No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH GRAHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX VOLUME 1 – COURT OPINIONS, ORDERS, AND STATUTORY PROVISIONS INVOLVED

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3197

UNITED STATES OF AMERICA

v.

KENNETH GRAHAM,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 2:21-cr-00645-001)
District Judge: Honorable William J. Martini

Submitted Under Third Circuit L.A.R. 34.1(a)
November 13, 2024

Before: RESTREPO, MONTGOMERY-REEVES, and AMBRO, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted on November 13, 2024.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** that the judgment of the District Court entered on October 30, 2023, is hereby **AFFIRMED**. Costs will not be taxed.

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

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: January 30, 2025

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3197

UNITED STATES OF AMERICA

v.

KENNETH GRAHAM,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
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District Judge: Honorable William J. Martini

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November 13, 2024

Before: RESTREPO, MONTGOMERY-REEVES, and AMBRO, *Circuit Judges*.

(Opinion filed: January 30, 2025)

OPINION*

MONTGOMERY-REEVES, *Circuit Judge*.

In January 2021, Kenneth Graham robbed a Boost Mobile store at gunpoint. A jury found him guilty of Hobbs Act robbery and brandishing a firearm during a crime of

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

violence. *See* 18 U.S.C. §§ 1951(a) ("Count One"), 924(c)(1)(A)(ii) ("Count Two"). The District Court sentenced him to 330 months of imprisonment. Graham timely appealed. Because Graham's arguments do not withstand scrutiny, we will affirm.

I. DISCUSSION[1]

Graham argues that we must reverse his conviction for four reasons: (1) the District Judge should have recused himself from the case; (2) the District Court improperly admitted evidence of drug possession under Federal Rule of Evidence 404(b); (3) the District Court violated *Miranda v. Arizona*, 384 U.S. 436 (1966), by admitting Graham's response to booking questions incident to arrest; and (4) the District Court improperly charged the jury by (a) incorrectly defining "firearm" and (b) mentioning a "bank robbery" when none occurred. We address each argument in turn.

A. Recusal

First, Graham contends that the District Judge abused his discretion by not recusing himself.[2] Graham argues that the District Judge could not proceed impartially

[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. "Because [Graham] was convicted after a jury trial, 'we must defer to the jury's verdict and view the evidence in the light most favorable to the [G]overnment. Therefore, we recount the [G]overnment's version of the facts.'" *United States v. Kolodesh*, 787 F.3d 224, 229 n.1 (3d Cir. 2015) (quoting *United States v. Serafini*, 233 F.3d 758, 763 n.4 (3d Cir. 2000)).

[2] "Where a motion for disqualification was made in the District Court, we review the denial of such a motion for abuse of discretion." *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 166 (3d Cir. 2004).

because he handled a prior criminal case involving Graham. Graham argues that the District Judge's impartiality became evident in two exchanges at a status conference.

In the first exchange, the District Judge addressed a letter sent by Graham expressing concern about why Essex County Jail held him in lockdown. The District Judge directed the U.S. Marshals to produce a report addressing the basis for Graham's detention status. After hearing from Graham, the District Judge explained that Graham "might have a little streak" that he "might not see." App. 30. The District Judge described that he saw "firsthand" Graham's failure to come to court and that if Graham did "things like that in the jail, there's a reason then why they deal with you in a different way." App. 31. The District Judge then repeated that he would investigate Graham's complaint.

In the second exchange, Graham's counsel raised an issue with his representation of Graham. Counsel stated that Graham "refused to speak or discuss his case" for two months before the hearing. App. 32. The District Judge explained to Graham that his counsel is "one of the most experienced lawyers" to handle the case. *Id.* The District Judge informed Graham that he could represent himself, but doing so would be against his best interest. The District Judge concluded by telling counsel that if Graham refused to cooperate going forward, then "we'll deal with him in a different way." App. 33.

Judges must recuse "in any proceeding in which . . . impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This standard is met when "a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality . . . ." *Selkridge*, 360 F.3d at 167 (quoting *In re Prudential Ins. Co. of Am.*

Sales Pracs. Litig., 148 F.3d 283, 343 (3d Cir. 1998)). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added).

We disagree that the District Judge abused his discretion by denying Graham's motion for recusal. Graham contends without support that the District Judge relied on extrajudicial sources when presiding over this case. Yet the only evidence in the record of a source outside the current proceeding is the prior criminal case handled by the District Judge. And knowledge from that prior proceeding is not a ground for recusal under *Liteky* unless the District Judge showed such deeply rooted antagonism that would make "fair judgment impossible." *Id.*

Neither comment meets that standard. As to Graham's detention status, the District Judge ordered a report, promised to investigate, and queried whether Graham could improve the situation by modifying his behavior. A reasonable person would understand that exchange as showing *impartiality*, not partiality. As to the representation issue, the District Judge recognized Graham's ability to proceed *pro se* while encouraging him to work and confer with his able counsel. Again, this exchange shows a jurist acting impartially to ensure that Graham received representation sufficient to protect his own rights and interests in the case. *Cf. United States v. Peppers*, 302 F.3d 120, 129 (3d Cir. 2002) (explaining how courts must ensure a defendant "understands

both the scope of the right sacrificed and the restrictions and challenges that he will face" before proceeding *pro se*).

B. Evidence of Drug Possession

Second, Graham argues that the District Court erred by admitting certain evidence at trial.[3] During the investigation of the robbery of the Boost Mobile store, law enforcement officers identified the assailant's getaway vehicle. When the officers located the vehicle and arrived to seize it, Graham got out of the car smelling of marijuana. The officers searched Graham, found marijuana and heroin in his possession, and arrested him for possession of illegal drugs.

Before trial, the District Court denied Graham's motion to exclude evidence of his arrest for drug possession because it showed why detectives arrested and searched him, which related to the robbery. But the District Court only allowed mention of marijuana possession, not heroin possession. Graham argues that the District Court abused its discretion by admitting the evidence in violation of Federal Rule of Evidence 404(b).

Rule 404(b)(1) prohibits evidence of "any other crime, wrong, or act" to show that a defendant "acted in accordance with" that character, otherwise known as the propensity purpose. But the same evidence may be admissible if offered for "a non-propensity purpose." *Caldwell*, 760 F.3d at 276. Evidence is admissible for a non-propensity

[3] "We review a district court's evidentiary rulings for an abuse of discretion." *United States v. Caldwell*, 760 F.3d 267, 274 (3d Cir. 2014). But we exercise "plenary review over 'whether evidence falls within the scope of Rule 404(b).'" *Id.* (quoting *United States v. Smith*, 725 F.3d 340, 344–45 (3d Cir. 2013)).

purpose if the proponent shows that it "is (1) offered for a proper non-propensity purpose that is at issue in the case; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403 such that its probative value is not outweighed by any inherent danger of unfair prejudice; and (4) accompanied by a limiting instruction, if requested." *Id.* at 277–78.[4]

The District Court did not abuse its discretion under Rule 404. The evidence was relevant towards both a non-propensity purpose of law enforcement credibility and a non-propensity purpose of completing the narrative of the investigation. *See United States v. Green*, 617 F.3d 233, 247, 250 (3d Cir. 2010) ("[A]llowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b)" (collecting cases); explaining how evidence that would "improve [a witness's] credibility with the jury" is also a proper non-propensity purpose). And we find no abuse of discretion for the District Court's application of Rule 403, particularly where it tailored the evidence by limiting any mention of heroin. *See United States v. Vosburgh*, 602 F.3d 512, 537 (3d Cir. 2010) ("We will not disturb the District Court's ruling unless it was 'arbitrary or irrational.'" (quoting *United States v. Kellogg*, 510 F.3d 188, 197 (3d Cir. 2007))).[5]

[4] We note that the District Court issued a limiting instruction.

[5] Graham also suggests that, Rule 404(b) aside, the evidence was not relevant under Rule 401. But "the bar for what constitutes relevant evidence is low." *Forrest v. Parry*, 930 F.3d 93, 114 (3d Cir. 2019). And we have explained how, for example, "evidence concerning a witness's credibility is always relevant, because credibility is always at

C. *Miranda*

Third, Graham argues that the District Court erred by admitting evidence in violation of his *Miranda* rights.[6] Over objection, the District Court admitted body cam footage showing Graham's answers to routine booking questions incident to arrest from a standard form administered by a law enforcement officer. In the footage, Graham provided his height, weight, employment status, and telephone number. This information was provided in response to routine booking questions and therefore falls under an exception to *Miranda*. *See United States v. Bishop*, 66 F.3d 569, 572 n.2 (3d Cir. 1995) (recognizing the routine booking exception to *Miranda* and holding that a "police officer's question about [the defendant's] limp was part of the booking procedure designed to fulfill the government's obligation to provide medical attention").

Graham contends that the routine booking exception does not apply because the Government used the answers to incriminate Graham in the eyes of the jury. But the issue is not whether booking questions led to incriminatory evidence at trial; it is whether

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issue." *United States v. Repak*, 852 F.3d 230, 249–50 (3d Cir. 2017) (quoting *Green*, 617 F.3d at 251)).

Finally, Graham compares this case to *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008). But *Morena* concerned "systematic presentation of prejudicial drug evidence" that "constituted [prosecutorial] misconduct in violation of due process." *Id.* at 197. Graham does not explain—nor could he—how *Morena* has any application here.

[6] Whether the District Court properly applied the *Miranda* rule is a legal conclusion that we are free to re-examine, and this standard "does not change simply because the legal determination in a *Miranda* situation depends on the particular facts of each case." *United States v. Calisto*, 838 F.2d 711, 718 n.3 (3d Cir. 1988) (quoting *United States v. Mesa*, 638 F.2d 582, 591 n.3 (3d Cir. 1980)).

the questions were "designed to elicit" incriminating statements. *Pennsylvania v. Muniz*, 496 U.S. 582, 602 n.14 (1990); *cf. Rhode Island v. Innis*, 446 U.S. 291, 301 (holding that interrogation under *Miranda* refers to "any words or actions . . . that the police should know are reasonably likely to elicit an incriminating response" based on "the perceptions of the suspect"). Nothing about the questions here indicate any design to incriminate. And nothing apart from speculation indicates that the application of the standard questions here deviated in the context of Graham's particular arrest. We therefore hold that the District Court properly admitted the body cam footage under the routine booking exception to *Miranda*.

D. Jury Instructions

Fourth and finally, Graham argues that the District Court improperly defined "firearm" for purposes of 18 U.S.C. § 924(c) and that it tainted the trial by mentioning "bank robbery" during the instructions.[7] Both arguments fail.

[7] We review "jury instructions to determine whether, 'taken as a whole, they properly apprized the jury of the issues and the applicable law.'" *United States v. Yeaman*, 194 F.3d 442, 452 (3d Cir. 1999) (quoting *Dressler v. Busch Ent. Corp.*, 143 F.3d 778, 780 (3d Cir. 1998)). Whether the District Court properly stated the legal standard is subject to plenary review. *O'Brien v. Middle E. F.*, 57 F.4th 110, 117 (3d Cir. 2023) ("While we generally review a court's refusal to give a requested jury instruction for abuse of discretion, 'where, as here, the question is whether the jury instructions stated the proper legal standard, our review is plenary.'" (quoting *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995))). But our "review of the wording of the instruction, *i.e.*, the expression, is for abuse of discretion." *Yeaman*, 194 F.3d at 452. And we reverse "only if the instruction was capable of confusing and thereby misleading the jury." *Dressler*, 143 F.3d at 780 (quoting *United States v. Rockwell*, 781 F.2d 985, 991 (3d Cir. 1986)).

