No. 11-3254

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANKIE MAYBEE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is the first case before a federal court of appeals addressing convictions under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (Shepard-Byrd Act), 18 U.S.C. 249, enacted in 2009. A jury convicted defendant Frankie Maybee (Maybee or defendant) of five counts of violating Section 249(a)(1), which prohibits willfully causing bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1). Defendant was also convicted of one count of conspiracy to violate Section 249(a)(1), in violation of 18 U.S.C. 371.

The evidence established that defendant, along with two others, while driving his truck, chased a car occupied by five young Hispanic men and deliberately used his truck to repeatedly strike the victims' car, ultimately causing the car to crash and burst into flames. All of the passengers were injured, one seriously. During this time, defendant was yelling racial slurs at the victims.

Defendant principally argues on appeal that the evidence was insufficient to sustain the convictions, and that Congress lacked the authority to enact the Shepard-Byrd Act. Although counsel for defendant has waived oral argument, the United States believes that oral argument may be warranted on the issue of the constitutionality of the Shepard-Byrd Act, and that 10 minutes per side would be appropriate.

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JURISDICTIONAL STATEMENT

Defendant Frankie Maybee was indicted and convicted under the criminal laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on September 29, 2011. App. 37-42.[1] Defendant

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[1] Citations to "App. __" are to page numbers in the Appendix for the United States as Appellee filed along with this brief. Citations to "R. __" refer to documents in the district court record, as numbered on the district court's docket sheet. Citations to "Br. __" refer to page numbers in defendant's opening brief. Citations to "Tr. __" are to page numbers in the transcript of the jury trial.

timely filed a notice of appeal on October 10, 2011. App. 43-44. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the evidence was sufficient to support defendant's convictions.

United States v. *Coutentos*, 651 F.3d 809 (8th Cir. 2011)

2. Whether the district court abused its discretion in denying defendant's motion for a new trial.

United States v. *Campos*, 306 F.3d 577 (8th Cir. 2002)

United States v. *LeGrand*, 468 F.3d 1077 (8th Cir. 2006)

3. Whether 18 U.S.C. 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)

Griffin v. *Breckenridge*, 403 U.S. 88 (1971)

United States v. *Nelson*, 277 F.3d 164 (2d Cir. 2002)

United States v. *Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)

4. Whether defendant's remaining arguments warrant reversing his convictions or sentence.

United States v. *Morton*, 412 F.3d 901 (8th Cir. 2005)

United States v. *Zackery*, 494 F.3d 644 (8th Cir. 2007)

STATEMENT OF THE CASE

1. On April 6, 2011, the United States filed a six-count indictment charging Frankie Maybee and Sean Popejoy with violating the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (Shepard-Byrd Act), 18 U.S.C. 249(a)(1), and the federal conspiracy law, 18 U.S.C. 371. App. 1-5. Count One alleged that defendants violated 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 249(a)(1)[2] by causing bodily injury to five persons – identified as J.P., F.R., B.V., A.G., and V.S.[3] – because of their race, color, and national origin. App. 2-3. Count One alleged six overt acts in furtherance of the conspiracy, including that Maybee used his truck to strike the vehicle occupied by the victims, causing the vehicle to go off the road, overturn, and burst into flames. App. 2-3. Counts Two through Six alleged violations of 18 U.S.C. 249(a)(1) and 18 U.S.C. 2 with respect to each of the five victims; namely, that defendants "while aiding and abetting each other, did

[2] Section 249(a)(1) provides: "Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person * * * [shall be subject to various criminal penalties]."

[3] The indictment referred to the five victims by their initials. At trial, the victims were identified by name: Jeffrey Perez, Francisco Reyes, Brian Vital, Anthony Gomez, and Victor Sanchez, respectively. See, *e.g.*, Tr. 112 (government's opening statement).

willfully cause bodily injury, and attempted to cause bodily injury[,] by use of a dangerous weapon, to wit, a truck, to [J.P., F.R., B.V., A.G., and V.S.] because of the actual and perceived race, color, and national origin [of the victims]." App. 3-5

On May 13, 2011, Popejoy pled guilty to Counts One and Two pursuant to a plea agreement. R. 33. Between May 17-19, 2011, a jury trial was held, at which Popejoy and Curtis Simer, both of whom were with defendant during the incident, testified for the government. R. 34-36.[4] At the close of the government's evidence, Maybee moved for a judgment of acquittal under Fed. R. Crim. P. 29, arguing that (1) the evidence was insufficient to support his convictions, and (2) Section 249(a)(1) is unconstitutional because it exceeds congressional authority. Tr. 452-469. The court denied the motion with respect to the sufficiency of the evidence, and took under advisement the argument that Section 249(a)(1) was unconstitutional, expressing concern that the latter issue was not raised prior to trial. Tr. 460-469; App. 22-23.

