No. 09-30395

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

RICHARD C. ARMSTRONG,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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SENTENCING GUIDELINES:

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STATEMENT OF JURISDICTION AND BAIL STATUS

Defendant was indicted in the District of Idaho under 18 U.S.C. 241, 18 U.S.C. 245, and 18 U.S.C. 2. R. 1; ER 199.[1] The district court had jurisdiction

[1] "Br. _" refers to defendant's opening brief. "ER _" refers to defendant's excerpts of record filed with his opening brief. "Sealed ER _" refers to the defendant's excerpts of record filed as a separate volume under seal. "SER _" refers to the government's supplemental excerpts of records. "Tr. _" refers to the transcripts of the trial and sentencing. "Police Tr. _" refers to the transcript of

(continued…)

under 18 U.S.C. 3231. It entered judgment on November 3, 2009 and amended judgment on November 5, 2009. ER 7; R. 237, 243. Armstrong filed a timely notice of appeal on November 6, 2009. ER 3; R. 239. This Court has jurisdiction under 28 U.S.C. 1291. Defendant is serving a 46-month sentence. ER 8; R. 243. His projected release date is August 1, 2012. Br. 4.

ISSUES PRESENTED

1. Whether the court abused its discretion in imposing a three-level upward adjustment under U.S.S.G. 3A1.1(a) because the jury found defendant assaulted Raylen Smith on account of his race.

2. Whether the court clearly erred in finding defendant perjured himself at trial, requiring an upward adjustment under U.S.S.G. 3C1.1 for obstruction of justice.

3. Whether Armstrong's sentence at the low end of the guidelines range is unreasonable.

STATEMENT OF THE CASE

Armstrong was indicted for his participation in beating Raylen Smith, an African-American shopper he encountered at Wal-Mart. Armstrong and three codefendants were charged with conspiring to threaten and intimidate Smith, on

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(continued…)
Armstrong's August 18, 2008 interview with police. "R. _" refers to documents filed with the district court by docket number.

account of his race, in his use of a place of public accommodation in violation of 18 U.S.C. 241 (Count One). R. 1; ER 199. The defendants were also charged with using force to intimidate and interfere with Smith's right to enjoy a place of public accommodation because of his race, while aiding and abetting each other in violation of 18 U.S.C. 245 and 18 U.S.C. 2 (Count Two). R. 1; ER 199. Coconspirators James Whitewater, Jennifer Hartpence, and Michael Bullard were indicted with Armstrong. Whitewater pled guilty to Count One. R. 120 at 1-2. The court dismissed the charges against Hartpence at the close of the government's case. R. 193; Tr. 549.

The jury convicted Armstrong and Bullard on both counts. R. 174. At sentencing, the court imposed a two-level upward departure under U.S.S.G. 3C1.1 for Armstrong's false testimony at trial and a three-level upward departure under U.S.S.G. 3A1.1(a) for his racial motivation in attacking Smith. Sentencing Tr. 38, 45; ER 56, 63. It sentenced him to 46 months in prison. ER 8, 64; R. 243; Sentencing Tr. 46.

STATEMENT OF THE FACTS

1. The Attack On Raylen Smith

On the Fourth of July, 2008, shortly after midnight, Raylen Smith went to Wal-Mart in Nampa, Idaho, to buy some milk. Tr. 45; ER 176. While in the milk aisle, he noticed three strangers talking amongst themselves. Tr. 56-57; ER 178-

179. The men were James Whitewater, Michael Bullard, and Richard Armstrong, three friends who had met in prison and who, after a night of drinking and drug use, had come to Wal-Mart to buy orange juice for mixed drinks. Tr. 56, 164, 201, 214, 890; ER 79, 141, 150, 153, 178. When they saw Smith, Bullard said "It's a fucking nigger." Tr. 166; ER 141. Smith did not speak to the group and did not hear what they said. Tr. 57; ER 179. As Armstrong, Bullard, and Whitewater walked to the checkout stand, Bullard said he was going to beat up Smith. Tr. 168; ER 142. Armstrong taunted Bullard, telling him Smith was bigger, expressing doubt Bullard could beat him up, and "egging him on." Tr. 168-169, 264; ER 142, 166. Armstrong referred to Smith as a "nigger" and asked Bullard if he wanted help in the attack. Tr. 168-169; ER 142. Whitewater laughed at the conversation, and chimed in: "Fuck that nigger." Tr. 169; ER 142.

The group got in line at the check stand and Smith got in line behind them. Tr. 58, 170; ER 142, 179. Smith noticed Bullard staring at him in a way he "thought * * * was kind of strange." Tr. 59; ER 179. It was an "evil stare." Tr. 117; ER 194.

Bullard, Whitewater, and Armstrong purchased the juice and walked towards the exit. They met up with Bullard's girlfriend, Jennifer Hartpence, and resumed their conversation about attacking the "nigger." Tr. 170-171; ER 142. Once outside the store, Bullard prepared himself for the assault by taking off his

shirt and his watch and passing the items — along with his cigarettes and wallet — to Hartpence for safekeeping. Tr. 173-174, 920-921, 925; ER 87, 143; SER 22. Armstrong handed his two jugs of orange juice to Hartpence. Tr. 175; ER 143. The group stood outside and waited for Smith to pass. Tr. 61; ER 180. Bullard paced and smoked a cigarette. Tr. 925; SER 22. The men continued to talk about Smith using racial slurs and to discuss beating him. Tr. 175-176; ER 143-144. Hartpence told Bullard "[t]hat would be hot." Tr. 174; ER 143.

Smith emerged and the others yelled at Bullard to let him know Smith was coming. Tr. 177; ER 144. Smith had to pass near the group to reach the parking lot. Tr. 63; ER 180. As he did, he said to Bullard "What's up?" Tr. 63; ER 180. Bullard responded, "What's up?" and Smith kept walking. Bullard flicked his cigarette and asked Smith "Do you know what country you're in?" Tr. 64, 97, 179, 927; ER 180, 189, 144; SER 23. Smith turned to Bullard, "surprised that he had said that." Tr. 64; ER 180. Then he began to back away, afraid that he "was going to get jumped." Tr. 64; ER 180. He turned and fled across the parking lot. Tr. 64; ER 180. The three men chased him, and Armstrong yelled "Get him. Get that fucking nigger." Tr. 65, 108, 178; ER 144, 181, 191.