1. Definition of "firearm"

The District Court issued the following instruction to the jury about the definition of "firearm" for purposes of Count Two under 18 U.S.C. § 924(c)(1)(A)(ii):

> Now, the term firearm means any weapon which . . . will expel or is designed to, or may readily [be] converted to expel, a projectile, by the action of an explosive. The term firearm includes the frame or receiver of any such weapon.

App. 910 (mirroring Third Circuit's Model Criminal Jury Instruction § 6.18.922A-2).

Graham objected to this instruction at the charge conference. He argued that after *United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017), the jury instructions must specify "that the firearm was a real one." App. 810. The District Court rejected that proposed phrasing, explaining that "[t]he charge, as it is right now, makes [that] clear. They have to be satisfied that it's a real gun, a fireable gun." *Id.* Graham repeats the same argument on appeal—that *Hodge* required including the proposed instruction that "it must be established that the firearm was a real one." Opening Br. 30.

Section 921(a)(3) defines "firearm" for purposes of § 924(c)(1)(A) as, among other things, "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive[, or] the frame or receiver of any such weapon . . . [.]" 18 U.S.C. § 921(a)(3). Contrary to Graham's suggestion, we have not held that a "real" gun somehow differs from the definition of "firearm" in 18 U.S.C. § 921(a)(3). In *United States v. Lake*, 150 F.3d 269, 271 (3d Cir. 1998), in determining the sufficiency of the evidence to a § 924(c)(1) conviction, a defendant argued that the evidence did not show that "he used or carried a 'firearm'

within the meaning of 18 U.S.C. § 921(a)(3)." Outlining the evidence, we explained that "a rational jury could find that the gun was real." *Id.* Then in *Hodge*, when conducting a Double Jeopardy analysis, we relied on *Lake* for the proposition that a jury must "find that the firearm was a 'real' one" to convict under § 924(c). 870 F.3d at 195 (first citing *Lake*, 150 F.3d at 271; and then citing *United States v. Beverly*, 99 F.3d 570, 572 (3d Cir. 1996)). But both *Hodge* and *Lake* describe—in a succinct way—how Congress defined "firearm" under 18 U.S.C. § 921(a)(3). As a result, the District Court did not improperly describe the applicable law by quoting the statutory definition of "firearm." And the District Court's particular *expression* of the law—that is, by defining it without explaining that the "firearm" must be "real"—was not an abuse of discretion.

2. Reference to "bank robbery"

During jury instructions, the District Court mistakenly referred to the underlying act as "bank robbery." App. 910. Graham's counsel alerted the District Court to the mistake, and it issued the following curative instruction: "My apologies, . . . I may have referenced to a bank robbery. This is not a bank robbery. That was my mistake. I guess I've had them in the past. You know, this is an alleged robbery of a [Boost Mobile] store. So that is all." App. 919. Graham contends that this mistaken reference had a "prejudicial effect on the jury [that] could not be cured as the bell could not be unrung." Opening Br. 31. We disagree.

In *United States v. Flores*, 454 F.3d 149, 158 (3d Cir. 2006), we considered a "one-word slip of the tongue" that resulted in shifting the burden of proof in a criminal case to the defendant, Flores. Because that slip of the tongue contradicted "repeated

references" to the correct burden of proof, we held that the instructions were "more than sufficient to dispel any possible misconception" and thus did not constitute plain error. *Id.* In so holding, we explained that Flores's counsel failed to object, and that failure left "us with the impression" that the mistake "was hardly noticeable." *Id.* And we noted that—if Flores's counsel did object—"the mistake could have been resolved immediately." *Id.*

What happened here is precisely the type of best practice discussed by this Court in *Flores*. The District Court misspoke, defense counsel pointed out the mistake outside the presence of the jury, and the District Court immediately issued a curative instruction explaining any reference to "bank robbery" was a slip of the tongue. And "we presume that the jury will follow a curative instruction unless there is an overwhelming probability that the jury will be unable to follow it and a strong likelihood that the effect of the evidence would be devasting to the defendant." *United States v. Newby*, 11 F.3d 1143, 1147 (3d Cir. 1993) (cleaned up). Nothing suggests that the jury was unable to follow the curative instruction. And nothing suggests the reference to "bank robbery" was so devasting to Graham such that the judgment must be set aside. We therefore hold that the District Court cured any error resulting from the mistaken reference to "bank robbery" by issuing the curative instruction.[8]

[8] Graham suggests that the reference to "bank robbery" is further indication of why the District Court should have recused. But like we explain above, nothing—including with knowledge of the reference to "bank robbery"—indicates "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

II. CONCLUSION

For the reasons discussed above, we will affirm the District Court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3197

UNITED STATES OF AMERICA

v.

KENNETH GRAHAM,
Appellant

(D.C. Criminal No. 2:21-cr-00645-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge; HARDIMAN, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and AMBRO[1], Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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[1] Judge Ambro's vote is limited to panel rehearing.

BY THE COURT,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: March 20, 2025
Amr/cc: All counsel of record

Other Orders/Judgments **APPENDIX B**

2:21-cr-00645-WJM USA v. GRAHAM

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 10/30/2023 at 4:50 PM EDT and filed on 10/30/2023

Case Name: USA v. GRAHAM
Case Number: 2:21-cr-00645-WJM
Filer:
Document Number: 85

Docket Text:
JUDGMENT as to KENNETH GRAHAM (1), Counts 1,2, Sentence: 30 months Imprisonment on Count 1 and 300 months on Count 2 to be served consecutively; Supervised Release: 3 years on Count 1 and 5 years on Count 2 to run concurrently and w/ Special Conditions: FINANCIAL DISCLOSURE, MENTAL HEALTH TREATMENT, NEW DEBT RESTRICTIONS, CONSENT TO SEARCH, LIFE SKILLS/EDUCATION; Restitution: $2,773.00 (due immediately); Fine: Waived; Special Assessment: $200.00 total as to Counts 1 and 2 (due immediately)(Finance notified). Signed by Judge William J. Martini on 10/30/2023. (msd)

2:21-cr-00645-WJM-1 Notice has been electronically mailed to:

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DANIELLE VARGAS Danielle_Vargas@njp.uscourts.gov

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2:21-cr-00645-WJM-1 Notice has been sent by regular U.S. Mail:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=10/30/2023] [FileNumber=17754997-0] [743fa3aacdeaf990af13d3c90d559d4f19cb8204340182461cec0fcd15e0fe681cd8c6907efe06487cae4d0328c861984eaba8ba09145749e256677b47478d9e]]

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

CASE NUMBER 2:21-CR-00645-WJM-1

KENNETH GRAHAM

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, KENNETH GRAHAM, was represented by KEVIN ARTHUR BUCHAN and JAMES SEPLOWITZ.

The defendant was found guilty on count(s) 1 and 2 by a jury verdict on 3/20/2023 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:1951(a)	HOBBS ACT ROBBERY	1/18/2021	1
18:924(c)(1)(A)(II)	USING, CARRYING, AND BRANDISHING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	1/18/2021	2

As pronounced on October 25, 2023, the defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must pay to the United States a special assessment of $100.00 for count 1 and $100.00 for count 2 for a total of $200.00 which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further 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 any material change in economic circumstances.

Signed this 30 day of October, 2023.

William J. Martini
Senior U.S. District Judge

Defendant: KENNETH GRAHAM
Case Number: 2:21-CR-00645-WJM-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 months on Count 1 and 300 months on Count 2 to be served consecutively.

The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that the Bureau of Prisons designate a facility for service of this sentence as near as possible to your home address.

The defendant will remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years on Count 1 and five years on Count 2 to be served concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released.

While on supervised release, you must not commit another federal, state, or local crime, must refrain from any unlawful use of a controlled substance and must comply with the mandatory and standard conditions that have been adopted by this court as set forth below.

You must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

You must cooperate in the collection of DNA as directed by the probation officer

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it is a condition of supervised release that you pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

You must comply with the following special conditions:

FINANCIAL DISCLOSURE

Upon request, you must provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You must cooperate with the U.S. Probation Officer in the investigation of your financial dealings and must provide truthful monthly statements of your income. You must cooperate in the signing of any authorization to release information forms permitting the U.S. Probation Office access to your financial records.

MENTAL HEALTH TREATMENT

You must undergo treatment in a mental health program approved by the U.S. Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, or sex offense-specific treatment, as approved by the U.S. Probation Office, until discharged by the Court. The U.S. Probation Office will supervise your compliance with this condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You must not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

CONSENT TO SEARCH

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

LIFE SKILLS/EDUCATION

As directed by the U.S. Probation Office, you must participate in and complete any educational, vocational, cognitive or any other enrichment programs offered by the U.S. Probation Office or any outside agency or establishment while under supervision.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have fulltime employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e.. anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

STANDARD CONDITIONS OF SUPERVISION

13) You must follow the instructions of the probation officer related to the conditions of supervision.

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed)_____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of $2,773.00. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for distribution to Boost Mobile.

Address:

Boost Mobile
591 Central Avenue
East Orange, NJ 07018

The restitution is due immediately and shall be paid in full within 30 days of sentencing.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: Kenneth Graham
CASE NUMBER: 0312 2:21CR00645
DISTRICT: New Jersey

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A. ☐ **The court adopts the presentence investigation report without change.**

B. ☑ **The court adopts the presentence investigation report with the following changes.** *(Use Section VIII if necessary)*
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)

1. ☑ **Chapter Two of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to base offense level, or specific offense characteristics)*
Base offense level reduced to 18

2. ☐ **Chapter Three of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)*

3. ☑ **Chapter Four of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)*
Criminal history category reduced to 2

4. ☐ **Additional Comments or Findings:** *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)*

C. ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline: *(if more than one guideline applies, list the guideline producing the highest offense level)* _____

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

A. ☑ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.

B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:

☐ findings of fact in this case: *(Specify)* _____

☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

C. ☐ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: 22
Criminal History Category: 2
Guideline Range: *(after application of §5G1.1 and §5G1.2)* 346 to 357 months
Supervised Release Range: 1 to 5 years
Fine Range: $15,000 to $150,000

☑ Fine waived or below the guideline range because of inability to pay.

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STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.

B. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*

C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V.)*

D. ☐ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

A. **The sentence imposed departs:** *(Check only one)*
- ☐ above the guideline range
- ☐ below the guideline range

B. **Motion for departure before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for departure accepted by the court
   - ☐ plea agreement for departure, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense departure motion.
2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for departure
   - ☐ defense motion for departure to which the government did not object
   - ☐ defense motion for departure to which the government objected
   - ☐ joint motion by both parties
3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for departure

C. **Reasons for departure:** *(Check all that apply)*

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
☐	5H1.11	Military Service	☐	5K2.8	Extreme Conduct	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5H1.11	Charitable Service/Good Works	☐	5K2.9	Criminal Purpose	☐	5K2.22	Sex Offender Characteristics
☐	5K1.1	Substantial Assistance	☐	5K2.10	Victim's Conduct	☐	5K2.23	Discharged Terms of Imprisonment
☐	5K2.0	Aggravating/Mitigating Circumstances	☐	5K2.11	Lesser Harm	☐	5K2.24	Unauthorized Insignia
						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

D. **State the basis for the departure.** *(Use Section VIII if necessary)*

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STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE *(If applicable)*

A. **The sentence imposed is:** *(Check only one)*
- ☐ above the guideline range
- ☑ below the guideline range

B. **Motion for a variance before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for a variance accepted by the court
   - ☐ plea agreement for a variance, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense motion for a variance
2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for a variance
   - ☐ defense motion for a variance to which the government did not object
   - ☐ defense motion for a variance to which the government objected
   - ☐ joint motion by both parties
3. **Other**
   - ☑ Other than a plea agreement or motion by the parties for a variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Mens Rea
  - ☐ Extreme Conduct
  - ☐ Dismissed/Uncharged Conduct
  - ☐ Role in the Offense
  - ☐ Victim Impact
  - ☐ General Aggravating or Mitigating Factors *(Specify)* _____
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Aberrant Behavior
  - ☐ Lack of Youthful Guidance
  - ☐ Age
  - ☐ Mental and Emotional Condition
  - ☐ Charitable Service/Good Works
  - ☐ Military Service
  - ☐ Community Ties
  - ☐ Non-Violent Offender
  - ☐ Diminished Capacity
  - ☐ Physical Condition
  - ☐ Drug or Alcohol Dependence
  - ☐ Pre-sentence Rehabilitation
  - ☐ Employment Record
  - ☐ Remorse/Lack of Remorse
  - ☐ Family Ties and Responsibilities
  - ☐ Other: (Specify) _____
  - ☐ Issues with Criminal History: *(Specify)* _____
- ☑ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility
- ☐ Conduct Pre-trial/On Bond
- ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement
- ☐ Global Plea Agreement
- ☐ Time Served *(not counted in sentence)*
- ☐ Waiver of Indictment
- ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007))*: *(Specify)* _____
- ☐ Other: *(Specify)* _____

D. ***State the basis for a variance.*** *(Use Section VIII if necessary)*

DEFENDANT: Kenneth Graham
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STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☐ **Restitution Not Applicable.**

B. **Total Amount of Restitution:** $ 2,773.00

C. **Restitution not ordered:** *(Check only one)*

1. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s)'(s) losses were not ascertainable (18 U.S.C. § 3664(d)(5)).
5. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. ☐ Restitution is not ordered for other reasons. *(Explain)*

D. ☐ **Partial restitution is ordered for these reasons** ***(18 U.S.C. § 3553(c))*****:**

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

Defendant's Soc. Sec. No.: 146-58-6144

Defendant's Date of Birth: 6/28/1972

Defendant's Residence Address: 875 South 16th Street second floor
Newark, NJ 07108

Defendant's Mailing Address: 875 South 16th Street second floor
Newark, NJ 07108

Date of Imposition of Judgment
10/25/2023

Signature of Judge
William J. Martini, SUSDJ
Name and Title of Judge

Date Signed 10/30/23

APPENDIX C

18 U.S.C. § 924 - U.S. Code - Unannotated Title 18. Crimes and Criminal Procedure § 924. Penalties

Current as of January 01, 2024 | Updated by FindLaw Staff

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(8) Whoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, 932, or 933, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title;

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition; and

(G) any offense under section 932 or 933.

(e)(1) 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 or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term “serious drug offense” means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly receives or transfers a firearm or ammunition, or attempts or conspires to do so, knowing or having reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)), or a crime under the Arms Export Control Act (22 U.S.C. 2751 et seq.), the Export Control Reform Act of 2018 (50 U.S.C. 4801 et seq.), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 et seq.), shall be fined under this title, imprisoned for not more than 15 years, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k)(1) A person who smuggles or knowingly brings into the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46; or

(B) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)),

shall be fined under this title, imprisoned for not more than 15 years, or both.

(2) A person who smuggles or knowingly takes out of the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) would be punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, if the conduct had occurred within the United States; or

(B) would constitute a felony or a Federal crime of terrorism (as such terms are defined in section 932(a)) for which the person may be prosecuted in a court of the United States, if the conduct had occurred within the United States,

shall be fined under this title, imprisoned for not more than 15 years, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

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870 F.3d 184
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Richard Antonio **HODGE**, Jr., Appellant

No. 15-2621
|
Argued: December 15, 2016
|
(Filed: September 6, 2017)

Synopsis

Background: After jury found defendant guilty of ten counts of federal and Virgin Islands offenses, including robbery, assault, firearms-related crimes, and reckless endangerment, the District Court of the Virgin Islands, No. 3-14-cr-00001-001, Curtis V. Gomez, J., 2016 WL 8730657, denied defendant's motions for acquittal and for new trial, and, 2016 WL 917931, overruled his objections to his sentencing on his federal firearms counts. Defendant appealed.

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

[1] separate convictions under federal and Virgin Islands firearms statutes were not multiplicitous and did not trigger double jeopardy protection;

[2] defendant's convictions on two separate counts under federal firearms statute for use of firearm during single criminal episode did not violate double jeopardy;

[3] defendant could only be convicted of one count under Virgin Islands firearms statute even though he committed multiple predicate offenses;

[4] defendant's separate convictions under Virgin Islands firearms statute, predicated on offense of first degree assault, and predicate offense of first degree assault were permissible;

[5] district court did not violate Virgin Islands statute when it imposed general five-year sentence for four counts;

[6] district court did not abuse its discretion by denying defendant's request for substitute counsel without engaging in direct colloquy with him; and

[7] district court's failure to strike three prospective jurors for cause due to alleged bias, necessitating defendant's use of peremptory strikes, did not violate defendant's Sixth Amendment right to impartial jury.

Affirmed in part, reversed in part, and remanded.

West Headnotes (28)

[1] **Double Jeopardy** Prohibition of Multiple Proceedings or Punishments

Double Jeopardy Simultaneous proceedings; multiplicity

The Fifth Amendment protects against multiple punishments for the same offense imposed in a single proceeding, and accordingly, prohibits multiplicity. U.S. Const. Amend. 5.

4 Cases that cite this headnote

[2] **Double Jeopardy** Limit on court or legislature

Pursuant to the Double Jeopardy Clause, the sentencing discretion of the judicial branch is limited by the legislative branch in that courts must ensure that the punishment imposed upon a defendant does not surpass that prescribed by the legislature. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[3] **Criminal Law** Defenses

Criminal Law Grand jury and indictment

Generally, appellate review of double jeopardy and multiplicity rulings is plenary. U.S. Const. Amend. 5.

4 Cases that cite this headnote

[4] **Criminal Law** Constitutional questions

Double jeopardy claims that were not raised before the district court are reviewed for plain error. U.S. Const. Amend. 5.

[5] **Criminal Law** Necessity of Objections in General

Under plain error review, the Court of Appeals will grant relief only if it concludes that there was an error, the error was clear or obvious, and the error affected the appellant's substantial rights; when these three prongs have been satisfied, the Court of Appeals may exercise its discretion to correct the forfeited error.

[6] **Double Jeopardy** Offenses against United States and a state or territory

Territories Application of Constitution and laws of United States to territory acquired

The Virgin Islands and the federal government are considered one sovereignty for the purpose of determining whether an individual may be punished under both Virgin Islands and United States statutes for a similar offense growing out of the same occurrence; this is because as a United States territory, the Virgin Islands does not have independent sovereignty but derives such powers as its government possesses directly from congressional grant under Article IV of the federal Constitution. U.S. Const. art. 4, § 3.

1 Case that cites this headnote

[7] **Double Jeopardy** Weapons offenses

Because federal and Virgin Islands firearms statutes each contained an element not found in the other, separate convictions under those statutes were not multiplicitous and did not trigger double jeopardy protection; Virgin Islands statute required that firearm be "unauthorized," while federal statute did not, and Virgin Islands statute criminalized use of "imitation" firearm, while federal statute did not. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(c); 14 V.I.C. § 2253(a).

[8] **Double Jeopardy** Weapons offenses

Defendant's convictions on two separate counts under federal firearms statute for use of firearm during single criminal episode did not violate double jeopardy, where he used firearm to commit multiple predicate crimes, including robbery and attempted murder. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(c).

3 Cases that cite this headnote

[9] **Criminal Law** Weapons offenses

Defendant could only be convicted of one count under Virgin Islands firearms statute even though he committed multiple predicate offenses, including robbery and attempted murder, where he used same firearm during entire criminal episode. 14 V.I.C. §§ 104, 2253(a).

3 Cases that cite this headnote

[10] **Double Jeopardy** Assault, battery, or armed violence

Under Virgin Islands law, defendant's separate convictions under firearms statute, predicated on offense of first degree assault, and predicate offense of first degree assault were permissible. 14 V.I.C. §§ 104, 2253(a).

[11] **Sentencing and Punishment** Total sentence deemed not excessive

District court did not violate Virgin Islands statute, which required that executions of punishment for all but one conviction arising from the same criminal act be stayed, when it imposed general five-year sentence for two counts of first degree assault, one count of first degree robbery, and one count of first degree reckless endangerment; assault counts related to different victims, reckless endangerment count related to other victims in vicinity, and although robbery count related to same victim as one of the assault counts, the assault and robbery were distinct acts where defendant discharged his gun

multiple times with some break in the sequence. 14 V.I.C. § 104.

[12] **Criminal Law** Time of trial; continuance

Criminal Law Right of defendant to counsel

The Court of Appeals reviews a district court's denial of a request for substitution of counsel and denial of a continuance for abuse of discretion.

2 Cases that cite this headnote

[13] **Criminal Law** Choice of Counsel

A criminal defendant has a right to be assisted by counsel of choice under the Sixth Amendment; the right to counsel of choice, however, has limits. U.S. Const. Amend. 6.

4 Cases that cite this headnote

[14] **Criminal Law** Time of trial; continuance

When a defendant's choice of counsel comes into conflict with a trial judge's discretionary power to deny a continuance, the court will apply a balancing test to determine if the trial judge acted fairly and reasonably. U.S. Const. Amend. 6.

4 Cases that cite this headnote

[15] **Criminal Law** Particular Cases

At trial for robbery, assault, and firearms offenses, district court did not abuse its discretion by denying defendant's request for substitute counsel without engaging in direct colloquy with him; defendant's public defender confirmed that he had no conflict of interest with any party or witness and that there had been no breakdown of communication between himself and defendant, defendant was present during court's conversation with his public defender and could have requested to be heard, and defendant's proposed substitute counsel was also present and did not dispute public defender's version of the events. U.S. Const. Amend. 6.

3 Cases that cite this headnote

[16] **Criminal Law** Selection and impaneling

The Court of Appeals reviews a district court's conduct of voir dire for abuse of discretion.

1 Case that cites this headnote

[17] **Jury** Competence for Trial of Cause

So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. U.S. Const. Amend. 6.

1 Case that cites this headnote

[18] **Jury** Competence for Trial of Cause

At trial for robbery, assault, and firearms offenses, district court's failure to strike three prospective jurors for cause due to alleged bias, necessitating defendant's use of peremptory strikes, did not violate defendant's Sixth Amendment right to impartial jury, since none of jurors who were actually empaneled were biased. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[19] **Criminal Law** Objections to evidence in general

Criminal Law Arguments and conduct in general

The Court of Appeals reviews for plain error when there is no contemporaneous objection to admission of evidence or counsel's comments about evidence during a summation.

1 Case that cites this headnote

[20] **Criminal Law** Identification evidence

At trial for robbery, assault, and firearms offenses, admission of testimony of eyewitness officer, in which she referred to her knowledge of defendant as unemployed, was not plain error; testimony increased probative value of officer's correct identification of defendant, which was critical issue of fact in the case.

[21] **Criminal Law** Statement of evidence

Criminal Law Inferences from and Effect of Evidence

Counsel presenting a summation is free to repeat the evidence and even argue reasonable inferences from the evidence, as long as counsel refrains from misstating the evidence.

