PETITION APPENDIX

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APPENDIX A

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK WAYNE MCHENRY, a/k/a Savage,

Defendant - Appellant.

No. 24-7048

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00326-RAW-2)

Shira Kieval, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender for the District of Colorado, Denver, Colorado, for Defendant-Appellant.

Luke Rizzo Cascio, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with him on the brief), Office of the United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma for Plaintiff-Appellee.

Before **McHUGH**, **EID**, and **FEDERICO**, Circuit Judges.

EID, Circuit Judge.

A jury found Patrick Wayne McHenry guilty of, among other crimes, violating 18 U.S.C. § 924(c)(1)(A) by carrying a firearm during and in relation to crimes of violence—namely, a robbery in Indian Country and a carjacking.[1]

McHenry now appeals his § 924(c)(1)(A) conviction, arguing the government presented insufficient evidence that he carried his shotgun *during* the predicate robbery offenses because he did not possess or move the shotgun during the "taking" stage of either offense. We disagree.

Though McHenry may not have had a firearm on his person while committing the predicate robbery offenses, the evidence, viewed in the light most favorable to the government, suffices to show that McHenry was constructively "carr[ying]" the shotgun "during" the continuation of his robberies: while he fled from the scene. Thus, the evidence sufficiently supports the jury's § 924(c)(1)(A) guilty verdict. Accordingly, we affirm.

I.

A.

On the evening of September 11, 2021, B.N. was in a room at a Motel 6 in Muskogee, Oklahoma, with a man she had recently met, C.J. The two had spent the day together, drinking alcohol and smoking marijuana.

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[1] Because "carjacking is a type of robbery," *Jones v. United States*, 526 U.S. 227, 235 (1999), we refer to carjacking and federal enclave robbery as "robberies."

Around ten in the evening, B.N. asked C.J. for a ride home. C.J. declined because he had been drinking. B.N. then contacted McHenry, whom she had known for a short time, asking for a ride home from the motel.

McHenry picked up B.N. from the motel in his silver Honda, but instead of driving her home, he took her to his nearby house. The two entered the house together. Shortly thereafter, McHenry's girlfriend, Ashton Clark, arrived, at which point McHenry attacked B.N. Clark joined in the assault.

At McHenry's direction, Clark stood over B.N. and held her at gunpoint with McHenry's shotgun. McHenry proceeded to bind and gag B.N. McHenry and Clark then searched B.N. for money and drugs. They failed to find anything.

B.N. told McHenry she had "left everything" at the Motel 6, so he turned his attention there. R. Vol. I at 585. McHenry forced B.N. into the trunk of his Honda, shut the trunk, and told Clark to follow him. McHenry then set off for the Motel 6 in his Honda, with his shotgun sitting on the back floorboard and B.N. in the trunk. Clark followed McHenry in a separate car.

Once at the Motel 6, McHenry opened the trunk and demanded B.N. tell him what room she had stayed in. McHenry told her that if she sent him to the wrong room, he would kill her. B.N. gave McHenry the correct room number.

McHenry left B.N. and his shotgun in the Honda and went with Clark to B.N.'s old room, where C.J. remained. McHenry knocked and stood outside of the view of the peephole. C.J. opened the door, thinking it was B.N., and McHenry pushed his way into the room.

Inside the room, McHenry threatened to kill C.J., telling C.J. he would "[b]low [his] head off" and "blow [his] dick off." *Id.* at 499. McHenry did not have his shotgun on him, but he pretended to have a gun. C.J. thought McHenry "might have had a firearm," and so he "didn't want to take a chance" with anything. *Id.* McHenry and Clark stripped C.J. naked, stole all of his things—including his suitcase, clothes, tools, and cell phone—and loaded them into the Honda. They also took the keys to C.J.'s Subaru. McHenry told C.J. that he would kill him if he "ever told the cops or reported [the] car stolen." *Id.* at 493. McHenry also read C.J.'s address on his driver's license and threatened to kill his family if he reported the Subaru stolen. With C.J.'s (forced) help, McHenry started up the Subaru.[2] McHenry then returned C.J. to the motel room, where McHenry instructed him to lay down in the bathroom and told him "not to get up until daylight." *Id*. at 496.

With C.J. out of the way, McHenry returned to the Subaru, at which point he "made [Clark] get in the Honda and drive it," *id.* at 584, telling her "to follow him," *id.* at 588. The two then left the Motel 6, with McHenry in C.J.'s Subaru and Clark following behind in McHenry's Honda—which still held McHenry's shotgun and which now also contained the stolen items. C.J. waited until daybreak to go to a nearby business and call the police.

[2] After B.N. had left earlier in the night, C.J. grew afraid that she might return to steal his Subaru, so he removed and hid two of its fuses. McHenry forced C.J. to come outside and reinstall the fuses.

During the drive away from the Motel 6, B.N. managed to open the Honda's trunk from the inside, forcing Clark to pull over to resecure the trunk. When she could not do so, she called McHenry. McHenry arrived, exited the Subaru, put B.N. in the back seat of the Honda, and got into the Honda himself. At this point, McHenry's shotgun sat on the front passenger floorboard of the Honda. McHenry drove the Honda away, along with B.N. and the shotgun; Clark switched over to the Subaru and followed. After driving for some time, McHenry called Clark and instructed her to pull over, at which point he took the keys to the Subaru and told Clark he would contact her in three hours. McHenry left the Subaru where it was, and again set off in the Honda with B.N. inside.

McHenry drove B.N. to a house in Braggs, Oklahoma, where he confined B.N. to a shed on the property. After over a day in the shed, B.N. escaped and had a neighbor call 911. Law enforcement recovered C.J.'s things from the Honda and the house near the shed.

The same day, McHenry and Clark were arrested at the Tulsa Inn and Suites. Law enforcement recovered the shotgun from a duffle bag in the hotel room and found C.J.'s Subaru parked outside.

B.

On May 24, 2022, a federal grand jury returned an indictment charging McHenry with five crimes: (1) conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c); (2) kidnapping, in violation of 18 U.S.C. §§ 2 and 1201(a)(l); (3) carjacking, in violation of 18 U.S.C. § 2119; (4) robbery in Indian Country, in violation of 18 U.S.C. §§ 2, 2111, 1151, and 1152; and (5) using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c)(l)(A)(i).

Counts 3 and 4—carjacking and robbery in Indian Country—were the "crime of violence" predicates for the § 924(c)(1)(A)(i) charge in Count 5. Both statutes criminalize "tak[ing]" property "from the person or presence of another" "by force and violence" or "by intimidation." 18 U.S.C. §§ 2111, 2119.

McHenry's case proceeded to trial. At the close of the government's evidence, he moved for a judgment of acquittal under Federal Rules of Criminal Procedure Rule 29. Particularly relevant here, McHenry argued that "nobody testified that there was a gun on [him] at all during the time at the Motel 6," only that there was a shotgun inside the Honda that Clark "drove off in." R. Vol. I at 823. Thus, McHenry argued, there was insufficient evidence that he used or carried a gun "during and in relation to" the robberies at the Motel 6. The government responded that the evidence "that the shotgun was in the Honda and specifically the defendant brought the shotgun to the Motel 6 when they completed their robbery" was sufficient to sustain a § 924(c)(1)(A) conviction. *Id.* at 825.

