction qualifies, under force clause of Armed Career Criminal Act (ACCA), as predicate violent felony for sentence enhancement purposes, courts do not resort to a case-by-case evaluation of the underlying facts of each conviction; instead, they look at the statute itself and examine the elements of that crime, i.e., courts apply a categorical analysis to determine whether the statute itself necessarily and invariably requires the use or threatened use of physical force. 18 U.S.C.A. § 924(e)(2)(B)(i).

3. Sentencing and Punishment ⚿1262

Under the categorical approach, a defendant's prior conviction does not qualify, under the force clause of the Armed Career Criminal Act (ACCA), as a predicate violent felony for sentence enhancement purposes if any act criminalized by the statute of conviction, including the least culpable act, does not entail physical force against the person of another, regardless of whether the actual facts of the case at hand indicate that force was used. 18 U.S.C.A. § 924(e)(2)(B)(i).

4. Sentencing and Punishment ⚿1262

When determining whether a defendant's prior conviction qualifies, under the force clause of the Armed Career Criminal Act (ACCA), as a predicate violent felony for sentence enhancement purposes, if the statute of conviction is divisible, that is, a single statute creates multiple, distinct crimes, some violent and some non-violent, courts apply a modified categorical approach, which allows them to look at docu-

ments in the record, such as an indictment, jury instructions, or a plea colloquy, for the limited purpose of determining the specific crime under the statute for which the defendant was charged and convicted, in order to determine whether that crime of conviction requires as an element the use of force. 18 U.S.C.A. § 924(e)(2)(B)(i).

5. Sentencing and Punishment ⚿1262

Offenses with a mens rea of recklessness do not qualify as violent felonies under the force clause of the Armed Career Criminal Act (ACCA), for purposes of sentence enhancement, because they do not require the active employment of force against another person. 18 U.S.C.A. § 924(e)(2)(B)(i).

6. Sentencing and Punishment ⚿1285

The Texas simple-robbery statute is divisible, and thus, the modified categorical approach can be applied when determining whether a defendant's prior conviction under the statute qualifies, under force clause of Armed Career Criminal Act (ACCA), as predicate violent felony for sentence enhancement purposes; statute creates two distinct crimes, robbery-by-injury and robbery-by-threat, with pertinent portion of statute divided into two separate, numbered subdivisions separated by semicolon, robbery-by-injury and robbery-by-threat are conceptually distinct, and their mental-state requirements are different. 18 U.S.C.A. § 924(e)(2)(B)(i); Tex. Penal Code Ann. § 29.02(a).

7. Sentencing and Punishment ⚿1285

Under the categorical approach, the Texas offense of simple robbery, based on intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death, qualifies as violent felony under force clause of Armed Career Criminal Act (ACCA), as predicate prior conviction for sentence enhancement purposes; the offense involves the threatened use of physical force, and it requires a mental state of intent or knowledge rather than mere recklessness. 18 U.S.C.A. § 924(e)(2)(B)(i); Tex. Penal Code Ann. § 29.02(a)(2).

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:16-CR-107-1, Sam A. Lindsay, U.S. District Judge

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Stephen S. Gilstrap, John J. Boyle, Brian W. Portugal, Leigha Amy Simonton, Assistant U.S. Attorneys, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff-Appellant/Cross-Appellee.

Kevin Joel Page, Federal Public Defender's Office, Northern District of Texas, Stephen James Green, Assistant Federal Public Defender, Stephen Green Law, Dallas, TX, for Defendant-Appellee/Cross-Appellant.

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), offenders with three previous violent felony convictions are subject to significantly increased sentences. When this court earlier reviewed the sentence of the appellee, we held that a previous conviction for simple robbery was a violent felony that qualifies as a predicate to an enhanced sentence under the ACCA. *United States v. Garrett*, 810 F. App'x 353, 354 (5th Cir. 2020) (unpublished). The Supreme Court has now vacated our judgment and remanded for further consideration in the light of its decision in *Borden v. United States*, —— U.S. ——, 141 S. Ct. 1817, 210 L.Ed.2d 63 (2021). On

remand, we conclude that the robbery offense of which appellee was convicted under the Texas simple robbery statute, TEX. PENAL CODE ANN. § 29.02, was robbery-by-threat, a valid ACCA predicate for an enhanced sentence that was not affected by *Borden*. We therefore reinstate our judgment reversing the district court's imposition of a lesser sentence, and remand to the district court for resentencing under the ACCA.

