No. 17-10749

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TROY MARKEITH GRIFFIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:15-cr-453, Hon. Mary S. Scriven

APPELLANT'S BRIEF OF TROY MARKEITH GRIFFIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Allen, Adam Benjamin – Assistant Federal Public Defender;
3. Anderson, Howard C. – Assistant Federal Public Defender;
4. Armsden, Kenneth – Victim;
5. Bayer, Steven – Victim;
6. Bentley, III, A. Lee – Former United States Attorney;
7. Burns, P.A. – Appellate counsel for Defendant-Appellant;
8. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
9. Candela, Anthony Michael – Trial counsel for Defendant Tevin Jamar Marketh Major;
10. Candela Law Firm, P.A. – Trial counsel for Defendant Tevin Jamar Marketh Major;
11. Carr, Jason – Victim;
12. Coleman, Kenni – Victim;
13. Crawford, Stephen M. – Trial counsel for Craig Demetrio Koonce;
14. Dugan, Ramona – Victim;
15. Elm, Donna – Federal Public Defender;
16. Gammons, Carlton Curtiss – Assistant United States Attorney;

17. Griffin, Troy Markeith – Defendant-Appellant;

18. Griffin, Jr., Troy Markeith – Defendant;

19. Koonce, Craig Demetrio – Defendant;

20. Law Office of Ray Christopher Lopez – Trial counsel for Defendant-Appellant;

21. Lopez, Ray Christopher – Trial counsel for Defendant-Appellant;

22. Love, Samuel – Claimant;

23. Maier, Elizabeth – Victim;

24. Major, Tevin Jamar Marketh – Defendant;

25. Merkley, Kathy – Victim;

26. Minardi, Richard Charles – Trial counsel for Defendant Craig Demetrio Koonce;

27. Muench, James A. – Assistant United States Attorney;

28. Muldrow, W. Stephen – Acting United States Attorney;

29. Pizzo, Hon. Mark A. – United States Magistrate Judge;

30. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

31. Richard C. Minardi, P.A. – Trial counsel for Craig Demetrio Koonce;

32. Roberts, Juwaan – Defendant;

33. Sansone Law, P.A. – Trial counsel for Defendant Troy Markeith Griffin, Jr.;

34. Sansone, William Fargo – Trial counsel for Defendant Troy Markeith Griffin, Jr.;

35. Scriven, Hon. Mary S. – United States District Judge;

36. Twin Horse Saloon – Victim;

37. Waterman, David C. – Assistant United States Attorney, Appellate Division; and

38. Wilson, Hon. Thomas G. – United States Magistrate Judge.

No publicly traded company or corporation has an interest in the outcome of this appeal.

August 21, 2017

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Troy Markeith Griffin does not request oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Mr. Griffin was indicted (Doc. 1) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and authority to examine the sentence under 18 U.S.C. § 3742(a) because the District Court entered a final judgment on February 10, 2017 (Doc. 234), which Mr. Griffin timely appealed on February 16, 2017 (Doc. 236).

STATEMENT OF THE ISSUES

1. Was the jurisdictional nexus evidence sufficient?

2. Did the District Court commit procedural error at sentencing when it overruled an objection to a two-point obstruction enhancement?

STATEMENT OF THE CASE

Course Of Proceedings

A. Indictment

A grand jury returned a three-count indictment charging Troy Markeith Griffin and four other defendants with the following offenses committed on or about October 8, 2015:

> **Count One:** Conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);
>
> **Count Two:** Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and 2; and
>
> **Count Three:** Knowingly using, carrying, and brandishing a firearm during and in relation to a Hobbs Act robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 2.

Doc. 1 at 1-3. The other four defendants pled guilty pursuant to plea agreements. Docs. 43; 48; 99; 117. Mr. Griffin pled not guilty. Doc. 72.

B. Pretrial Motions

Mr. Griffin adopted motions to dismiss Count Three because the underlying statute was void for vagueness. Docs. 91; 94; 97; 111; 114.

The Government opposed. Doc. 112. They were denied. Docs. 102; 115. Mr. Griffin also moved in limine to exclude evidence about other robberies he and the four other defendants had allegedly carried out in Manatee County, Florida. Doc. 135. The Government opposed. Doc. 140. It was denied. Doc. 154.

C. Trial

The case was tried to a jury for two days. Docs. 169; 171; 177. During trial, Mr. Griffin orally moved for judgment of acquittal at the close of the Government's case. Doc. 253 at 154-159. It was denied. Doc. 253 at 159-161, 163-164. After the two-day trial, the jury returned guilty verdicts on all counts. Docs. 177; 179.