The district court denied McHenry's Rule 29 motion, and the defense did not present any additional evidence. The jury ultimately found McHenry guilty on all charges, including violating § 924(c)(1)(A). By special interrogatory, the jury indicated that it found McHenry guilty of carrying (but not using) a firearm during the robberies. The district court imposed the mandatory consecutive five-year sentence required by the § 924(c)(1)(A) conviction, for a total sentence of thirty-five years' imprisonment. McHenry timely appealed.

II.

On appeal, McHenry renews his trial argument that there was insufficient evidence for the jury to convict him under § 924(c)(1)(A) because he did not carry a firearm during the robberies.

"We review sufficiency of the evidence claims de novo." *CGC Holding Co. v. Hutchins*, 874 F.3d 1201, 1209 (10th Cir. 2020). In examining a sufficiency-of-the-evidence challenge, "we review the entire record in the light most favorable to the government to determine whether the evidence is such that a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995) (quotation marks omitted) (quoting *United States v. Dirden*, 38 F.3d 1131, 1142 (10th Cir. 1994)). We must affirm if "any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt." *United States v. Emmons*, 24 F.3d 1210, 1217 (10th Cir. 1994) (quotation marks omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

III.

18 U.S.C. § 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years." "To sustain a conviction under 18 U.S.C. § 924(c)(1), the

government must prove three elements: (1) the defendant committed the underlying crime; (2) the defendant 'used' or 'carried' a weapon; and (3) the use or carriage of the weapon was 'during and in relation to' the [underlying crime]." *United States v. Lampley*, 127 F.3d 1231, 1240 (10th Cir. 1997) (quoting *United States v. Richardson*, 86 F.3d 1537, 1548 (10th Cir. 1996)).

On appeal, McHenry does not contest that he committed the underlying crimes. Accordingly, the only question is whether there is sufficient evidence that he "carried" the shotgun "during" the robberies. We find that there is.

A.

Section 924(c)(1)'s "carries" prong contains "two elements: possession of the weapon through the exercise of dominion or control; and transportation or movement of the weapon." *United States v. Martinez*, 912 F.2d 419, 420 (10th Cir. 1990); *see also United States v. Durham*, 139 F.3d 1325, 1335 (10th Cir. 1998). "Carrying" does not only refer to carrying a weapon on one's person. In *Muscarello v. United States*, the Supreme Court held that a person "carries a firearm" under § 924(c)(1) when the "person [ ] knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." 524 U.S. 125, 126–27 (1998). There is thus no question that McHenry "carrie[d]" the shotgun in the Honda while he drove the Honda from his house to the motel with his shotgun sitting on the back floorboard.

Following from *Muscarello*, we have also held that a person "carries a firearm" within the meaning of § 924(c)(1) when the person indirectly—or *constructively*—possesses and conveys a firearm in a vehicle through a subordinate who, at the person's orders, drives the vehicle.[3] In *United States v. Lindsey*, we held that the defendant "carrie[d]" firearms when the defendant's subordinate, "who did whatever [the d]efendant told him to do," drove a U-Haul filled with firearms inside, and the defendant followed in a separate vehicle. 389 F.3d 1334, 1338–39 (10th Cir. 2004) (internal quotation marks omitted). On the "possession" element of "carries," we held that "although [the defendant was] not in actual possession of the firearms," the defendant "maintained constructive possession of the firearms while [the subordinate] transported them in the U-Haul because he exercised dominion and control over [the subordinate] and the U-Haul." *Id.* at 1339. And on the "transports" element, we held that the defendant "transported the firearms in the U-Haul, even though he was not physically present inside the vehicle," because he "paid for the U-Haul, directed [the subordinate] to drive the U-Haul, and insisted the U-Haul travel in tandem with him at all times." *Id.* We further stressed that the defendant "undoubtedly went along with the U-Haul as he and his cohorts traveled." *Id.* (internal quotation marks omitted).

This case is not meaningfully distinguishable from *Lindsey*. Here, Clark testified that, as McHenry was getting into the Subaru to leave the Motel 6, McHenry "made [her] get in the Honda and drive it," and he "told [her] to follow him." R. Vol. I at 584, 588. The two then drove away from the Motel 6 together. All

[3] We note the jury was instructed on constructive possession.

along, Clark followed McHenry's orders and looked to him for guidance. For instance, during their drive away from the motel, Clark called McHenry as soon as B.N. managed to open the trunk and Clark was unable to close it. And later, when Clark had since switched cars and was driving the Subaru, she pulled over, left the Subaru, and then split away from McHenry when McHenry called her and instructed her to do so. On these facts, just like in *Lindsey*, a rational juror could conclude that McHenry "exercised dominion and control over [Clark] and the [Honda]" during the time McHenry drove the Subaru, and led Clark in the Honda. *Lindsey*, 389 F.3d at 1339.[4]

For these reasons, McHenry was "carr[ying]" the shotgun within the meaning of § 924(c)(1) both while he drove the Honda, himself, and while he drove the Subaru and Clark followed in the Honda at his direction. Because McHenry "carried" the shotgun, the question then becomes whether any of that carriage occurred "during" either of the robberies under § 924(c)(1).

B.

"A firearm is carried 'during and in relation to' the underlying crime, when the 'defendant avails himself of the weapon and . . . the weapon plays an integral role in the underlying offense.'" *United States v. Shuler*, 181 F.3d 1188, 1190 (10th Cir.

[4] One difference between this case and *Lindsey* is that, where the defendant in *Lindsey* "paid for the U-Haul," McHenry did not own or pay for the Honda. Clark, however, testified that McHenry was loaned the Honda but "never returned it"—and was not going to return it—because McHenry accused Clark of having an affair with the Honda's true owner. R. Vol. I at 580–81.

1999) (ellipsis in original) (brackets omitted) (quoting *Lampley*, 127 F.3d at 1240). To show this, the government "must establish a nexus between the carriage of the firearm and the underlying offense." *Id.* The "evidence must support a finding that the defendant intended the weapon to be available for use during the crime of violence." *Id.* (brackets omitted) (quoting *Richardson*, 86 F.3d at 1548).

McHenry begins with the premise that a firearm is "'carrie[d]' 'during . . . a[] crime of violence'" only "if the gun is carried contemporaneously with the commission of at least some of the conduct that constitutes an element of the predicate offense." Reply Br. at 5 (alterations in original). Building from there, McHenry contends that, by only carrying the shotgun in his Honda to and from the motel, and not carrying it *into* the motel room or *while* acquiring C.J.'s Subaru, he did not carry the firearm "during" his robberies under § 924(c)(1). McHenry's argument homes in on the word "takes"—and the lack of the phrase "and carries away"—in the predicate robbery statutes. *See* 18 U.S.C. §§ 2111, 2119. McHenry says that each of his two predicate robbery offenses "starts and ends with a violent taking," and to have carried a firearm "during" those offenses under § 924(c)(1), he reasons, he must have "both possesse[d] and move[d] a gun while engaged in that violent taking." Aplt. Br. at 20–22.

We have already rejected McHenry's narrow "during" argument. In *United States v. Brown*, 400 F.3d 1242 (10th Cir. 2005), the government charged a defendant under § 924(c)(1) with carrying a firearm during and in relation to a drug trafficking offense, specifically, "'manufacturing methamphetamine,' in violation of 21 U.S.C. § 841(a)(1)." *Id.* at 1247. The jury convicted, and we affirmed.

