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**United States Court of Appeals
For the Eighth Circuit**

No. 17-1017

United States of America

Plaintiff-Appellee

v.

Antonio Minnis

Defendant-Appellant

Appeal from United States District Court for
the Eastern District of Missouri – St. Louis

Submitted: September 22, 2017

Filed: October 6, 2017

Before COLLOTON, BENTON, and KELLY, Circuit
Judges.

BENTON, Circuit Judge.

Antonio Minnis pled guilty to possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B)(i). Finding Minnis a

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career offender under U.S.S.G. § 4B1.1, the district court¹ sentenced him to 188 months' imprisonment. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Minnis argues he is not a career offender, claiming his prior conviction for attempted first-degree assault is not a crime of violence. *See* § **565.050 RSMo**. This court reviews de novo whether a prior conviction is a crime of violence. *United States v. Harrison*, 809 F.3d 420, 425 (8th Cir. 2015).

Under U.S.S.G. § 4B1.1(a), “a defendant is a career offender if”:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

A “crime of violence” is “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” **U.S.S.G. § 4B1.2(a)(1)**. A “crime of violence” includes “attempting to commit such offenses.” **U.S.S.G. § 4B1.2 cmt. n. 1**. “To

¹ The Honorable Ronnie L. White, United States District Judge for the Eastern District of Missouri.

determine whether a prior conviction was for a crime of violence,” this court applies “a categorical approach, looking to the elements of the offense as defined in the . . . statute of conviction rather than to the facts underlying the defendant’s prior conviction.” ***United States v. Rice***, 813 F.3d 704, 705 (8th Cir. 2016) (citation omitted). A conviction may be a crime of violence “only if the statute’s elements are the same as, or narrower than, those of the generic offense.” ***Descamps v. United States***, 133 S. Ct. 2276, 2281 (2013). *See United States v. Vinton*, 631 F.3d 476, 484 (8th Cir. 2011) (“To determine whether a previous conviction is a crime of violence under § 4B1.2(a), we often have looked to the case law interpreting 18 U.S.C. § 924(e)(2)(B), a provision of the Armed Career Criminal Act (ACCA) that defines the term ‘violent felony’ using similar language.”).

Relying on *State v. Lammers*, 479 S.W.3d 624, 636 (Mo. banc 2016), Minnis believes: “The elements of attempted first degree assault in Missouri are unmistakably broader than the generic crime.” In Missouri, “attempt” is “a substantial step towards commission of the offense.” ***State v. Whalen***, 49 S.W.3d 181, 186 (Mo. banc 2001), *citing State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999). In *Lammers*, the court found sufficient evidence for attempted first-degree assault where the defendant purchased two assault rifles, took target practice, and admitted planning “to carry out a mass shooting, with Walmart in mind as a specific target.” *See Lammers*, 479 S.W.3d at 632-33. Minnis relies on the dissenting opinion that argued *Lammers*’s

conduct was not a substantial step. *See id.* at 637 (Teitelman, J., dissenting).

Lammers did not modify Missouri’s attempt analysis. *See id.* at 632 (“[T]o be convicted of attempted first-degree assault, Defendant must have . . . committed some act that is a substantial step toward completing that offense. . . . ‘Substantial step’ is defined as conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.” (internal quotation marks omitted) (citing *Whalen*, 49 S.W.3d at 186)). *Lammers* – applying well-established law – did not lower the threshold for proving attempt. *See id.* at 633-34 (“The trial court did not err in finding *sufficient evidence* that Defendant’s conduct constituted a substantial step under section 564.011.” (emphasis added)).

The Government invokes *United States v. Alexander*, 809 F.3d 1029 (8th Cir. 2016). There, this court found that Alexander’s conviction for second-degree assault under RSMo § 565.060.1(2) was a violent felony under the ACCA. *See id.* at 1032-33. Alexander argued that “criminalizing a ‘substantial step’ is over-inclusive because it expands beyond the traditional understanding of a generic assault attempt.” *Id.* at 1033. This court noted: “We have found no case in which the Missouri Supreme Court has construed attempt under § 565.060(1)(2) in an overinclusive manner.” *Id.* *Lammers*, decided after *Alexander*, does not modify the substantial-step analysis, and thus does not construe attempt in an overinclusive manner. *Alexander*

controls here.² The elements of attempted first-degree assault under Missouri law are not broader than the generic crime.

