

APPENDIX 1

NOTE: Identify Changes with Asterisks(*)

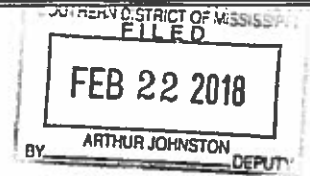
AO 245B (Rev. 02/18) Judgment in a Criminal Case

Sheet 1

JVH/rv

UNITED STATES DISTRICT COURT

Southern District of Mississippi



UNITED STATES OF AMERICA

v.

LINDSEY JOHNSON

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16cr14WHB-LRA-001

USM Number: 19733-043

Date of Last Amended Judgment 08/16/2016

Michael L. Scott, 200 S. Lamar St., Suite 200-N, Jackson, MS 39201

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) 1 through 3
after a plea of not guilty.

Correction of Sentence for Clerical Mistake (Fed R Crim P36(a))

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2119	Carjacking	08/02/2015	1
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	08/02/2015	2
18 U.S.C. § 924(c)(1)(A)(ii)	Brandishing a Firearm in Relation to a Crime of Violence	08/02/2015	3

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.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are 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.

02/14/2018

Date of Imposition of Judgment

Signature of Judge

The Honorable William H. Barbour, Jr. Senior U.S. District Judge

Name and Title of Judge

2/22/18

Date

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Sheet 2 — Imprisonment

Judgment — Page 2 of 7

DEFENDANT: LINDSEY JOHNSON
CASE NUMBER: 3:16cr14WHB-LRA-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

96 months as to Counts 1 and 2, to run concurrent to each other, and 84 months as to Count 3, to run consecutive to Counts 1 and 2, for a total of 180 months to serve. The term of imprisonment shall run consecutive to the term of imprisonment imposed in Hinds County, Mississippi Circuit Court Cause Numbers 14-0-957 and 14-0-954.

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

The Court recommends the defendant be housed at FCC Yazoo City, Mississippi, if he qualifies for the facility.

☒ 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 _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B(Rev. 02/18) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment—Page 3 of 7

DEFENDANT: LINDSEY JOHNSON
CASE NUMBER: 3:16cr14WHB-LRA-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

*3 years as to Counts 1 and 2, and 5 years as to Count 3, all to run concurrent to each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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Sheet 3A — Supervised Release

Judgment—Page 4 of 7

DEFENDANT: LINDSEY JOHNSON

CASE NUMBER: 3:16cr14WHB-LRA-001

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 full-time 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.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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Sheet 3D — Supervised Release

Judgment—Page 5 of 7

DEFENDANT: LINDSEY JOHNSON
CASE NUMBER: 3:16cr14WHB-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall participate in a program of testing and/or treatment for alcohol/drug abuse as directed by the probation officer. If enrolled in an alcohol/drug treatment program, the defendant shall abstain from consuming alcoholic beverages during treatment and shall continue abstaining for the remaining period of supervision. The defendant shall contribute to the cost of treatment in accordance with the probation office co-payment policy.
- 2) The defendant shall not possess, ingest, or otherwise use, a synthetic cannabinoid, or other synthetic narcotic, unless prescribed by a licensed medical practitioner
- 3) The defendant shall participate in a program of mental health treatment, as directed by the probation office. If enrolled in a mental health treatment program, the defendant shall abstain from consuming alcoholic beverages during treatment and shall abstain for the remaining period of supervision. The defendant shall contribute to the cost of treatment in accordance with the probation office Copayment Policy.
- 4) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
- 5) The defendant shall provide the probation office with access to any requested financial information.
- 6) The defendant shall submit his person, property, house, residence, vehicle, papers, 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. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his 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.

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Sheet 5 — Criminal Monetary Penalties

Judgment — Page 6 of 7

DEFENDANT: LINDSEY JOHNSON

CASE NUMBER: 3:16cr14WHB-LRA-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$ 1,500.00	\$

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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Sheet 6 — Schedule of Payments

Judgment — Page 7 of 7

DEFENDANT: LINDSEY JOHNSON
CASE NUMBER: 3:16cr14WHB-LRA-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 50.00 over a period of xx xx (e.g., months or years), to commence 60 day(s) (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

The value of any future discovered assets may be applied to offset the balance of criminal monetary penalties. The defendant may be included in the Treasury Offset Program allowing qualified federal benefits to be applied to offset the balance of criminal monetary penalties.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
One Rossi Model M88, .38 caliber revolver, serial number W208464; five rounds of assorted .38 caliber ammunition; one Smith and Wesson, Model M&P 40 Pro Series, .40 caliber pistol, serial number DYE3088; and fifteen rounds of Winchester-Western .40 caliber ammunition.
Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60574

United States Court of Appeals
Fifth Circuit

FILED

January 23, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LINDSEY JOHNSON,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

In this appeal, Defendant Lindsey Johnson raises several challenges to his conviction and sentence for carjacking and two related firearm offenses. We affirm in full but remand for the district court to correct a clerical error in its judgment.

I.

On the afternoon of August 2, 2015, Johnson encountered Jeremy McNeal at an apartment complex in Jackson, Mississippi. The two men's accounts of what happened next differ greatly, but it is undisputed that Johnson left the complex at the wheel of McNeal's Lexus. Police soon spotted the car and, acting on a report that the vehicle had been stolen, began a

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pursuit. After a brief chase, Johnson surrendered and was arrested. A search of the Lexus yielded two firearms: a silver Rossi revolver under the driver's seat and a black .40 caliber Smith & Wesson handgun under the passenger's seat. Police also found a small quantity of marijuana. A drug-detecting K-9 unit was subsequently called to the scene and uncovered a larger quantity of marijuana in a hidden compartment under the car's gearshift. Johnson was ultimately charged in a three-count indictment with: carjacking under 18 U.S.C. § 2119 (Count 1); being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 2); and brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii) (Count 3).

At trial, the Government presented the case as a straightforward carjacking. The Government's principal witness was McNeal, who testified that he was talking to a friend named Jaron Thompson when Johnson walked up to McNeal's Lexus, pulled out a handgun, and ordered McNeal to exit the car. McNeal complied, and Johnson left in the Lexus. The Government also called two other eyewitnesses, Thompson and Jamia Harney. Thompson stated that he was walking away from McNeal when he turned around to see Johnson standing near McNeal's car. Johnson showed McNeal a small bag of marijuana, then pulled out a revolver and told McNeal to "get out of the car" and "give me everything you got." When McNeal exited the Lexus, Johnson got in and sped out of the apartment complex. Harney, a resident of the apartment complex, testified that she saw a young man pointing a silver gun at a car. The person in the car got out and ran off, and the man holding the gun pulled away in the vehicle.