As he reached the end of the parking lot, Smith realized he could not escape and turned around. Bullard tackled him, knocking him to the ground and into a nearby ditch. Tr. 66; ER 181. Smith realized he "should probably defend

[him]self," and head-butted and punched Bullard. Tr. 65; ER 181. Bullard put his head down to ward off the blows but kept Smith pinned to the ground and continued to punch him. Tr. 65, 67, 126; ER 181, 196. Armstrong ran up to Smith from the right and began punching and kicking him where he lay. Tr. 65, 180; ER 181, 145. Whitewater joined in by kicking Smith. Tr. 181; ER 145. During the attack Smith felt "very scared" and "thought for sure I was going to either die or something * * * because that had never happened to me before." Tr. 69; ER 182. Whitewater observed Smith simply "laying there" as the three struck him. Tr. 270; ER 167. At some point during the attack, Smith became unconscious. Tr. 69; ER 182. When Whitewater saw a group of people approaching from the parking lot, he pulled Bullard off Smith and said, "Let's * * * go." Tr. 183, 272; ER 145, 168. He observed that Smith was not moving or talking. Tr. 272; ER 168. Before leaving, Armstrong took one last kick at Smith's glasses, which had fallen off when Bullard tackled him. Tr. 183-184; ER 145-146.

The attackers returned to Armstrong's apartment next to Wal-Mart, where Armstrong's girlfriend, Rachael Pratt and Whitewater's girlfriend, Natalie Shubert,[2] were waiting. Tr. 184, 463; ER 146; SER 6. Armstrong, Bullard, and Whitewater congratulated each other on the attack. Tr. 247, 280; ER 161, 170.

[2] After the attack but before trial, Natalie married Whitewater and took his name. Tr. 236; ER 159. This brief will refer to her by her maiden name.

Bullard's face was bleeding, and he told the women about the assault. Tr. 277; ER 169. He boasted he "hit a nigger at Wal-Mart" and had "asked a coon what country he thought he was in." Tr. 312-313; ER 118. Pratt testified that Bullard claimed "he beat up a nigger" and "he didn't sound like he felt bad about it." Tr. 476; SER 8. Armstrong told Bullard "what a good job he did" and referred to Smith as a "nigger." Tr. 278, 320; ER 120, 169. He told Pratt the group had chased down a "nigger." Tr. 472-473; SER 7.

Armstrong, Bullard, and Whitewater agreed that "[i]f anything was to ever come of it, that [Bullard] would take the blame saying it was a one-on-one fight, nothing racial was ever said." Tr. 185, 280; ER 146, 170. Whitewater stated the group made the plan because "we knew it was a hate crime." Tr. 185; ER 146.

Shubert felt angry about the assault and upset by the attackers' racial motivation. Tr. 323-324; ER 120-121. Shortly after the men returned, Pratt and Shubert went to Wal-Mart to look for Smith. Tr. 200, 477; ER 150; SER 8. They wanted to "check on" him and see if he was safe. Tr. 478; SER 9. Bullard "wasn't happy" about their actions. Tr. 326, 497; ER 121; SER 12. After Shubert returned, he shook his head "like he was annoyed" and said "I thought your loyalties were to me." Tr. 326; ER 121; SER 12. Later, Armstrong complained about the women's actions. Whitewater heard him say "something about [them] fraternizing with the enemy." Tr. 200; ER 150.

When Smith regained consciousness, his head and jaw hurt and he felt sore. Tr. 69; ER 182. He was very angry and wanted to go home. He looked around and found his glasses but could not find his keys, as Bullard had thrown them on the other side of the ditch. Tr. 326, 494; ER 121. Smith spent 15 or 20 minutes looking for his keys before Pratt and Shubert arrived. Tr. 79; ER 184. They asked him how he was and he told them he "got jumped." Tr. 479; SER 9. The three looked for Smith's keys, unsuccessfully, for another ten minutes. Tr. 81; ER 185. The women gave Smith a ride back to his apartment.

2. The Investigation And Armstrong's Statements To Police

Smith contacted police that evening. The police obtained security footage from Wal-Mart showing Bullard, Whitewater, Hartpence, and Armstrong waiting for Smith outside the Wal-Mart and chasing him in the parking lot. Tr. 86-89, 401; ER 186-187; SER 1. The cameras did not capture the beating. Tr. 124; ER 195. With the footage, the police were able to locate the attackers about a month after the incident. Tr. 901; ER 82.

Bullard initially told police he knew nothing about the incident, but eventually explained he confronted and chased Smith because Smith stared at him. Sealed ER 35-36. He claimed Smith turned around and punched him, and he tackled Smith. Sealed ER 36; Tr. 901, 912; ER 82, 85. He denied using racial slurs. Sealed ER 36. Police contacted Whitewater, who told them neither he nor

Armstrong had hit Smith. Tr. 203; ER 150. He wanted to "keep [Armstrong] out of trouble." Tr. 203; ER 150. Armstrong spoke to police in a recorded interview. Tr. 929-930; SER 23. He admitted the group directed racial slurs at Smith, denied striking Smith, and claimed he tried to intervene to stop Bullard. Sealed ER 37.

Shubert called to ask Armstrong's advice after police asked to speak to her, and he told her to "blame it all on [Bullard]." Tr. 329; ER 122. Based on his own interview with police, Armstrong believed that Bullard was trying to blame the attack on him. He told Shubert "if [Bullard] was going to rat [Armstrong] out, then it all falls back on him." Tr. 329; ER 122. Armstrong requested Shubert make further false statements to support his own statements to police. Because he had tried to claim the credit for Shubert's and Pratt's efforts to help Smith after the beating, see Sealed ER 38, Armstrong asked Shubert to back up his story and claim he had asked the women to find Smith. Tr. 331; ER 122. He also requested Shubert's help in explaining his tattoos of swastikas, asking her to tell the police he got them when he was young and wanted them removed. Tr. 329, 334; ER 122-123. After the conversation, Shubert spoke with police and implicated Bullard. Tr. 330; ER 122.

