No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL BOYER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GINA A. AMORIELLO, ESQ.
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(215) 389-3090
Counsel for Petitioner Michael Boyer

QUESTION PRESENTED

1. Did the Third Circuit err by upholding Petitioner's conviction for carjacking in violation of 18 U.S.C. § 2119 when the Government failed to prove that Petitioner possessed the intent to seriously harm or kill the driver if necessary to steal the car?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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CONSTITUTIONAL PROVISIONS

STATUTES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Third Circuit, filed October 1, 2024, appears in the Appendix at A.001.

The Order and written opinion of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's Rule 29 motion appears in the Appendix at A.011.

JURISDICTION

The United States Court of Appeals for the Third Circuit panel decision was filed October 1, 2024.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ….

United States Constitution, Fifth Amendment

> "No person shall be….deprived of life, liberty, or property, without due process of law…."

STATEMENT OF THE CASE

Factual Background

The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The United States District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

Petitioner was charged in a one-count indictment with carjacking, in violation of 18 U.S.C. § 2119. On July 13, 2023, Petitioner appeared for jury selection/trial before the Honorable Timothy Savage of the District Court for the Eastern District of Pennsylvania and a jury. Petitioner's jury trial occurred on July 17, 2023, and he was convicted that day.

On July 29, 2023, Petitioner timely filed a Motion for a Judgment of Acquittal pursuant to Fed. R. Crim. P. 29(c). That motion was denied by the District Court. On December 19, 2023, Petitioner was sentenced to 120 months imprisonment followed by 3 years supervised release.

A timely appeal from the conviction at trial followed. The Panel Opinion and Judgment of the United States Court of Appeals for the Third Circuit was entered on October 1, 2024. The Third Circuit affirmed the District Court's denial of Petitioner's motion for judgment of acquittal, finding that the evidence was sufficient for the jury to find that the Petitioner possessed the required intent to cause death or serious bodily harm.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an issue of constitutional magnitude and compelling reasons exist for granting this petition. The Third Circuit panel opinion concluded that the evidence at trial was sufficient to establish the element of the carjacking offense which requires the intent to cause death or serious bodily injury. The evidence was woefully insufficient, and the contrary ruling results in manifest injustice. Petitioner's conviction is based on legally insufficient evidence, which violates his Fifth Amendment Due Process clause rights. The Fifth Amendment guarantees that "No person shall be….deprived of life, liberty, or property, without due process of law…." U.S. Const. amend V.

The statute criminalizing carjacking, 18 U.S.C. § 2119, provides in relevant part as follows: "Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so…" is guilty of an offense. 18 U.S.C. § 2119. The trial court properly instructed the jury that, to prove the crime of carjacking, the Government must prove beyond a reasonable doubt that Petitioner: (1) took the motor vehicle from the person or presence of another; (2) used force and violence or intimidation while taking the vehicle; (3) acted with intent to cause death or serious bodily harm while taking the vehicle; and (4) the motor vehicle had been transported, shipped or received in interstate or foreign commerce.

The Government's evidence failed to establish that Petitioner acted with the specific intent to cause death or serious bodily harm. "The intent requirement of § 2119 … [requires that] the Government prove[] that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car." *Holloway v. United States*, 526 U.S. 1, 15 (1999).

On May 22, 2022, in the early morning hours, after Petitioner and his co-defendant were "hanging out" with the complainant, his female companion and another male, the complainant was in the driver side of his vehicle with his male passenger in the rear seat. Petitioner approached the driver's side of the car wearing a shoulder backpack, with the bag partially in front of him. With his hand in the bag partially exposing what appeared to be a firearm, Petitioner told the victim to get out of the car (which he did).

Petitioner knew that what he was partially taking out of the backpack during the incident was a BB gun and not an actual firearm. Petitioner never removed the BB gun completely from the bag, and only took it out part way. There was no evidence of any fighting or any physical struggle either before or during the incident. In fact, Petitioner allowed the driver to retrieve his bags from the passenger side by walking around to that side of the car after Petitioner was already in the driver's seat. No physical contact of any kind was made. There was also no evidence that the BB gun was loaded.