The evidence showed that the defendant had manufactured methamphetamine at a criminal partner's motor home and trailer. *Id.* We held that the defendant "carried" a firearm within the meaning of § 924(c)(1) because the firearm was in the front seat of another partner's van that the defendant had driven on the day of his arrest. *See id.* at 1247–48.

The defendant maintained that there was no evidence that he "carrie[d]" the firearm "during" manufacturing methamphetamine, "because he was not actually manufacturing methamphetamine in [the] van while he was 'carrying' the [firearm], and he was not actually 'carrying' the [firearm] in [the] motor home or trailer when he was manufacturing methamphetamine." *Id.* at 1249. The defendant argued that the term "manufacture" in the predicate statute "does not include mere possession of ingredients that might be used to manufacture the controlled substance," which is the most that the defendant did while driving the van and "carrying" the firearm inside. *Id.* In essence, the defendant's argument was that he would have already completed the elements of the predicate "manufactur[ing]" offense in one location before he would "carr[y]" the firearm in the van, and he would stop "carr[ying]" the firearm in the van before he would re-start and re-complete the elements of the predicate "manufactur[ing]" offense in the second location.

We rejected the defendant's argument and held there was sufficient evidence that he carried the firearm "during" the crime of manufacturing methamphetamine.

In so holding, we looked beyond the predicate crime's statutory text and elements and focused more broadly on the body of the predicate offense as a logical whole. We treated the defendant's underlying statutory crime as a "continuing offense," even though the underlying statute itself did not indicate as much. *Id.* at 1249–50. That statute, by its terms, made (and still makes) it a crime "to manufacture . . . a controlled substance," 21 U.S.C. § 841(a)(1), which most naturally is read to criminalize a single event in time—the manufacturing itself.[5] Put differently, driving around with ingredients that could be used to manufacture methamphetamine, but not actually "manufactur[ing]" methamphetamine, would not itself, as McHenry himself argues, constitute "the commission of at least some of the conduct that constitutes an element of the predicate [§ 841(a)(1)] offense." Reply Br. at 5.

Nevertheless, we viewed this statutory crime as a "continuing offense" for § 924(c)(1) "during" purposes, observing that the evidence established "not only that [the defendant] manufactured methamphetamine, but that [his] methamphetamine manufacture was a continuous and ongoing operation" for over two weeks. *Brown*, 400 F.3d at 1249–50. We held that the operative question for whether the § 924(c)(1)

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[5] In relevant part, "manufacture" means

> the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container.

Id. § 802(15).

conviction could stand, therefore, was "not whether the evidence demonstrate[d] the [firearm] was directly connected to any particular drug transaction or point in the methamphetamine production process, but whether the firearm was sufficiently connected to the 'continuing offense' as a whole." *Id.*

Thus, we held that the carriage occurred "during" the "continuing offense." *Id.* at 1250. We explained that the evidence before the jury supported the inference that the defendant "'carried' the gun throughout the period alleged in the indictment in connection with his road trips out of state to obtain the [ingredients]" to manufacture methamphetamine. *Id.* That was so because the "trips occurred 'during' the ongoing and underlying crime; indeed, they were essential to the maintenance of [the defendant's] continuous methamphetamine manufacturing enterprise." *Id.*

The upshot of *Brown* is that when we assess whether the carriage of a firearm occurs "during" an underlying crime within the meaning of § 924(c)(1), the underlying crime does not necessarily end right when the final element of that crime is satisfied. Restated, carriage need not occur at the precise moment that the defendant completes the last statutory element of a predicate crime for the carriage to have occurred "during" that predicate crime under § 924(c)(1). In *Brown*, none of the defendant's driving around in the van with the ingredients itself constituted any part of the offense of "manufactur[ing]" methamphetamine under § 841(a)(1). Still, we held that the driving with a weapon could be considered as occurring "during" the predicate crime for purposes of § 924(c)(1).

Under *Brown*, if the facts and law show that a predicate crime "was ongoing and continuous," a § 924(c)(1) conviction may lie if carriage occurred "during" that "ongoing and underlying crime." 400 F.3d at 1249–50. As the Third Circuit similarly stated—in a predicate-crime robbery case no less—§ 924(c)(1) does not require "look[ing] only at the offense under [the predicate criminal statute] to determine whether [a defendant] carried the gun 'during' the crime," rather, it "requir[es] a common sense, temporal approach to the specific facts." *United States v. Williams*, 344 F.3d 365, 374 (3d Cir. 2003).

Brown therefore dooms McHenry's categorical "during" argument. Again, just as the *Brown* defendant did with the word "manufacture" in the predicate statute there, McHenry argues that the operative word "take[]" in the two predicate robbery statutes here, 18 U.S.C. §§ 2111, 2119, required him to have carried a firearm "during" a "tak[ing]" to fall within § 924(c)(1)'s ambit. But even spotting McHenry that, as a substantive matter of his underlying crimes, the robberies were "committed at the precise moment" of a forcible taking, Aplt. Br. at 20 (cleaned up), *Brown* indicates that we need not mechanically graft that narrow time frame onto § 924(c)(1)'s "during" inquiry. *See* 400 F.3d at 1249–50.

Finally, if there were any doubt, applying *Brown* to McHenry's robberies puts us in good company: "a number of courts have held that, in the context of § 924(c), a bank robbery does not necessarily end at the point along the time line at which all of the elements of the offense have been established." *United States v. Cecil*, 615 F.3d 678, 693 (6th Cir. 2010) (collecting cases). And cases where federal bank robbery under § 2113(a) was the predicate crime for § 924(c)(1) liability are fully apt here. As the Supreme Court has recognized, that statute's text tracks that of the carjacking statute (§ 2119) and the robbery in Indian Country statute (§ 2111). *See Jones v. United States*, 526 U.S. 227, 235–36 & n.4 (1999). Those statutes all, in pertinent part, criminalize only "tak[ing]" property. *See* 18 U.S.C. §§ 2111, 2113(a), 2119. The federal bank robbery and robbery in Indian Country statutes also both served as models for the federal carjacking statute. *See Jones*, 526 U.S. at 235–36 & n.4.

IV.

Because McHenry's robberies are "continuing offenses" for § 924(c)(1)(A) "during" purposes, the final question is whether the offenses continued throughout McHenry's flight from the Motel 6. They did. Thus, the evidence, viewed in the light most favorable to the government, established that McHenry was "carr[ying]" the shotgun "during" the time he fled the scene of the robberies. This legally amounts to a § 924(c)(1)(A) violation.

Robbery is generally viewed as a continuing offense that continues throughout flight from the scene. We have held that "the uniform generic definition of robbery incorporates the continuing offense theory." *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1236 (10th Cir. 2009). Representative of that theory, the Model Penal Code provides that "[a]n act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or *in flight after the attempt or commission*." Model Penal Code § 222.1(1) (A.L.I. 2024) (emphasis added).