3. The Trial

a. Evidence Of Armstrong's Racial Animus

At trial, the government presented Smith's account of the attack at Wal-Mart and showed footage from security cameras. Tr. 42-93; ER 175-188. Whitewater testified pursuant to a plea agreement and acknowledged that the three men used racial slurs against Smith, waited for him outside the store, and pursued him across the parking lot. Tr. 149-214; ER 137-153. He stated that as Smith fled Armstrong yelled "Get him. Get that fucking nigger" and that Armstrong punched and kicked Smith once Bullard had tackled him to the ground. Tr. 65, 108, 178; ER 144, 181, 191.

The jury considered other evidence of Armstrong's racial motivation. It viewed pictures of the large swastika tattoo on his chest and one on his ankle. Tr. 480-481, 518, 571, 719-720; ER 89; SER 1, 13, 17. Armstrong used to have a swastika on his hand and one on his forearm as well, but had them removed. Tr. 556, 566-567, 720; ER 89; SER 15-16.[3] He has a double lightning bolt symbol, the insignia of Hitler's SS, on his shoulder. Tr. 481, 518-519; SER 9, 13. Once,

[3] Armstrong's mother testified that he had a tattoo removed from his arm featuring a swastika inside a mushroom. Tr. 566-567; SER 16. His presentence report stated that he currently has a tattoo on his forearm of a mushroom with the initials "PW." Sealed ER 25. "PW" stands for "Peckerwood," a white power group Armstrong joined in youth detention. Sealed ER 23-25.

when swimming at a friend's apartment complex, Armstrong spotted a black family using the pool, took off his shirt, slapped his swastika tattoo, and shouted: "Fuck that." Tr. 336; ER 124. The family left the pool. Tr. 336; ER 124.

Armstrong has drawings of racist symbols. Tr. 482-485, 490-491, 677; SER 10-11, 21. One presented at trial bears his signature as "Ricky Armstrong, '08, SS" with the Nazi SS lightning bolt insignia. Gov't Exh. 29; Tr. 482-485, 490-491, 677; SER 10-11, 21. Asked about the insignia, Armstrong stated it was a symbol of "white pride." Tr. 804; ER 110. According to a fellow prisoner, Armstrong drew swastikas in his county jail cell and announced, "White is right. White is the only way to go." Tr. 453-454; SER 4-5.

Friends testified that Armstrong enjoys racial jokes and slurs, using the words "nigger," "spook," and "jigaboo" "all the time." Tr. 211, 214, 676-677; ER 152-153; SER 21. Armstrong called his father and Bullard from jail to share racial jokes and comments.[4] Tr. 418-422, 576-578; SER 2-3, 18-19. Armstrong's girlfriend affirmed he believes in the "family values" and "some of" the "code" of Nazi racism. Tr. 669; SER 20. As Armstrong put it, he believes he should "stick to [his] own race" and would never marry outside it. Tr. 733; ER 92.

[4] The conversations were recorded after Armstrong's attack on Smith, while Armstrong was in the county jail for domestic violence.

b. Armstrong's Testimony About The Attack

At trial, Armstrong contradicted Whitewater's and Smith's accounts of the defendants' encounter at Wal-Mart. He testified that as the group picked out some orange juice, Bullard had complained about someone "staring at him." Tr. 736; ER 93. Armstrong asserted that in the cash register area they had "no discussion of a fight." Tr. 772; ER 102. After Smith got in line behind the group, Armstrong claimed, Bullard again complained Smith "wouldn't stop staring at him." Tr. 739-740; ER 94. As the group approached the entrance, Bullard said "I'm going to see if this guy has a staring problem." Tr. 740; ER 94. Armstrong stated that at the time of the attack he did not harbor any "ill feelings" towards Smith. Tr. 753; ER 97.

On cross examination, Armstrong denied the group directed any racial slurs at Smith when they spotted him at Wal-Mart. Tr. 783; ER 105. Under further questioning, he admitted Bullard "could have" called Smith a "spook" when he first saw him. Tr. 784; ER 105. The prosecutor then presented Armstrong with a transcript of his interview with police in which Armstrong stated one of the group called Smith a "spook." Tr. 784-785; ER 105. Armstrong changed his testimony and admitted that someone in the group had used the term. Tr. 785; ER 105.

The prosecutor showed Armstrong a portion of his transcribed interview with police. Tr. 786; ER 105; Police Tr. 23; SER 30. In the transcript, Armstrong

reported that in the store someone said "we'll take it outside, fucking bitch, punk nigger." Police Tr. 23; SER 30. Armstrong again denied anyone in the group had called Smith a "nigger" inside the store. Tr. 786; ER 105. The prosecutor asked again if the word "nigger" was in his statement as it appeared in the transcript, and Armstrong admitted it was. Tr. 786-787; ER 105-106. The prosecutor asked him again if anyone inside the store called Smith "names." Tr. 787; ER 106. He replied someone "could have," but he "wasn't paying much attention." Tr. 787; ER 106. The police, he complained, were "trying to get me to say that." Tr. 786-788; ER 105-106.

Asked whether he ever called Smith a "nigger," Armstrong said: "I could have." Tr. 788; ER 106. Asked again, he said "I don't think I did. I know I never did to him." Tr. 788; ER 106. The prosecutor asked Armstrong to review his statement to police, where he was asked about his statements in the Wal-Mart exit foyer. Tr. 789. He told police: "I mean I'm not going to sit here and say I didn't say it 'cause I said it. I know I said it. * * * I'm sure I called him a nigger, I just didn't say it to his face." Tr. 941; Gov't Exh. 47b; Police Tr. 34; SER 24b, 31.[5]

[5] In the video clip of the interview shown to the jury, it is not clear when Armstrong called Smith a "nigger." In context on page 34 of the police interview transcript, it is clear he did so while the group was at Wal-Mart because Armstrong was still carrying the orange juice. Police Tr. 34; SER 31. Hartpence carried the orange juice home. Tr. 175, 190, 246, 358; ER 129, 143, 147, 161. Although the quote was not contextualized for the jury, the court was provided the context as it

(continued…)

After he reviewed the police statement transcript, the prosecutor asked Armstrong again whether he had called Smith a "nigger" while inside the store, in the exit foyer, or outside the store. Tr. 790; ER 106. Armstrong denied each instance, replying "[n]o" and "I never did." Tr. 790, 794; ER 106-107.