In assessing whether conduct is sufficient to establish the required intent, it has been held that the use of a weapon, affirmative threatening statements and physical

violence against a victim all constitute probative evidence of an intent to harm or kill a victim if necessary to steal a vehicle. Threats, whether the gun was loaded, and actual harm are additional factors. *See United States v. Small*, 944 F.3d 490, 499-501 (4th Cir.2019); *United States v. Wilson*, 838 F.App'x 750, 753 (4th Cir. 2020). Other courts have found that brandishing a gun is insufficient without more, such as physical touching, direct proof firearm was loaded, and explicit threats to cause harm. *United States v. Fekete*, 535. F.3d 471, 480-81 (6th Cir. 2008). Here, none of the above occurred:

- there were no express verbal threats
- there was no physical force or even any physical touching
- there was no evidence the BB gun was loaded
- there was no actual physical harm to any alleged victim or other person
- there was no testimony that Petitioner and his cooperating co-defendant discussed or intended to kill or harm the driver or anyone else

"To satisfy the intent element, the government must show that the defendant unconditionally intended to kill or seriously injure the car's driver *or* that the defendant possessed a conditional intent to kill or seriously injure the car's driver should such violence become necessary—i.e., 'that the defendant was conditionally prepared to' kill or seriously harm the driver if the driver 'failed to relinquish the vehicle.'" *United States v. Bailey*, 819 F.3d 92, 95-96 (4th Cir. 2016)(citing *United States v. Foster,* 507 F.3d 233, 247 (4th Cir.2007)). In *Bailey*, the Government argued that Bailey's conditional intent was established by engaging in a high-speed chase

after the incident, his frantic and desperate appearance and his "implied threat when he placed a cold, hard object to the back of [the driver's] neck and said [d]rive, drive, drive, drive.'" *Bailey*, 819 F.3d at 96. The Court in *Bailey* went on to compare that defendant's conduct to cases in other Circuits involving sufficiency of the evidence challenges to the carjacking statute based upon whether sufficient evidence of the defendant's intent had been presented to the jury. The cases discussed in *Bailey* demonstrates the contrast with the instant case in terms of what constitutes sufficient evidence of intent to kill or cause serious bodily injury. What those cases involved to support an intent to kill or seriously injure a victim -- that is lacking in the instant case -- is that actual guns (not a BB gun) were used, there were express or implied verbal threats to the victim, physical contact including violent physical contact, placement of a gun to the victim's head or other body part, for example. *Bailey*, 819 F.3d at 96-97 (collecting cases). As to those cases, the *Bailey* court observed, which applies equally here, "while the specific evidence proffered by the government to support a finding that the defendant possessed a conditional intent to kill or seriously harm varied in each of the above cases, what is clear is that, in each case, the evidence of intent was much stronger than the evidence presented to the jury regarding *Bailey*'s [here Petitioner's] state of mind." *Bailey*, 819 F.3d at 96-97.

A review of the totality of the circumstances in the instant case reveals that the lack of sufficient evidence of intent by Petitioner is even more clear. The government failed to prove Appellant had any intent to kill or seriously harm anyone:

- there were no express or implied verbal threats

- there was no physical force or even any physical touching
- the BB gun was only partially visible but was not removed from the backpack, was not placed against any part of the victim's body, and was not even pointed at anyone
- there was no evidence the BB gun was loaded
- no real gun was present
- there was no actual physical harm to the driver or anyone else
- there was no testimony that Petitioner and his cooperating co-defendant discussed or intended to kill or harm the driver or anyone else
- the driver was allowed to remove items from the car and leave

It is clear the jury was struggling with the intent issue from its note requesting clarification regarding that element, stating that they "couldn't read his mind." The District Court then properly answered this question by rereading the applicable portion of the charge. The jury's conclusion that Petitioner's conduct amounted to carjacking was erroneous as there was insufficient evidence to sustain this conviction. The Rule 29 motion made by defense counsel during trial (and subsequently after conviction) should have been granted and the Third Circuit erred in affirming the conviction.

The Government contended that Petitioner's "intimidating conduct" was enough to establish the required intent. While a victim's perception can be instructive as to a perpetrator's intent, when there is an empty threat, the recipient's distress does nothing to transform the threat itself. *See United States v. Guerrero- Narvaez*, 415 F.Supp. 3d 281, 292-93 (D.P.R. 2019), aff'd, 29 F.4th 1 (1st Cir. 2022). Here, the BB gun was never pointed at anyone or even mentioned verbally. The victim was permitted freely to remove his items from the car. There was no physical contact whatsoever. Further, no one was hurt. Whether the driver was in fear does not salvage the insufficiency of the evidence regarding whether Petitioner had the requisite intent to kill or cause serious injury.

What matters is Petitioner's specific state of mind, and in the totality of the circumstances, the evidence here certainly was insufficient to establish the requisite intent to cause death or serious bodily injury.

CONCLUSION

This Court should grant this petition as Petitioner's conviction, based on legally insufficient evidence, deprives him of his Fifth Amendment right to due process. That constitutional wrong should be addressed by this Court.