D. Sentencing

After overruling an objection to a two-point obstruction of justice enhancement, the District Court sentenced Mr. Griffin to 294 months' imprisonment, consisting of concurrent 210-month terms on Counts One and Two and a consecutive 84-month term on Count Three. Doc. 247 at 34-35. It also ordered Mr. Griffin to pay $695.50 in restitution. Doc. 247 at 36. He is currently incarcerated in state custody until November 20, 2018, at which point he will transfer to federal custody.

Statement Of Facts

A. Trial

1. The Robberies

Viewed in the light most favorable to the verdict, the testimony and evidence at trial established that Mr. Griffin and four other defendants robbed the Twin Horse Saloon and led police on a high speed chase. *See* Docs. 252 at 120-239; 253 at 11-21, 40-149. The details are as follows:

Mr. Griffin drove the group from Bradenton, Florida to Saint Petersburg, Florida. *E.g.*, Doc. 253 at 54. During the drive, two firearms were in Mr. Griffin's plain view. *E.g.*, Doc. 253 at 54. Mr. Griffin came up with the idea of the robbery, selected the Twin Horse Saloon, gave the four other defendants t-shirts to cover their faces, and gave them a walkie-talkie to communicate with him. *E.g.*, Doc. 253 at 53-57. While Mr. Griffin waited in the getaway car, the other four defendants entered the Twin Horse Saloon, brandished firearms, struck two victims with a pool cue stick, and absconded with $695.50 in cash from the register and two other victims. *E.g.*, Doc. 253 at 56-57.

As the group was leaving, police immediately spotted them. *E.g.*, Doc. 253 at 57. A high-speed chase ensued, which culminated in police executing a Precision Immobilization Technique ("PIT") maneuver to stop the fleeing car. *E.g.*, Doc. 253 at 57-58. The other four defendants fled on foot while Mr. Griffin waited in the car. *E.g.*, Doc. 253 at 58-59. Police arrested Mr. Griffin and the other defendants. *See* Doc. 252 at 195-196.

2. The Jurisdictional Nexus

To establish the jurisdictional nexus, the Government introduced testimony from the Twin Horse Saloon's owner and an employee from its beer distributor. Doc. 253 at 23-38.

David Brooks worked for a beer distributor headquartered in Jupiter, Florida. Doc. 253 at 23. In Florida, it had warehouses in Tampa and Fort Myers, a cross stock operation in Fort Pierce, and an office in Sebring. Doc. 253 at 23. It also had a distribution center in Minneapolis, Minnesota. Doc. 253 at 23. The beer distributor had approximately 11,000 active customers in Florida, such as Publix, Total Wines, Sam's Club, small restaurants, and so forth. Doc. 253 at 24.

As director of purchases, Mr. Brooks purchased beer from suppliers, such as Miller Brewing Company, Heineken, Guinness, and Yuengling, then distributed them to customers. Doc. 253 at 24-25. Through Mr. Brooks, the Government introduced into evidence three invoices (U.S. Ex. 23) issued from the beer distributor to the Twin Horse Saloon. Doc. 253 at 26-27.

The first invoice, dated May 8, 2015, indicated the Twin Horse Saloon purchased Coors Light, Heineken, and Miller Lite. Doc. 253 at 28; U.S. Ex. 23 at 1. The second invoice, dated December 26, 2014, indicated the Twin Horse Saloon purchased Coors Light, Heineken, Miller High Life, and Miller Lite. Doc. 253 at 28; U.S. Ex. 23 at 2. The third invoice, dated October 24, 2014, indicated the Twin Horse Saloon purchased Coors Light and Miller Lite. Doc. 253 at 29; U.S. Ex. 23 at 3. Mr. Brooks confirmed the Coors Light, Miller Lite, and Heineken was brewed outside of Florida. Doc. 253 at 29-30.

The prosecutor did not ask, however, how these invoices (dated May 8, 2015, December 26, 2014, and October 24, 2014) related to the robbery committed at least five months later on October 8, 2015. *See* Doc. 252 at 122. Nor did the prosecutor ask why the upper left-hand

corner of each invoice was dated September 30, 2017 (a date that still has not yet occurred as of the time of filing this brief). On cross-examination, Mr. Brooks testified that he "believe[d]" his beer distributor still sold "items" to the Twin Horse Saloon. Doc. 253 at 32. Mr. Brooks did not, however, testify that those "items" included beers brewed outside Florida. *See* Doc. 253 at 32.