The defense portrayed the incident as a drug deal gone bad. Johnson testified that he was visiting the apartment complex in order to obtain information about an assault he had suffered the previous night. Johnson and McNeal discussed the assault, after which Johnson sought to purchase drugs

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from McNeal. McNeal told Johnson to get into the Lexus. When Johnson did so, McNeal told him to put whatever money he wanted to spend in the center armrest. Johnson opened the armrest and saw a silver revolver, which McNeal then attempted to grab. Johnson pushed McNeal's hand away, causing McNeal to drop the gun. McNeal said something like "I'm going to get you" and exited the Lexus, and Johnson immediately departed in the vehicle.

The jury convicted Johnson on all three counts, and the district court sentenced him to 180 months in prison and three years of supervised release.

II.

On cross-examination by the defense, McNeal denied ever owning a gun. Defense counsel then showed McNeal printouts of several posts from McNeal's Facebook page. One post featured a photograph of a handgun on a nightstand near a large stack of cash; McNeal stated that he did not know who owned the gun in the picture. Other posts featured photos of McNeal and a young child holding large sums of cash, and one post appears to show marijuana. Upon further questioning, McNeal admitted that he only earned \$250 a week from his employment but denied selling drugs. Defense counsel then sought to introduce the Facebook posts into evidence, arguing that they went to McNeal's credibility. The district court, however, sustained the Government's objection and denied admission of the posts. Johnson challenges that ruling.

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Tuma*, 738 F.3d 681, 687 (5th Cir. 2013); *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998). "[A]ny error made in excluding evidence is subject to the harmless error doctrine and does not necessitate reversal unless it affected the defendant's substantial rights." *Tuma*, 738 F.3d at 687–88 (internal quotation marks and citation omitted); *accord Lowery*, 135 F.3d at 959. "In assessing any error, we must consider the other evidence in the case and determine whether the improperly excluded evidence, if admitted,

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would have had a substantial impact on the jury's verdict." *Tuma*, 738 F.3d at 688 (internal quotation marks and citation omitted).

We conclude that even if the district court erred by excluding McNeal's Facebook posts, Johnson has failed to show that that error "had substantial and injurious effect or influence in determining the jury's verdict." *Lowery*, 135 F.3d at 959 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). None of the posts directly contradicted any of McNeal's testimony at trial. The photo of the firearm on the nightstand does not establish that McNeal ever owned a gun, nor do the photos of cash and marijuana show that McNeal was a drug dealer. The photos may have indirectly supported some aspects of Johnson's testimony and diminished McNeal's credibility to some extent. But when viewed in light of the evidence as a whole—especially Thompson and Harney's independent eyewitness testimony and the undisputed facts surrounding Johnson's arrest—we cannot conclude that admission of the Facebook posts would have had a "substantial impact" on the jury's ultimate verdict.

III.

Subject to certain limitations not relevant to this case, 18 U.S.C. § 922(g)(1) prohibits any person who has been convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm." To obtain a conviction under this provision, the Government must prove beyond a reasonable doubt "that the defendant previously had been convicted of a felony." *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005) (citing *United States v. Daugherty*, 264 F.3d 513, 515 (5th Cir. 2001)).

In connection with the Count 2 charge, Johnson and the Government agreed to a stipulation stating that Johnson "had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense, on or before August 2, 2015." That stipulation was read to the

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jury and entered into evidence as an exhibit. Despite that stipulation, however, the Government opened its cross-examination of Johnson as follows:

Q: Mr. Johnson, you've been convicted of three prior felonies, have you not?

A: Yes, sir.

Q: Name them.

A: Two—

Defense counsel then objected. Citing the stipulation and the Supreme Court's ruling in *Old Chief v. United States*, 519 U.S. 172 (1997), the defense asked the district court to declare a mistrial. The court refused to do so but admonished the Government (outside of the jury's presence) that if it "elicit[ed] anything else about the nature of these convictions," particularly the fact that they were for carjacking offenses, a mistrial would indeed result.

In general, "a defendant who takes the stand to testify in his own defense may be impeached by proof of prior felony convictions." *United States v. Bray*, 445 F.2d 178, 181 (5th Cir. 1971). In *Old Chief*, however, the Supreme Court held that when a defendant charged with violating § 922(g)(1) offers to concede the fact of a prior conviction and the "name or nature of the prior offense raises the risk of a verdict tainted by improper considerations," a court may not admit the full record of the prior judgment if the purpose of doing so "is solely to prove the element of prior conviction." 519 U.S. at 174. Johnson maintains that the Government's questioning in the present case violated *Old Chief* and therefore mandated a mistrial. However, unlike *Old Chief*, the Government in this case only elicited testimony about the *number* of Johnson's prior convictions. Due to defense counsel's timely objection, the Government failed to elicit any information regarding the "name or nature" of Johnson's prior convictions. *Old Chief* is therefore inapposite.

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Johnson further contends that the Government's reference to Johnson's "three prior felonies" constitutes an improper prejudicial remark amounting to prosecutorial misconduct.

We apply a two-step analysis to claims of prosecutorial misconduct: First, we assess whether the prosecutor made an improper remark. If so, we determine whether the defendant was prejudiced—a "high bar." *United States v. Davis*, 609 F.3d 663, 677 (5th Cir. 2010) (internal quotation marks omitted). The prejudice prong turns on whether the prosecutor's remarks "cast serious doubt on the correctness of the jury's verdict." *Id.* (internal quotation marks omitted). We look to three factors in deciding whether the improper remarks "cast serious doubt": "(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction." *Id.* (internal quotation marks omitted).

United States v. Rodriguez-Lopez, 756 F.3d 422, 433 (5th Cir. 2014).