4 Cases that cite this headnote

[22] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Weight of Evidence in General

When faced with a sufficiency-of-the-evidence challenge, the Court of Appeals reviews the evidence in the light most favorable to the government; it does not reweigh the evidence or assess witness credibility.

3 Cases that cite this headnote

[23] **Criminal Law** Substantial evidence

Criminal Law Reasonable doubt

The Court of Appeals' inquiry on a sufficiency-of-the-evidence challenge is limited to determining whether the jury's verdict is permissible; to do so, the Court of Appeals asks whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence.

1 Case that cites this headnote

[24] **Weapons** Underlying crime

Element of premeditation in attempted murder predicate of federal firearms offense was supported by sufficient evidence, including evidence of defendant's preparation and use of firearm during assault and robbery. 18 U.S.C.A. § 924(c).

[25] **Homicide** Deliberation and premeditation

Premeditation, as required for an attempted murder conviction, is almost always proven through circumstantial evidence.

[26] **Criminal Law** Elements and incidents of offense

District court was not required to restate definition of attempted murder in jury instruction for firearms charge for which attempted murder was predicate offense, where court had previously given definition in instruction for attempted murder charge. 18 U.S.C.A. § 924(c).

[27] **Criminal Law** Custody and conduct of jury

A jury is presumed to follow the instructions given by the judge.

4 Cases that cite this headnote

[28] **Criminal Law** Form, language, preparation, and delivery; definition of terms

District court did not commit plain error in declining to define terms "willful" and "deliberate" in jury instruction for firearms offense predicated on attempted murder, where court defined term "premeditated," which encompassed terms "willful" and "deliberate." 18 U.S.C.A. § 924(c).

***187** On Appeal from the District Court of the Virgin Islands (No. 3-14-cr-00001-001) District Judge: Honorable Curtis V. Gomez

Attorneys and Law Firms

Richard F. Della Fera, Esq. (ARGUED), Entin & Della Fera, 633 South Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301, Counsel for Appellant

David W. White, Esq. (ARGUED), Nelson L. Jones, Esq., Office of United States Attorney, 5500 Veterans Building, Suite 260, United States Courthouse, St. Thomas, VI 00802, Counsel for Appellee

Before: CHAGARES, JORDAN, and HARDIMAN, Circuit Judges.

OPINION

CHAGARES, Circuit Judge.

****790** A jury found Richard Antonio **Hodge** guilty of ten counts of federal and Virgin ***188** Islands offenses, including robbery, assault, firearms-related crimes, and reckless endangerment. **Hodge** appeals his conviction and sentence on the following grounds: double jeopardy, denial of his pretrial motion to substitute counsel, denial of his motion to strike three jurors for cause, admission of prejudicial evidence at trial, insufficiency of the evidence, and error in the jury instructions.

For the reasons that follow, we agree that **Hodge's** multiple convictions under 14 V.I.C. § 2253(a), a Virgin Islands firearms statute, violated his right against double jeopardy. Therefore, we will remand to the District Court to vacate the convictions as to the appropriate counts and for requisite resentencing. We will otherwise affirm.

****791** I.

A.

On December 3, 2013, Asim Powell, an employee of Ranger American Armored Services ("Ranger"), was carrying a bag containing $33,550 in cash deposits from a K-Mart in St. Thomas in the U.S. Virgin Islands to a Ranger armored vehicle in the K-Mart parking lot. On his way, Powell met his supervisor Clement Bougouneau. While the two were standing in the parking lot, a man, whose face was partially covered, shot Powell in the back and attempted to seize the bag of money. Powell did not relent, and the man then shot him twice more, in the wrist and hip. The man then shot Bougouneau once in the groin and fled the scene with the bag. Latoya Schneider, an off-duty Virgin Islands police officer, happened to be at the shopping center at the time and recognized **Hodge** as the shooter. **Hodge** was later apprehended. Both Powell and Bougouneau survived the shootings.

On January 2, 2014, a fifteen-count Information was filed against **Hodge** in the District of the Virgin Islands:

— Count 1, Interference with Commerce by Robbery, 18 U.S.C. § 1951;

— Count 2, Use and Discharge of a Firearm During the Commission of a Crime of Violence (robbery), 18 U.S.C. § 924(c)(1)(A);

— Count 3, Use and Discharge of a Firearm During the Commission of a Crime of Violence (attempted murder of Powell), 18 U.S.C. § 924(c)(1)(A);

— Count 4, Use and Discharge of a Firearm During the Commission of a Crime of Violence (attempted murder of Bougouneau), 18 U.S.C. § 924(c)(1)(A);

— Count 5, Attempted First Degree Murder of Powell, 14 V.I.C. §§ 921, 922(a)(2), and 331;

— Count 6, Using an Unlicensed Firearm During Commission of a Crime of Violence (attempted murder of Powell), 14 V.I.C. § 2253(a);

— Count 7, Using an Unlicensed Firearm During Commission of a Crime of Violence (first degree assault of Powell), 14 V.I.C. § 2253(a);

****792** — Count 8, Using an Unlicensed Firearm During Commission of a Crime of Violence (robbery of Powell), 14 V.I.C. § 2253(a);

— Count 9, First Degree Assault with Intent to Commit Murder (Powell), 14 V.I.C. § 295(1);

— Count 10, First Degree Assault with Intent to Commit Murder (Powell), 14 V.I.C. § 295(3) [sic];

— Count 11, First Degree Robbery of Powell, 14 V.I.C. §§ 1861 and 1862(1);

— Count 12, Attempted First Degree Murder of Bougouneau, 14 V.I.C. §§ 921, 922(a)(2), and 331;

***189** — Count 13, Using an Unlicensed Firearm During Commission of a Crime of Violence (attempted murder of Bougouneau), 14 V.I.C. § 2253(a);

— Count 14, First Degree Assault with Intent to Commit Murder (Bougouneau), 14 V.I.C. § 295(1); and

— Count 15, Reckless Endangerment in the First Degree, 14 V.I.C. § 625(a).

Appendix ("App.") 13-28. The District Court dismissed Count 10 prior to trial because it contained an error.

B.

Hodge was represented by Federal Public Defender Omodare Jupiter. Prior to trial, **Hodge** indicated he wanted substitute counsel, but none was arranged at that time. [1] On the morning of the first day of trial, June 9, 2014, **Hodge** moved to substitute attorney Michael Joseph for Jupiter, and Joseph submitted a faxed motion to appear on **Hodge's** behalf. Jupiter reported to the District Court that **Hodge** wished to have Joseph represent him at trial.

The District Court engaged in the following colloquy with Jupiter:

> THE COURT: Are you aware—is there some conflict between you and your client?
>
> MR. JUPITER: There's no conflict that I—
>
> ****793** THE COURT: Any other substantial reason that you cannot represent Mr. **Hodge**?
>
> MR. JUPITER: No, Your Honor. The only issue—
>
> THE COURT: It's just a question of choice, then?
>
> MR. JUPITER: This is only a question of whether—I think the only issue I want to make sure that the Court—the record is clear, the only issue the Court raised is whether or not he has a right to his counsel of choice, Your Honor. And so no, I'm not aware of any conflict that I have with Mr. **Hodge**. I was not aware until Sunday, yesterday, that Mr. Joseph was going to be trying to enter his appearance in this case.
>
> THE COURT: Okay. Are you communicating with your client?
>
> MR. JUPITER: Yes, Your Honor.
>
> THE COURT: Is your client communicating with you?
>
> MR. JUPITER: Yes, Your Honor.
>
> THE COURT: And you have no conflict with your client at this time, correct?
>
> MR. JUPITER: Correct, Your Honor.
>
> THE COURT: Is there any conflict of interest, are you representing some other entity, Ranger American, or have any relationship with anyone?
>
> MR. JUPITER: Not at all.
>
> THE COURT: I don't find there's any good cause for any continuance, which is the only way I think Attorney Joseph can come in and adequately represent the defendant in this case.

App. 37-39. Joseph confirmed to the Court that while he would prefer more time, he was ready to proceed with jury selection and that his only request was to begin opening statements the next morning. The District Court did not directly ask **Hodge** any questions. After the Government indicated its concern about **Hodge's** right to counsel, the District Court denied the motion. The court noted that it did not "see any good cause for a continuance ... [or] for substituting counsel," and concluded that the motion was "simply a matter of choice, and what the Court views what ***190** may come close to kind of tactically moving the trial around." App. 43-44. The court characterized Joseph's recitation as "at best ... equivocal when it comes to his preparedness for trial," App. 42, and concluded that "a continuance would be required in the Court's view in order to allow Attorney Joseph to represent the defendant," ****794** App. 43. [2] The court then advised **Hodge** that his options were to proceed with Jupiter or to represent himself. **Hodge** opted to proceed with Jupiter as his counsel.

C.

During jury selection, several prospective jurors revealed their relationships with witnesses or parties in the case. **Hodge** urged the District Court to excuse three prospective jurors for cause.

First, **Hodge** challenged Juror 18, who indicated she was a childhood friend of Bougouneau and that they speak occasionally when they see each other, especially at work. She stated that she works at a bank and that she has overheard employees of Ranger discussing the case.

Second, **Hodge** challenged Juror 59, who stated she knew both Bougouneau and Powell through working at a bank that uses Ranger for transporting money.

Third and finally, **Hodge** challenged Juror 24, who stated that her father was killed 22 years earlier and that "it still hurts [her] because the criminals are out running." App. 60. Juror 24 also was acquainted with Schneider.

The court refused to excuse any of the three prospective jurors for cause on the basis that all three stated that they could be fair and impartial, and because "[i]t's a very small community." App. 67. **Hodge** then exercised his peremptory strikes to remove Jurors 18, 59, and 24 from the jury.

D.

Hodge's jury trial took place on June 9, 10, and 11, 2014. Below, we summarize the statements and evidence presented at trial that relate to the issues raised on appeal.

Both Powell and Bougouneau testified at trial, although neither could directly identify **Hodge**. Powell testified that while he was conversing with Bougouneau in the K-Mart parking lot, Bougouneau shouted "[w]atch out," and Powell felt a "sharp pain in [his] back." Supplemental Appendix ("Supp. App.") 18. Powell fell forward bleeding from the chest. ****795** Supp. App. 18. Next, Powell heard several more shots and "felt somebody pulling at the bag" of cash deposits from the K-Mart that he had in his hand. Supp. App. 18. Powell "tried to restrain by not letting go the bag," and "felt a shot in [his] hip." Supp. App. 18. He also felt a shot in his wrist. Supp. App. 19. Powell testified that two to three minutes elapsed between when he was shot and when the money bag he was holding was "wrestled" from him. June 9, 2014 Trial Tr. (D. Ct. Dkt. No. 66) at 112.

Bougouneau testified that he saw Powell leaving the K-Mart and approaching him. Bougouneau confirmed that he "saw the gun pull up behind Powell," and that he said "[l]ook out." Supp. App. 21. He testified that the assailant's hair and face were covered. Supp. App. 22; June 9, 2014 Trial Tr. at 143. Bougouneau testified that "by the time I tried to grab my gun, shots fired and I go down." Supp. App. 21. At some point, Bougouneau was shot. Supp. App. 20. Bougouneau then ran after the assailant along with Schneider. Supp. App. 24.

***191** Schneider identified **Hodge** as the shooter. She testified that on the day of the crime, she was off-duty from her position as a Virgin Islands police officer and was working as a taxi driver when she saw **Hodge**, whom she knew as "Richie," in the K-Mart parking lot. The Government asked Schneider how long she knew **Hodge**. She responded:

> I've been a police [officer] for about nine years. I don't know him personally, but, you know, my experience from working in special ops and dealing with the guys in the area, town, country, and all the different housing communities and stuff. I gathered his name from, you know, my co-workers and stuff like that. But I don't personally know him.