Albert Velocci, the owner of the Twin Horse Saloon, testified that during the past 11 years, he had purchased beers, such as "Miller, Miller Lite, Coors, [and] Coronas," from the beer distributor. Doc. 253 at 35-36. He did not, however, testify that he continued to purchase those particular beers from the beer distributor. *See* Doc. 253 at 35-36. On redirect, Mr. Velocci testified that "the money that was stolen during th[e] robbery[] would … have been used in furtherance of [his] business." Doc. 253 at 38. At no point, however, did Mr. Velocci testify that the Twin Horse Saloon was engaged in interstate commerce or that it purchased fewer beers from his beer distributor as a result of the robbery.

3. The Obstruction Testimony

Juwaan Roberts, one of Mr. Griffin's co-defendants who testified against him pursuant to a plea agreement, explained that he had writ-

ten a false affidavit retracting the information he had against Mr. Griffin. Doc. 253 at 59-60. Although Mr. Roberts wrote the letter of his "own free will," he also explained he had been "under a lot of pressure" because "people" were "saying how bad it could be on me and my family" if he testified against Mr. Griffin. Doc. 253 at 59-60. By that, Mr. Roberts meant he "could be like beat up in prison or some things could happen to my family." Doc. 253 at 60. This worried Mr. Roberts and went into his thinking in drafting the affidavit. Doc. 253 at 60. Mr. Roberts did not, however, identify who the "people" were or who had sent them. *See* Doc. 253 at 59-60.

On cross-examination, Mr. Roberts confirmed Mr. Griffin was not one of the "people" who told him to sign the affidavit. Doc. 253 at 64. On redirect, however, Mr. Roberts stated that although he did not know the person who urged him to sign the affidavit, he believed "*[t]o [his] knowledge*" that person knew Mr. Griffin and was acting on his behalf. *See* Doc. 253 at 72 (emphasis added). Mr. Roberts did not elaborate the basis for his "knowledge." *See* Doc. 253 at 72.

B. The Obstruction-Of-Justice Enhancement

Probation calculated a two-level enhancement pursuant to U.S.S.G. §3C1.1 for obstruction of justice based on the following facts:

> Codefendant Juwaan Roberts testified at trial that he was approached and intimidated in the jail causing him to write a letter exonerating the defendant. Mr. Roberts was also provided the defendant's attorney's contact information to send the letter to. Based upon this information, there is a preponderance of evidence to suggest that the defendant sent this individual to intim[id]ate Mr. Roberts.

Doc. S227 at 7. In supporting this enhancement, the prosecutor relied on the wrong evidentiary standard when she contended Mr. Roberts's testimony established "more than enough *probable cause* to believe this person was sent by the defendant." Doc. S227 at 29 (emphasis added).

At sentencing, Mr. Griffin reiterated his objection to this enhancement. Doc. 247 at 6-8. In response, the prosecutor explained, "The letter itself is the evidence of the obstruction." Doc. 247 at 8. The District Court asked, "What is the evidence tying the defendant to this directive?" Doc. 247 at 8. The prosecutor responded, "I think the evidence is made through *inference* that he is the person that would have benefited from that, he is the person that would have wanted that, it bene-

fited him solely, it exonerated him solely." Doc. 247 at 9. Based on that explanation, the District Court found:

> it is more likely than not that the defendant was the source of the procurement of this affidavit and that in securing someone to act as his ombudsman to get this affidavit, he did place the co-defendant, Juwaan Roberts, in a position of fear and concern for his family, which is by extension fear for himself, and so the Court would find the adjustment for obstruction of justice as it relates to paragraph 25 in addition to the 24, two levels to be appropriately applied in this case.

Doc. 247 at 17.

Later, the District Court briefly recessed the proceedings to review Mr. Roberts's trial testimony. Doc. 247 at 34. After doing so, the District Court confirmed its recollection of Mr. Roberts's testimony:

> THE COURT: The Court has confirmed its recollection of the testimony of Mr. Roberts. He was cross-examined and indicated, by reading of the letter, that he was saying in the letter that he was making the statements of his own free will, but on direct and redirect he testified that he felt in fear of his safety in prison, the safety of his family members, and on redirect testified that he *believed* that the letter was procured by someone acting on Mr. Griffin's behalf and for Mr. Griffin's benefit, and that he was directed to send the letter by this person to Mr. Griffin's attorney. So the Court stands by its initial ruling with respect to the obstruction offense or enhancement.

Doc. 247 at 34 (emphasis added).

Given this two-level enhancement, Mr. Griffin scored out at criminal history category VI and level 30. Doc. S227 at 7-16. Accordingly, Mr. Griffin's guidelines range was 168-210 months' imprisonment for Counts One and Two to be followed by 84 months' imprisonment on Count Three. Doc. S227 at 22. Had the District Court sustained Mr. Griffin's objection, his guidelines range for Counts One and Two would have been 140-175 months' imprisonment. *See* U.S.S.G. § 5A.