I

A

In 2017, David Lee Garrett was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Before this conviction, he had two prior burglary convictions (both adequate predicates for ACCA enhancement), as well as one conviction for simple robbery under section 29.02 of the Texas Penal Code. On the basis of this criminal record, the government sought to have Garrett sentenced under the ACCA, which imposes a minimum of fifteen years' imprisonment for those with three prior predicate offenses. 18 U.S.C. § 924(e).[1] The district court ruled, however, that the robbery was not a valid predicate under the ACCA for an enhanced sentence, and thus imposed a sentence of only eighty-four months. The government appealed the sentence.

On appeal, we held that robbery was an ACCA predicate because it categorically involved the use of force; we therefore vacated the sentence and remanded for the imposition of an ACCA sentence. *Garrett*, 810 F. App'x at 354. Garrett filed a petition for a writ of certiorari. Shortly thereafter, the Supreme Court decided *Borden v. United States*. *Borden* held that criminal offenses that can be committed through mere recklessness do not require the use of force and therefore are not violent felonies under the ACCA. 141 S. Ct. at 1834. The Court vacated our decision in *Garrett* and remanded for further consideration in the light of *Borden*.

B

On remand, Garrett argues principally that the Texas simple robbery statute creates a single, indivisible crime that cannot support an enhanced sentence because the statute allows a conviction for "*recklessly* caus[ing] bodily injury to another" in the course of a theft. TEX. PENAL CODE ANN. § 29.02(a)(1) (emphasis added).[2] On the other hand, the government argues that

1. The ACCA provides in pertinent part that:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony . . . such person shall be fined under this title and imprisoned not less than fifteen years.

18 U.S.C. § 924(e)(1). A violent felony is defined as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

2. The statute is violated when a defendant, in the course of committing a theft, either "(1) intentionally, knowingly, or recklessly causes bodily injury to another," or "(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." TEX. PENAL CODE ANN. § 29.02(a). We refer to the first alternative as robbery-by-injury and the second as robbery-by-threat.

the robbery statute is, in fact, divisible into separate crimes and that Garrett was actually convicted of robbery-by-threat, which entails "intentionally or knowingly threaten[ing] or plac[ing] another in fear of imminent bodily injury or death," an offense that cannot be committed through mere recklessness. *Id.* § 29.02(a)(2). We now turn to resolving this dispute.

II

[1] Whether a crime is a predicate to an enhanced sentence under the ACCA is a question of law reviewed *de novo*. *United States v. Massey*, 858 F.3d 380, 382 (5th Cir. 2017). As pertinent to this case, a crime is an ACCA predicate when it is a violent felony, which is defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[3] 18 U.S.C. § 924(e)(2)(B)(i).

[2, 3] It must be underscored that, to qualify as an ACCA predicate, a crime must "ha[ve] *as an element* the use, attempted use, or threatened use of force." *Id.* (emphasis added). Courts therefore do not resort to a case-by-case evaluation of the underlying facts of each conviction. *Borden*, 141 S. Ct. at 1822. Instead, we look at the statute itself and examine the elements of that crime; that is to say, we apply a categorical analysis to determine whether the statute itself necessarily and invariably requires the "use . . . or threatened use of physical force." *Id.*; 18 U.S.C. § 924(e)(2)(B)(i). "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the [force clause], and so cannot serve as an ACCA predicate." *Borden*, 141 S. Ct. at 1822. In other words, any crime that can be committed without the use of force cannot serve as an ACCA predicate under the force clause, regardless of whether the actual facts of the case at hand indicate that force was used. *Id.*

[4] Some statutes, however, are divisible—that is, a single statute may create multiple, distinct crimes, some violent, some non-violent. *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). A divisible statute requires us to shift gears and apply the modified categorical approach: we are then allowed to look at documents in the record, such as an indictment, jury instructions, or a plea colloquy, for the limited purpose of determining the specific crime under the statute for which the defendant was charged and convicted in order to determine whether that crime of conviction requires as an element the use of force. *Id.*; *see United States v. Howell*, 838 F.3d 489, 494 & n.21 (5th Cir. 2016).

[5] Finally, regardless of whether the offense being examined arises from an indivisible statute or constitutes a distinct crime within a divisible statute, a crime cannot be a predicate under the ACCA's force clause if it can be committed through recklessness. "Offenses with a *mens rea* of recklessness do not qualify as violent felonies" because "[t]hey do not require . . . the active employment of force against another person." *Borden*, 141 S. Ct. at 1834.