Assuming that the Government's remark here was "improper," we conclude that Johnson has failed to demonstrate that he suffered prejudice sufficient to require a new trial. First, referring to the fact that Johnson had sustained *three* prior felony convictions likely had some prejudicial impact, but since the Government did not mention the prior convictions by name, any such impact was limited. Second, the district court included a limiting instruction in the jury charge stating that "[t]he fact that the defendant was previously found guilty of a crime does not mean that [he] committed the crime for which [he] is on trial, and you must not use this prior conviction as proof of the crime charged in this case." Third, the evidence supporting Johnson's conviction is relatively strong. Taking these factors together, we perceive no basis for concluding that the Government's remark "cast serious doubt on the correctness of the jury's verdict." *Rodriguez-Lopez*, 756 F.3d at 433.

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IV.

The district court applied a two-level enhancement to Johnson's sentence pursuant to § 3C1.1 of the Sentencing Guidelines. That provision applies when:

(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense

U.S.S.G. § 3C1.1. Perjury falls within the scope of § 3C1.1 when a defendant "provides 'false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Smith*, 804 F.3d 724, 737 (5th Cir. 2015) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)).

The district court determined that application of this enhancement was appropriate based on its finding that Johnson "lied while he took the stand" and "directly contradicted" the eyewitnesses' testimony. The court acknowledged that the other witnesses' testimony was not without shortcomings but nonetheless concluded that "their stories made much more logical sense than that of [Johnson] who was trying to lie—who was lying trying to get out of the charges." The court noted, in particular, that Johnson's "story made no sense in connection with the actions that he took after the incident which involved a car chase and an attempt to try to flee the scene"—actions that Johnson had "no reason" to take "if, in fact, his story was the correct one."

Bearing in mind the "particular deference" we give to a district court's credibility determinations, we conclude that the district court's findings in this case are "plausible in light of the record as a whole," particularly since there is no indication that Johnson's testimony resulted from "confusion, mistake, or

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faulty memory.” *Smith*, 804 F.3d at 737. We stress, however, that our conclusion is closely tethered to the particular facts of this case and the reasons specifically articulated on the record by the district court. Using § 3C1.1 in other, less obvious contexts would impermissibly risk transforming the enhancement into a de facto penalty on defendants who exercise their right to testify in their own behalf.

V.

Johnson next argues that the district court erroneously calculated his base offense level because neither of his two prior state convictions for armed carjacking qualifies as a “crime of violence” under § 2K2.1(a)(4)(A) of the Sentencing Guidelines. Since Johnson filed objections on these grounds below, we review the district court’s “interpretation and application of the Guidelines de novo and its factual findings for clear error.” *United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010).

Section 2K2.1(a)(4)(A) sets the base offense level for unlawful possession of a firearm at 20 if “the defendant committed any part of [that] offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” The commentary to § 2K2.1 states that the term “crime of violence” has “the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.” U.S.S.G. § 2K2.1, comment. (n.1). Section 4B1.2(a), in turn, defines “crime of violence” to include “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).¹

¹ Prior to August 1, 2016, § 4B1.2(a)(2) contained the so-called residual clause, which defined “crime of violence” to also include any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” Johnson argues that the

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In *Johnson v. United States*, 559 U.S. 133 (2010), the Supreme Court held that the phrase “physical force,” as used in the Armed Career Criminal Act’s (ACCA) definition of “violent felony” (codified at 18 U.S.C. § 924(e)(2)(B)(i)), means “violent force—that is, force capable of causing physical pain or injury to another person.” *Id.* at 140 (emphasis in original). So far as this case is concerned, § 4B1.2(a)(1)’s definition of “crime of violence,” as incorporated in § 2K2.1(a)(4)(A), is identical to the ACCA’s definition of “violent felony.” See 18 U.S.C. § 924(e)(2)(B)(i) (defining “violent felony” to include “any crime 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”). Thus, *Johnson*’s definition of “physical force” applies in determining whether Johnson’s prior carjacking convictions had “as an element the use, attempted use, or threatened use of physical force against the person of another.” See *United States v. Jones*, 752 F.3d 1039, 1041 (5th Cir. 2014) (noting that, in interpreting “§ 4B1.2(a) of the Guidelines, our court has considered decisions of the Supreme Court construing the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), to be instructive”); *United States v. Marquez*, 626 F.3d 214, 217 (5th Cir. 2010); *United States v. St. Clair*, 608 F. App’x 192, 194 (5th Cir. 2015) (unpublished decision) (“[O]ur precedent regarding ACCA’s definition of a violent felony is directly applicable to the Guidelines definition of a crime of violence.”); *United States v. Martin*, 864 F.3d 1281, 1283 (11th Cir. 2017) (“[A]n offense that is a violent felony under the ACCA is a crime of violence under § 2K2.1.”).

residual clause is unconstitutionally vague, but the district court did not base its calculation on that provision. In any event, the Supreme Court has held that the Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. *Beckles v. United States*, 137 S. Ct. 886 (2017).

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Johnson argues that the offense of armed carjacking under Mississippi law is not a “crime of violence” because it does not have “as an element the use, attempted use, or threatened use” of *violent* force. “In determining if a prior conviction is for an offense enumerated or defined in a Guidelines provision, we generally apply the categorical approach and look to the elements of the offense enumerated or defined by the Guideline section and compare those elements to the elements of the prior offense for which the defendant was convicted.” *United States v. Howell*, 838 F.3d 489, 494 (5th Cir. 2016). “We do not consider the actual conduct of the defendant in committing the offense.” *Id.*

Johnson’s prior convictions were for armed carjacking under the Mississippi carjacking statute, which states, in pertinent part:

(1) Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person’s immediate actual possession shall be guilty of carjacking.

* * *

(2) Whoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm or imitation thereof or other dangerous or deadly weapon, including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade, razor, blackjack, billy, or metallic or other false knuckles, or any object capable of inflicting death or serious bodily harm, shall be guilty of armed carjacking.

* * *

MISS. CODE ANN. § 97-3-117.

The Mississippi Supreme Court has held that:

[T]he statutory elements for carjacking are (1) a taking of a motor vehicle (2) from someone’s immediate actual possession (3) by force, stealth or violence. Force or violence includes putting the victim in fear of the same. Use of a firearm or other deadly or dangerous weapon elevates the crime to armed carjacking.

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Smith v. State, 907 So.2d 292, 296 (Miss. 2005) (construing the statute's elements for purposes of determining whether a jury instruction on a lesser-included offense should have been given).