Maybee did not offer any evidence at trial. See Tr. 480. On May 19, 2011, the jury found Maybee guilty on all counts. Tr. 531-532; App. 6-8. The court then denied his motion challenging the constitutionality of Section 249(a)(1) both as untimely and on the merits. Tr. 534-536.

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[4] Curtis Simer agreed to cooperate with the government and testified at trial pursuant to an immunity agreement. See Tr. 383-384.

2. On June 2, 2011, Maybee filed a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29, motion for new trial pursuant to Fed. R. Crim. P. 33, and motion for an arrest of judgment pursuant to Fed. R. Crim. P. 34. App. 9-21. With regard to the motion for judgment of acquittal and motion for a new trial, defendant principally argued that there was insufficient evidence of racial animus. App. 14-17. With regard to the motion for an arrest of judgment, defendant argued that Congress lacked authority to enact Section 249(a)(1). App. 20. The United States opposed the motions. R. 40.

On July 15, 2011, the district court denied the motions in their entirety. App. 22-36. The court found that the evidence was sufficient to sustain the jury's verdict on all counts. App. 24-25. The court also found that "the weight of the evidence is clearly in favor of the jury's verdict," and therefore denied the motion for a new trial. App. 25-27. Finally, the court concluded that Section 249(a)(1) was a valid exercise of congressional power under Section 2 of the Thirteenth Amendment to eliminate badges and incidents of slavery because slavery and involuntary servitude were often enforced through private violence. App. 29-36.

3. On September 29, 2011, the court entered final judgment and sentenced Maybee to 135 months' imprisonment; 120 months on each of Counts Two through Six, to run concurrently, and 60 months on Count One, 15 months of which to run consecutively to the 120 months' sentence on Counts Two through

Six. App. 37. On October 10, 2011, Maybee filed a timely notice of appeal. App. 43-44.

STATEMENT OF THE FACTS

1. The Initial Encounter At The Gas Station And Maybee's Pursuit Of The Victims' Car

On June 20, 2010, at approximately 1:00 a.m., defendant Frankie Maybee, Sean Popejoy, and Curtis Simer were "hanging out" in the parking lot of a Red-X gas and convenience store in Alpena, Arkansas. Tr. 407; see also Tr. 219, 366-367, 406-408. They arrived in Maybee's 2001 blue, four-door, Ford F-250 pick-up truck. Tr. 177, 366, 407. At that time, they saw a car occupied by several Hispanic men pull into the gas station. Tr. 366-368, 408. The five men in the car – a green 1995 Buick LeSabre –were Jeffrey Perez, Francisco Reyes, Brian Vital, Anthony Gomez, and Victor Sanchez. Tr. 268-269.

Vital and Sanchez (Vital's brother) got out of the car to fill it up with gas; they then went into the convenience store. Tr. 275, 339. Upon exiting, defendant and Popejoy began taunting Vital and Sanchez and yelling derogatory and racial epithets at them, including calling them "fuckin' beaners" and "wetbacks" and telling them: "You Mexicans need to go back to Mexico." Tr. 276-277, 307, 340-341, 368, 389, 410-411, 424, 435-436. The victims did not make any statements to Maybee and his friends or otherwise respond to them. Tr. 278-279, 315, 341, 343, 370, 411.

After a few minutes, the victims pulled out of the gas station and drove away (with Vital driving). Tr. 287, 355, 411. They did not do so in an aggressive manner, or attempt to scare or run over Maybee and his friends. Tr. 283, 372-373, 411-412. As they were leaving, Popejoy stepped toward the car, slapped the back trunk, and yelled additional derogatory and racial epithets. Tr. 223, 385, 411-412. The car headed westbound down Highway 412, a two-lane highway. Tr. 129, 347, 412.