App. 76. Schneider testified that her sister lives in the area and added, "I see him all the time." App. 76.

Schneider testified that she saw **Hodge** in a "slow jog" and that at the time, she thought to herself, "Oh, Richie found a job" because she saw that **Hodge** had a hat or cloth over his face and assumed it was to cover it from dust. App. 75-76. The Government then asked Schneider how she knew **Hodge** was unemployed. She replied, "Well, I always see him on the corner or on the turf, hanging with a group of guys," and added that she had observed him "hanging" in the area for four or five years. App. 76, 80. Schneider testified that **Hodge** had "his hands in this big jacket" ****796** and that she found it "strange." App. 77. Schneider stated that when she turned to retrieve her service weapon, she heard "[m]ore than two" shots "ring off." App. 77. She testified that she next saw one of the victims falling, **Hodge** picking up a bag, and **Hodge** running with a gun in his hand. App. 77-78. Later, during closing statements, the Government referred to Schneider's characterization of **Hodge** as previously unemployed and that she at first believed he had found a job. **Hodge** did not object to Schneider's testimony or to the Government's statement during closing.

Schneider and Bougouneau stopped their pursuit of **Hodge** because of Bougouneau's gunshot wound. Other officers arrived and eventually found **Hodge** in a dense wooded area, only half-dressed. The officers recovered from the bushes nearby a tee shirt, a black ski mask, and the jacket identified

by Schneider. Gunpowder residue was later found on the clothing. The ski mask had male DNA on it, but **Hodge** was excluded as a contributor to the DNA sample in the mask.

E.

The District Court instructed the jury before and after closing statements. In the jury instructions before the closing statements, the District Court explained:

> The crimes charged in this case are serious crimes which require proof of the defendant's mental state or intent before he can be convicted. To establish mental state or intent, the government must prove that the defendant's actions were knowingly and intentionally done. The government is not required to prove that the defendant knew that he was breaking the law when he did the acts charged in the information. You may determine his mental state or intent from all the facts and circumstances surrounding the case. State of mind or knowledge ordinarily may only be proved indirectly, that is, by circumstantial evidence, because there's no way we can get inside to observe the operations of the human mind.

Supp. App. 50-51.

In instructing the jury as to Counts 3 and 4, the 18 U.S.C. § 924(c) counts relating ***192** to the attempted murders of Powell and Bougouneau, the court first stated:

> ****797** Counts 3 and 4 charge that on or about December 3rd, 2013, the defendant used a firearm to commit attempted murder.
>
> To find the defendant guilty of using and discharging a firearm during the commission of attempted murder, the government must prove each of the following essential elements beyond a reasonable doubt:
>
> First, that the defendant committed an attempted murder as charged in either Counts 5 or 12 of the information.
>
> Second, that during and in relation to the commission of that crime, the defendant knowingly used a firearm.
>
> Third, that the defendant used the firearm during and in relation to the crime of attempted murder.

App. 90. The court paused to address an unrelated matter, and then repeated the instruction as to Counts 3 and 4. In the second iteration, the court did not specifically refer to "Counts 5 or 12 of the information." App. 91. It also replaced "knowingly used" with "knowingly discharged" in the second to last sentence of the instruction. App. 92.

The court then gave the jury instructions for Counts 5 and 12 for attempted murder. It stated:

> To meet its burden of proof for the crime charged in Counts 5 and 12, the government must prove the following essential elements beyond a reasonable doubt:
>
> First, that the defendant attempted to kill a human being.
>
> Second, that the defendant acted willfully, deliberately and with premeditation.
>
> And third, that the defendant acted with malice aforethought.

App. 92-93. Next, the District Court specifically defined premeditation and malice aforethought:

> To premeditate a killing is to conceive the design or plan to kill.
>
> Malice aforethought may be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief, without regard to its consequences. Malice aforethought does not mean simply hatred or particular ill will, but embraces generally the state of mind with which one commits a wrongful act. And it includes all those states of mind in which a homicide is committed without legal justification, extenuation or execution.

****798** App. 93-94.

The court then gave jury instructions for Counts 6 and 13, the firearms offenses in violation of 14 V.I.C. § 2253(a) with respect to attempted murder:

> To sustain its burden of proof for the crime charged in Counts 6 and 13, the government must prove the following essential elements beyond a reasonable doubt:
>
> First, that the defendant knowingly used the firearm in question.
>
> Second, that the defendant was not authorized by law to use the firearm in question.
>
> And third, that the defendant used the firearm during the commission of an attempted murder.

App. 94-95.

F.

The jury returned a mixed verdict. It acquitted **Hodge** of four counts: Count 4, the 18 U.S.C. § 924(c) offense as to the attempted murder of Bougouneau; Count 5, attempted first degree murder of Powell; Count 12, attempted first degree murder of Bougouneau; and Count 13, the ***193** 14 V.I.C. § 2253(a) offense of using an unauthorized firearm in commission of the attempted murder of Bougouneau. It convicted him of the remaining ten counts.

On September 16, 2015, the District Court entered a judgment of conviction and sentence as to Counts 1, 2, and 3 and a separate judgment and commitment as to Counts 6, 7, 8, 9, 11, 14, and 15. On Count 1 (Hobbs Act robbery of Powell), the court sentenced **Hodge** to seventy months of imprisonment. On Counts 2 and 3 (the § 924(c) counts related to the robbery and attempted murder of Powell), the court sentenced **Hodge** to a mandatory minimum of 300 months of imprisonment on the second § 924(c) violation and 120 months of imprisonment for the initial violation,[3] to run consecutively.

As to the Virgin Islands offenses, the District Court sentenced **Hodge** to a fifteen-year general sentence on Counts 6, 7 and 8—the Virgin ****799** Islands firearms offenses related to the attempted murder, first degree assault, and robbery of Powell, respectively. It sentenced **Hodge** to a five-year general sentence for Counts 9, 11, 14, and 15—the first degree assault of Powell, first degree robbery of Powell, first degree assault of Bougouneau, and first degree reckless endangerment, respectively. Both the five- and fifteen-year general sentences were to run consecutively to each other and to all other sentences.

The District Court also issued an opinion on March 8, 2016 regarding Counts 2 and 3, the dual § 924(c) convictions, rejecting **Hodge's** position that the convictions were duplicative and that only one of the convictions could stand. The District Court also denied **Hodge's** motion for a new trial and motion to vacate in a written opinion dated April 15, 2016. **Hodge** filed a timely appeal.

II.[4]

[1] **[2]** **Hodge** raises separate arguments as to why several counts of his conviction and his sentence should be vacated because they are multiplicitous and violate the Fifth Amendment's Double Jeopardy Clause.[5] The Fifth Amendment protects, inter alia, "against multiple punishments for the same offense imposed in a single proceeding," Jones v. Thomas, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) (quotation marks omitted), and accordingly, prohibits multiplicity. We have observed that "[m]ultiplicity is the charging of a single offense in separate counts of the indictment. A multiplicitous indictment risks subjecting a defendant to multiple sentences for the same offense, an obvious violation of the Double Jeopardy Clause's protection against cumulative punishment." United States v. Kennedy, 682 F.3d 244, 254-55 (3d Cir. 2012) (citations omitted). The Supreme Court has noted that "[b]ecause the substantive power to prescribe crimes and determine ****800** punishments is vested with the legislature, the ***194** question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." Ohio v. Johnson, 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (citations omitted). As a result, the sentencing discretion of the judicial branch is limited by the legislative branch in that courts must ensure that the punishment imposed upon a defendant does not surpass that prescribed by the legislature. See Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court provided a test to determine whether the legislature "intended that two statutory offenses be punished cumulatively." Albernaz v. United States, 450 U.S. 333, 337, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The Court in Blockburger directed that "where the same act or transaction constitutes a violation

of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304, 52 S.Ct. 180. See Iannelli v. United States, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) (explaining that the Blockburger test serves the "function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction"). However, the Blockburger test is merely one "rule of statutory construction;" it does not control "where, for example, there is a clear indication of contrary legislative intent." Albernaz, 450 U.S. at 340, 101 S.Ct. 1137 (quotation marks omitted).

[3] **[4]** **[5]** Generally, our review of double jeopardy and multiplicity rulings is plenary. See Kennedy, 682 F.3d at 255 n.8. However, double jeopardy claims that were not raised before the District Court are reviewed for plain error. United States v. Miller, 527 F.3d 54, 60 (3d Cir. 2008). Under plain error review, we will "grant relief only if we conclude that (1) there was an error, (2) the error was 'clear or obvious,' and (3) the error 'affected the appellant's substantial rights.' " United States v. Stinson, 734 F.3d 180, 184 (3d Cir. 2013) (quoting Puckett v. United States, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)). When these three prongs have been satisfied, we may exercise our discretion to correct the forfeited error. Id.

We address **Hodge's** double jeopardy claims in seriatim below and note where we conduct plain error review instead of plenary review.

****801** A.

Hodge argues that his convictions under 18 U.S.C. § 924(c) and 14 V.I.C. § 2253(a) (the federal and Virgin Islands crime-of-violence firearms offenses, respectively) cannot both stand if they are based on the same predicate offense conduct. There are two sets of convictions that fall into this category: Counts 2 and 8, where Count 2 is the federal firearms offense and Count 8 is the local Virgin Islands firearms offense, both based on the robbery of Powell; and Counts 3 and 6, where Count 3 is the federal firearms offense and Count 6 is the local firearms offense, both based on the attempted murder of Powell. Because **Hodge** did not raise this issue before the District Court, but did not appear to have intentionally waived it, we review it for plain error. See United States v. Olano, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

[6] As a preliminary matter, unlike a scenario where the dual sovereigns of a state government and the federal government ***195** pursue parallel prosecutions for the same conduct, "the Virgin Islands and the federal government are considered one sovereignty for the purpose of determining whether an individual may be punished under both Virgin Islands and United States statutes for a similar offense growing out of the same occurrence." Gov't of the V.I. v. Brathwaite, 782 F.2d 399, 406 (3d Cir. 1986). This is because as a United States territory, the U.S. Virgin Islands "does not have independent sovereignty but derives such powers as its government possesses directly from congressional grant under article IV, section 3 of the federal Constitution." Gov't of the V.I. v. Dowling, 633 F.2d 660, 669 (3d Cir. 1980).

We therefore turn to the Blockburger test to analyze whether 18 U.S.C. § 924(c) and 14 V.I.C. § 2253(a) "constitute violations of two distinct statutory provisions," Blockburger, 284 U.S. at 304, 52 S.Ct. 180. The predicate offenses for Counts 2 and 8 (robbery) [6] and Counts 3 and 6 (attempted murder) are the same. As a result, we need only examine the other elements of the two statutes.

[7] Because the federal and Virgin Islands firearms statutes each contain an element not found in the other, Counts 2 and 8 and Counts 3 ****802** and 6 are not multiplicitous and do not trigger double jeopardy protection. The Virgin Islands firearms statute, 14 V.I.C. § 2253(a) requires that any firearm that is the basis of the charge be "unauthorized." [7] The federal statute, 18 U.S.C. § 924(c), on the other hand, does not require that the firearm be unauthorized. [8]

The federal statute also possesses requirements that the Virgin Islands statute does not. To prove a violation of 18 U.S.C. § 924(c), a reasonable jury must find that the firearm was a "real" one. See United States v. Lake, 150 F.3d 269, 271 (3d Cir. 1998); United States v. Beverly, 99 F.3d 570, 572 (3d Cir. 1996). However, section 2253(a) explicitly provides that even an "imitation" of a firearm used during a crime of violence triggers criminal liability. See United States v. Fontaine, 697 F.3d 221, 228 (3d Cir. 2012).