The parties do not cite, and we have not found, any Mississippi caselaw explaining the distinction, if any, between carjacking by “force” and carjacking by “violence.” So far as *armed* carjacking is concerned, we conclude that the “force or violence” element necessarily entails, at a minimum, the threatened use of *violent* force—i.e., force capable of causing physical pain or injury to another person.² Johnson maintains that the statutory language permits an armed carjacking conviction so long as a firearm is “readily available” to the perpetrator, regardless of whether the victim is threatened by, or even knows about, the presence of such a weapon. This is a possible reading of the statute’s language, but we see no realistic probability that the statute would ever be applied in such a manner, given the Mississippi Supreme Court’s strong indication that actual “use of a firearm” is required to sustain an armed carjacking conviction. *See Smith*, 907 So.2d at 296.

Accordingly, we find no merit in Johnson’s challenge to the district court’s application of § 2K2.1(a)(4)(A).

VI.

18 U.S.C. § 924(c)(1)(A)(ii) prohibits brandishing a firearm “during and in relation to any crime of violence.” Section 924(c)(3) defines the term “crime of violence” as a felony offense that either:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

² Neither Johnson nor the Government has presented any argument regarding carjacking by “stealth.” We express no opinion on that aspect of Mississippi’s carjacking statute, and our decision today does not foreclose future litigants from raising arguments in connection therewith.

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(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.

18 U.S.C. § 924(c)(3).

Johnson argues that the district court should have set aside his conviction under this provision. First, he contends that § 924(c)(3)(B) is unconstitutionally vague based on the Supreme Court’s opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Second, he argues that his Count 1 carjacking conviction does not satisfy § 924(c)(3)(A)’s “physical force” requirement because the federal carjacking statute includes carjacking “by intimidation.” See 18 U.S.C. § 2119 (proscribing the “tak[ing] [of] a motor vehicle . . . from the person or presence of another by force and violence *or by intimidation*” (emphasis added)). Both of these arguments, however, are foreclosed by this circuit’s decision in *United States v. Jones*, 854 F.3d 737, 739–41 (5th Cir. 2017) (holding that “the definition of ‘crime of violence’ under § 924(c)(3)(B) is not unconstitutionally vague,” and that carjacking under 18 U.S.C. § 2119 “fits under the definition set forth in § 924(c)(3)(A)” because carjacking by “intimidation” requires a threat of “violent force”).

VII.

The district court’s amended judgment states that “[u]pon release from imprisonment, the defendant shall be on supervised release for a term of: 3 year(s) as to Counts 1 and 2, and 5 years as to Count 5, all to run concurrent to each other.” Although neither Johnson nor the Government raises the point on appeal, the reference to “Count 5” is plainly a clerical error, given that the indictment listed only three counts and the amended judgment elsewhere refers to Counts 1, 2, and 3. We therefore remand this case to the district court with instructions to correct this portion of its judgment. See *United States v. Powell*, 354 F.3d 362, 371–72 (5th Cir. 2003); FED. R. CRIM. P. 36.

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VIII.

For these reasons, the judgment and sentence are AFFIRMED. This case is REMANDED to the district court for the limited purpose of correcting the clerical error in the judgment identified above.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60574

United States Court of Appeals
Fifth Circuit

FILED

January 23, 2018

Lyle W. Cayce
Clerk

D.C. Docket No. 3:16-CR-14-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LINDSEY JOHNSON,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed and remanded to the district court to correct a clerical error in its judgment.

APPENDIX 3

880 F.3d 226

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee

v.

Lindsey JOHNSON, Defendant–Appellant

No.

16

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60574

|

FILED January 23, 2018

Synopsis

Background: Defendant was convicted, in the United States District Court for the Southern District of Mississippi, William H. Barbour, Jr., Senior District Judge, of carjacking, being a felon in possession of a firearm, and brandishing a firearm in relation to a crime of violence. Defendant appealed.

Holdings: The Court of Appeals, James E. Graves, Jr., Circuit Judge, held that:

[1] any error in excluding, on defendant's cross-examination of carjacking victim, evidence of victim's postings to social networking website did not have a substantial impact on jury's ultimate verdict;

[2] Government's questions on cross-examination of defendant, asking whether he had three prior convictions for felonies and asking him to name them, did not require mistrial;

[3] determination, at sentencing, that defendant's trial testimony was perjured was plausible; and

[4] defendant's prior felony convictions in Mississippi, for armed carjacking, were crimes of violence.

Affirmed; remanded for correction of clerical error in judgment.

West Headnotes (17)

[1] Criminal Law

🔑 Reception and Admissibility of Evidence

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.1 In general

The court of appeals reviews a district court's evidentiary rulings for abuse of discretion.

Cases that cite this headnote

[2] Criminal Law

🔑 Exclusion of Evidence

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1170 Exclusion of Evidence

110k1170(1) In general

Any error made in excluding evidence is subject to the harmless error doctrine and does not necessitate reversal unless it affected the defendant's substantial rights.

Cases that cite this headnote

[3] Criminal Law

🔑 Exclusion of Evidence

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1170 Exclusion of Evidence

110k1170(1) In general

In assessing an error in excluding evidence, the court of appeals must consider the other evidence in the case and determine whether the improperly excluded evidence, if admitted, would have had a substantial impact on the jury's verdict.

Cases that cite this headnote

[4] Criminal Law

🔑 Exclusion of Evidence

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1170 Exclusion of Evidence
 110k1170(1) In general

Any error in excluding, on defendant's cross-examination of carjacking victim, evidence of victim's postings to social networking website, which featured a photograph of a handgun on a nightstand near a large stack of cash, a photograph of victim and a young child holding large sums of cash, and a photograph appearing to show marijuana, did not have a substantial impact on jury's ultimate verdict, as would be required for reversal of convictions for carjacking, being a felon in possession of a firearm, and brandishing a firearm in relation to a crime of violence; while the defense theory portrayed the incident as a drug deal gone bad, with victim as the drug dealer, and defendant denied ever owning a gun, the photographs did not directly contradict any of victim's testimony at trial, victim's friend and a resident of nearby apartment complex gave independent eyewitness testimony, and facts surrounding defendant's arrest as driver of victim's car were undisputed. 18 U.S.C.A. §§ 922(g)(1), 924(a)(2), (c)(1)(A)(ii), 2119.

Cases that cite this headnote

[5] **Weapons**

✦ Elements of offense in general

406 Weapons
 406IV Offenses
 406IV(C) Possession, Use, Carrying, or Personal Transport
 406k173 Possession After Conviction of Crime
 406k175 Elements of offense in general

To obtain a conviction for being a felon in possession of a firearm, the Government must prove beyond a reasonable doubt that the defendant previously had been convicted of a felony. 18 U.S.C.A. § 922(g)(1).