Throughout cross-examination, Armstrong repeatedly claimed he did not think he had said what was in the transcript and that it was not "accurate." Tr. 789-790, 810, 812; ER 106, 111-112. In response, the prosecution presented video footage of parts of Armstrong's interview with police, including his admission that he was "sure" he called Smith a "nigger," and that he "knew [he] said it." Tr. 935-936, 940; Police Tr. 9-10, 34; SER 24a-24b, 28-29, 31; Gov't Exh. 47a; Gov't Exh. 47b.

Armstrong also claimed he never hit or kicked Smith during the attack, but tried to stop Bullard by pulling him off Smith. Tr. 746; ER 95. He said he had no idea Bullard had been planning to "do that" and had no discussions about how to "deal with this incident in the future." Tr. 751, 753; ER 98. He denied telling Shubert what to say to police. Tr. 812-813; ER 112.

(continued…)
would have seen the entire page when it was placed on the viewing screen during trial. Pages 9-10, 34, and 23 were presented at trial. Tr. 786, 789, 810; ER 105-106, 111. The Presentence Report (PSR) also summarized the police interview. Sealed ER 37-38.

4. The Verdict And Sentencing Proceedings

The jury convicted Armstrong and Bullard on both counts. The initial presentence report (PSR) in Armstrong's case provided a guidelines computation of 15, applying a base level of 12 and a three-level adjustment pursuant to U.S.S.G. 3A1.1(a). Sealed ER 17. The adjustment is available where "defendant intentionally selected any victim * * * because of * * * race." U.S.S.G. 3A1.1(a). The report did not include an enhancement for obstruction of justice. Sealed ER 16, 18.

In response to the PSR, the prosecution submitted a letter to the probation officer objecting to the omission of an enhancement for obstruction of justice under U.S.S.G. 3C1.1. ER 72; Sealed ER 57-59. The government argued defendant had falsely denied participation in the conspiracy and assault, falsely denied racial motivation and use of racial epithets, lied when he claimed he tried to stop the attack, lied about his efforts to remove his white supremacist tattoos, and falsely denied attempting to influence other witnesses. Sealed ER 58; R. 223 at 5-6. Defendant also filed objections to the PSR, claiming that enhancement for racial selection of the victim was improper because Bullard, rather than Armstrong, selected Smith as a victim. R. 220; Sealed ER 60.

At the sentencing hearing, the government argued for application of 3C1.1 and 3A1.1(a). Sentencing Tr. 11-15; ER 29-33. Defendant's counsel again argued

that Armstrong did not participate in the crime but tried to stop it. Sentencing Tr. 20-21; ER 38-39. He stated the alleged "perjury" was "Mr. Armstrong's defense of himself," and argued the sentencing factors of 18 U.S.C. 3553 required a shorter sentence. Sentencing Tr. 21, 27-29, 33; ER 39, 45-47, 51. Armstrong gave a statement denying his involvement in the attack and denying the group targeted Smith because of his race. Sentencing Tr. 33-37; ER 51-55.

The court imposed both requested enhancements. It noted that the jury was specifically required to find and did find Armstrong acted because of race. Sentencing Tr. 38; ER 56. In imposing an enhancement for obstruction of justice, the court stated that both the jury's finding and an objective review of the evidence at trial supported a finding of perjury. Sentencing Tr. 43-44; ER 61-62. The court calculated a total offense level on 17, based on a criminal history category of V (the second-highest level), a two-level enhancement for obstruction of justice, and a three-level enhancement for racial selection of the victim. Sealed ER 1. The court sentenced Armstrong to 46 months in prison, the lowest guidelines sentence. Sealed ER 1.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in applying a three-level enhancement under U.S.S.G. 3A1.1(a) for selection of a victim based on race. The

jury necessarily found that Armstrong targeted Smith on account of his race because racial intent is an element of the offenses of conviction.

The court did not clearly err in enhancing Armstrong's sentence for obstruction of justice. During his trial testimony, Armstrong committed perjury about his and his coconspirators' motives for attacking Smith, falsely denied using a racial slur during the attack, and lied about using the word "nigger" in statements to police after the attack. His false statements went to the heart of the case, as racial intent is an element of the offenses. Furthermore, Armstrong could not have been mistaken about his own motives and persisted in denying his statements to police even after reviewing transcripts.

Finally, Armstrong's sentence, which is the lowest sentence recommended under the sentencing guidelines, is reasonable.

ARGUMENT

I

THE COURT PROPERLY IMPOSED A THREE-LEVEL ENHANCEMENT FOR RACIAL SELECTION OF THE VICTIM

A. Standard Of Review

The district court's application of the sentencing guidelines to the facts of a case is reviewed for abuse of discretion. *Gall* v. *United States*, 552 U.S. 38, 41 (2007); *United States* v. *Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

B. Because The Jury Determined Armstrong's Racial Motivation, Application Of U.S.S.G. 3A1.1(a) Was Proper

> The Sentencing Guidelines provide for a three-level enhancement where
>
> the finder of fact at trial * * * determines beyond a reasonable doubt that the defendant intentionally selected any victim * * * because of the actual or perceived race * * * of any person.

U.S.S.G. 3A1.1(a). Where a case goes to trial, the jury, not the judge, finds the factual predicate for enhancement.[6] If the jury finds hate crime motivation, 3A1.1(a) applies. *United States* v. *Weems*, 517 F.3d 1027, 1030 (8th Cir. 2008) ("Because the jury found beyond a reasonable doubt that [defendants] selected the victim because of his race, the district court should have applied the three-level enhancement."); *United States* v. *Smith*, No. 08-10386, 2010 U.S. App. LEXIS 2874, at *16-17 (9th Cir. Feb. 12, 2010) ("as there is * * * no textual basis for applying a different standard to the sentencing than to the conviction for hate crimes," "the jury's factual finding supported the imposition of the hate crimes sentencing enhancement"). The commentary explains this subsection "applies to offenses that are hate crimes." U.S.S.G. 3A1.1, comment n.1.