Minnis claims that because “Missouri statutes defining first degree attempted assault do not require proof of ‘physical force’ within the contemplation of § 4B1.2(a)(1),” his prior conviction cannot be a crime of violence. First-degree assault in Missouri requires that a defendant “knowingly causes or attempts to cause serious physical injury to another person.” § **565.050 RSMo**. Minnis emphasizes hypothetical scenarios, but this court has rejected a similar argument under the ACCA:

Physical force . . . need not be applied directly to the body of the victim. Hypothetical scenarios involving no physical contact by the perpetrator (luring a victim to drink poison or infecting a victim with a disease) do not avoid coverage under § 924(e)(2)(B)(i).

United States v. Winston, 845 F.3d 876, 878 (8th Cir. 2017), *citing* ***United States v. Castleman***, 134 S. Ct. 1405, 1414-15 (2014). Because Minnis’s prior

² In a rule 28(j) letter, Minnis asserts that *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) “undermines the authority that the government assigns to *Alexander*.” This assertion has no merit. The defendant in *Fields* was convicted under RSMo § 565.060.1(3) – “[r]ecklessly causes serious physical injury to another person” – not § 565.060.1(2) – “[a]ttempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument.” *Fields* does not cite *Alexander*, nor does it discuss or modify Missouri’s attempt or substantial step analysis.

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conviction for attempted first-degree assault is a crime of violence, the district court properly found that he is a career offender under U.S.S.G. § 4B1.1.

* * *

The judgment of the district court is affirmed.

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**United States District Court
Eastern District of Missouri**

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	CASE NUMBER:
Antonio Minnis	<u>4:16CR00122 RLW</u>
	USM Number: <u>31448-044</u>
	<u>Paul E. Sims</u>
	Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) one of the indictment of
September 20, 2016.
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☐ was found guilty on count(s) _____
after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)	Possession With Intent to Distribute Heroin	March 3, 2016	One

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The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ dismissed on the motion of the United States.

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

December 20, 2016

Date of Imposition of Judgment

/s/ Ronnie L. White

Signature of Judge

Ronnie L. White

United States District Judge

Name & Title of Judge

December 20, 2016

Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 188 months. This sentence

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shall run consecutive with the sentence imposed in the revocation in Docket No. S1-4:04CR00629-04 RWS.

- ☒ The court makes the following recommendations to the Bureau of Prisons:

While in the custody of the Bureau of Prisons, it is recommended the defendant be evaluated for participation in the Residential Drug Abuse Program. It is also recommended that the defendant be placed at a facility as close as possible to Saint Louis, Missouri. Such a recommendation is made to the extent it is consistent with the Bureau of Prisons policies.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ a.m./p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office

MARSHALS RETURN MADE ON SEPARATE PAGE

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1017

United States of America

Appellee

v.

Antonio Minnis

Appellant

Appeal from U.S. District Court for the
Eastern District of Missouri – St. Louis
(4:16-cr-00122-RLW-1)

ORDER

The petition for rehearing by the panel is denied.

November 16, 2017

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

/s/ Michael E. Gans

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES	)	
OF AMERICA,	)	
Plaintiff,	)	
VS.	)	No. 4:16-CR-122 (RLW)-1
ANTONIO MINNIS,	)	
Defendant.	)	

SENTENCING HEARING
BEFORE THE HONORABLE RONNIE L. WHITE
DECEMBER 20, 2016
ST. LOUIS, MISSOURI

FOR THE PLAINTIFF:

EDWARD L. DOWD, III
OFFICE OF U.S. ATTORNEY
111 South Tenth Street, Suite 2000
St. Louis, MO 63102
(314) 539-2200

FOR THE DEFENDANT:

PAUL E. SIMS
SIMS & BAILEY
4387 Laclede Avenue, Suite A
St. Louis, MO 63108
(314) 534-0800

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR
Federal Official Court Reporter
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7449

* * *

[3] THE COURT: Mr. Sims, are there any objections to the factual accuracy of the report?

MR. SIMS: As far as the –

THE COURT: Anything contained in the report. I know you filed a motion that said you objected to Paragraph 27.

MR. SIMS: Correct.

THE COURT: Is that objection still –

MR. SIMS: Yes, Your Honor.

THE COURT: If you'd like to address that right now, you may.