Cases that cite this headnote

[6] **Criminal Law**

✦ Cross-examination, impeachment, and bolstering

110 Criminal Law
 110XX Trial
 110XX(J) Issues Relating to Jury Trial
 110k867 Discharge of Jury Without Verdict; Mistrial

110k867.14 Witnesses

110k867.14(3) Cross-examination, impeachment, and bolstering

Government's questions on cross-examination of defendant, asking whether he had three prior convictions for felonies and asking him to name them, did not require mistrial, in prosecution for being a felon in possession of a firearm, though Government and defendant had agreed to a stipulation that defendant had a predicate prior felony conviction; when defendant began his answer by saying "Two," counsel immediately objected, preventing Government from eliciting any information regarding name or nature of defendant's prior convictions. 18 U.S.C.A. § 922(g)(1).

Cases that cite this headnote

[7] **Witnesses**

✦ Felonies or misdemeanors; ordinance violations

410 Witnesses
 410IV Credibility and Impeachment
 410IV(B) Character and Conduct of Witness
 410k334 Witnesses Who May Be Impeached as to Character
 410k337 Accused as Witness in Criminal Prosecution
 410k337(5) Former Accusation or Conviction of Crime
 410k337(9) Felonies or misdemeanors; ordinance violations

In general, a defendant who takes the stand to testify in his own defense may be impeached by proof of prior felony convictions.

Cases that cite this headnote

[8] **Criminal Law**

✦ Cross-examination

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.8 Presentation of Evidence

110k1171.8(2) Cross-examination

Assuming that prosecutor's question on cross-examination of defendant, asking whether he had three prior convictions for felonies, was improper after defendant had stipulated that he had a prior felony conviction that served as a predicate for charge of being a felon in possession of a firearm, defendant was not prejudiced, as would be required for reversal based on prosecutorial misconduct; prior convictions were not mentioned by name, district court gave limiting instruction that a prior conviction could not be used as proof of the charged crime, and evidence against defendant was strong. 18 U.S.C.A. § 922(g)(1).

Cases that cite this headnote

[9] Criminal Law

⚡ Duties and Obligations of Prosecuting Attorneys

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)I In General

110k1980 In general

A two-step analysis is applied to claims of prosecutorial misconduct: first, the court assesses whether the prosecutor made an improper remark, and if so, the court determines whether the defendant was prejudiced, which is a high bar.

Cases that cite this headnote

[10] Criminal Law

⚡ Statements as to Facts, Comments, and Arguments

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.1 In General

110k1171.1(2) Statements as to Facts, Comments, and Arguments

110k1171.1(2.1) In general

The prejudice prong, for a defendant's claim of prosecutorial misconduct arising from improper remarks, turns on whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict, and the court looks to three factors: (1) the magnitude of the prejudicial effect of the prosecutor's remarks; (2) the efficacy of any cautionary instruction by the judge; and (3) the strength of the evidence supporting the conviction.

Cases that cite this headnote

[11] Sentencing and Punishment

⚡ Obstruction of justice

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(C) Adjustments

350HIV(C)2 Factors Increasing Offense Level

350Hk761 Obstruction of justice

Perjury falls within the scope of the Sentencing Guidelines provision enhancing a defendant's offense level if the defendant willfully obstructed or attempted to obstruct justice, where the defendant provides false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. U.S.S.G. § 3C1.1.

Cases that cite this headnote

[12] Sentencing and Punishment

⚡ Obstruction of justice

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(H) Proceedings

350HIV(H)2 Evidence

350Hk974 Sufficiency

350Hk977 Obstruction of justice

Sentencing court's determination that defendant's trial testimony was perjured was plausible, as basis for enhancement of offense level under Sentencing Guidelines, on grounds of willfully obstructing or attempting to obstruct justice, in prosecution for carjacking;

sentencing court found that defendant's trial testimony directly contradicted the testimony of victim and two eyewitnesses, and that while those witnesses' testimony was not without shortcomings, it made more logical sense than defendant's testimony, in light of his actions after the incident, which involved an attempt to flee the scene in victim's car, and a car chase. 18 U.S.C.A. § 2119; U.S.S.G. § 3C1.1.

Cases that cite this headnote

[13] Criminal Law

⚡ Review De Novo

Criminal Law

⚡ Sentencing

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 In general

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.34 Sentencing

Court of Appeals would review de novo the District Court's interpretation and application, at sentencing for being a felon in possession of a firearm, of the Sentencing Guidelines concerning enhancement of offense level based on a prior crime of violence, and would review for clear error the District Court's factual findings. 18 U.S.C.A. § 922(g)(1); U.S.S.G. §§ 2K2.1(a)(4)(A) & cmt. n.1, 4B1.2(a)(1).

Cases that cite this headnote

[14] Sentencing and Punishment

⚡ Crime of violence

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(E) Prior or Subsequent Misconduct

350Hk781 Crime of violence

"Physical force," within meaning of Sentencing Guidelines' definition of prior crime of violence, as basis for enhancement of offense level under Guidelines, as being an offense that has as an element the use,

attempted use, or threatened use of physical force against the person of another, is violent force that is capable of causing physical pain or injury to another person. U.S.S.G. § 4B1.2(a)(1).

1 Cases that cite this headnote

[15] Sentencing and Punishment

⚡ Offense or adjudication in other jurisdiction

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(E) Prior or Subsequent Misconduct

350Hk793 Offense or adjudication in other jurisdiction

Under the categorical approach, defendant's prior felony convictions in Mississippi, for armed carjacking, were crimes of violence, as basis for enhancement of offense level under Sentencing Guidelines, in prosecution for being a felon in possession of a firearm, as prior convictions for an offense that had as an element the use, attempted use, or threatened use of physical force against the person of another; the force or violence element of the Mississippi offense necessarily entailed, at a minimum, the threatened use of violent force capable of causing physical pain or injury to another person, and there was no realistic probability that the statute would be applied when a firearm merely was readily available to the perpetrator. 18 U.S.C.A. § 922(g)(1); U.S.S.G. §§ 2K2.1(a)(4)(A) & cmt. n.1, 4B1.2(a)(1); Miss. Code. Ann. § 97-3-117(1, 2).