After the car drove away, Maybee, Popejoy, and Simer stood in the parking lot and discussed driving after the Hispanic men and assaulting them. Tr. 412-413. They referred to the victims in racial terms, and decided to chase after them and get into a fight. Tr. 371-372, 414-415. Popejoy stated: "[l]et's go get the fuckin' Mexicans." Tr. 372. A video taken by a security camera at the gas station showed three young Caucasian men, including Maybee, huddled together in the parking lot for nearly a minute before they got in defendant's truck and drove off in the direction of the victims' car. Tr. 221-224.

Maybee drove at a high rate of speed in pursuit of the car occupied by the five Hispanic men. Tr. 374. During the pursuit, Maybee and Popejoy talked to each other about physically assaulting the men in the car, and Maybee used derogatory and racial epithets to describe the Hispanic men. Tr. 373, 414-415.

2. Maybee Uses His Truck To Cause The Victims' Car To Crash

After several miles, defendant caught up with the victims' car. Tr. 414. Defendant drove up behind Vital's car with his lights off, then turned on his bright lights. Tr. 287, 291. Defendant flashed his lights on and off several times, and then pulled into the opposite lane and drove up next to the victims' car. Tr. 291, 347, 375-376. Sanchez recognized the vehicle as the truck they saw parked at the gas station. Tr. 347. Popejoy leaned out of the truck window, waived a tire wrench, and yelled racial epithets and threats of physical harm to try to provoke a fight. Tr. 288, 376-377, 415-416. Vital tried to get away but could not; he did not know what to do because it was the middle of the night, and they did not know where they were. Tr. 288-290, 345.

Maybee then rammed the victims' car with the front bumper of his truck approximately three times. Tr. 288, 291, 323, 345, 375, 417. Eventually, Maybee used his truck to strike the car near its left rear wheel, performing what Popejoy (and others) called a "pit maneuver" to cause the driver to lose control and spin off the road. Tr. 348, 351, 375-377, 419. The car veered across the opposite lane of traffic, went off the road, down a ravine, crashed through a fence and into a tree, and burst into flames. Tr. 289, 293, 301, 348-349, 378, 419-420. According to Simer, defendant stated that he hoped the "fuckin' beaners burn and die" so that he would not get caught. Tr. 390.

Although Popejoy saw the car hit the tree and ignite, Maybee, Popejoy, and Simer did not stop, call 911, or attempt to assist the victims. Tr. 298, 378, 420. They kept driving, and Maybee threatened Popejoy and Simer with physical harm if they disclosed what they had done, stating: "you mother F-ers better not say nothing," and that if they told anyone he would kill them. Tr. 378, 420, 428, 441. Simer was afraid of Maybee and took Maybee's statement as a threat. Tr. 381, 420. Maybee also told Popejoy and Simer that if the police contacted them about the crash, they should say that they did not know anything about it. Tr. 382.

3. Maybee Hides His Truck Off The Road

After Maybee drove a few miles past the crash scene, he turned onto a dirt road to circle back around the accident to go home. Tr. 379, 421. He ended up back on Highway 412, and as he neared the crash scene he was running out of gas. Tr. 379, 421. Maybee pulled off the road and backed his truck up against a fence so that it was barely visible from the road. Tr. 261, 379-380, 421. Maybee then examined the front bumper and front "tow hooks" on his truck for damage. Tr. 379, 421.

Maybee called a friend, Jake Fultz, and asked Fultz to pick them up. Tr. 209, 258-263, 422. As Fultz drove them home, they passed the crash site and the victims' car was still on fire. Tr. 258-259, 422-423. Maybee told everyone in the car to shut up and stay calm. Tr. 381. Nobody told Fultz what had happened. Tr.

380. A volunteer firefighter directing traffic at the scene saw Maybee in the passenger seat of the car, and noticed that Maybee was just looking straight ahead and not at the crash scene. Tr. 168-170.