To that point, in *United States v. Burton*, 121 F. App'x 318 (10th Cir. 2005) (unpublished), we affirmed a § 924(c)(1)(A) conviction for carrying a firearm "during" a federal bank robbery where the defendant "did not carry the weapon into the bank," because the defendant "possessed a gun while obviously fleeing the robbery," and "escape or flight is a phase of a robbery." *Id.* at 323. To be sure, *Burton* is a non-precedential decision. But *Burton*'s persuasiveness grows when we consider that at least the Third, Sixth, Seventh, and Eighth Circuits have adopted the same principle: that flight or escape from a bank robbery "is part of the robbery and occurs 'during' it" under "the language of 18 U.S.C. § 924(c)(1)(A)." *United States v. Reichow*, 416 F.3d 802, 805 (8th Cir. 2005) (citing *United States v. Pate*, 932 F.2d 736, 738 (8th Cir. 1991)); *accord Williams*, 344 F.3d at 375 (3d Cir.) ("[F]light may be considered a part of a bank robbery under § 924(c)."); *United States v. Andrews*, 442 F.3d 996, 1002 (7th Cir. 2006) ("Escape is considered part of a robbery and the use of a firearm during an escape is a violation of 18 U.S.C. § 924(c)."); *see also Cecil*, 615 F.3d at 693 (6th Cir.) (collecting bank robbery cases and "[a]pplying this principle" in the Hobbs Act robbery context). And for the reasons explained above, cases like these dealing with § 2113(a) federal bank robbery as a predicate crime apply with full force to the robbery in Indian Country and carjacking predicates at issue here.

The government's evidence sufficed to prove that McHenry was fleeing from the scene of his robberies in the stolen Subaru while also constructively carrying the shotgun in the Honda. At least for the first few moments that McHenry drove the stolen Subaru away from the Motel 6, with C.J.'s other items in tow in the accompanying Honda, he was engaged in flight from the scene "during" the robberies. This follows directly from our decision in *Burton*. There, we held that the defendant was "*obviously* fleeing the robbery" when he "had the firearm on his person within inches of the robbery proceeds, within a few blocks of the robbery, and not less than a few minutes after he left the bank premises." 121 F. App'x at 323 (emphasis added). Based on the carriage during that flight, *Burton* held, "the jury could reasonably find [the defendant] carried a gun in violation of § 924(c)." *Id.* The early stages of McHenry driving away in the Subaru, with Clark and the loot-filled Honda following close behind, track dispositively closely—in terms of temporal and spatial proximity to the robbery scene and proceeds—to what we deemed "obvious[]" flight, and thus "during" the robbery, in *Burton*.

What's more, McHenry's conduct during the robberies was calculated to aid in his flight, further linking the underlying robberies to the flight. While robbing C.J., McHenry "told [C.J.] he was going to blow [C.J.'s] brains out and kill [him] if [he] ever told the cops or reported [his Subaru] stolen." R. Vol. I at 493. Then, right before leaving, McHenry "read [C.J.'s] address off to [C.J.] and said that [he] was going to kill [C.J.'s] family if [C.J.] reported [the Subaru] stolen." *Id.* at 494–95. McHenry also took C.J.'s phone, made C.J. lay down on the bathroom floor naked, and "told [C.J.] not to get up until daylight." *Id.* at 496. From the jury's perspective, these threats could conceivably have contributed to C.J. waiting until the next day to report the robberies. This is particularly so given that the jury learned that C.J. knew he could have easily gone to the Motel 6's main office and used a phone to report the robberies at any time. Based on McHenry's threats, which certainly contemplated a future flight, and which may have enabled that flight, a rational jury could conclude that McHenry's "flight" from the scene was "during" his underlying robberies within the meaning of § 924(c)(1).

And—the final piece of this puzzle—during the time McHenry was fleeing the robberies in the Subaru, he was constructively "carr[ying]" the shotgun in the Honda. As discussed above, McHenry "exercised dominion and control over [Clark] and the [Honda]" by "direct[ing] [Clark] to drive the [Honda]" and "insist[ing] the [Honda] travel in tandem with him" as he left the motel. *Lindsey*, 389 F.3d at 1339.

Therefore, the evidence, when viewed in the light most favorable to the government, reflects at least *some* temporal overlap between McHenry's flight and his constructive carriage of the shotgun. Accordingly, there was sufficient evidence that McHenry "carried" a firearm "during" his "ongoing and underlying" robberies. *See Brown*, 400 F.3d at 1250. That is sufficient evidence to sustain McHenry's § 924(c)(1)(A) conviction.

V.

Finally, we acknowledge that the government's appellate brief primarily defends the jury's verdict by arguing that McHenry's carriage of the firearm *to* the Motel 6—i.e., the time *before* the "tak[ings]"—was "during" the robberies. *See* Aple. Br. at 13–14 (arguing that "the robber[ies] began when [McHenry] . . . started driving to the Motel 6 with his shotgun within reach, and with his accomplice following in tandem at his direction"). Still, our decision to affirm based on McHenry's *post*-taking carriage is well supported by a theory that the government put forth at trial.

We can affirm a criminal conviction based on any theory presented to the jury. *See Chiarella v. United States*, 445 U.S. 222, 236 (1980). Here, the government has consistently—from trial, to briefing, to oral arguments—advanced a "post-taking" carriage theory along with the "pre-taking" theory.

At trial, the government argued to the jury that McHenry transporting the shotgun away from the Motel 6 to "the house in Braggs, and then back up to Tulsa," showed that he violated § 924(c)(1)(A). R. Vol. I at 894. It even argued that McHenry "simply retrieving [the gun] from the Honda" away from the Motel 6 was "carr[ying] the [gun] during and in relation to [the] carjacking and robbery." *Id.* at 895. And, at oral argument on appeal, the government clarified that it "has never abandoned the . . . theory that the robbery is still continuing while they escape" and that carriage during that escape—i.e., post-"tak[ing]"—suffices to affirm. Oral Arg. Audio at 29:27–30:00. During oral argument, the government further cited to *United States v. Von Roeder*, 435 F.2d 1004 (10th Cir. 1970), for the proposition that it is "well known" that "the escape from the robbery is part of the robbery crime." *Id.* at 28:50–29:15.

McHenry, for his part, clearly recognized that the government had advanced this post-taking theory below. In response, McHenry devoted an entire section of his opening brief on appeal to arguing that "[t]he statutory robbery offenses charged in this case do not include a separate 'escape phase.'" Aplt. Br. at 22–25. He sought to clarify that *Von Roeder*, the case that the government later cited at oral argument, "applies only to robbery offenses with asportation elements, not to statutory robbery offenses like federal carjacking and federal enclave robbery that lack the element of asportation." *Id.* at 24.

Accordingly, our decision that the "post-taking" carriage theory supports McHenry's § 924(c)(1)(A) conviction does not require us to "cherry-pick facts" presented to the jury and apply them to a *different* carriage theory. *Ciminelli v. United States*, 598 U.S. 306, 316–17 (2023). Our decision rests on the *same* carriage theory that the government presented to the jury below: that McHenry carried his weapon for at least some period of time post-taking. *See* R. Vol. I at 894 ("He transported [the firearm] from . . . Motel 6 [to] the house in Braggs."). As such, affirming McHenry's conviction on the post-taking theory does not require us to "assume . . . the function . . . of a jury." *Ciminelli*, 598 U.S. at 317. Instead, we need only apply the government's theory, which the government presented to the jury, to the facts of this case to uphold McHenry's § 924(c)(1)(A) conviction based on his post-taking flight with a firearm.

VI.

For the foregoing reasons, we AFFIRM.

No. 24-7048, *United States v. McHenry*
FEDERICO, Circuit Judge, joined by **McHUGH**, Circuit Judge, concurring.