The offenses underlying Counts 2 and 8 contain at least one element that the other does not. The same applies to Counts 3 and 6. Therefore, under the Blockburger test, there was no double jeopardy when ***196** **Hodge** was convicted of both the federal 18 U.S.C. § 924(c) count and the territorial 14 V.I.C. § 2253(a) count based on the same predicate offenses.

B.

Hodge argues that the District Court erred in failing to dismiss one of the two federal convictions under 18 U.S.C. § 924(c). **Hodge** does not contend that the two convictions (Counts 2 and 3) violate the Blockburger ****803** test. **Hodge** Br. 51. Instead, he argues more generally that the Double Jeopardy Clause "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended," United States v. Diaz, 592 F.3d 467, 470 (3d Cir. 2010) (quoting Hunter, 459 U.S. at 366, 103 S.Ct. 673), and that § 924(c) is at best ambiguous as to whether he can be charged and sentenced under both Counts 2 and 3.

[8] **Hodge** contends that § 924(c) is ambiguous and can be read to mean that a single use, carrying, or possession of a firearm cannot support multiple prosecutions. He urges that we should apply the rule of lenity to vacate either Count 2 or 3 because the predicate offenses—one for robbery and one for attempted murder—are both based on a single use of his firearm in shooting Powell.

We disagree. We have not held, as **Hodge** maintains, that the unit of prosecution for a § 924(c) count is each use of the firearm regardless of how many predicate offenses are charged. Rather, we have held that "crimes occurring as part of the same underlying occurrence may constitute separate predicate offenses if properly charged as separate crimes. It follows that each may be a separate predicate for a § 924(c)(1) conviction." United States v. Casiano, 113 F.3d 420, 426 (3d Cir. 1997) (citations omitted).

In Casiano, we rejected the argument that "§ 924(c) was never intended to punish subsequent convictions arising out of a single criminal enterprise involving the same victim." Id. at 425. The defendant's co-conspirators in Casiano pistol-whipped the victim while carjacking him, held a gun to his head while the victim lay in the back of the stolen vehicle, and pistol-whipped him again in the car.[9] Id. at 423. The defendant was convicted of two counts of § 924(c), one based on carjacking and one based on kidnapping. Id. at 424. The Court held that the application of § 924(c) to both was appropriate because the statute refers to a second or subsequent "conviction, not criminal episode." Id. (quotation marks omitted) (citing Deal v. United States, 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993)). The same logic applies here, since the sequence of **Hodge's** actions closely parallels Casiano's and in both cases a firearm was employed multiple times to commit multiple predicate crimes.

****804** **Hodge** next argues that our decision in Diaz, 592 F.3d at 474-75, requires that the rule of lenity be applied to vacate his second § 924(c) conviction. In Diaz, the defendant used a firearm multiple times to commit a single predicate act: possession with intent to distribute heroin. Based on this single predicate offense, he was convicted of two § 924(c) offenses. After surveying the opinions of our sister Courts of Appeals and the relevant legislative history, we concluded that the statutory text of § 924(c) was "susceptible of differing interpretations" as to the issues in that case, id. at 473, with the relevant unit of prosecution being either (1) the underlying ***197** predicate offense, or (2) each individual instance in which a defendant uses or carries a firearm throughout the duration of an underlying predicate offense. Id. at 471-72. Given this ambiguity, we concluded that application of the rule of lenity would be appropriate in that particular case and vacated one count of the defendant's two § 924(c) convictions. Id. at 474-75.

Hodge's reliance on Diaz is misplaced. Unlike the defendant in Diaz, who had two § 924(c) convictions on the basis of a single predicate crime, **Hodge's** two § 924(c) convictions were based on two separate predicate offenses: robbery and attempted murder. The analysis regarding lenity in Diaz thus does not suggest its extension to this case. This is because regardless of what constitutes the unit of prosecution, **Hodge** engaged in multiple uses of a firearm to commit multiple crimes, albeit all during the same criminal episode.[10] This scenario was neither at issue in ****805** nor contemplated by the Diaz Court. To the contrary, the Diaz Court explicitly distinguished its particular factual scenario, reinforcing that Casiano would still control in a situation like that at issue here. See Diaz, 592 F.3d at 470 n.3 ("Casiano does not govern this case because the Government there charged more predicate crimes than § 924(c) violations."); see also United States v. Anderson, 59 F.3d 1323, 1334 (D.C. Cir. 1995) ("In circumstances in which a defendant displays or fires a gun on separate and distinct occasions, the government will often be able to charge those acts as separate § 924(c) violations linked to separate predicate offenses."). **Hodge's** argument—that a defendant commits only one § 924(c) violation despite multiple uses of a firearm to commit multiple crimes—is thus foreclosed by Casiano. For this reason and because our holding in Diaz does not alter that conclusion, we will affirm the judgment as to Counts 2 and 3.

C.

[9] **Hodge** contends that Counts 6, 7, and 8, the Virgin Islands counts related to ***198** the use of an unlicensed firearm in violation of 14 V.I.C. § 2253(a), are multiplicitous because all three charges were predicated upon crimes committed with the same firearm during one continuous act. **Hodge** Br. 56-57. **Hodge** bases his contention on two theories: first, that 14 V.I.C. § 2253(a) only allows for one prosecution where there was one firearm used in a continuous act, and second, 14 V.I.C. § 104 forbids multiple punishments for the same action. Both theories have merit.

The Virgin Islands firearms statute criminalizes the unauthorized possession, bearing, transporting, or carrying of a firearm. It imposes additional penalties if the defendant also commits a "crime of violence." In **Hodge's** case, the three counts under section 2253(a) charge multiple predicate crimes of violence against Powell. **Hodge** asserts that only one count under section 2253(a) is permissible because he only possessed the ****806** firearm once. We must therefore determine whether a separate offense arises under section 2253(a) for each crime of violence during which a firearm was present, or for each instance of possessing, bearing, transporting or carrying the firearm, regardless of how many crimes of violence are committed (which is what **Hodge** urges us to conclude). To determine what the unit of prosecution is, we first look to the text of the statute. See Kennedy, 682 F.3d at 255.

We agree with **Hodge** and hold that the plain text of the statute indicates that the unit of prosecution refers to the fact that a defendant "has, possesses, bears, transports or carries" an unauthorized firearm. This is a crucial difference between 14 V.I.C. § 2253(a) and 18 U.S.C. § 924(c). The former criminalizes the unauthorized possession of a firearm for any purpose. The latter, in contrast, criminalizes the use, carrying, or possession of a firearm only if it is in furtherance of certain prescribed activity—here, a crime of violence. In the absence of a crime of violence, **Hodge** would not face a § 924(c) charge at all. He would still face, however, a charge under 14 V.I.C. § 2253(a) for possession of an unauthorized firearm.

The language of section 2253(a) regarding a crime of violence is structured as a sentencing enhancement and attaches to the possession offense in the previous clause. See 14 V.I.C. § 2253(a) (referencing "if such firearm" being "under the proximate control of such person during the commission or attempted commission of a crime of violence" (emphasis added)). In other words, **Hodge** already violated 14 V.I.C. § 2253(a) by virtue of possessing an unauthorized firearm, even if he did nothing else. His commission of a crime of violence can only enhance the sentence, and cannot serve as the basis for another prosecution for a firearms possession offense under section 2253(a). See United States v. Xavier, 2 F.3d 1281, 1291 (3d Cir. 1993) ("[Section 2253] provides punishment for unauthorized possession 'except that' a greater punishment applies for a defendant convicted of possessing a weapon during a crime of violence."); see also Fontaine, 697 F.3d at 229 ("It is thus the lack of authorization to have a firearm that stands as a prerequisite to criminal liability [under section 2253(a)]."). The plain meaning of the statute leads us to the conclusion that only one count under 14 V.I.C. § 2253(a) can be sustained under the facts of this case.

Moreover, 14 V.I.C. § 104 also forbids **Hodge's** multiple convictions under section 2253(a). Section 104 provides:

> ****807** An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one. An acquittal or conviction and ***199** sentence under any one bars a prosecution for the same act or omission under any other.

While the Double Jeopardy Clause "protects criminal defendants against multiple prosecutions or punishments for a single offense," section 104 "speaks to multiple punishments for the same act." Castillo v. People, 59 V.I. 240, 284 n.1 (2013) (**Hodge**, C.J., concurring). Section 104 thus "provides greater protections than the Double Jeopardy Clause" and "dictates that despite the fact that an individual can be charged and found guilty of violating multiple provisions of the Virgin Islands Code arising from a single act or omission, that individual can ultimately be punished for only one offense." Estick v. People, 62 V.I. 604, 620-21 (2015); see also Williams v. People, 56 V.I. 821, 821 n.9 (2012). We agree with **Hodge** that section 104 prevents multiple punishments under Counts 6, 7, and 8, all of which arise from a single act of having, possessing, bearing, transporting, or carrying an unauthorized firearm. See 14 V.I.C. § 2253(a).

Although the District Court imposed a general sentence for Counts 6 through 8, a "second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence." Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). Rather, "[t]he separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id. at 865, 105 S.Ct. 1668 (noting the collateral consequences of deferred eligibility for parole, enhanced sentencing for recidivists for future offenses, social stigma, and impeachment of credibility); see also United States v. Ward, 626 F.3d 179, 185 n.8 (3d Cir. 2010) ("To the extent [our previous] cases can be read as permitting a general sentence on multiple convictions to cure a Double Jeopardy problem, the Supreme Court has since rejected such an approach." (citing Rutledge v. United States, 517 U.S. 292, 307, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996))). We will therefore remand to the District ****808** Court to vacate two of the three convictions in Counts 6, 7, and 8. See United States v. Miller, 527 F.3d 54, 74 (3d Cir. 2008). [11]

D.

[10] **Hodge** asserts that separate punishments for Count 7, a 14 V.I.C. § 2253(a) offense predicated on the offense of first degree assault, and Count 9, the predicate offense of first degree assault, are not permissible under 14 V.I.C. § 104. He argues that because the predicate offense in Count 9 and the firearms offense in Count 7 arose from the "same act or omission," section 104 prevents him from being sentenced for both counts. [12]

We disagree. **Hodge** has already conceded in the proceedings below that "a ***200** conviction for a violation of 14 V.I.C. § 2253(a) ... [and a predicate felony] are not multiplicitous, and that the local Legislature intended that the penalty for this crime should be in addition to the predicate felony." **Hodge** Sentencing Mem., (D. Ct. Dkt. 77, Feb. 18, 2015) at 3. Indeed, the statute explicitly provides that penalties "shall be in addition to" penalties for the predicate offense. 14 V.I.C. § 2253(a). The Virgin Islands Supreme Court has already ruled that section 2253(a)'s consecutive sentencing mandate does not conflict with section 104. Phillip v. People, 58 V.I. 569, 594-95 (2013) (citing Ward v. People, 58 V.I. 277, 286 (2013)); see also Fontaine v. People, 62 V.I. 643, 653-54 (2015). The court reasoned that "the Legislature intended to establish an exception to the general rule set forth in section 104, and allow individuals to be punished for both violating [the firearms offense] and the underlying crime of violence." Ward, 58 V.I. at 286. Therefore, because there was "a clear and unambiguous intent on the part of the Legislature ... to require punishment for both of those offenses," statutes such as section 2253(a) do not conflict with section 104. Id.