4. The Aftermath Of The Crash And The Victims' Injuries

During the crash, the three passengers in the backseat (Jeffrey Perez, Francisco Reyes, and Anthony Gomez) were ejected from the vehicle. Tr. 294, 349-350. The driver (Vital) and the other front seat passenger (Sanchez) had their seatbelts on and remained in the car. Tr. 293, 349-350. Vital briefly lost consciousness, and when he awoke he could see that the car was on fire. Tr. 293, 301. Vital and Sanchez exited the vehicle and noticed that the other three passengers were missing. Tr. 293-294.

Vital and Sanchez searched for the three others. Tr. 294, 350. They found Gomez walking around, looking shaken. Tr. 294, 350. They found Reyes lying on the ground on his stomach near the car, unconscious, but making noises, with blood covering his face and neck. Tr. 294-295, 350.

They could not find Perez, and went to a nearby house for help. Tr. 295-296, 350. A person at the house saw Vital's and Sanchez's injuries, and the car on fire, and called the police. Tr. 350. Eventually, Vital found Perez lying in the grass, with a gash in his head, covered with blood, and moaning in pain. Tr. 296-

297. Perez was taken by helicopter to a Level 1 trauma center. Tr. 297-298, 444-446. Reyes was taken by ambulance to a hospital. Tr. 329.

All five passengers were injured. Perez was the most seriously injured. He suffered injuries to his head, ribs, and lungs, and, when he arrived at the hospital, he was paralyzed, unresponsive, and had a tube in his windpipe to assist with breathing. Tr. 324, 447-448. Reyes was treated for head injuries, a fractured spine, abrasions, and contusions. Tr. 330-331. The emergency room doctor who treated Reyes testified that these injuries were consistent with being thrown from a vehicle, and that the fractures were "very painful" injuries. Tr. 330-331.

Vital suffered a burn on his arm and cuts to his shoulder and the back of the head. Tr. 303. The burn took a month to heal and caused pain. Tr. 304. Sanchez suffered some bumps to the side of his head, an injury to this knee, and physical pain. Tr. 349. Finally, Gomez suffered numerous abrasions, lacerations, and bruises, which caused significant pain. Tr. 399-400. The doctor who treated Gomez testified that Gomez told her that he was injured when he was ejected from the back seat of a car that was forced off of the road by some "rednecks," and that his injuries were consistent with such an occurrence. Tr. 398-400.

5. The Crash Investigation

When Joel Hand of the Carroll County Sheriff's Office reached the scene of the crash, he believed it was a one-vehicle accident. Tr. 126-132. After speaking

with the victims, however, the investigation became that of a possible two-vehicle hit-and-run. Tr. 132.

Hand examined the roadway near the crash site. Tr. 134-135. He found taillight and lens covers on the road approximately 150 yards before the crash site, which indicated that a vehicle "had suffered impact on the roadway." Tr. 135. He also saw skid marks that indicated that "the vehicle was sliding out of control." Tr. 135. Hand concluded that the burned vehicle had been damaged by another vehicle prior to leaving the roadway. Tr. 144.

In addition, the Alpena Fire Department, after leaving the crash site, observed a dark colored pick-up truck parked off the side of the road, about a tenth of a mile from the crash scene. Tr. 149. Officer Hand went to investigate, and identified the truck as a four door F-250 Ford pick-up. Tr. 149. He noticed that it was not in plain sight, but was backed up against a gate with the front of the truck facing the road; as a result, it was very difficult to see the license plate. Tr. 149, 160. He also observed fresh damage on the front of the vehicle and a "green paint transfer." Tr. 150. The truck was towed to the Sheriff's Office and secured as evidence. Tr. 150.

On July 20, 2010, the Sheriff's Office executed a search warrant for the pickup truck and recovered paint scrapings from the front bumper, two front tow hooks, and a wrench from inside the truck. Tr. 176-178. An expert in comparative

paint analysis testified that the green paint on the truck's tow hooks and bumper was consistent with the green metallic automotive paint General Motors used at a plant that made Buick LeSabres in 1995, and therefore that it was "possible" that the green paint came from such a car. Tr. 252-255.

Later the day of the crash, Maybee called the Sheriff's Office and stated that his pickup truck, which he had parked near Highway 412, was missing. Tr. 172-173. Maybee told Deputy Sheriff Donald Harlan that his truck ran out of gas as he sat in traffic at a crash scene, and that he parked the truck off the side of the road. Tr. 171-173. He did not say anything else about why he was at the scene of the accident. Tr. 174.