Cases that cite this headnote

[16] Sentencing and Punishment

⚡ Crime of violence

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(E) Prior or Subsequent Misconduct

350Hk781 Crime of violence

In determining if a prior conviction is for an offense enumerated or defined in a Sentencing Guidelines provision as a crime of violence, as basis for enhancement of offense level under Guidelines, the court generally applies

the categorical approach and looks to the elements of the offense enumerated or defined by the Guidelines section and compares those elements to the elements of the prior offense for which the defendant was convicted, and the court does not consider the actual conduct of the defendant in committing the offense. U.S.S.G. § 4B1.2(a).

Cases that cite this headnote

[17] **Weapons**

☞ Crimes of violence

406 Weapons

406IV Offenses

406IV(C) Possession, Use, Carrying, or Personal Transport

406k189 Use or Possession During and in Relation to Commission of Crime

406k194 Crime at Issue

406k194(2) Crimes of violence

Federal conviction for carjacking, which offense proscribes a taking of a motor vehicle from the person or presence of another by force and violence or by intimidation, satisfies the physical force requirement for the definition of crime of violence, as predicate for federal offense of brandishing a firearm during and in relation to crime of violence, as being an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; carjacking by intimidation requires a threat of violent force. 18 U.S.C.A. § 924(c)(1)(A)(ii), (c)(3)(A).

1 Cases that cite this headnote

Appeal from the United States District Court for the Southern District of Mississippi

Attorneys and Law Firms

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Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

Opinion

JAMES E. GRAVES, JR., Circuit Judge:

In this appeal, Defendant Lindsey Johnson raises several challenges to his conviction and sentence for carjacking and two related firearm offenses. We affirm in full but remand for the district court to correct a clerical error in its judgment.

***230 I.**

On the afternoon of August 2, 2015, Johnson encountered Jeremy McNeal at an apartment complex in Jackson, Mississippi. The two men's accounts of what happened next differ greatly, but it is undisputed that Johnson left the complex at the wheel of McNeal's Lexus. Police soon spotted the car and, acting on a report that the vehicle had been stolen, began a pursuit. After a brief chase, Johnson surrendered and was arrested. A search of the Lexus yielded two firearms: a silver Rossi revolver under the driver's seat and a black .40 caliber Smith & Wesson handgun under the passenger's seat. Police also found a small quantity of marijuana. A drug-detecting K-9 unit was subsequently called to the scene and uncovered a larger quantity of marijuana in a hidden compartment under the car's gearshift. Johnson was ultimately charged in a three-count indictment with: carjacking under 18 U.S.C. § 2119 (Count 1); being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 2); and brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii) (Count 3).

At trial, the Government presented the case as a straightforward carjacking. The Government's principal witness was McNeal, who testified that he was talking to a friend named Jaron Thompson when Johnson walked up to McNeal's Lexus, pulled out a handgun, and ordered McNeal to exit the car. McNeal complied, and Johnson

left in the Lexus. The Government also called two other eyewitnesses, Thompson and Jamia Harney. Thompson stated that he was walking away from McNeal when he turned around to see Johnson standing near McNeal's car. Johnson showed McNeal a small bag of marijuana, then pulled out a revolver and told McNeal to "get out of the car" and "give me everything you got." When McNeal exited the Lexus, Johnson got in and sped out of the apartment complex. Harney, a resident of the apartment complex, testified that she saw a young man pointing a silver gun at a car. The person in the car got out and ran off, and the man holding the gun pulled away in the vehicle.

The defense portrayed the incident as a drug deal gone bad. Johnson testified that he was visiting the apartment complex in order to obtain information about an assault he had suffered the previous night. Johnson and McNeal discussed the assault, after which Johnson sought to purchase drugs from McNeal. McNeal told Johnson to get into the Lexus. When Johnson did so, McNeal told him to put whatever money he wanted to spend in the center armrest. Johnson opened the armrest and saw a silver revolver, which McNeal then attempted to grab. Johnson pushed McNeal's hand away, causing McNeal to drop the gun. McNeal said something like "I'm going to get you" and exited the Lexus, and Johnson immediately departed in the vehicle.

The jury convicted Johnson on all three counts, and the district court sentenced him to 180 months in prison and three years of supervised release.

II.

On cross-examination by the defense, McNeal denied ever owning a gun. Defense counsel then showed McNeal printouts of several posts from McNeal's Facebook page. One post featured a photograph of a handgun on a nightstand near a large stack of cash; McNeal stated that he did not know who owned the gun in the picture. Other posts featured photos of McNeal and a young child holding large sums of cash, and one post appears to show marijuana. Upon further questioning, *231 McNeal admitted that he only earned \$250 a week from his employment but denied selling drugs. Defense counsel then sought to introduce the Facebook posts into evidence, arguing that they went to McNeal's credibility.

The district court, however, sustained the Government's objection and denied admission of the posts. Johnson challenges that ruling.

[1] [2] [3] We review a district court's evidentiary rulings for abuse of discretion. *United States v. Tuma*, 738 F.3d 681, 687 (5th Cir. 2013); *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998). "[A]ny error made in excluding evidence is subject to the harmless error doctrine and does not necessitate reversal unless it affected the defendant's substantial rights." *Tuma*, 738 F.3d at 687–88 (internal quotation marks and citation omitted); *accord Lowery*, 135 F.3d at 959. "In assessing any error, we must consider the other evidence in the case and determine whether the improperly excluded evidence, if admitted, would have had a substantial impact on the jury's verdict." *Tuma*, 738 F.3d at 688 (internal quotation marks and citation omitted).

[4] We conclude that even if the district court erred by excluding McNeal's Facebook posts, Johnson has failed to show that that error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Lowery*, 135 F.3d at 959 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). None of the posts directly contradicted any of McNeal's testimony at trial. The photo of the firearm on the nightstand does not establish that McNeal ever owned a gun, nor do the photos of cash and marijuana show that McNeal was a drug dealer. The photos may have indirectly supported some aspects of Johnson's testimony and diminished McNeal's credibility to some extent. But when viewed in light of the evidence as a whole—especially Thompson and Harney's independent eyewitness testimony and the undisputed facts surrounding Johnson's arrest—we cannot conclude that admission of the Facebook posts would have had a "substantial impact" on the jury's ultimate verdict.

III.