III

Against this background, the initial and primary question for us to address is whether the Texas simple robbery statute creates one crime or more than one—that is to say, whether it is divisible. If the statute is indivisible and thus only states one crime, Garrett's conviction does not

3. We refer to this provision as the ACCA's force clause.

qualify under *Borden* as an ACCA violent felony because robbery can be committed recklessly. *See* TEX. PENAL CODE ANN. § 29.02(a)(1) (criminalizing "intentionally, knowingly, or *recklessly* caus[ing] bodily injury to another" (emphasis added)). If, on the other hand, the statute is divisible into distinct crimes, we must then identify what crime, specifically, Garrett committed and whether that crime constitutes a violent felony.

Our caselaw guides us in deciding whether the Texas simple robbery statute is divisible into separate crimes. We have previously held that if a statute only sets out alternative means of committing a crime, such that the jury need not agree which of the various possible means was actually employed in committing the crime, then the statute states only one crime and consequently is indivisible. *Howell*, 838 F.3d at 497. But if the statute lays out alternative elements of the crime, such that the jury must agree which of the two or more potential alternatives is satisfied, the statute is divisible. *Id.* To reiterate, "[t]he test to distinguish means from elements is whether a jury must agree" that one alternative, and not the other, was committed. *Id.* In conducting this inquiry, the Supreme Court has directed our attention to the state statute itself, as well as state court decisions. *Mathis*, 136 S. Ct. at 2256.

4. The full text of the simple robbery statute provides that:

> A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

TEX. PENAL CODE ANN. § 29.02.

A

[6] We begin with the statute and find it unambiguous.[4] The Texas simple robbery statute creates two distinct crimes, robbery-by-injury and robbery-by-threat. The pertinent portion of the statute is divided into two separate, numbered subdivisions separated by a semicolon. Moreover, the significance of this structural feature is confirmed by the conceptually distinct nature of each alternative; causing bodily injury is behavior meaningfully different from threatening or placing another in fear. And the different nature of these two crimes is further made apparent by their different mental state requirements; robbery-by-injury can be committed "intentionally, knowingly, or recklessly," while robbery-by-threat can only be committed "intentionally or knowingly." TEX. PENAL CODE ANN. § 29.02(a); *see also United States v. Wehmhoefer*, 835 F. App'x 208, 211 (9th Cir. 2020) (unpublished) (finding robbery under Texas law divisible and stating that "[d]iffering *mens rea* requirements are a hallmark of divisibility").

Looking to the provisions of a related state statute that has been held divisible, our interpretation of the robbery statute is confirmed. The Texas Court of Criminal Appeals, the final authority on Texas criminal law, has explicitly stated that the state's assault statute, which contains relevant language analogous to the robbery statute, creates "three distinct criminal offenses."[5] *United States v. Torres*, 923 F.3d

5. The assault statute also contains a third subdivision not relevant here. The statute reads in full:

> A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person

420, 425 (5th Cir. 2019) (citing *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008)). The court explained that assault by causing bodily injury is a "result-oriented offense," while assault by threat is a "conduct-oriented offense." *Landrian*, 268 S.W.3d at 540. As such, the fundamental "gravamen of the offense" is different in each type of assault. *Id.* at 541. This court has consequently decided that the assault statute is divisible into separate crimes for the purposes of the ACCA. *Id.* Given the closely related wording of the simple robbery statute, we do not see how we could but conclude that the robbery statute, under Texas caselaw, and indeed our precedent, is divisible.

B

Thus, we think that in *Landrian*, the Texas Court of Criminal Appeals resolved the interpretation of the simple robbery statute for purposes of Texas law. However, we should note, perhaps only parenthetically, that the lesser Texas courts have also spoken on the subject. Although these courts have not been entirely consistent, we think that lower state court cases, considered as a whole, support—and certainly do not undermine—our conclusion that simple robbery is divisible. In *Loville v. State*, No. 14-12-00297-CR, 2013 WL 1867077 at *8, 2013 Tex. App. LEXIS 5453 at *24 (Tex. App. May 2, 2013) (unpublished), the court held that the "robbery statute provides two separate criminal offenses—robbery causing bodily injury and robbery by threat" and that the jury must be unanimous as to which offense was committed. Likewise, another state court found that the robbery statute "provides two separate, underlying robbery offenses." *Woodard v. State*, 294 S.W.3d 605, 608–09 (Tex. App. 2009).