The following day, Chad Hipps, an Arkansas State Police investigator, interviewed Maybee. Tr. 182, 203. Maybee told Hipps that he and his friends were hanging out at the Red-X gas station, and that when they left they saw a car of Hispanic men drive out of the parking lot in front of them going west on Highway 412. Tr. 206-207. Maybee stated that the car pulled into a park, and that he and his friends continued on to the "blue hole" (a place to swim). Tr. 207, 364. Maybee explained that when they returned, they were stuck in traffic at an accident. Tr. 207. Maybee stated that because his truck was running out of gas, they pushed it off the road and called a friend to pick them up. Tr. 208-209.

Maybee volunteered that when he got out of the car, he inspected it for damage. Tr. 208.

Hipps asked Maybee about the crash. Maybee stated that he did not have anything to do with it. Tr. 209. Hipps showed Maybee some photographs taken of the vehicles involved, including those of the front tow hooks of the truck that appeared to have green paint on them. Tr. 210. When Hipps stated the paint on the tow hooks appeared to be fresh, Maybee responded: "Is that all you have? Is that the best you have to prove my truck did this?" Tr. 211.

Hipps also interviewed Simer. Tr. 381-382. Simer initially did not tell Hipps the truth because he thought Maybee would kill him if he said what actually happened; Simer followed Maybee's direction and told Hipps that he did not know anything about the crash and that they went to the blue hole. Tr. 381-383.

SUMMARY OF THE ARGUMENT

1. Ample evidence supports the jury's verdict that defendant agreed with Popejoy to cause bodily injury to the five victims, and did so willfully, *because* the victims were Hispanic, and, in so doing, violated 18 U.S.C. 371 and 18 U.S.C. 249(a)(1). Defendant's assertion that the verdict should be overturned because his two accomplices (Popejoy and Simer) expected to (or did) receive some benefit for testifying simply raises a credibility issue, which is the province of the jury. Here

the jury was aware that Popejoy could receive favorable treatment for his testimony, and that Simer testified pursuant to an immunity agreement.

2. The district court did not abuse its discretion in denying defendant's motion for a new trial. The evidence of defendant's racial animus is overwhelming, and defendant has not shown how exhibits of the burned vehicle and the victims' injuries (which were relevant to the "bodily injury" element of the Section 249 violations) resulted in a miscarriage of justice.

3. Section 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment. Section 2 granted Congress broad authority to pass laws abolishing badges and incidents of slavery. In enacting Section 249(a)(1), Congress specifically found that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th Amendment[,] * * * through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry," and that "[a]ccordingly, eliminating racially motivated violence is an important means of eliminating * * * the badges, incidents, and relics of slavery." 18 U.S.C. 249, Findings, sec. 4702(7).

4. Defendant raises several additional issues that he suggests warrant reversing his convictions or sentence. Some of these arguments are conclusory, or otherwise not well-developed. In all events, these arguments are baseless.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTIONS

A. Standard Of Review

The Court reviews *de novo* the denial of a motion for a judgment of acquittal based on insufficient evidence. *United States* v. *Coutentos*, 651 F.3d 809, 823 (8th Cir. 2011). It does so, however, deferentially, "view[ing] the evidence in the light most favorable to the [government], resolving evidentiary conflicts in favor of the verdict, and accepting all reasonable inferences drawn from the evidence to support the jury's verdict." *Ibid.* This Court will reverse a conviction "only if no reasonable jury could have found the defendant guilty" beyond a reasonable doubt. *Ibid.* (citation omitted).

B. Sufficient Evidence Supports Defendant's Convictions

Defendant's argument (Br. 34-37) that there was insufficient evidence to support his convictions ignores the overwhelming evidence supporting the verdict.