For the foregoing reasons, Petitioner submits that this Court should grant the Petition for a Writ of *Certiorari* to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

LAW OFFICES OF GINA A. AMORIELLO
ATTORNEY FOR PETITIONER MICHAEL BOYER

BY: _____

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Dated: 12/9/24

APPENDIX

APPENDIX CONTENTS

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3253

UNITED STATES OF AMERICA

v.

MICHAEL BOYER,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 2-22-cr-00429-001)
District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit L.A.R. 34.1(a)
September 26, 2024

Before: KRAUSE, BIBAS and AMBRO, Circuit Judges

(Opinion filed: October 1, 2024)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

AMBRO, Circuit Judge

Michael Boyer was convicted of carjacking after stealing a vehicle with an accomplice in Philadelphia. He argues, as he did in a post-trial motion before the District Court, that the Government failed to establish that he acted with the requisite intent to commit that offense. Like the District Court, which denied his motion and later sentenced him, we determine that a rational juror could have found Boyer possessed the requisite intent beyond a reasonable doubt. We thus affirm.

Boyer and an accomplice, Asad Brown, stole a vehicle from Elliott Anderson in the early hours of May 22, 2022, as Anderson and his friend Corey sat in the car near Love Park in Philadelphia. Before the carjacking, Anderson had spoken with Boyer for about 30 minutes in the park before he returned to his car with Corey.[1] When Anderson and Corey left the park to walk toward Anderson's car, Boyer told Brown that he wanted to rob them. Brown agreed, and as the two started to pursue Anderson, Brown handed Boyer a fanny pack containing a BB gun. There was no evidence presented at trial bearing on whether the BB gun was loaded or unloaded.

Boyer and Brown then approached Anderson's car, and Boyer pulled the gun partially out of the bag so that Anderson could see it. Anderson, believing a robbery was taking place, asked Boyer, "[A]re we really doing this?" App. 43. Boyer affirmed and told Anderson to get out of the car. Corey, who had previously intimated he had a firearm, tried to grab his bag before leaving the vehicle. According to Anderson's

[1] Another acquaintance of Anderson named Destiny had also talked with Boyer but was not involved in the subsequent carjacking.

testimony, Boyer threatened Corey as he was doing so by asking, "[A]re you trying to get shot?" App. 43. After Anderson and Corey got out of the car, Boyer and Brown let Anderson fetch his backpack from the vehicle. Boyer then sat in the driver's seat, Brown got in the backseat, and the two fled in the car.

Later that afternoon, a Philadelphia police officer spotted the stolen vehicle. The officer attempted to pull Boyer and Brown over and instructed Brown, who was now driving the car, to park it and throw the keys out of the window. Boyer told Brown instead to drive away, and he sped off. Brown drove at a high rate of speed through stop signs, struck a child on a bicycle, and finally crashed into several parked cars. Boyer and Brown then fled on foot. The two were soon apprehended by officers. Officers also recovered Brown's fanny pack, containing the BB gun used in the carjacking.

Boyer was indicted and charged with carjacking and aiding and abetting in violation of 18 U.S.C. §§ 2119 and 2. He proceeded to trial in July 2023, where the jury found him guilty. Boyer filed a post-trial motion for judgment of acquittal per Federal Rule of Criminal Procedure 29(c), arguing that the Government had failed to establish that he had acted with the specific intent to cause death or serious bodily harm—an element of carjacking, as set out below. Fed. R. Crim. P. 29(c). The District Court denied the motion, concluding that a rational juror could have found the intent element beyond a reasonable doubt. The Court then sentenced Boyer to 120 months' imprisonment and a term of supervised release of three years.

On appeal, Boyer makes the same argument as in his Rule 29 motion, *i.e.*, that the Government's evidence at trial failed to establish he acted with the requisite intent to support his carjacking conviction.[2]

We review the sufficiency of the evidence under a "highly deferential" standard, and we will overturn a jury verdict only "if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430–31 (3d Cir. 2013) (quoting *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987)). "[T]he jury's verdict must be assessed from the perspective of a reasonable juror, and the verdict must be upheld as long as it does not 'fall below the threshold of bare rationality.'" *Caraballo-Rodriguez*, 726 F.3d at 431 (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)). In this context, we review the evidence in the light most favorable to the prosecution. *Id.* at 430.

The criminal carjacking statute provides that a person is guilty of the offense when, "with the intent to cause death or serious bodily harm[, he] takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so[.]" 18 U.S.C. § 2119. In other words, to establish the offense, the Government must prove beyond a reasonable doubt that the defendant "(1) with intent to cause death or serious bodily harm (2) took a motor vehicle (3) that had been transported, shipped or

[2] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

received in interstate or foreign commerce (4) from the person or presence of another (5) by force and violence or intimidation." *United States v. Applewhaite*, 195 F.3d 679, 685 (3d Cir. 1999) (quoting *United States v. Lake*, 150 F.3d 269, 272 (3d Cir. 1998)). The District Court instructed the jury on these elements, and Boyer raises no dispute concerning the instruction.