Following trial, a jury convicted Patrick McHenry of multiple offenses, including for violating 18 U.S.C. § 924(c)(1)(A) for carrying a firearm in connection with a predicate crime of violence. We affirm that conviction today based on the theory that McHenry constructively possessed a shotgun while fleeing the scene of his predicate crime, a theory that stems from *United States v. Lindsey*, 389 F.3d 1334 (10th Cir. 2004). I agree with the majority that the facts here are materially indistinguishable from the facts in *Lindsey*. In *Lindsey*, we affirmed a similar § 924(c)(1)(A) conviction because the defendant maintained constructive possession over his firearm by directing a subordinate to transport the firearm in a U-Haul truck while the defendant rode in a different vehicle close to the U-Haul. *Id.* at 1338–39. Here, as McHenry fled the scene in a stolen car, he likewise instructed someone else (his girlfriend) to follow him in a separate car where the shotgun was contained. As such, McHenry constructively possessed the shotgun, and he possessed it while fleeing.

Had the Government made the argument that the majority now adopts, this would be a much more straightforward case. But the Government did not, so affirming on this basis requires working through tricky waiver questions. I concur because I ultimately conclude that the Government has not waived the winning argument. I write separately to emphasize that the law governing waivers in these circumstances is underdeveloped, making this case a much closer call than the majority opinion lets on.

Two types of potential waiver are in play. The first is appellate waiver. In its appellate brief, the Government does not cite *Lindsey*, nor does it argue that McHenry carried a firearm while fleeing the scene. It was not until oral argument, and only when prompted by the panel, that the Government first pressed its flight argument on appeal. I am not too concerned about this first type of waiver – we have long said that we have the discretion to affirm on any basis supported by the record, even on a basis not presented on appeal. *United States v. Margheim*, 770 F.3d 1312, 1325 (10th Cir. 2014) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)).

It is the second type of waiver that I find more challenging. For ease of reference, I will refer to it as trial waiver. It arises from the Government's failure to argue to the jury at trial that McHenry constructively possessed the shotgun during his flight when he instructed his girlfriend to follow him in the car that contained the shotgun.

Unlike appellate waiver, we do not have discretion when it comes to trial waiver. The Supreme Court has told us that we "are not permitted to affirm convictions on any theory [we] please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). So, the theory upon which we affirm a conviction must have been presented to the jury. This is because a court that adopts an unpresented theory improperly substitutes itself as factfinder in place of the jury. To satisfy itself that an unpresented theory supports conviction, the court would need to review the evidence in the first instance, which includes making inferences and findings that the jury was never asked to make. *See Ciminelli v. United States*, 598 U.S. 306, 316–17 (2023) ("[T]he Government asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume . . . the function . . . of a jury. That is not our role."). Put differently, the Government cannot convince a jury to convict on legally indefensible grounds only to then turn around and ask an appellate court to salvage its case by bootstrapping a valid theory, never argued to the jury, onto the jury's verdict.[1]

Applying *McCormick* and *Ciminelli*, we have no discretion to excuse this potential trial waiver. However, it is somewhat unclear whether or how trial waiver applies in these circumstances. *McCormick*'s rule that appellate courts cannot affirm "on any theory they please" seems to center trial waiver on how

[1] This would likely also circumvent the Government's burden of proof, as appellate review is less searching than the reasonable doubt standard a jury was tasked with applying if the Government had presented an appropriate theory at trial.

the Government argued its theory of the case to the jury. 500 U.S. at 270 n.8. Yet, in the immediately preceding sentence, *McCormick* says that a defendant is denied his jury right "when an appellate court retries a case on appeal under different instructions *and* on a different theory than was ever presented to the jury." *Id.* (emphasis added). This suggests that trial waiver depends on both failure to present a particular theory of the case *and* failure to instruct the jury on that theory. *Ciminelli*, too, focused on the jury instructions. There, the Supreme Court declined to affirm on an alternative theory in part because the jury had not been charged on that theory; rather, the jury had been charged on a right-to-control theory that the Supreme Court had rejected. *Ciminelli*, 598 U.S. at 316–17. *McCormick* and *Ciminelli* thus leave open some questions about the scope of trial waiver and how we should apply it.

Absent more definitive guidance, I fall back on the well-worn principle that we do not reverse jury verdicts unless no reasonable juror could have reached the challenged verdict. *United States v. Shepard*, 396 F.3d 1116, 1119 (10th Cir. 2005) (citation omitted). In this case, there was enough, barely, for a reasonable juror to convict on the theory of constructive possession during flight, which is the theory of affirmance on appeal.

The Government argued to the jury that McHenry possessed the shotgun "for the entire relevant period," which necessarily included the moments when McHenry fled from the hotel and his criminal conduct continued. R. I at 894.

And the district court instructed the jury on constructive possession, including the fact that McHenry could have constructively possessed the firearm "through another person." *Id.* at 248. Combined with the testimony from McHenry's girlfriend that McHenry did in fact direct her to follow in a separate vehicle with the shotgun, the jury had all the puzzle pieces needed to convict on the theory that the majority opinion adopts. To be sure, the Government never put the pieces together for the jury by specifically arguing constructive possession during flight. But a rational juror could have finished the puzzle without the Government's help. I therefore respectfully concur.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

December 12, 2025

Ms. Shira Kieval
Office of the Federal Public Defender
Districts of Colorado and Wyoming
633 Seventeenth Street, Suite 1000
Denver, CO 80202

RE: 24-7048, United States v. McHenry
Dist/Ag docket: 6:21-CR-00326-RAW-2

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Luke Matthew Rizzo Cascio
Linda A. Epperley

CMW/sls

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

April 2, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK WAYNE MCHENRY, a/k/a Savage,

Defendant - Appellant.

No. 24-7048
(D.C. No. 6:21-CR-00326-RAW-2)
(E.D. Okla.)

ORDER

Before **McHUGH**, **EID**, and **FEDERICO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Per Curiam

APPENDIX C

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

UNITED STATES OF AMERICA, Plaintiff, v. PATRICK WAYNE MCHENRY, Defendant.	Case No. CR-21-326-RAW

INSTRUCTIONS TO THE JURY

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the court concerning the law that you are to apply to this case. In any jury trial there are, in effect, two judges. I am one of the judges, you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. I presided over the trial and decided what evidence was proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

In explaining the rules of law that you must follow, first, I will give you some general instructions which apply in every criminal case – for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then I will give you some specific rules of law that apply to this particular case and, finally, I will explain the procedures you should follow in your deliberations, and the possible verdicts you may return. These instructions will be given to you for use in the jury room.

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

INDICTMENT

The Superseding Indictment in this case is the formal method of accusing the defendant of an offense and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt. You may have a copy of the Superseding Indictment with you in the jury room.

The defendant is on trial only for the crimes charged against him in the Superseding Indictment, not for any other acts or conduct.

The Superseding Indictment in this case charges in Count One that on or about September 11, 2021, through September 13, 2021, in the Eastern District of Oklahoma and elsewhere, the defendant, Patrick Wayne McHenry, and others known and unknown to the Grand Jury, did knowingly and intentionally conspire, confederate, and agree with each other and others to commit offenses against the United States in violation of Title 18, United States Code, Section 1201(a)(1). The object of the conspiracy was to unlawfully seize, confine, inveigle, decoy, kidnap, abduct, carry away, and hold for some benefit, B.N. In order to effectuate the object of the conspiracy, the Defendants used means, facilities, and instrumentalities of interstate commerce, to wit: cellular telephones and the Internet. The overt acts alleged are listed on pages 2 – 4 of the Superseding Indictment.