****809** E.

Hodge argues that the District Court did not heed the requirements of 14 V.I.C. § 104 when it imposed a five-year general sentence for Counts 9, 11, 14, and 15, but failed to stay the execution of punishment for all but one of the counts. The Government contends that the sentences for these counts do not fall under the purview of section 104 because they relate to multiple acts and multiple victims.

[11] We agree with the Government. While **Hodge** is correct that section 104 requires not only that a concurrent sentence be imposed for related convictions, but also that the executions of punishment for all but one conviction arising from the same criminal act be stayed, see Williams, 56 V.I. at 821 n.9, there is no basis for doing so in this case because the multiple convictions for those four counts do not implicate section 104.

While the District Court appeared to consider section 104 generally during sentencing, it did not explicitly state that it was grouping together the four counts under section 104. App. 146 (imposing a five-year sentence on Counts 9, 11, 14, and 15 without reference to section 104); App. 133 (noting prior to imposing a sentence that, in general, "[t]he Court's position is to stay within the confines of ... [section] 104"). Regardless of the court's intent, section 104 does not apply here because the four counts could not "aris[e] from a single act or omission." Estick, 62 V.I. at 621. The Virgin Islands Supreme Court has held that a "multiple-victim exception" to section 104 applies when there is "an act of violence that harms or risks harming more than one person." Phillip, 58 V.I. at 593; see also Woodrup v. People, 63 V.I. 696, 723 (2015); Fontaine, 62 V.I. at 654. In Phillip, the court held that section 104 does not apply to convictions for first degree murder and first degree reckless endangerment, where the defendant's shooting of the gun killed a victim and "the act of firing created a risk of death to others" near the victim. 58 V.I. at 594. Here, Count 14, first degree assault of Bougouneau, relates to a different victim

than Counts 9 (first degree assault of Powell) and 10 (first degree robbery of Powell). Count 15, first degree reckless endangerment, related to yet other victims in the vicinity.

A different question remains as to whether Counts 9 and 10 (where Powell is the victim for both counts) arose from the same act under section 104. We hold that they do not, since the assault and robbery ***201** were distinct acts where **Hodge** discharged his gun multiple times, with some ****810** break in the sequence. In Galloway v. People, 57 V.I. 693, 712 (2012), the Virgin Islands Supreme Court held that the defendant's convictions and sentences for driving under the influence and failure to stop at a red light did not violate section 104 because "his convictions for both offenses were not part of an indivisible state of mind or coincident error of judgment." Similarly, **Hodge's** decision to use his gun multiple times to assault and rob Powell was not "part of an indivisible state of mind." See also Francis v. People, 63 V.I. 724, 743 (2015) (holding that two counts of aggravated rape do not arise from the same act under section 104 because each can be "considered separately as two units of prosecution"); Webster v. People, 60 V.I. 666, 682 n.7 (2014) (holding that defendant's "actions in waking his mother to demand the keys and later taking the vehicle without her consent do not constitute 'a single act or omission' for the purposes of 14 V.I.C. § 104").

Thus, we hold that the District Court did not violate section 104 when it imposed a general sentence upon **Hodge** for his convictions on Counts 9, 11, 14, and 15.

III.

[12] **Hodge** contends that his Sixth Amendment rights were violated because the District Court denied his request for substitute counsel. We review a District Court's denial of a request for substitution of counsel and denial of a continuance for abuse of discretion. United States v. Goldberg, 67 F.3d 1092, 1097 (3d Cir. 1995); United States v. Kikumura, 947 F.2d 72, 78 (3d Cir. 1991).

[13] **[14]** A criminal defendant has a right to be assisted by counsel of choice under the Sixth Amendment. The right to counsel of choice, however, has limits. "[W]hen that choice comes into conflict with a trial judge's discretionary power to deny a continuance, the court will apply a balancing test to determine if the trial judge acted fairly and reasonably." Kikumura, 947 F.2d at 78.

Here, **Hodge** formally moved for a change of counsel moments before trial was scheduled to begin. The procedure for entertaining a substitution of counsel motion on the eve of trial is set forth in United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982):

> [T]he district court must engage in two lines of inquiry. First, the court must decide if the reasons for the defendant's request for substitute ****811** counsel constitute good cause and are thus sufficiently substantial to justify a continuance of the trial in order to allow new counsel to be obtained. If the district court determines that the defendant is not entitled to a continuance in order to engage new counsel, the defendant is then left with a choice between continuing with his existing counsel or proceeding to trial pro se, thus bringing into play the court's second stage of inquiry.

The Welty court then provided examples of good cause, "such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with his attorney." Id. at 188; see also Goldberg, 67 F.3d at 1098.

[15] **Hodge's** argument is only as to the first line of inquiry set forth in Welty. He contends that the District Court's failure to engage in a direct colloquy with him when examining the reasons for change of counsel was constitutional error. We conclude that the District Court did not abuse its discretion by denying the request without engaging in a direct colloquy with **Hodge**.

***202** Our precedents after Welty command that "[e]ven when the trial judge suspects that the defendant's contentions are disingenuous, and motives impure, a thorough and searching inquiry is required." McMahon v. Fulcomer, 821 F.2d 934, 942 (3d Cir. 1987). Although the District Court's Welty step one inquiry in this case was directed at **Hodge's** original attorney instead of **Hodge** himself, **Hodge** has not demonstrated that this was an abuse of discretion. Jupiter, **Hodge's** public defender, confirmed that he had no conflict

of interest with any party or witness, that there had been no breakdown of communication between himself and his client, and that in fact, the two were still communicating. **Hodge** was present during this conversation and could have requested to be heard. He could have also spoken on this issue when the court asked him later about his understanding of his right to proceed pro se. Finally, his proposed substitute counsel, Joseph, was also present, given an opportunity to speak, and did not dispute Jupiter's version of events. Even now, **Hodge** has advanced no legitimate reason for his desire to substitute counsel justifying a continuance.

We do note that by only gathering information from counsel whom a defendant wishes to reject, but not the defendant himself, a trial court creates some risk of overlooking some latent, legitimate reason for substitution that is not articulable by his counsel. There is some support ****812** for this position in Welty, where we noted: "[i]f the reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known." Welty, 674 F.2d at 188 (quoting Brown v. United States, 264 F.2d 363, 369 (D.C. Cir. 1959) (en banc) (Burger, J., concurring in part)). However, it is not the case that a trial court must ceaselessly pursue the inquiry until some satisfactory reason is given, since the very purpose of the inquiry is to determine whether any such reason exists.

Nor do we agree with **Hodge** that the failure to conduct a one-on-one colloquy with the defendant is itself reversible error. [13] This Court did not hold in Welty that such a colloquy between the judge and the defendant is required in every instance, and we do not require that now. Such a per se requirement would be encroaching into the province of the trial judge. We recognize that the District Court can ascertain whether good cause exists by using various sources, and we decline to require that in every instance, it must question the defendant directly. Therefore, the District Court did not abuse its discretion in denying the motion to substitute counsel.

IV.

[16] **Hodge** challenges the District Court's refusal to strike three prospective jurors for cause. In particular, **Hodge** claims that two of the prospective jurors ***203** knew the shooting victims and the third harbored bias because her father had been murdered. "We review the district court's conduct of voir dire for abuse of discretion." Butler v. City of Camden, City Hall, 352 F.3d 811, 814 n.4 (3d Cir. 2003).

****813** **[17]** **[18]** **Hodge** does not advance any claim that any of the jurors who were actually empaneled were biased, and therefore this claim fails. We need not reach the question of whether the three potential jurors should have been stricken for cause because **Hodge** exercised his peremptory strikes, and none ultimately served on the jury. "So long as the jury that sits is impartial ... the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." United States v. Martinez-Salazar, 528 U.S. 304, 313, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (quoting Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). Thus, **Hodge** cannot prevail.

V.

We next turn to **Hodge's** trial-evidence related challenges on appeal.

A.

[19] **Hodge** first argues that the testimony of eyewitness Officer Schneider, in which she referred to her knowledge of him as unemployed, was irrelevant and prejudicial. He also challenges the Government's closing statement, which referred to this aspect of Schneider's testimony. [14]

[20] We hold that the admission of Schneider's testimony was not plain error. Schneider, who was an off-duty police officer and an eyewitness to the crime, identified **Hodge** and testified as to the basis of her knowledge of **Hodge's** identity. She stated that when she first saw **Hodge** at the shopping center, she noticed him because she knew him to be someone who frequented the area, and that she recalled thinking he may have obtained employment. Admission of this testimony was not erroneous as it increased the probative value of Schneider's correct identification of **Hodge**, which was also the critical issue of fact in this case. Moreover, even if admission of the testimony were in error, the error was not plain because it was not "clear or obvious, rather than subject to reasonable dispute." Puckett, 556 U.S. at 135, 129 S.Ct. 1423.

[21] Relatedly, the prosecutor's reiteration of Schneider's testimony during closing statements does not constitute a

basis for ****814** reversal. Nothing that the prosecutor said fell outside the scope of Schneider's testimony, and re-presentation of the testimony was not inappropriate in this case. Indeed, it is fundamental that counsel presenting a summation is free to repeat the evidence and even "argue reasonable inferences from the evidence," as long as counsel refrains from misstating the evidence. United States v. Fulton, 837 F.3d 281, 306 (3d Cir. 2016) (quoting United States v. Carter, 236 F.3d 777, 784 (6th Cir. 2001)). **Hodge** has not demonstrated any plain error, and therefore this claim fails.

B.

Hodge next argues that there was insufficient evidence of premeditation to convict him of Counts 3 and 6, firearms offenses under 18 U.S.C. § 924(c) and ***204** 14 V.I.C. § 2253(a), respectively. Both Counts 3 and 6 contain as the predicate offense the crime of violence of attempted murder. **Hodge** was acquitted of Count 5 (attempted first degree murder of Powell).

[22] **[23]** When faced with a sufficiency-of-the-evidence challenge, "[w]e review the evidence in the light most favorable to the government. We do not reweigh the evidence or assess witness credibility." United States v. McKee, 506 F.3d 225, 232 (3d Cir. 2007). Therefore, "our inquiry is limited to determining whether the jury's verdict is permissible." Id. at 233. To do so, we ask whether "a rational trier of fact could have found [the] defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence." Id. at 232 (alterations in original) (quoting United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995)).

[24] **[25]** **Hodge's** challenge focuses exclusively on the sufficiency of the trial evidence as to the element of premeditation in the attempted murder predicate of the firearms offenses in Counts 3 and 6. He argues the trial evidence does not support that he "planned and reflected" on a killing. **Hodge** Br. 61 (quoting Brown v. People, 54 V.I. 496, 507 (2010)). We disagree. Premeditation is almost always proven through circumstantial evidence. In this case, the jury could have reasonably inferred premeditation from **Hodge's** preparation and use of a firearm. [15] Indeed, in Brown, the court held:

> ****815** It is not required, however, that the accused shall have brooded over his plan to kill or entertained it for any considerable period of time. Although the mental processes involved must take place prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill.

Brown, 54 V.I. at 507 (emphasis omitted) (quoting Gov't of the V.I. v. Martinez, 780 F.2d 302, 305 (3d Cir. 1985)); see also Gov't of the V.I. v. Charles, 72 F.3d 401, 411 (3d Cir. 1995) ("A brief moment of thought can be sufficient. Based on the use of a knife and the absence of any provocation or display of emotion by [the defendant], the jury could reasonably infer that [the defendant], in this brief moment, formulated a deliberate intent to kill [the victim].").