Standard Of Review

1. Sufficiency is reviewed de novo. *United States* v. *Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013).

2. Sentences are reviewed for abuse of discretion, reviewing factual questions for clear error and legal questions de novo. *United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc).

SUMMARY OF THE ARGUMENT

1. The jurisdictional nexus evidence was insufficient. The invoices from the beer distributor to the Twin Horse Saloon predated the robbery by five months or more, so any effect on interstate commerce was too speculative and indirect.

2. The District Court committed procedural error at sentencing when it overruled an objection to a two-point obstruction enhancement. Other than Mr. Roberts's speculative belief, no evidence showed Mr. Griffin sent "people" to urge Mr. Roberts to sign a false affidavit.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE JURISDICTIONAL NEXUS EVIDENCE WAS INSUFFICIENT

The Government introduced insufficient evidence to establish the jurisdictional nexus for conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and brandishing a firearm in relation thereto.

"The Hobbs Act prohibits robbery or extortion, and attempts or conspiracies to commit robbery or extortion, that 'in any way or degree obstruct, delay, or affect commerce or the movement of any article or commodity in commerce.'" *United States* v. *Diaz*, 248 F.3d 1065, 1084 (11th Cir. 2001). "Proof of a connection to interstate commerce is a jurisdictional prerequisite to a Hobbs Act conviction." *United States* v. *Frost*, 61 F.3d 1518, 1524 (11th Cir. 1995) (reversing Hobbs Act convictions for lack of jurisdictional nexus).

To satisfy the jurisdictional nexus, a Hobbs Act conspiracy "requires proof that defendants' scheme would have affected interstate

commerce," whereas a substantive Hobbs Act violation "requires an actual effect on interstate commerce." *Diaz*, 248 F.3d at 1084. But "the requisite effect on interstate commerce need not be substantial—all that is required is minimal impact." *Id.* And "the effect on interstate commerce is not limited to only adverse effects." *Id.* But a "speculative, indirect effect on a business engaged in interstate commerce" is insufficient. *Id.* at 1089.

There was insufficient evidence regarding the jurisdictional nexus. It does "not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Rather, the question is "whether a reasonable juror could have reached a conclusion of guilt beyond a reasonable doubt." *United States* v. *Faust*, 456 F.3d 1342, 1345 (11th Cir. 2006). Here, the invoices predated the robbery by five months or more, and there was no testimony that the Twin Horse Saloon was itself engaged in interstate commerce or had continued to order beers that were brewed outside Florida. Accordingly, because the jurisdictional nexus is an essential element of all three crimes charged, the judgment must be reversed on all three counts.

II. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT OVERRULED AN OBJECTION TO A TWO-POINT OBSTRUCTION-OF-JUSTICE ENHANCEMENT

The District Court also committed procedural error when it overruled Mr. Griffin's objection to a two-point obstruction of justice enhancement. There is no dispute that the false affidavit itself was obstructive. Instead, the dispute is whether Mr. Griffin was responsible for sending "people" to encourage Mr. Roberts to send the obstructive affidavit.

A district court must "make *independent* findings establishing the factual basis for its Guidelines calculations." *United States* v. *Hamaker*, 455 F.3d 1316, 1338 (11th Cir. 2006) (emphasis in original). In making such findings, "speculat[ion] about the existence of facts" is "forbidden." *United States* v. *Stein*, 846 F.3d 1135, 1152, 1154 (11th Cir. 2017). The factual finding that Mr. Griffin was responsible for sending "people" to encourage Mr. Roberts to send the obstructive affidavit was not an appropriate inference based on circumstantial evidence; rather, it was nothing more than the District Court's speculation based on Mr. Roberts's "belie[f]" that he had done so. Doc. 247 at 34.

Simply put, a district court's speculation stacked on a witness's belief is insufficient to support a guidelines calculation. *See Hamaker*, 455 F.3d at 1338; *Stein*, 846 F.3d at 1154. The judgment must be vacated and remanded for resentencing without the two-point obstruction enhancement pursuant to the sentence package doctrine. *United States* v. *Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014) ("sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the 'sentence package'—that reflects the guidelines and the relevant § 3553(a) factors").

CONCLUSION

The Court should reverse the judgment or vacate it and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,728 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

August 21, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 21st day of August, 2017, to:

David J. Smith, Clerk of Court
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56 Forsyth Street N.W.
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 21st day of August, 2017, to:

United States

AUSA David C. Waterman

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 21st day of August, 2017, to:

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