The Superseding Indictment in this case charges in Count Two that on or about September 11, 2021, within the Eastern District of Oklahoma, the defendant, Patrick Wayne McHenry, did unlawfully seize, confine, inveigle, decoy, kidnap, abduct, carry away, and hold for some benefit, B.N., by using a means, facility, and instrumentality of interstate commerce, to wit: a cellular telephone and the Internet, in committing or in furtherance of the commission of the offense, in violation of Title 18, United States Code, Sections 1201(a)(1) and 2.

The Superseding Indictment in this case charges in Count Three that on or about September 12, 2021, within the Eastern District of Oklahoma, the defendant, Patrick Wayne McHenry, took and attempted to take a motor vehicle, to wit: a 2008 Subaru Outback Sport bearing Cherokee Nation plate AA9129, that had been transported, shipped, and received in interstate and foreign commerce from the person and a presence of another by force and violence, and by intimidation, with the intent to cause death and serious bodily harm in violation of Title 18, United States Code, Section 2119.

The Superseding Indictment in this case charges in Count Four that on or about September 12, 2021, within the Eastern District of Oklahoma, in Indian Country, the defendant, Patrick Wayne McHenry, a non-Indian, did by force and violence, and by intimidation, take and attempt to take items of value from the person and presence of C.J., an Indian, in violation of Title 18, United States Code, Sections 2111, 2, 1151, and 1152.

The Superseding Indictment in this case charges in Count Five that on or about September 12, 2021, within the Eastern District of Oklahoma, the defendant, Patrick Wayne McHenry, did knowingly use and carry a firearm, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Carjacking as charged in Count Three and Robbery in Indian Country as charged in Count Four, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) and 2.

The defendant has pleaded not guilty to the charges.

PRESUMPTION OF INNOCENCE—BURDEN OF PROOF—REASONABLE DOUBT

The government has the burden of proving the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

EVIDENCE - DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decisions in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decisions in any way.

EVIDENCE - DIRECT AND CIRCUMSTANTIAL - INFERENCES

There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions:

- Did the witness impress you as honest?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome in this case?
- Did the witness have any relationship with either the government or the defense?
- Did the witness seem to have a good memory?

- Did the witness clearly see or hear the things about which he or she testified?
- Did the witness have the opportunity and ability to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection or failure of recollection is not uncommon.

In reaching a conclusion on a particular point, or ultimately in reaching your verdicts in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

NON-TESTIFYING DEFENDANT

The defendant did not testify, and I remind you that you cannot consider his decision not to testify as evidence of guilt. You must understand that the Constitution of the United States grants to a defendant the right to remain silent. That means the right not to testify. That is a constitutional right in this country, it is very carefully guarded, and you must not presume or infer guilt from the fact that a defendant does not take the witness stand and testify or call any witnesses.

IMPEACHMENT BY PRIOR INCONSISTENCIES

You have heard the testimony of [redacted] and [redacted]. You have also heard that, before this trial, they made statements that may be different from their testimony here in court.

The earlier statements were brought to your attention only to help you decide how believable their testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating their testimony here in court.

IMPEACHMENT BY PRIOR CONVICTION

(Witness Other Than Defendant)

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a felony, that is a crime punishable by imprisonment for a term of years or of a crime of dishonesty or false statement. A prior conviction does not mean that a witness is not qualified to testify, but is merely one circumstance that you may consider in determining the credibility of the witness. You may decide how much weight to give any prior felony conviction or crime of dishonesty that was used to impeach a witness.

ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT

The government called as one of its witnesses an alleged accomplice, who was named as a co-defendant in the original Indictment. The government has entered into a plea agreement with the co-defendant, providing for the dismissal of some charges and a recommendation of a lesser sentence than the co-defendant would otherwise likely receive. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it. An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of an alleged accomplice may, by itself, support a guilty verdict. You should receive this type of testimony with caution and weigh it with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that testimony beyond a reasonable doubt. The fact that an accomplice has entered a guilty plea to the offense charged is not evidence of the guilt of any other person.

WITNESS'S USE OF ADDICTIVE DRUGS

The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs.

[redacted] may be considered to be abusers of drugs.

You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

EXPERT WITNESS

In some cases, such as this one, scientific, technical, or other specialized knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and the other evidence in the trial.

CAUTION—CONSIDER ONLY CRIMES CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or crime not charged in the Superseding Indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crimes charged. The fact that another person may also be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this defendant has been proved guilty of the crimes charged.

MULTIPLE COUNTS

A separate crime is charged against the defendant in each count of the Superseding Indictment. You must separately consider the evidence against the defendant on each count and return a separate verdict for each. Your verdict as to any one count, whether it is guilty or not guilty, should not influence your verdict as to any other count.

IDENTIFICATION TESTIMONY

The government must prove, beyond a reasonable doubt, that the offenses charged in this case were actually committed and that it was the defendant who committed them. Thus, the identification of the defendant as the person who committed the offenses charged is a necessary and important part of the government's case.

You should evaluate the credibility of any witness making an identification in the same manner as you would any other witness. You should also consider at least the following questions:

Did the witness have the ability and an adequate opportunity to observe the person who committed the offenses charged? You should consider, in this regard, such matters as the length of time the witness had to observe the person in question, the lighting conditions at that time, the prevailing visibility, the distance between the witness and the person observed, and whether the witness had known or observed the person before.

Is the testimony about an identification made after the commission of the crimes the product of the witness's own recollection? In this regard, you should consider very carefully the circumstances under which the later identification was made, including the manner in which the defendant was presented to the witness for identification and the length of time that elapsed between the crimes and the witness's subsequent identification.

If, after examining all of the testimony and evidence in this case, you have a reasonable doubt as to the identity of the defendant as the person who committed the offenses charged, you must find the defendant not guilty.

VOLUNTARINESS OF STATEMENT BY DEFENDANT

Evidence has been presented about a statement attributed to the defendant alleged to have been made after the commission of the crimes charged in this case but not made in court. Such evidence should always be considered by you with caution and weighed with care. You should give any such statement the weight you think it deserves, after considering all the circumstances under which the statement was made.

In determining whether any such statement is reliable and credible, consider factors bearing on the voluntariness of the statement. For example, consider the age, training, education, occupation, and physical and mental condition of the defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

After considering all the evidence, you may give such weight to the statement as you feel it deserves under all the circumstances. If you determine that the statement is unreliable or not credible, you may disregard the statement entirely.

ON OR ABOUT

You will note that the Superseding Indictment charges that the defendant committed these crimes on or about September 11, 2021, through September 13, 2021. The government must prove beyond a reasonable doubt that the defendant committed the crimes reasonably near those dates.

COUNT ONE
ESSENTIAL ELEMENTS

CONSPIRACY TO COMMIT KIDNAPPING
18 U.S.C. § 1201(c)

The defendant is charged in Count One of the Superseding Indictment with Conspiracy to Commit Kidnapping in violation of Title 18, United States Code, Section 1201(c).