Boyer challenges the sufficiency of the evidence only for the first element: intent to cause death or serious bodily harm. He argues that the Government failed to establish the requisite intent because the BB gun was not an actual firearm; Boyer never "removed the BB gun completely from the bag"; the carjackers allowed Anderson to retrieve his bag from the vehicle before driving away; there was no physical altercation during the carjacking; and there was no evidence the BB gun was loaded. Opening Br. at 9.

To show the requisite intent, the Government must prove beyond a reasonable doubt "that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car . . . ." *Holloway v. United States*, 526 U.S. 1, 12 (1999). The Government does not need to show "unconditional intent to use violence regardless of how the driver responds to [the] threat"; it needs only to provide "proof of an intent to kill or harm if necessary to effect a carjacking." *Id.* at 3. Still, an "empty threat, or intimidating bluff," is not sufficient by itself to satisfy the intent element. *Id.* at 11. Whether a defendant had the requisite intent is judged by the totality of the facts and circumstances. *See United States v. Anderson*, 108 F.3d 478, 485 (3d Cir. 1997).

Here, a reasonable juror could have concluded that Boyer had the intent to seriously harm or kill Anderson if it proved necessary in order to steal the car. As described above, Boyer brandished the BB gun and made it clear he intended to rob Anderson. He also threatened to shoot Corey as he reached for his backpack even after Corey had implied that he had a firearm in the backpack. This is more than an empty threat. While the BB gun was not a real firearm, and there was no evidence bearing on whether it was loaded, Boyer could well have used it as a blunt instrument if Anderson had struggled in giving up his vehicle. *See, e.g.*, *United States v. Fekete*, 535 F.3d 471, 478–80 (6th Cir. 2008); *see also United States v. Small*, 944 F.3d 490, 500 (4th Cir. 2019) ("[E]ven an unloaded firearm is capable of causing harm."); *United States v. Guerrero-Narváez*, 29 F.4th 1, 11 (1st Cir. 2022) ("[P]roof of intent to cause serious bodily harm or death does not require proof of the involvement of a weapon."). Similarly, while Boyer argues that he did not actually use any physical force during the carjacking, that is not an element of the carjacking statute. Instead, the defendant need only possess a conditional intent to "seriously harm . . . the driver if necessary" to complete the carjacking. *Holloway*, 526 U.S. at 12. Nor does the fact that the carjackers allowed Anderson to get his backpack from the vehicle before driving away weigh sufficiently against Boyer's intent to justify overturning the jury's verdict.

Under our highly deferential standard, Boyer's actions were sufficient to allow a rational juror to conclude he intended at least to seriously harm Anderson if necessary to steal the car. We thus affirm.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3253

UNITED STATES OF AMERICA

v.

MICHAEL BOYER,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 2-22-cr-00429-001)
District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit L.A.R. 34.1(a)
September 26, 2024

Before: KRAUSE, BIBAS and AMBRO, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit L.A.R. 34.1(a) on September 26, 2024.

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered December 21, 2023, is hereby **AFFIRMED**. Costs are not taxed.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: October 1, 2024

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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October 1, 2024

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Brian R. Doherty
Office of United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

RE: USA v. Michael Boyer
Case Number: 23-3253
District Court Case Number: 2-22-cr-00429-001

ENTRY OF JUDGMENT

Today, **October 01, 2024** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: *s/ Aina Renwrick*
Legal Assistant
267-299-4957

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
MICHAEL BOYER	:	**NO. 22-429-1**

ORDER

NOW, this 19th day of October, 2023, upon consideration of Defendant's Motion Pursuant to Federal Rule of Criminal Procedure 29(c) Challenging the Sufficiency of the Evidence in Support of His Conviction for Carjacking (Doc. No. 63) and the government's response in opposition, it is **ORDERED** that the motion is **DENIED**.

/s/ Timothy J. Savage
TIMOTHY J. SAVAGE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
MICHAEL BOYER	:	**NO. 22-429-1**

MEMORANDUM

Savage, J. **October 19, 2023**

After a jury found him guilty of carjacking in violation of 18 U.S.C. § 2119, defendant Michael Boyer moves for judgment of acquittal under Fed. R. Crim. P. 29. He argues that the evidence was insufficient to prove that he had the specific intent to cause death or serious bodily harm – a necessary element of the crime.[1]

Viewing the evidence in the light most favorable to the government and determining that a rational juror could have found beyond a reasonable doubt that the defendant had the intent to cause death or serious bodily injury, we shall deny the motion.