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[6] The issue on appeal is not whether the evidence "support[s]" a finding that Armstrong selected the victim. Br. 31, 33. The district court was not required to make its own findings on the matter; this Court must consider whether the jury decided Armstrong selected the victim because of race. And even if the Court were to consider the facts, Armstrong's statements show he joined the attack because of Smith's race. Tr. 65, 108, 178; ER 144, 181, 191.

In this case, the instructions required the jurors to find that Armstrong was motivated by race. See *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (finding Guideline 3A1.1(a) enhancement proper where jury instructions "expressly incorporated language about the race of the victims"), cert. denied, 529 U.S. 1089 (2000). The jury had to find for Count One that Armstrong joined a conspiracy "directed toward the infringement of a [federal] right," namely, "[t]he right to use and enjoyment of a place of public accommodation without interference on account of race." Tr. 965; SER 25. It also had to find Armstrong "understood the purpose of the conspiracy." Tr. 966; SER 25.

Under Count Two, the instructions required a finding that "the Defendant acted because of the race, color or national origin of the victim." Tr. 969-970; SER 26. In order to be convicted, Armstrong must have "acted with the knowledge and intention" of committing the hate crime charged under 18 U.S.C. 245. Tr. 976; SER 27. As the district court acknowledged, "one of the findings the jury had to make was that [Armstrong] acted because of * * * race," and "that [he] knowingly and voluntarily joined the conspiracy with an understanding of its purpose." Sentencing Tr. 38; ER 56.

Nothing in Guideline 3A1.1 suggests that, in a case of conspiracy or aiding and abetting, the guideline applies only to the defendant who first chose the victim.

Defendant cites no cases supporting this strained interpretation. Even if Armstrong was not the first to suggest attacking Smith, he joined in the attack.

Indeed, the Tenth Circuit has soundly rejected this argument. In *United States* v. *Woodlee*, 136 F.3d 1399 (1998), the court approved a Guideline 3A1.1(a) enhancement for a codefendant who claimed on appeal he did not "select" the victim because the coconspirators did. *Id*. at 1414. The court held this argument "strain[ed] the obvious. It is inconceivable [codefendant] did not 'select' his victims because of their race. * * * The only logical reason to chase and shoot at these men was their race." *Ibid*. The court did not "believe simply because the other defendants made the initial decision" that the coconspirator was "relieved of his choice to join in the melee." *Ibid*. "By aiding and abetting the continuing crime, [he] must have also made the same choice." *Id*. at 1413.

Similarly, here, Armstrong's only logical reason for chasing Smith, calling him racial slurs, and beating him was his race. Furthermore, he helped plan the attack in Wal-Mart and encouraged Bullard, using racial epithets to "egg[]" him on. Tr. 168-169, 264; ER 142, 166. He lay in wait with the others and immediately joined Bullard in the assault.[7] Indeed, in this case, *all* the defendants

[7] Armstrong presents a different view of the facts (Br. 35), essentially re-arguing his claim he intervened to stop the fight. The jury has rejected this tale.

were charged with committing the crime while aiding and abetting one another; according to Armstrong's interpretation *no one* selected the victim. See R. 1.

II

THE COURT DID NOT CLEARLY ERR IN FINDING DEFENDANT OBSTRUCTED JUSTICE

A. Standard Of Review

"A factual finding that a defendant obstructed justice is reviewed for clear error." *United States* v. *Garro*, 517 F.3d 1163, 1171 (9th Cir. 2008); see also *United States* v. *Jimenez*, 300 F.3d 1166, 1170 (9th Cir. 2002). The Court should affirm where the district court's findings are "plausible in light of the record viewed in its entirety." *United States* v. *Barajas*, 360 F.3d 1037, 1044 (9th Cir. 2004) (quoting *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985)).

B. The Court's Finding That Armstrong Perjured Himself Is Not Clearly Erroneous

Sentencing Guideline 3C1.1 states:

> [i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. 3C1.1.

Under this guideline, obstructive conduct includes "committing, suborning, or attempting to suborn perjury" or "providing materially false information to a

judge or magistrate." U.S.S.G. 3C1.1, comment n. 4. Once the court finds the factual predicate, enhancement must be included in the guidelines calculation. "Upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is *required* by the Sentencing Guidelines." *United States* v. *Dunnigan*, 507 U.S. 87, 98 (1993) (emphasis added); see also *United States* v. *Alvarado-Guizar*, 361 F.3d 597, 600-601 (9th Cir. 2004).

When applying Guideline 3C1.1 based on defendant's testimony, the court must find defendant perjured himself. Perjury requires "that (1) the defendant gave false testimony, (2) on a material matter, (3) with willful intent." *Garro*, 517 F.3d at 1171. The court's findings need not be detailed. This Court has "accepted perfunctory findings as long as they are clearly supported by the record." *United States* v. *Monzon-Valenzuela*, 186 F.3d 1181, 1184 (9th Cir. 1999). The district court need not always "explain the obvious" in making its findings. *United States* v. *Ancheta*, 38 F.3d 1114, 1118 (9th Cir. 1994). And "although 'it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding,' this is in no way required." *United States* v. *Oplinger*, 150 F.3d 1061, 1070 (9th Cir. 1998) (overruled on other grounds) (quoting *Dunnigan*, 507 U.S. at 95). It is "sufficient if a court's finding of an obstruction of justice 'encompasses all of the factual predicates for a finding of perjury.'" *Alvarado-Guizar*, 361 F.3d at 600 (quoting *Dunnigan*, 507 U.S. at 95).

As with other sentencing findings, the court bases its findings on the preponderance of the evidence. Contrary to Armstrong's contention (Br. 27), it need not find perjury beyond a reasonable doubt. *United States* v. *Tidwell*, 191 F.3d 976, 982 (9th Cir. 1999). The court may consider hearsay or other evidence not admissible at trial. *Ibid*.