This law makes it a crime to knowingly and willfully conspire, confederate, and agree with others to unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away and hold for some benefit another person and to use any means, facility, or instrumentality of interstate commerce in committing or in furtherance of the kidnapping.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt:

First: on or about September 11, 2021 through September 13, 2021, the defendant agreed with at least one other person to kidnap [redacted]

Second: the defendant knew the essential objective of the conspiracy;

Third: the defendant knowingly and voluntarily involved himself in the conspiracy;

Fourth: at least one of the conspirators engaged in at least one overt act in furtherance of the conspiracy's objective; and

Fifth: there was interdependence among the members of the conspiracy; that is, the members in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member. The evidence may show that some of the persons involved in the alleged conspiracy are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged or tried together in one proceeding.

The evidence need not show that the members entered into an express or formal agreement. Nor does the law require proof that the members agreed on all the details. But the evidence must show that the members of the alleged conspiracy came to a mutual understanding to try to accomplish a common and unlawful plan.

If you are convinced that the charged conspiracy existed, then you must next determine whether the defendant was a member of that conspiracy, that is, whether the defendant knew at least the essential goals of the conspiracy and voluntarily chose to be part of it. The law does not require proof that the defendant knew all the other members of the conspiracy or knew all the details about how activities were to be carried out. A person may belong to a conspiracy for a brief period of time or play a minor roll. On the other hand, proof is not sufficient if it merely shows that the defendant knew about the existence of the conspiracy or was associated with members of the conspiracy. Rather, the evidence must show that the defendant knowingly joined the conspiracy with the intent to advance its purposes.

An "overt act" is a substantial step toward committing the kidnapping. Mere preparation is not a substantial step. The government must prove that at least one member of the conspiracy, with the intent of committing kidnapping, did some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission of kidnapping.

You are also required to find that interdependence existed among the members of the conspiracy. This means that the members intended to act for their shared mutual benefit. To satisfy this element, you must conclude that the defendant participated in a shared criminal purpose and that his actions constituted an essential and integral step toward the realization of that purpose.

An "instrumentality of interstate commerce" includes a cell phone and the Internet.

COUNT TWO
ESSENTIAL ELEMENTS

KIDNAPPING
18 U.S.C. §§ 1201(a)(1) & 2

The defendant is charged in Count Two of the Superseding Indictment with Kidnapping in violation of Title 18, United States Code, Sections 1201(a)(1) and 2.

This law makes it a crime to unlawfully kidnap another person and then transport that person in interstate commerce.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: on or about September 11, 2021, the defendant, knowingly acting contrary to law, kidnapped [redacted] by seizing, confining, abducting, or carrying her away;

Second: the defendant kidnapped [redacted] for some purpose or benefit;

Third: the defendant willfully transported [redacted] and

Fourth: the transportation used any means, facility, or instrumentality of interstate commerce in committing or in furtherance of the kidnapping.

To "kidnap" a person means to unlawfully hold, keep, detain, and confine the person against that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.

In the third element, the term "willfully" means that the defendant acted voluntarily and with the intent to violate the law.

An "instrumentality of interstate commerce" includes a cell phone and the Internet.

COUNT THREE
ESSENTIAL ELEMENTS

CARJACKING
18 U.S.C. § 2119

The defendant is charged in Count Three of the Superseding Indictment with Carjacking in violation of Title 18, United States Code, Section 2119.

This law makes it a crime to take or attempt to take from a person or the presence of another person by force and violence, or by intimidation, a motor vehicle that has moved in interstate commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: on or about September 12, 2021, the defendant took or attempted to take a 2008 Subaru Outback Sport bearing Cherokee Nation plate AA9129 from a person or the presence of another person, namely, [redacted]

Second: the defendant did so by means of force and violence or intimidation;

Third: the motor vehicle had been transported, shipped, or received in interstate commerce; and

Fourth: the defendant intended to cause death or serious bodily harm.

You are instructed that conditional intent is sufficient to satisfy the fourth element. In other words, in a carjacking case in which the driver surrendered or otherwise lost control over his car without the defendant attempting to inflict, or actually inflicting, serious bodily harm, the government must prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car.

"Serious bodily injury" means injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

COUNT FOUR
ESSENTIAL ELEMENTS

ROBBERY IN INDIAN COUNTRY
18 U.S.C. §§ 2111, 2, 1151, & 1152

The defendant is charged in Count Four of the Superseding Indictment with Robbery in Indian Country in violation of Title 18, United States Code, Sections 2111, 1, 1151, and 1152.

This law makes it a crime to take or attempt to take anything of value from the person or presence of another, by force and violence, or by intimidation within the territorial jurisdiction of the United States.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: on or about September 12, 2021, the defendant took or attempted to take anything of value;

Second: from the person or presence of another, namely, [redacted]

Third: by force and violence, or by intimidation;

Fourth: the robbery occurred within Indian Country in the Eastern District of Oklahoma, which is within the territorial jurisdiction of the United States;

Fifth: the defendant is not an Indian; and

Sixth: [redacted] is an Indian.

To take "by means of intimidation" is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of the thing of value accompanied by intentional, intimidating behavior by the defendant.

You are instructed that an Indian is a person who has some degree of Indian blood and is a member of a federally recognized Indian tribe.

You are instructed that the court has taken judicial notice, that is, the court has determined that the location of the alleged robbery – the Motel 6 located at 903 S. 32nd in Muskogee, Oklahoma – is within the boundaries of the Muscogee (Creek) Nation Reservation in the Eastern District of Oklahoma and is therefore within the territorial jurisdiction of the United States. You may or may not accept this noticed fact as conclusive.

COUNT FIVE
ESSENTIAL ELEMENTS

USE AND CARRY A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE 18 U.S.C. §§ 924(c)(1)(A)(i) & 2

The defendant is charged in Count Five of the Superseding Indictment with Using and Carrying a Firearm During and in Relation to a Crime of Violence in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) and 2.

This law makes it a crime to use and/or carry a firearm during and in relation to any crime of violence for which a person may be prosecuted in a court of the United States.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: on or about September 12, 2021, the defendant committed a crime of violence, specifically Carjacking as alleged in Count Three of the Superseding Indictment and/or Robbery in Indian Country as alleged in Count Four of the Superseding Indictment;

Second: the defendant knowingly used or carried a firearm;

Third: during and in relation to Carjacking and/or Robbery in Indian Country.

You are instructed that the crime charged in Count Three of the Superseding Indictment, Carjacking, is a crime of violence.

You are instructed that the crime charged in Count Four of the Superseding Indictment, Robbery in Indian Country, is a crime of violence.

The phrase "during and in relation to" means that the firearm played an integral part in the underlying crime, that is, it had a role in, facilitated (i.e., made easier), or had the potential of facilitating the underlying crime.

A defendant knowingly "uses" a firearm when it (1) is readily accessible and (2) is actively employed during and in relation to the underlying crime.

A defendant knowingly "carries" a firearm when he (1) possesses the firearm through the exercise of ownership or control and (2) transports or moves the firearm from one place to another.

In determining whether the defendant knowingly used or carried a firearm during and in relation to the underlying crime, you may consider all of the facts received in evidence including the nature of the crime, the usefulness of a firearm to the crime, the extent to which a firearm actually was observed before, during and after the time of the crime, and any other facts that bear on the issue.

A firearm plays an integral part in the underlying crime when it furthers the purpose or effect of the crime and its presence or involvement is not the result of coincidence. The government must prove a direct connection between the defendant's use or carrying of the firearm and the underlying crime, but the crime need not be the sole reason the defendant used or carried the firearm.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

SPECIAL VERDICT INSTRUCTIONS

You will see on the verdict form an additional question regarding Count Five. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in Count Five. If you find the defendant guilty of Count Five, you must specify in which way you find that the defendant used the firearm beyond a reasonable doubt – by using it and/or carrying it. Your verdict must be unanimous.