The evidence at trial relevant to the issue before us was as follows. After socializing with the victim and his friends, the defendant and his co-defendant decided to rob them. They went to the victim's car and the defendant pointed a BB gun at the victim and demanded that he turn the car over to him. When the victim asked if he was "really doing this," the defendant warned him that he was. When the victim's friend in the back seat reached for his bag, the defendant pointed the gun at him and threatened, "[d]o you

[1] The elements of carjacking are (1) the defendant took the motor vehicle described in the indictment from the person or the presence of another; (2) the defendant used force and violence or intimidation while taking it; (3) the defendant acted with intent to cause death or serious bodily harm while taking it; and (4) the motor vehicle had been transported, shipped, or received in interstate or foreign commerce. 18 U.S.C. § 2119.

wanna get shot?" He ordered the victim and his friend out of the car. The defendant and his co-defendant then rode off in the car.

At the outset, we observe that it is important not to conflate the intent element with the use of force and violence or intimidation element. Although the facts establishing each may overlap, the intent element is not necessarily proven by facts proving the force and violence or intimidation element. Thus, proving that the defendant took the vehicle by force and violence or intimidation does not prove that he had the specific intent to cause death or serious bodily injury if necessary to gain possession of the vehicle.

In *Holloway v. United States*, 526 U.S. 1 (1999), the Supreme Court held that the government satisfies the specific intent element by proving that "at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car.)" *Id*. at 12. The Court, recognizing the distinction between conditional and unconditional intent, concluded that either was sufficient. *Id*. at 9. The Court explained that it was not necessary for the government to prove that the defendant carried out his intent, but only that he intended to do so if his demand was not met. In other words, conditional intent is sufficient.

A defendant's state of mind at a given time often cannot be proven directly. It may be proven indirectly from the surrounding circumstances. Thus, the jury may consider evidence of what the defendant said, what he did, and all the other circumstances that tend to show what his state of mind was at the time. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978).

With respect to the intent element, we instructed the jury as follows:

> The third element the government must prove beyond a reasonable doubt is that the defendant acted with the intent to cause death or serious bodily harm.
>
> Evidence that the defendant intended to frighten the victim is not alone sufficient itself to prove an intent to harm or kill. To establish this element, the government must prove that when the defendant demanded or took control of the vehicle, he possessed the specific intent to seriously harm or kill the driver if necessary to take the car. The defendant's intent to cause serious bodily harm to the victim must bear a reasonable connection to the taking of the vehicle.
>
> It is not enough for the government to prove that the defendant took control of the car by force and violence or intimidation from the person or presence of another. The government must prove beyond a reasonable doubt that the defendant had the specific intent at that moment to seriously harm or kill the person if such action had been necessary to complete taking the car. You must look at all the surrounding facts and circumstances in determining whether the government has proven beyond a reasonable doubt that the defendant had the specific intent to kill or seriously injure the person from whom the car was taken.

That the defendant used a BB gun does not preclude his having the specific intent to kill or seriously harm the victim. He may have thought the gun was capable of doing either. Indeed, he could have used it to shoot the victim in the face or pistol-whip him.

Even the use of an unloaded gun is sufficient to support, with other evidence, a finding of specific intent. *United States v. Fekete*, 535 F.3d 471, 480 (6th Cir. 2008). In *Fekete*, the Sixth Circuit stated: "a lack of proof beyond a reasonable doubt that a gun was loaded, therefore, does not foreclose the possibility that (1) the defendant, nonetheless, had the requisite conditional intent to cause death or serious bodily harm by other means (e.g., pistol-whipping or brute force), or (2) the weapon was fully loaded." *Id*.

We conclude there was sufficient evidence from which a reasonable jury could find that the defendant intended to seriously harm or kill the owner or the other occupant of the car if the owner had not yielded to his demand to turn over the car. Therefore, we shall deny the motion for acquittal.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL BOYER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PROOF OF SERVICE

I, Gina A. Amoriello, Esquire do swear or declare that on this date, December 9, 2024, as required by Supreme Court Rule 29, that I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. I also emailed same on this date to Brian Doherty, Esquire, Special Assistant U.S. Attorney. I cannot locate an email address for United States Attorney Sellinger or the Solicitor General of the United States.

(continued on next page)

The names and addresses of those served are:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530-0001

Brian Doherty, Esquire
SAUSA
U.S. Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 9, 2024.

_____
Gina A. Amoriello, Esq.