MR. SIMS: Thank you, Your Honor.

Your Honor, the Government is relying on the commentary to Section 4B1.2 quoting that a “crime of violence” in controlled substance offenses include the offenses of aiding and abetting, conspiring and attempt to commit such offenses. However, what I would like to point out is that the *Guidelines* are advisory only and case law is not. Case law sets precedence. And according to *Johnson*, which this Circuit recognizes as applying to the *Guidelines*, *Johnson* applies, *Mathis* also

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applies. And I'm speaking of *Mathis versus United States*, decided in 2016. It's 136 Supreme Court.

It states that when a case, such as this case, in this instant case, involves a statute that defines only one crime, that's what – attempted assault first degree, the statute only defines that one crime with one set of elements [4] but has alternative factual means by which a defendant can satisfy those elements. And since we are in Missouri, we have to – and it's a state crime, we are looking at the elements of attempted assault first degree. Well, under Missouri law, “attempt” has multitudes of factual elements that – that a defendant can do to violate that. It includes lying in wait, having the tools to do it, enticing a victim to be at a certain place at a certain time. All of those are nonviolent actions, and you will still get an attempt assault first degree.

Now the Supreme Court in *Mathis* said, in no uncertain terms, that when this factual situation occurs, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of the listed generic offense. In other words, you have to look at the least-culpable actions that would violate that statute. And if those least-culpable actions are not violent, then that crime cannot qualify as a “crime of violence.”

And it makes no difference even if the defendant's conduct fits within the definition of the generic offense. In other words, you cannot use the modified category approach to – to evaluate that state crime. You have to use the generic – I mean if it's broader than the generic crime, you have to use the categorical approach which

says you don't look at what the defendant did. You look at the least-culpable actions [5] that would violate that statute. And if those least-culpable actions are not violent acts, then that law or that statute is not a violent felony for the determination of a "crime of violence."

We also, Your Honor, wanted to talk to you –

THE COURT: Before you go on, I want to let Mr. Dowd respond to that, –

MR. SIMS: Oh, I'm sorry, Your Honor.

THE COURT: – assuming you have another objection to the Presentence Report.

Mr. Dowd?

MR. DOWD, III: Thank you, Your Honor.

Mr. Sims is correct to the extent that the Government has cited the commentary to the Guidelines Section 4B1.2 which plays out that "attempt" is included, Your Honor. However, I would also point the Court to where the Government also cited the Guidelines Manual, Section 4. – 4B1.1 for the "Career Offender" section which talks about what the priors of the career offender have to qualify as and, most importantly, Your Honor, to Section 4B1.2 which defines a "crime of violence."

And, Your Honor, it specifically says that the term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that, under Subsection (1), which is what we're dealing with [6] in this case, has an element

the use or attempted use or threatened use of physical force against the person of another.

And that's what Mr. Minnis pled guilty to at the state level. I believe it was in the 24th Judicial Circuit, Your Honor, in Case No. 05D8-CR00361-01. And that case was amended from an assault degree – an assault first degree serious physical injury to an attempted assault degree serious physical injury, but it still is the same statute, Your Honor. And the importance of that statute is that under Missouri law, 565.050, a person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

So that's what he pled to under Missouri law was that last important clause in which he attempted to cause serious physical injury of another person.

Your Honor, there's also case law. I would cite the Court to *Wilson versus United States* – the cite is 2010 WL 3614074 – where the Court concluded that in Missouri, first degree assault is a violent felony under the force clause of the Armed Career Criminal Act.

And after the – Ms. Davis in this case, the Presentence Investigation Report writer, investigated the facts of the underlying cases as well, that according to the charging document on May 8th, 2005, the [7] Defendant, acting well and in concert with others, knowingly attempted to cause serious physical injury to DDF by beating him with a mop handle.

And so, Your Honor, it's the Government's position that that prior offense qualifies as a violent prior and, therefore, qualifies him with his other federal prior as a career offender.

THE COURT: And under your analysis, what would the Total Offense Level be? Do you agree with the Presentence Report that it would be a 31?

MR. DOWD, III: Yes, Your Honor. I agree with the – what the sentence report rendered in this case.

THE COURT: All right. Mr. Sims, your objection to Paragraph 27 is overruled. Do you have any further objections?

* * *

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**THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 17-1017

UNITED STATES OF AMERICA

Appellee

vs.