AID AND ABET
18 U.S.C. § 2(a)

Counts Two, Four, and Five of the Superseding Indictment also charge a violation of 18 U.S.C. section 2, which provides that: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This law makes it a crime to intentionally help someone else commit a crime. To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: every element of the charged crimes, as outlined in Counts Two, Four, and Five, was committed by someone other than the defendant, and

Second: the defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

The defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

INTERSTATE AND FOREIGN COMMERCE—DEFINED

18 U.S.C. § 10

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

ACTUAL OR CONSTRUCTIVE POSSESSION

A person who, although not in actual possession, knowingly has the power and intent at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.

More than one person can be in possession of an object if each knows of its presence and has the power and intent to control it.

In the situation where the object is found in a place (such as a room or car) occupied by more than one person, you may not infer power and intent to exercise control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation, the government must prove some connection between the particular defendant and the object demonstrating the power and intent to exercise control over the object.

CAUTION - PUNISHMENT

If you find the defendant guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

A JURY'S DUTY TO DELIBERATE

It is your duty, as jurors, to talk with one another and to deliberate in the jury room. You should try to reach an agreement if you can. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you are wrong. But do not give up your honest beliefs solely because the others think differently, or merely to get the case over with. Your only interest is to determine whether the government has proven the defendant guilty beyond a reasonable doubt.

The decision you reach in the jury room must be unanimous. You must all agree. Your deliberations will be secret. You will never have to explain your verdicts to anyone.

VERDICTS

If you find from the evidence in this case and under these instructions, beyond a reasonable doubt, that the defendant is guilty of the crimes charged against him in this case, then you should find him guilty. If, however, you do not so find, or if you entertain a reasonable doubt as to the guilt of the defendant of the crimes charged against him, then you should find him not guilty.

The court will furnish you a verdict form for your use in this regard. It is simply the written notice of the decision that you reach in this case.

CLOSING

You are the judges of the facts, the weight of the evidence, and the credibility of the witnesses. From all the facts and circumstances appearing in evidence and coming to your observation during the trial and aided by the knowledge which you each possess in common with other persons, you will reach your conclusions.

These instructions contain all the law, whether statutory or otherwise, to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You will not use any method of chance in arriving at your verdicts, but will base your verdicts on the judgment of each juror concurring therein.

SELECTION OF FOREPERSON, COMMUNICATION WITH THE JUDGE, VERDICT FORM

When you go to the jury room to begin considering the evidence in this case, I suggest you first select one of the members of the jury to act as your foreperson. This person will help guide your discussions in the jury room.

Once you are there, do not speak to anyone not a member of the jury. This includes the bailiff. Do not speak to the bailiff or anyone else. You should only communicate with me, and you should communicate with me only by a written message. Simply give the written message to the bailiff, and he will bring the message to me. You will have a form in the jury deliberation room for this purpose.

Please understand that when you send me a written message, I am obligated, in most instances, to call in the lawyers to discuss an appropriate response. Therefore, you should remember a couple of things. First, do not put in the message how you stand as to your verdict. For instance, if you are split "6-6" or "8-4" – do not tell me that in your note. Second, because I will need to discuss an appropriate response to your message with the lawyers, you should not expect an immediate response. We will respond as quickly as possible, but you should not stop your deliberations while awaiting a response.

Often your message will be a question about the law or the evidence. Ninety percent of the time, after I have consulted with counsel, the response I give to your question is: "You have all of the law and evidence necessary for you to reach your verdicts." I'm telling you this now, not to discourage you from sending me a written question, but so that you will not be surprised or annoyed at the answer you ultimately receive.

There are a few messages I might receive from you that I will act on without asking for input from the lawyers. Usually that message involves jurors who want to go outside to smoke. If any of you need to go smoke during deliberations, I will give my approval without consulting counsel. But you must remember that you can only deliberate when all of you are together. When smokers leave the deliberation room, the remaining jurors must stop deliberating. Likewise, the smokers cannot deliberate among themselves while they are smoking.

When I send you a written message back, please keep it in this instruction book and bring it back with you when you have reached your verdict.

As I have mentioned, the decision you reach must be unanimous. You must all agree. When you have reached a decision, have the foreperson fill in the verdict form, date it and sign it. Then give the bailiff a note to me indicating you have reached your verdict.

The bailiff will come forward to be sworn.

Dated this 21 day of December, 2022.

Ronald A. White
HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

APPENDIX D

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
)
-v-) Case No.
) 21-CR-326-RAW
)
PATRICK WAYNE McHENRY,)
a/k/a Savage,)
)
Defendant.)

JURY TRIAL
VOLUME III
BEFORE THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

DECEMBER 21, 2022

SHELLEY OTTWELL, RPR, CSR
United States Stenographer
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firearm when he, one, possesses the firearm through the exercise of ownership and control -- through the -- I'm sorry. Through the exercise of ownership or control and, two, transports or moves the firearm from one place to another.

The defendant possessed the sawed-off shotgun for the entire relevant period from the time that he was at the house at Inman Street until he was arrested at the Tulsa Inn & Suites. That's where that firearm was ultimately found. That's where those pictures were taken. He had it with him in the Honda at the Motel 6. That was the defendant's firearm. He possessed it. He owned it. He controlled it, and he also transported it. He transported it from Inman to Motel 6, the house in Braggs, and then back up to Tulsa.

The third element provides that this was carried during and in relation to carjacking and robbery in Indian country. And the instructions provide that the phrase "during and in relation to" means that the firearm plays an integral role in the underlying crime, that is, it has a role in, it facilitated, i.e., it made easier or had the potential of facilitating the underlying crime. That sawed-off shotgun at the very least had the potential of facilitating the underlying crimes, the robbery, the carjacking. It was right there available to the defendant. If he needed to make sure that Charles Jarman was going to give him what he wanted. The defendant threatened Jarman with bodily harm, death, blow his head off, among other things. The defendant had told Britney that if she gave him the wrong room number that he would kill her. These threats could have became more than just threats. Simply retrieving that sawed-off shotgun from that Honda, the defendant carried the sawed-off shotgun during and in relation to carjacking and robbery in Indian country.

Now I suspect defense counsel is going to come up here and he's going to argue that everyone was high, they didn't don't know what they were doing. They don't remember what happened. It's drug-induced psychosis, whatever that means. Whatever did happen was consensual. That simply doesn't make sense.

Some of the players here that you heard from, they didn't know each other before this happened. Some of them had never even seen each other before or there was no pre-existing friendship. Ashton and Britney weren't friends. Ashton was with the

MS. CORNELL: No, your Honor.

THE COURT: Mr. Hilfiger?

MR. HILFIGER: No, your Honor.

THE COURT: All right. Mr. McHenry, you're remanded to the custody of the Marshals, sir. Thank you.

(Off the record at 3:50 p.m.)

* * * *

C E R T I F I C A T E

I, Shelley Ottwell, Registered Professional Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in the above-captioned case.

I further certify that I am not employed by nor related to any party to this action, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of May, 2023.

s/Shelley Ottwell
SHELLEY OTTWELL, RPR, CSR
United States Court Reporter