For these reasons, **Hodge's** sufficiency-of-the-evidence challenge fails.

VI.

Hodge also challenges several components of the jury charge. First, **Hodge** argues that the jury instructions as to Counts 3 and 6 were erroneous because in describing the predicate offense of attempted murder, the District Court did not give a separate definition of attempted murder, did not specifically reference Counts 5 and 12 as the predicate crimes, and did not reference specific victims. In the alternative, he argues that even if the jury instructions on Counts 3 and 6 were adequate, the instructions on Count 5 were insufficient because they did not contain a definition of "willfully" or "deliberately."

[26] **Hodge** contends that the District Court erred by providing confusing jury instructions for Counts 3 and 6. He principally ***205** argues that the District Court (1) did not give a definition of attempted murder when discussing the elements of these offenses which were predicated on attempted murder, (2) did not reference where in the Information the attempted murder charge could be found, and (3) did not specify to which victim these attempted murders referred.

****816** **[27]** **Hodge** has failed to identify any error. [16] The District Court defined attempted murder when instructing the jury on Counts 5 and 12 and was not required to repeat the definition each time attempted murder was mentioned

as an element of a crime. A jury is presumed to follow the instructions given by the judge, Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), and as such, we presume the jury followed the District Court's instructions as to attempted murder in both its direct iteration in Counts 5 and 12 as well as upon successive reference in other counts.

The second and third arguments are also without merit, and we identify no error in the Court's instructions. The District Court's instructions for Count 3 and 4 (§ 924(c) counts based on the attempted murders of Powell and Bougouneau, respectively) specified that the Government must prove that "the defendant committed an attempted murder as charged in either Counts 5 or 12 of the information." App. 90. While the District Court repeated the instructions for Counts 3 and 4 moments later and did not refer to Counts 5 and 12 in the second reading, the totality of the instructions gave jurors sufficient guidance based on the law. United States v. Leahy, 445 F.3d 634, 642 (3d Cir. 2006) ("[W]hen we consider jury instructions we consider the totality of the instructions and not a particular sentence or paragraph in isolation." (quoting United States v. Coyle, 63 F.3d 1239, 1245 (3d Cir. 1995))), abrogated on other grounds by Loughrin v. United States, —— U.S. ——, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014).

Similarly, although the District Court did not again refer to Counts 5 and 12 in giving instructions for Counts 6 and 13 (14 V.I.C. § 2253(a) firearms counts based on the attempted murders of Powell and Bougouneau, respectively), **Hodge** has identified no authority requiring that the court do so. There was only evidence of two victims of attempted murder, and **Hodge** was prosecuted for the attempted murders of both. The Counts in the Information where the attempted murders were charged were already stated to the jury. We therefore conclude that **Hodge's** challenges to the jury instructions for Counts 3 and 6 are meritless.

****817** A.

Hodge argues in the alternative that the jury instructions for Count 5 (attempted murder of Powell) should have contained definitions of "willful" and "deliberate" in order for the jury properly to convict him on Counts 3 and 6, the firearms offenses predicated on attempted murder. He acknowledges that the District Court did define "premeditated," but alleges error in the failure to define "willful" and "deliberate." [17]

***206** **[28]** This argument does not survive plain error review. Even if we assume the premise that the District Court committed error in not defining those two terms, we could not characterize such error as plain or affecting substantial rights. Gov't of the V.I. v. Rosa, 399 F.3d 283, 293 (3d Cir. 2005). It is hard to reconcile how a crime could be premeditated—"conceive[d] the design or plan to kill"—and not be "deliberate" or "willful" about the act of attempted killing. In other words, when viewed in its totality, the jury instructions provided jurors with sufficient basis for evaluating the elements of attempted murder with the proper understanding of the element of intent required for conviction.

Hodge is correct that we have defined deliberateness with more detail in the past. Martinez, 780 F.2d at 305 ("A deliberate killing is one which has been planned and reflected upon by the accused and is committed in a cool state of the blood, not in sudden passion engendered by just cause of provocation." (quoting Gov't of the V.I. v. Lake, 362 F.2d 770, 776 (3d Cir. 1966))). However, in this case there is no evidence regarding provocation or sudden passion. Therefore, the District Court's decision to omit that language was not plainly erroneous.

VII.

For the reasons stated above, we will affirm the District Court's judgment of conviction and sentence on Counts 1, 2, and 3. We will also affirm the District Court's judgment and commitment, except that we will remand to the District Court to vacate two of the three offenses charged in Counts 6, 7, and 8.

All Citations

870 F.3d 184, 68 V.I. 783

Footnotes

1 At a prior motions hearing, Jupiter alerted the District Court that **Hodge** wished to be represented by substitute counsel. However, the transcript of that hearing is devoid of any substantive discussion as to the rationale, timing, or other details of the request.

2 Jury selection took place immediately after this colloquy regarding counsel. Opening statements began shortly after noon that same day.

3 Because the firearm in this case was discharged, the mandatory minimum for the first § 924(c) offense is ten years. 18 U.S.C. § 924(c)(1)(A)(iii).

4 The District Court had jurisdiction over this case under 48 U.S.C. § 1612 and 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

5 **Hodge** also argues that a few counts of his conviction and his sentence should be vacated by operation of an analog of the Double Jeopardy Clause—title 14, section 104 of the Virgin Islands Code. Arguments implicating section 104 will be discussed infra. When we are tasked with interpreting a territorial law under the Virgin Islands Code and there is no controlling precedent on point, "it is our role to predict how the Supreme Court of the Virgin Islands would resolve this interpretive issue." United States v. Fontaine, 697 F.3d 221, 227 n.12 (3d Cir. 2012).

6 While the Information is not clear as to which robbery charge Counts 2 and 8 refer to, the jury instructions indicate that both referred to the Virgin Islands first degree robbery statute in Count 11, rather than to the federal Hobbs Act robbery in Count 1. App. 88-91, 96.

7 Title 14, section 2253(a) of the Virgin Islands Code provides, in relevant part:

> Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either, actually or constructively, openly or concealed any firearm ... may be arrested without a warrant, and shall be sentenced to imprisonment of not less than ten years ... except that ... if such firearm or an imitation thereof was had, possessed, borne, transported or carried by or under the proximate control of such person during the commission or attempted commission of a crime of violence ... then such person shall be fined $25,000 and imprisoned not less than fifteen (15) years nor more than twenty (20) years.

8 Title 18, section 924(c) of the United States Code provides, in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ... be sentenced to a term of imprisonment of not less than 5 years.... In the case of a second or subsequent conviction under this subsection, the person shall ... be sentenced to a term of imprisonment of not less than 25 years.

9 The assailants then shot at the victim twice after taking him to a remote location, but Casiano did not appear to have been charged based on the shooting. Casiano, 113 F.3d at 423.

10 Even if the unit of prosecution for § 924(c) were based on each use of a firearm rather than the underlying predicate offense, **Hodge's** argument would still fail because his characterization of Counts 2 and 3 as involving "use of a firearm once," **Hodge** Br. 44, is factually incorrect. Powell testified at trial that he was first shot and began bleeding from his chest before the assailant attempted to rob him of the money bag. Supp. App. 18-19. When Powell "tried to restrain by not letting go the bag," he then "felt a shot in [his] hip." Supp. App. at 18. Powell was subsequently shot a third time in the right wrist. Supp. App. at 19. Shooting Powell to rob him and then shooting him twice more when Powell refused to give up the money can rightly be understood on this record as constituting multiple "uses" of the firearm to commit different predicate crimes. See United

States v. Vichitvongsa, 819 F.3d 260, 270 (6th Cir. 2016) ("Whether a criminal episode contains more than one unique and independent use, carry, or possession depends at least in part on whether the defendant made more than one choice to use, carry, or possess a firearm."); United States v. Wilson, 160 F.3d 732, 749 (D.C. Cir. 1998) ("[T]here may be circumstances in which such [multiple] offenses could support more than one § 924(c) charge—as where, for example, the evidence shows distinct uses of the firearm, first to intimidate and then to kill."). We therefore deem inapposite **Hodge's** citations to out-of-circuit cases regarding truly simultaneous offenses based on a single use of a firearm. See, e.g., Vichitvongsa, 819 F.3d at 269-70 (vacating two of four § 924(c) convictions where the defendant—on two separate occasions—brandished a gun once to commit both Hobbs Act robbery and a drug trafficking crime simultaneously); United States v. Rentz, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc) (vacating one of two § 924(c) convictions where the defendant shot a gun once and the bullet hit two victims, killing one and injuring the other); United States v. Cureton, 739 F.3d 1032, 1036 (7th Cir. 2014) (involving a single act of pressing a gun to the victim's head in making both an extortion and ransom request).

11 **Hodge** also argues that his convictions under Counts 6 and 7 violated the Double Jeopardy Clause because Count 7's predicate offense of first degree assault with intention to kill under 14 V.I.C. § 295(1) is the same offense as Count 6's predicate offense of attempted first degree murder under 14 V.I.C. §§ 921, 922(a)(2), and 331. Because we have already determined that Virgin Islands law allows only one of Counts 6, 7, and 8 to remain, we need not reach this argument.

12 This issue will be moot, however, if the District Court on remand vacates Count 7 pursuant to section II(C), supra. It is also unclear why **Hodge** only advanced this argument as to Counts 7 and 9, but not as to Counts 8 and 11, where the Virgin Islands firearms offense charged in Count 8 is predicated on the first degree robbery of Powell charged in Count 11.

13 Moreover, the District Court is required to consider "countervailing governmental interests" when faced with a last minute request for substitution of counsel and a continuance. Goldberg, 67 F.3d at 1098. Joseph asked that opening statements take place the following morning. Although the requested continuance was a short one, it nevertheless risked disrupting the court's administration. The District Court also observed that Joseph was not fully ready for trial, after Joseph represented that he had received discovery materials from Jupiter just days before and would have preferred an extra week. For this additional reason, the District Court's balancing of various factors, including "the efficient administration of criminal justice; the accused's rights, including the opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance," id., to deny substitution was not an abuse of discretion.

14 We review for plain error when, as here, there is no contemporaneous objection to admission of evidence or counsel's comments about evidence during a summation. Langbord v. U.S. Dep't of Treasury, 832 F.3d 170, 192 n.12 (3d Cir. 2016) (en banc); United States v. Christie, 624 F.3d 558, 567 (3d Cir. 2010).

15 Evidence that **Hodge** sought to conceal his involvement in the attempted murder and robberies by hiding in the bushes and shedding his clothing also support the verdict. Contrary to **Hodge's** contention, we have held that conduct after the commission of a crime can support a finding of premeditation. See Gov't of the V.I. v. Roldan, 612 F.2d 775, 782 (3d Cir. 1979) (noting that evidence that the defendant attempted to conceal the victim's body and the murder weapon and lied to law enforcement supported a verdict of premeditated murder).

16 Moreover, as the District Court noted, **Hodge** did not raise these objections at trial. See D. Ct. Op. (D. Ct. Dkt. 101, Apr. 15, 2016) at 33; **Hodge** Mot. to Vacate, (D. Ct. Dkt. No. 89, Jun. 24, 2015) at 2.

17 **Hodge** appears to also make the same argument as it relates to Count 4 (§ 924(c) charge predicated on attempted murder of Bougouneau) and Count 12 (attempted murder of Bougouneau). Since **Hodge** was acquitted of both those counts, we do not address them here.