In this case, the court specifically found Armstrong had perjured himself:

> Now, in this case perjury is a legal consideration in the determination of whether there was an obstruction of justice. Not only because of the jury's findings and instructions they were given, but I just think if you just step back from the evidence and just look at it with an open mind, you can clearly see that you perjured yourself when you testified that you did not conspire to assault the victim because he was African-American. It is just not logical. It certainly is not consistent with the language you were using, some of the past problems you have been in.
>
> The fact that, as I mentioned, that Mr. Smith was in a state of unconsciousness. You deny committing the offense because the victim was African-American. That was exactly what the jury had to find and they did. Twelve people selected because of the fact they were sitting as a jury with an open mind and did not have any bias or prejudice. You denied using racial slurs referring to the victim during and after the attack. The evidence clearly shows to the contrary and that is material to your racial motivation.

Sentencing Tr. 43-44; ER 61-62.

1. Armstrong Repeatedly Lied While Testifying

The court found that Armstrong falsely denied his own racial motives and the racial intent of the conspiracy. This is born out in the record. When asked about the group's expressions of its racial intent, Armstrong flatly, falsely, and

repeatedly denied that he or anyone called Smith racial slurs in the store. Tr. 783, 785-787, 790, 794; ER 105-107. In fact, all three attackers did so. Tr. 166, 168-169; ER 141-142.

Armstrong further attempted to cover up the conspiracy's racial motive by inventing a non-racial reason for the assault: Smith had "stared at" Bullard. Tr. 736, 739-740; ER 93-94. He fabricated a detailed account of the attack. He also claimed he did not know Bullard's motives at the time, testifying he had no idea Bullard had been planning to "do that." Tr. 751; ER 97.

In his trial testimony Armstrong denied his own racial motives by asserting he harbored no "ill-feelings" towards Smith at the time of the attack. Tr. 753; SER 14a; ER 97. These statements were contrary to the evidence in the record. After the assault, Armstrong joined the others in making plans to cover up what they "knew * * * was a hate crime." Tr. 185; ER 146. When Pratt tried to help Smith, he accused her of "fraternizing with the enemy." Tr. 200; ER 150.

As noted above, Armstrong himself used racial slurs when planning the attack and bragged about the attack in racial terms. Tr. 185, 247, 276-278, 280; ER 146, 161, 168-169. The judge reasonably found Armstrong's story "certainly is not consistent with the language you were using." Sentencing Tr. 44; ER 62. The court did not err, much less clearly err, in finding that Armstrong's language and active part in the attack proved that his motivation was racial.

In addition, the court reasonably found Armstrong's account inconsistent with his "past problems." Tr. 44; ER 62. Armstrong espouses "white pride," has accumulated many Nazi-inspired tattoos, and signs his name with the Nazi "SS" insignia on racist artwork. Tr. 480-481, 518, 556, 566-567, 571, 719-720, 803-804; ER 89, 110; SER 9, 13, 15-17. On one occasion, he used his large swastika tattoo to scare a black family away from the swimming pool. Tr. 336; ER 124. He uses the words "nigger," "spook," and "jigaboo" "all the time" and joined a white-power organization in juvenile detention. Tr. 211, 214, 676-677; ER 152-153; Sealed ER 23-25; SER 21.

Indeed, the jury necessarily found that Armstrong "acted because of the race, color or national origin of the victim," that he "understood the purpose of the conspiracy," and that the conspiracy's object was to interfere with Smith's right to "use and enjoyment of a place of public accommodation without interference on account of race." Tr. 965-966, 969-970; SER 25-26. Although a court may not "rel[y] solely on the inconsistency between the verdict and [defendant's] testimony," the jury's finding further shows that the court's decision was reasonable. *Monzon-Valenzuela*, 186 F.3d at 1184.

In addition to its finding that Armstrong denied racial intent, the court specifically found that Armstrong falsely denied using racial slurs during or after the attack. Sentencing Tr. 44; ER 62. Indeed, Armstrong broadly asserted "no"

and "I never did" when asked if he called Smith a "nigger" while inside the store, in the exit foyer, or outside the store. Tr. 790, 794; ER 106-107. Whitewater testified otherwise, reporting Armstrong shouted outside the store during the attack: "Get him. Get that fucking nigger." Tr. 65, 108, 178; ER 144, 181, 191. Smith also testified that one of his attackers called him a "nigger" as the group chased him down. Tr. 65; ER 181.

In his trial testimony, Armstrong also repeatedly denied that he used the word "nigger" in his interview with police after the attack. Although Armstrong admitted to police that the group called Smith a "punk," "bitch," and a "nigger" in the store, he testified at trial that he did not use the word "nigger" in his statement. Tr. 786-787; ER 105-106; Police Tr. 23; SER 30. He persisted in this assertion even after he reviewed the statement. Tr. 786-787; ER 105-106; Police Tr. 23; SER 30. After additional questioning, he admitted "the word 'nigger' is there" but claimed the police were "trying to get me to say that." Tr. 787-788; ER 106. Later in his testimony Armstrong again contradicted his statement to police and denied he had used the word "nigger" in the interview. He told police after the attack that he was "sure" he "called [Smith] a nigger" and "I said it. I know I said it." Tr. 940; Gov't Exh. 47b; Police Tr. 34; SER 24b, 31. But at trial, Armstrong claimed he "did not think" he used the word and stated he did not believe he had said what was in the police transcript. Tr. 789-790, 810, 812; ER 106, 111-112.

2. Armstrong's False Statements Were Material

Testimony is material where "if believed, [it] would tend to influence or affect the issue under determination." U.S.S.G. 3C1.1, comment n.6. Racial motivation was an element of Count Two, violation of 18 U.S.C. 245, which criminalizes threats and intimidation against individuals attempting to use public facilities "without discrimination on account of race." 18 U.S.C. 245(b)(4)(A); R. 1. Defendants' race-motivated conduct was the basis for Count One, conspiracy to threaten or intimidate Smith in the exercise of his right to use a public facility without racial discrimination. 18 U.S.C. 241; R. 1. Thus Armstrong's intent was a central issue in the case; the court explained this when it pointed out racial motivation "was exactly what the jury had to find." Sentencing Tr. 44; ER 62.