[5] Subject to certain limitations not relevant to this case, 18 U.S.C. § 922(g)(1) prohibits any person who has been convicted of "a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm." To obtain a conviction under this provision, the Government must prove beyond a reasonable doubt "that the defendant previously had been convicted of a felony."

United States v. Guidry, 406 F.3d 314, 318 (5th Cir. 2005) (citing *United States v. Daugherty*, 264 F.3d 513, 515 (5th Cir. 2001)).

[6] In connection with the Count 2 charge, Johnson and the Government agreed to a stipulation stating that Johnson “had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense, on or before August 2, 2015.” That stipulation was read to the jury and entered into evidence as an exhibit. Despite that stipulation, however, the Government opened its cross-examination of Johnson as follows:

Q: Mr. Johnson, you’ve been convicted of three prior felonies, have you not?

A: Yes, sir.

Q: Name them.

A: Two—

Defense counsel then objected. Citing the stipulation and the Supreme Court’s ruling in *232 *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the defense asked the district court to declare a mistrial. The court refused to do so but admonished the Government (outside of the jury’s presence) that if it “elicited anything else about the nature of these convictions,” particularly the fact that they were for carjacking offenses, a mistrial would indeed result.

[7] In general, “a defendant who takes the stand to testify in his own defense may be impeached by proof of prior felony convictions.” *United States v. Bray*, 445 F.2d 178, 181 (5th Cir. 1971). In *Old Chief*, however, the Supreme Court held that when a defendant charged with violating § 922(g)(1) offers to concede the fact of a prior conviction and the “name or nature of the prior offense raises the risk of a verdict tainted by improper considerations,” a court may not admit the full record of the prior judgment if the purpose of doing so “is solely to prove the element of prior conviction.” 519 U.S. at 174, 117 S.Ct. 644. Johnson maintains that the Government’s questioning in the present case violated *Old Chief* and therefore mandated a mistrial. However, unlike *Old Chief*, the Government in this case only elicited testimony about the number of Johnson’s prior convictions. Due to defense counsel’s timely objection, the Government failed to elicit any information regarding the “name or nature”

of Johnson’s prior convictions. *Old Chief* is therefore inapposite.

[8] [9] [10] Johnson further contends that the Government’s reference to Johnson’s “three prior felonies” constitutes an improper prejudicial remark amounting to prosecutorial misconduct.

We apply a two-step analysis to claims of prosecutorial misconduct: First, we assess whether the prosecutor made an improper remark. If so, we determine whether the defendant was prejudiced—a “high bar.” *United States v. Davis*, 609 F.3d 663, 677 (5th Cir. 2010) (internal quotation marks omitted). The prejudice prong turns on whether the prosecutor’s remarks “cast serious doubt on the correctness of the jury’s verdict.” *Id.* (internal quotation marks omitted). We look to three factors in deciding whether the improper remarks “cast serious doubt”: “(1) the magnitude of the prejudicial effect of the prosecutor’s remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction.” *Id.* (internal quotation marks omitted).

United States v. Rodriguez-Lopez, 756 F.3d 422, 433 (5th Cir. 2014).

Assuming that the Government’s remark here was “improper,” we conclude that Johnson has failed to demonstrate that he suffered prejudice sufficient to require a new trial. First, referring to the fact that Johnson had sustained three prior felony convictions likely had some prejudicial impact, but since the Government did not mention the prior convictions by name, any such impact was limited. Second, the district court included a limiting instruction in the jury charge stating that “[t]he fact that the defendant was previously found guilty of a crime does not mean that [he] committed the crime for which [he] is on trial, and you must not use this prior conviction as proof of the crime charged in this case.” Third, the evidence supporting Johnson’s conviction is relatively strong. Taking these factors together, we perceive no basis for concluding that the Government’s remark “cast serious doubt on the correctness of the jury’s verdict.” *Rodriguez-Lopez*, 756 F.3d at 433.

IV.

[11] The district court applied a two-level enhancement to Johnson's sentence *233 pursuant to § 3C1.1 of the Sentencing Guidelines. That provision applies when:

- (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and
- (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense

U.S.S.G. § 3C1.1. Perjury falls within the scope of § 3C1.1 when a defendant "provides 'false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Smith*, 804 F.3d 724, 737 (5th Cir. 2015) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)).

[12] The district court determined that application of this enhancement was appropriate based on its finding that Johnson "lied while he took the stand" and "directly contradicted" the eyewitnesses' testimony. The court acknowledged that the other witnesses' testimony was not without shortcomings but nonetheless concluded that "their stories made much more logical sense than that of [Johnson] who was trying to lie—who was lying trying to get out of the charges." The court noted, in particular, that Johnson's "story made no sense in connection with the actions that he took after the incident which involved a car chase and an attempt to try to flee the scene"—actions that Johnson had "no reason" to take "if, in fact, his story was the correct one."

Bearing in mind the "particular deference" we give to a district court's credibility determinations, we conclude that the district court's findings in this case are "plausible in light of the record as a whole," particularly since there is no indication that Johnson's testimony resulted from "confusion, mistake, or faulty memory." *Smith*, 804 F.3d at 737. We stress, however, that our conclusion is closely tethered to the particular facts of this case and the reasons specifically articulated on the record by the district court. Using § 3C1.1 in other, less obvious contexts would

impermissibly risk transforming the enhancement into a de facto penalty on defendants who exercise their right to testify in their own behalf.

V.

[13] Johnson next argues that the district court erroneously calculated his base offense level because neither of his two prior state convictions for armed carjacking qualifies as a "crime of violence" under § 2K2.1(a)(4)(A) of the Sentencing Guidelines. Since Johnson filed objections on these grounds below, we review the district court's "interpretation and application of the Guidelines de novo and its factual findings for clear error." *United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010).

Section 2K2.1(a)(4)(A) sets the base offense level for unlawful possession of a firearm at 20 if "the defendant committed any part of [that] offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." The commentary to § 2K2.1 states that the term "crime of violence" has "the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." U.S.S.G. § 2K2.1, comment. (n.1). Section 4B1.2(a), in turn, defines "crime of violence" to include "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 *234 the person of another." U.S.S.G. § 4B1.2(a)(1).¹

¹ Prior to August 1, 2016, § 4B1.2(a)(2) contained the so-called residual clause, which defined "crime of violence" to also include any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Johnson argues that the residual clause is unconstitutionally vague, but the district court did not base its calculation on that provision. In any event, the Supreme Court has held that the Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. *Beckles v. United States*, — U.S. —, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017).