ANTONIO MINNIS

PETITION FOR PANEL REHEARING

Appellant Antonio Minnis requests rehearing by the panel pursuant to Fed. R. App. P. 40. Mr. Minnis directs the Court's attention to the following points of law and fact, which he believes the Court has overlooked or misapprehended:

In concluding that *State v. Lammers*, 479 S.W.3d 624 (Mo. 2016), did not alter the intent element of attempted first degree assault under Missouri law, the present opinion appears to have overlooked particulars of the Missouri Supreme Court's recitation of the facts supporting affirmance of the judgment of conviction and misapprehended the authority of the *Lammers* opinion for conviction of attempted first degree assault in the absence of proof that the defendant (a) first formed an intent to kill or injure another and then (b) took a substantial step toward the completion of that crime.

Argument

Mr. Minnis has contended that after *Lammers* it is possible to be convicted of attempted first degree assault in Missouri without proof that the defendant had first formed an intent to kill or seriously injure another and then taken a substantial step toward the commission of that crime. In particular, has maintained that the evidence of Mr. Lammers’ “intent” prior to his purchase of assault rifles consisted of statements that he had envisioned himself committing a mass shooting.¹

The panel’s opinion concludes that *Lammers* “did not lower the threshold for proving attempt,” noting that the Missouri Supreme Court’s affirmance was based on evidence that Mr. Lammers “purchased two assault rifles, took target practice, and admitted planning ‘to carry out a mass shooting, with Walmart in mind as a specific target.’” Slip op. at 3 (citing *Lammers*, 479 S.W.3d at 632-33). The *Lammers* opinion surely does contain the quoted passage. But neither the opinion’s recitation of the trial court record nor the trial transcript supports the notion that Mr. Lammers formed an intent or plan to harm anyone and then acted on that intent – and the transcript fairly declares the contrary to be true.² Mr. Minnis submits that the

¹ Mr. Minnis has not suggested that Mr. Lammers’ purchase of assault rifles would not have constituted proof of a substantial step if prior or contemporaneous intent also was proved.

² An excerpt from the interrogating police officer’s testimony is appended to this petition. The transcript is available at https://www.courts.mo.gov/fv/c/33256+Transcript.PDF?l=SMPDB0001_SAP&di=51018.

Lammers case will serve as authority for the sufficiency of evidence that a mentally ill individual purchased assault rifles after having imagined the details of himself committing a mass shooting to prove the two elements of attempted first degree assault in Missouri.

The Missouri Supreme Court summarized the police interrogation of Mr. Lammers as follows:

During the interview, [Mr. Lammers] admitted that, prior to purchasing the weapons, he had envisioned committing a mass shooting, specifically at the Bolivar Walmart, but that he changed his mind after taking target practice.

Officer: So tell me about your thoughts you had.

Defendant: Well I was watching . . . there's this movie called April Showers. It's about Columbine.

Officer: Ok.

Defendant: Well, my sister was in it. And I was like oh it's just . . . I want to see what it was about. It was a high school shooting and I was like . . . I don't want, I was . . . these thoughts were going through my head, like, what would happen if I ever did that. So I went out and bought [the assault rifles] and then I realized I don't want to spend the rest of my life in prison. I don't want to do that.

Officer: But here, but here's the thing.
You're not in school.

Defendant: No I'm out of school.

Officer: So you wouldn't shoot up . . .
where did you, where did you think about
shooting up?

Defendant: Walmart.

Officer: Walmart?

Defendant: Yes sir. It was when I gought
[sic] that. But then I realized when I went
shooting . . . I was like this, this isn't me.
I don't know why I did this.

Later in the interview, Defendant described
being in the Walmart on an occasion prior to
when he bought the assault rifles. He was
looking through the magazines and thinking
about concealed weapons:

Defendant: . . . I was like oh that looks
pretty cool.

Officer: And then it just came to you I'm
going to shoot up Walmart?

Defendant: Yeah.

When asked about his plan specifically from
start to finish, Defendant stated that he
would just walk into Walmart, start shooting
people at random, and wait until police ar-
rived. The detective then questioned why, if
his target was Walmart, he did not act the
same day he bought the guns. The detective

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asked Defendant if his actual target was a movie theater due to the similarities between these circumstances and the recent movie theater shooting in Aurora, Colorado, and the fact that the popular film “The Twilight Sage [sic]: Breaking Dawn – Part 2” was scheduled to premiere the same week Defendant bought the assault rifles. Defendant admitted he had considered this, but reaffirmed that his real target would have been the Walmart because there was sure to be many people there and, if he ran out [sic] of ammunition, he could easily reload.