The court found Armstrong's denial that he used racial slurs was "material to [his] racial motivation." Sentencing Tr. 44; ER 62. Armstrong aimed racial slurs at Smith as he planned the attack, while he carried it out, and in describing it afterwards. The importance of this word explains why Armstrong tried to convince the jury he never used it during the attack or repeated it to police afterwards.

3. Armstrong's False Statements Were Not The Result Of Faulty Memory Or Mistake

Although the district court did not use the term "willful" in its findings, it stated that Armstrong perjured himself at trial. A district court's "finding of

perjury a fortiori includes a finding of mens rea." *United States* v. *Hinostroza*, 297 F.3d 924, 929 (9th Cir. 2002) (finding Guideline 3C1.1 enhancement proper where "the court noted that defendant 'got up here at the sentencing hearing and committed perjury himself'").

Furthermore, a finding Armstrong perjured himself in denying his motivation and repeated use of racial language necessarily encompasses willfulness. Indeed, this Court accepted similar findings in *Oplinger*, holding detailed findings on willfulness are not required where defendant falsified facts about which he "could not have been mistaken." 150 F.3d at 1070 (quoting *Dunnigan*, 507 U.S. at 95-96). In that case, defendant bought hundreds of items of office supplies at Costco on his employer's account, then returned the items and kept the cash refund. *Id*. at 1064. At trial, he testified that all the items were defective and that he used the cash to purchase supplies elsewhere. The vendor testified that only two or three items were defective. The district court imposed an enhancement under Guideline 3C1.1, finding "the evidence shows that [Oplinger] did testify as [sic] a material, relevant issue of fact falsely. Therefore, he obstructed justice." On appeal, Oplinger claimed that the court had omitted a finding of willfulness because it made no statements about this element. This Court rejected the argument, holding the district court's findings encompassed the factual predicates for a finding of perjury. "This finding, combined with the

numerous witnesses and documents presented by the government demonstrating that the merchandise returned to Costco was not in fact defective or damaged, is * * * sufficient." *Id.* at 1071 (footnote omitted).

The district court made similar findings in this case, explaining to Armstrong "you perjured yourself when you testified that you did not conspire to assault the victim because he was African-American." Sentencing Tr. 44; ER 62. Armstrong could not have been mistaken about his own motives, any more than Oplinger was mistaken about his real reasons for making returns to Costco. Armstrong's repeated denials that he used racial slurs were likewise not a "result [of] confusion, mistake, or faulty memory." U.S.S.G. 3C1.1 comment n.2. He persisted in his denials even after reviewing transcripts showing he used the word "nigger" at least twice when police interviewed him after the attack.

4. A Single False Statement Is Sufficient To Require Enhancement Under U.S.S.G. 3C1.1

The Guidelines provide for a two-level enhancement for an act of obstruction. Section 3C1.1 does not provide further enhancement for multiple falsehoods or acts of obstruction.[8] Accordingly, although the court found that Armstrong perjured himself by denying racial motivation and denying use of racial

[8] Nor did the court use the additional obstructive behavior as a reason to depart from the guidelines or even to impose a sentence above the minimum.

statements, either finding would suffice for the enhancement. See *Ancheta*, 38 F.3d at 1119 (where the trial judge made sufficient findings for false statements to police, this Court need not address additional findings on perjury).[9]

C. The District Court Was Not Required To Order A Transcript Before Applying The Enhancement

Armstrong repeatedly complains that the district court did not refer to any transcript of Armstrong's testimony, suggesting the court was obligated sua sponte to order a transcript before deciding the enhancement. Br. 11, 17 n. 7, 23. Setting aside the fact that Armstrong made no request for such a transcript at sentencing, he cites no case requiring one be prepared before consideration of a Guideline 3C1.1 enhancement.[10] It would be strange indeed to require this, as judges

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[9] Armstrong presented other falsehoods at trial. He made contradictory statements about his tattoo removal. Tr. 775-777; ER 103; R. 65 at 69. He denied the three attackers agreed how to handle a potential investigation and claimed he did not tell Pratt to make exculpatory statements to the police. Tr. 753, 808, 812-813; ER 97, 111-112. Whitewater and Shubert testified otherwise. Tr. 185, 247, 280, 329-334; ER 122-123, 146, 161, 170. Nevertheless, the court did not rely on these statements as a basis for the enhancement and accordingly made no findings on their truthfulness. Despite Armstrong's attempt to reargue these issues, (Br. 21-22), they are not relevant in this appeal.

[10] As Armstrong notes, the district court in *United States* v. *Cabaccang*, 481 F.3d 1176, 1186 (9th Cir), cert. denied, 552 U.S. 905 (2007), relied on a transcript. Nothing in the opinion, however, suggests this is mandatory. The court in *Cabaccang* unsurprisingly relied on transcripts in resentencing after several years and two intervening appeals. *Id*. at 1179. The court sentenced Armstrong a few months after the trial.

routinely pronounce sentences based on untranscribed trial evidence and, indeed, juries decide defendants' guilt based on untranscribed testimony.

Nor is it required that a district court quote from a transcript or point to specific language in finding perjury. This Court has held that "the district court [is] not required to make specific findings as to specific portions of a defendant's testimony it believes to be false" in applying Guideline 3C1.1. *United States* v. *Arias-Villanueva*, 998 F.2d 1491, 1512 (9th Cir.) (overruled on other grounds), cert. denied, 510 U.S. 1001 (1993); see also *Monzon-Valenzuela*, 186 F.3d at 1184 (noting the district court's findings need not be detailed). It "is enough to demonstrate that the district court considered the relevant evidence" where the court simply states findings made "[i]n view of this *record*." *Oplinger*, 150 F.3d at 1070-1071; Sentencing Tr. 45; ER 63.

D. The Enhancement Does Not Interfere With Defendant's Constitutional Rights Because He Did Not Merely Make A General Denial Of Guilt

Armstrong suggests that punishment for his testimony "punish[es] [him] for the exercise of a constitutional right" because he made a "general denial of guilt." (Br. 15 (quoting U.S.S.G. 3C1.1., comment n. 2), 18-19). Armstrong's argument misses the point because the court did not rely on Armstrong's general denial of guilt in making his perjury determination. Instead, the court relied specifically on Armstrong's denial of racial motivation and use of racial statements.