[14] In *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), the Supreme Court held that the phrase "physical force," as used in the

Armed Career Criminal Act's (ACCA) definition of "violent felony" (codified at 18 U.S.C. § 924(e)(2)(B)(i)), means "violent force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140, 130 S.Ct. 1265 (emphasis in original). So far as this case is concerned, § 4B1.2(a)(1)'s definition of "crime of violence," as incorporated in § 2K2.1(a)(4)(A), is identical to the ACCA's definition of "violent felony." See 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" to include "any crime 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"). Thus, *Johnson*'s definition of "physical force" applies in determining whether *Johnson*'s prior carjacking convictions had "as an element the use, attempted use, or threatened use of physical force against the person of another." See *United States v. Jones*, 752 F.3d 1039, 1041 (5th Cir. 2014) (noting that, in interpreting "§ 4B1.2(a) of the Guidelines, our court has considered decisions of the Supreme Court construing the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), to be instructive"); *United States v. Marquez*, 626 F.3d 214, 217 (5th Cir. 2010); *United States v. St. Clair*, 608 Fed.Appx. 192, 194 (5th Cir. 2015) (unpublished decision) ("[O]ur precedent regarding ACCA's definition of a violent felony is directly applicable to the Guidelines definition of a crime of violence."); *United States v. Martin*, 864 F.3d 1281, 1283 (11th Cir. 2017) ("[A]n offense that is a violent felony under the ACCA is a crime of violence under § 2K2.1.").

[15] [16] *Johnson* argues that the offense of armed carjacking under Mississippi law is not a "crime of violence" because it does not have "as an element the use, attempted use, or threatened use" of *violent* force. "In determining if a prior conviction is for an offense enumerated or defined in a Guidelines provision, we generally apply the categorical approach and look to the elements of the offense enumerated or defined by the Guideline section and compare those elements to the elements of the prior offense for which the defendant was convicted." *United States v. Howell*, 838 F.3d 489, 494 (5th Cir. 2016). "We do not consider the actual conduct of the defendant in committing the offense." *Id.*

Johnson's prior convictions were for armed carjacking under the Mississippi carjacking statute, which states, in pertinent part:

(1) Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person's immediate actual possession shall be guilty of carjacking.

* * *

*235 (2) Whoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm or imitation thereof or other dangerous or deadly weapon, including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade, razor, blackjack, billy, or metallic or other false knuckles, or any object capable of inflicting death or serious bodily harm, shall be guilty of armed carjacking.

* * *

MISS. CODE ANN. § 97-3-117.

The Mississippi Supreme Court has held that:

[T]he statutory elements for carjacking are (1) a taking of a motor vehicle (2) from someone's immediate actual possession (3) by force, stealth or violence. Force or violence includes putting the victim in fear of the same. Use of a firearm or other deadly or dangerous weapon elevates the crime to armed carjacking.

Smith v. State, 907 So.2d 292, 296 (Miss. 2005) (construing the statute's elements for purposes of determining whether a jury instruction on a lesser-included offense should have been given).

The parties do not cite, and we have not found, any Mississippi caselaw explaining the distinction, if any, between carjacking by "force" and carjacking by "violence." So far as *armed* carjacking is concerned, we conclude that the "force or violence" element necessarily entails, at a minimum, the threatened use of *violent* force—i.e., force capable of causing physical pain or injury to another person.² *Johnson* maintains that the statutory language permits an armed carjacking conviction so long

as a firearm is “readily available” to the perpetrator, regardless of whether the victim is threatened by, or even knows about, the presence of such a weapon. This is a possible reading of the statute’s language, but we see no realistic probability that the statute would ever be applied in such a manner, given the Mississippi Supreme Court’s strong indication that actual “use of a firearm” is required to sustain an armed carjacking conviction. *See Smith*, 907 So.2d at 296.

- 2 Neither Johnson nor the Government has presented any argument regarding carjacking by “stealth.” We express no opinion on that aspect of Mississippi’s carjacking statute, and our decision today does not foreclose future litigants from raising arguments in connection therewith.

Accordingly, we find no merit in Johnson’s challenge to the district court’s application of § 2K2.1(a)(4)(A).

VI.

18 U.S.C. § 924(c)(1)(A)(ii) prohibits brandishing a firearm “during and in relation to any crime of violence.” Section 924(c)(3) defines the term “crime of violence” as a felony offense that either:

- (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.

18 U.S.C. § 924(c)(3).

[17] Johnson argues that the district court should have set aside his conviction under this provision. First, he contends that § 924(c)(3)(B) is unconstitutionally vague based on the Supreme Court’s opinion in *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Second, he argues that his Count 1 *236 carjacking conviction does not satisfy § 924(c)

(3)(A)’s “physical force” requirement because the federal carjacking statute includes carjacking “by intimidation.” *See* 18 U.S.C. § 2119 (proscribing the “tak[ing] [of] a motor vehicle ... from the person or presence of another by force and violence or by intimidation” (emphasis added)). Both of these arguments, however, are foreclosed by this circuit’s decision in *United States v. Jones*, 854 F.3d 737, 739–41 (5th Cir. 2017) (holding that “the definition of ‘crime of violence’ under § 924(c)(3)(B) is not unconstitutionally vague,” and that carjacking under 18 U.S.C. § 2119 “fits under the definition set forth in § 924(c)(3)(A)” because carjacking by “intimidation” requires a threat of “violent force”).

VII.

The district court’s amended judgment states that “[u]pon release from imprisonment, the defendant shall be on supervised release for a term of: 3 year(s) as to Counts 1 and 2, and 5 years as to Count 5, all to run concurrent to each other.” Although neither Johnson nor the Government raises the point on appeal, the reference to “Count 5” is plainly a clerical error, given that the indictment listed only three counts and the amended judgment elsewhere refers to Counts 1, 2, and 3. We therefore remand this case to the district court with instructions to correct this portion of its judgment. *See United States v. Powell*, 354 F.3d 362, 371–72 (5th Cir. 2003); FED. R. CRIM. P. 36.

VIII.

For these reasons, the judgment and sentence are **AFFIRMED**. This case is **REMANDED** to the district court for the limited purpose of correcting the clerical error in the judgment identified above.

All Citations

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