Lammers, 479 S.W.3d at 630-31. In the excerpt of trial testimony attached to this petition, the officer acknowledged his uncertainty about when Mr. Lammers had his “bad thoughts” about shooting people at a movie theater or a store:

Q. But he didn’t tell you when he had the thoughts, did he?

A. That’s correct.

Q. Okay. He may have had the thoughts after he got the gun.

A. He very well could have.

Q. All right. As a matter of fact, what he did tell you was . . . that when he had those thoughts, that is why he gave those guns to somebody else, isn’t it?

A. He said that he – he was afraid of what he would do with them, so absolutely.

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Conclusion

This appeal should be reconsidered by the panel. If another mentally ill person is charged with attempted first degree assault in Missouri after purchasing assault rifles and confessing that he first imagined emulating the Columbine shooting at a school and envisioned himself shooting people in a movie theater or a store – and went so far as to think about the advantages of one or the other – Lammers will serve as authority for his conviction upon that proof. That postulate does not include an intent to commit the crime of first degree assault.

Respectfully submitted,

/s/ Michael Gross

Michael Gross Law Office
Attorney for Appellant Antonio Minnis
231 South Bemiston Avenue, Suite 250
St. Louis, Missouri 63105
(314) 863-5887
mgross@grossbriefs.com

CERTIFICATE OF FILING AND SERVICE

This document was filed by submission to the Court's electronic filing system on October 20, 2017, to be served by that system upon all counsel in the case.

/s/ Michael Gross

**Exhibit: Excerpt of trial transcript
from State of Missouri v. Lammers**

[60] A. I told him what I thought the purpose of him buying the guns were. Yes, I did.

Q. All right. And then you told him you thought the purpose of him buying the guns was going to shoot people at a movie. He certainly didn't tell you that. He didn't buy the guns for that, did he?

A. No, not at first.

Q. Not at first? Are you saying that somewhere on this video that we heard, he made a statement, "At the time I purchased those guns, I was going to go into a movie and shoot somebody"?

A. No. He said that he had thoughts of doing it at the movie theater, but then he thought that it wasn't going to be the best location.

Q. But he didn't tell you when he had the thoughts, did he?

A. That's correct.

Q. Okay. He may have had the thoughts after he got the gun.

A. He very well could have.

Q. All right. As a matter of fact, what he did tell you was is that when he had those thoughts, that is why he gave those guns to somebody else, isn't it?

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A. He said that he – he was afraid of what he would do with them, so absolutely.

Q. And in fact, you verified the fact that his fear of what he might do with them caused him to give them to somebody else?

A. Yes.

Q. All right. Did you know this somebody else that he gave them to took complete control over them and locked them up to where he didn't have access to them?

A. I knew that they were at the house. I didn't know what the –

[[61] Q. Okay. But at the time – but what you're acknowledging is, though, is that the thoughts, whenever they occurred – and we don't know exactly when; is that correct?

A. I would – again, I mean, I guess I can't necessarily answer when – when his thoughts were.

Q. We don't know that he had the thoughts prior to the time that he went into Walmart to buy them. You already acknowledged that.

A. Exactly.

Q. All right. So the thoughts then coming up after the time he buys the guns, he acknowledged, and I think you were very astute in seeing this, if you're having thoughts like that, that's why you took those to the

man, so you wouldn't act out on any bad thoughts you had. And that question was answered affirmatively.

A. Yes.

Q. And you actually indicated to him that is what your perception of what happened was?

A. Yes.

Q. Okay. Did you ask Mr. Lammers or did your discussions with him lead you to find out that he had any guns other than the ones that he transferred to the father of his girlfriend?

A. I think the only other guns we talked about were the ones that he said his dad had.

Q. I meant guns that he –

A. Him personally?

Q. Yeah.

A. I don't believe so, no.

Q. As far as the investigation concerns, you didn't turn up that he had one in his [62] car or given one to somebody else or anything else, did you?

A. Other than the two that he had purchased?

Q. Right.

A. Yeah.