As the Supreme Court has stated, "a defendant's right to testify does not include a right to commit perjury" and a defendant "cannot contend that increasing [a] sentence because of * * * perjury interferes with [the] right to testify." *Dunnigan*, 507 U.S. at 96. The testimony in *Dunnigan* was very much like Armstrong's testimony. Dunnigan "denied all criminal acts attributed to her," claiming she was at the scene for an innocent purpose. *Id*. at 90. Armstrong admitted his group attacked Smith at Wal-Mart, but claimed he did not use racial language and that the attackers had a nonracial motive. Like Dunnigan, he flatly "denied the[] inculpatory statements" of several witnesses. *Id*. at 90.

III

ARMSTRONG'S LOW GUIDELINES SENTENCE WAS REASONABLE

A. Standard Of Review

This Court reviews a sentence for substantive and procedural reasonableness, and applies an abuse of discretion standard. *Gall* v. *United States*, 552 U.S. 38, 41 (2007).

B. Armstrong's Sentence Is Procedurally Reasonable

Armstrong argues (Br. 42-43) that his sentence is procedurally unreasonable because the court did not properly consider the factors described in 18 U.S.C. 3553(a). This argument is without merit.

A sentence is procedurally reasonable where the district court considers the guidelines, "tak[ing] them into account when sentencing," *United States* v. *Booker*, 543 U.S. 220, 264 (2005), and discusses the factors described in Section 3553(a). Section 3553(a) requires that a sentence reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from defendant's further crimes, and provide the defendant with needed training or correctional treatment. 18 U.S.C. 3553(a)(2). Especially for a within-guidelines sentence, "[t]he district court need not tick off each of the § 3553(a) factors to show that it has considered them." *United States* v. *Carty*, 520 F.3d 984, 992 (9th Cir.) (en banc), cert. denied, 128 S. Ct. 2491 (2008). Furthermore, "a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal" and "a within-Guidelines sentence ordinarily needs little explanation." *Id.* at 992, 988.

In this case, the court imposed an individualized sentence after hearing both parties' arguments and "looking at all of the 3553(a) factors and well as the recommended Sentencing Guidelines." Sentencing Tr. 41; ER 59. [11] The court discussed the relevant 3553(a) factors, stating:

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[11] Armstrong claims that his sentence is procedurally unreasonable because the court erred in applying enhancements for racial selection of the victim and obstruction of justice. These enhancements were proper, see Parts I and II, *supra*, and Armstrong does not allege any other errors in the guidelines calculation.

> So when you look at the 3553(a) factors, it is apparent to this Court that the Court must impose a sentence that reflects the seriousness of the offense, promotes respect for the law, and provides just punishment so that you deter others from doing like or being involved in like conduct so that both you and others do not make a similar mistake.

Sentencing Tr. 42; ER 60; see also Sentencing Tr. 46; ER 64.

The court considered the "seriousness of the offense" (relevant under 18 U.S.C. 3553(a)(2)(A)) and concluded that Smith was "beaten to the point of unconsciousness and then left without any regard for his well-being." Sentencing Tr. 40; ER 58. The attack was entirely unprovoked and was not a "quick action out of anger" as defendants carefully planned the assault and lay in wait. Sentencing Tr. 40; ER 58.

The court noted that previous sanctions had failed to "get [Armstrong's] attention." Sentencing Tr. 41; ER 59. The finding suggests a heightened need for deterrence required under Section 3553(a)(2)(B). The court emphasized Armstrong's lengthy criminal history, which includes multiple felonies, many acts of violence, racially-motivated behavior, extensive drug abuse, and repeated parole violations. Sealed ER 44-48; Sentencing Tr. 41-42; ER 59-60. It imposed specific drug treatment and testing requirements for supervised release, stating "the protection of society is one of the critical issues in this case." Sentencing Tr. 48-49; ER 66-67; 18 U.S.C. 3553(a)(2)(C) and (D).

Indeed, Armstrong does not point to any factor he believes the court neglected. Instead, he complains without elaboration that the court "did not rule favorab[ly] on the criminal history level." Br. 43. But Armstrong's generalized disagreement with the court's consideration of this factor does not show an abuse of discretion. The court properly "considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita* v. *United States*, 551 U.S. 338, 356 (2007). [12]

C. Armstrong's Sentence Is Substantively Reasonable

Although Armstrong argues (Br. 43) that his sentence is substantively unreasonable, he does not give any specific reasons for this conclusion. He suggests that his sentence is "illegal" and a "departure case" based on the enhancements. Br. 44. Armstrong's arguments about the enhancements were addressed, see Parts I and II, *supra*, and his argument as to substantive reasonableness is waived as inadequately briefed.

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[12] Armstrong also argues, without specifics, that the court did not properly consider mitigating factors. The record shows otherwise, as Armstrong's disadvantaged background induced the court to pronounce the lowest possible within-guidelines sentence. Sentencing Tr. 45-46; ER 63-64. Armstrong also suggests the court came "perilously close" to treating the Sentencing Guidelines as mandatory. Br. 43 (quoting *United States* v. *Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006), vacated by *United States* v. *Carty*, 462 F.3d 1066 (9th Cir. 2006). Assuming this is an allegation of error, it misstates the facts. The court stated "[t]he Guidelines are not binding on the Court" but were "one factor." Sentencing Tr. 46; ER 64.

But even if the argument was preserved, it would fail as the district court did not abuse its discretion in imposing a sentence "sufficient, but not greater than necessary to accomplish § 3553(a)(2)'s sentencing goals." *United States* v. *Ressam*, 593 F.3d 1095, 1120 (9th Cir. 2010) (citations and quotations marks omitted). The court gave "rational and meaningful consideration" to the statutory sentencing factors. *Id.* at 1120 (citations and quotations marks omitted). Armstrong's sentence is reasonable in light of "the totality of the circumstances," including the severity of the offense, Armstrong's extensive criminal history, and the fact that the sentence is the lowest within-guidelines sentence. *Carty*, 520 F.3d at 993.

CONCLUSION

This court should affirm the decision of the district court.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related cases, as described in Local Rule 28-2.6, that are pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 8700 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

Date: April 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 12, 2010

s/April J. Anderson
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