There is, unsurprisingly, more than one interpretation among the Texas courts of appeal. For example, in *Burton v. State*, 510 S.W.3d 232, 236–37 (Tex. App. 2017), the court found that jury instructions allowing a conviction on a theory of either robbery-by-injury or robbery-by-threat did not violate the defendant's right to jury unanimity on the verdict. There are other cases cited by Garrett, but we think they are either inapposite or unpersuasive.[6] Although state appellate court decisions are not unanimous, we conclude, as we have said, that lower court cases considered as a whole are supportive of the notion that simple robbery is divisible into separate crimes; and, in any event, these court of appeal cases to the contrary have significantly diminished authority in the shadow of *Landrian* and the Texas Court of Criminal Appeals.

knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE ANN. § 22.01.

6. Garrett points to *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014). But *Cooper* was a double jeopardy decision, *id.* at 427, and double jeopardy cases "shed little light on divisibility" because they generally will not provide the needed certainty on the crucial jury unanimity question. *Alejos-Perez v. Garland*, 991 F.3d 642, 650 (5th Cir. 2021) (quoting *United States v. Herrold*, 883 F.3d 517, 528–29 (5th Cir. 2018) (en banc)). Similarly, *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5985059 at *2–3, 2017 Tex. App. LEXIS 11181 at *6 (Tex. App. Dec. 1, 2017), had nothing to do with jury unanimity and instead considered sufficiency of the evidence. *Alexander v. State*, No. 02-15-00406-CR, 2017 WL 1738011 at *7, 2017 Tex. App. LEXIS 4072 at *19 (Tex. App. May 4, 2017), is closer to the mark in that it does deal with jury unanimity, but the defendant there conceded that the jury instructions charging theories of robbery-by-threat and robbery-by-injury as interchangeable alternatives were proper, and the court therefore was not required to decide the issue.

IV

[7] We have thus reviewed the Texas statute and state caselaw, leading us to hold that the Texas simple robbery statute is divisible. Given this conclusion, the remainder of our analysis may be addressed in short order. Because the statute is divisible, we apply the modified categorical approach to see which offense, under the simple robbery statute, is the crime of conviction. *Alejos-Perez v. Garland*, 991 F.3d 642, 648 (5th Cir. 2021). Applying the modified categorical approach, we are permitted to look to the indictment and the judicial confession entered on Garrett's guilty plea. We see that both documents state that Garrett "did then and there intentionally and knowingly threaten and place [the complainant] in fear of imminent bodily injury and death." In other words, the record recites the statutory language pertaining to robbery-by-threat and makes no mention of robbery-by-injury. Garrett's crime was thus robbery-by-threat under Texas Penal Code § 29.02(a)(2). Robbery-by-threat is a violent felony because intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death plainly constitutes the "threatened use of physical force" under the ACCA.[7] 18 U.S.C. § 924(e)(2)(B)(i). Furthermore, because robbery-by-threat requires a mental state of intent or knowledge rather than mere recklessness, TEX. PENAL CODE ANN. § 29.02(a)(2), our holding today is consistent with *Borden*. Garrett's conviction for robbery-by-threat is thus a violent felony under the ACCA and may serve as a predicate to an enhanced sentence. The district court's imposition of a non-ACCA sentence of eighty-four months is, once again, VACATED, and the case is REMANDED for resentencing under the ACCA.

Because of the time constraints imposed by Garrett's release date, the Clerk is directed to issue the mandate forthwith.

7. Garrett seeks to evade this conclusion. He asserts that *Borden* went further than ruling that crimes of recklessness are not ACCA violent felonies, arguing that the decision on recklessness is merely the application of a much broader holding that a defendant must "direct his action at, or target, another individual" to commit an ACCA predicate. *Borden*, 141 S. Ct. at 1825. But Garrett cites no case or circumstance applying *Borden* in this way. Furthermore, the Supreme Court was explicit that its holding was specifically directed at recklessness, as it appeared in the statute. *Id.* at 1822 ("We hold that a reckless offense cannot so qualify [as a violent felony].").

DANZIGER & DE LLANO, L.L.P., Plaintiff—Appellant,

v.

MORGAN VERKAMP, L.L.C.; Frederick M. Morgan, Jr., Esquire; Jennifer Verkamp, Esquire, Defendants—Appellees.

No. 21-20186

United States Court of Appeals,
Fifth Circuit.

FILED January 27, 2022

Background: Texas law firm brought action Ohio law firm and two of its members, asserting claims for fraud, unjust enrichment, tortious interference with prospective contractual relations, and breach of contract in connection with alleged fee-sharing agreement. The United States District Court for the Southern District of Texas, Alfred H. Bennett, J., granted de-