1. To establish a violation of Section 249(a)(1), the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) caused bodily injury to any person; (3) because of such person's "actual or perceived race, color,

religion, or national origin." 18 U.S.C. 249(a)(1); see also Tr. 493 (jury instructions); note 2, *supra*. Defendant challenges the first and third elements.[5]

First, the evidence is overwhelming that defendant intentionally and purposely engaged in conduct to injure the victims by running their car off the road because of the victims' actual or perceived race or national origin, and that Defendant knew that such conduct was unlawful. Defendant's two accomplices, Popejoy and Simer, testified that defendant, after taunting the victims with derogatory and racial epithets, wanted to chase the victims' car and beat them up. Tr. 373-374, 413-414. Defendant's intent is also established by testimony that he drove at a high rate of speed to catch up to the victims' car, rammed his truck several times into the back of the car, and performed a "pit maneuver" designed to cause the victims' car to spin off the road. In addition, defendant's threats to harm Popejoy and Simer if they told anyone what happened, hiding his truck off the roadway up against a fence, and lies to law enforcement to try to evade criminal responsibility show that he acted with knowledge that his conduct was unlawful. See pp. 9-10, 13-14, *supra*.

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[5] There is no dispute that defendant's conduct caused bodily injury to each of the five victims. Bodily injury includes "a cut, abrasion, bruise, burn, or disfigurement," as well as "physical pain * * * or any other injury to the body, no matter how temporary." Tr. 495; see 18 U.S.C. 249(c)(1) (referring to 18 U.S.C. 1365(h)(4)); see generally p. 11, *supra* (addressing injuries).

Second, the evidence of defendant's racial animus – established by the testimony of four witnesses at trial – is also overwhelming. Popejoy testified that he and defendant were yelling racial slurs at the victims, calling them "wetbacks," and stating "Go back to Mexico." Tr. 410, 424. He also testified that they were "hating on them" because of their race. Tr. 435-436. Simer testified that, after the victims crashed, defendant said that he hoped the "fuckin' beaners burn and die." Tr. 390. Vital and Sanchez, two of the victims, testified that they heard a group of Caucasian men yell racial slurs at them at the Red-X gas station, including calling them "wetbacks" and stating that "You Mexicans needs to go back to Mexico." Tr. 276-277, 307, 340-341; see pp. 6-7, *supra*. Given this testimony, a reasonable jury could conclude that defendant was motivated by the race or national origin of the Hispanic victims.

Defendant principally asserts that there was not sufficient evidence of racial animus, and notes that Popejoy "expected to receive some benefit for testifying," and Simer received immunity for his testimony. Br. 35.[6] But Popejoy and Simer were cross-examined, the jury was aware that Popejoy could receive favorable

[6] Defendant also asserts that "none of the alleged victims ever testified [that he] made any kind of racial slur or overt action toward them." Br. 35. The fact that two of the victims (Vital and Sanchez) did not specifically identify defendant, but referred collectively to statements from a group of persons at the gas station (*i.e.*, Maybee, Popejoy, and Simer), does not nullify the evidence against defendant, particularly given Popejoy's and Simer's testimony concerning defendant's racial statements. See Tr. 389, 410-411.

treatment for his testimony and that Simer testified pursuant to an immunity agreement, and the jury was instructed that it could take into consideration a witness's agreement with the government in evaluating his credibility. See Tr. 517, 521 (defendant's closing argument); Tr. 484-487 (jury instructions). Defendant's counsel also argued at length in closing that there was insufficient evidence of racial animus. Tr. 518-523. At bottom, defendant simply takes issue with the adverse jury verdict and the crediting of the testimony of the government's witnesses concerning the events at the Red-X gas station, the car chase, and the crash. But there is no question that, viewing the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the verdict, and accepting all reasonable inferences drawn from the evidence to support the jury's verdict, as this Court must, there is more than ample evidence to support the convictions for violating Section 249(a)(1) with respect to each of the victims.[7]

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[7] Apart from the testimony of Popejoy, Simer, and the victims, other evidence presented at trial linked defendant to the car crash: (1) Officer Hand's testimony concerning the taillight lens covers and skid marks found on the highway (Tr. 135); (2) testimony that defendant's truck was found near the accident scene backed up against a gate with the front of the truck facing the road, and there was fresh damage on the front of the vehicle and a "green paint transfer" (Tr. 149-150, 157-159); (3) testimony that paint scrapings from the front of the truck were consistent with the green metallic automotive paint used at a plant that made Buick LeSabres in 1995 (Tr. 177-178, 252-255); and (4) defendant's response, when Officer Hipps stated the paint on the truck's tow hooks appeared to

(continued…)

2. To establish a violation of Section 371, the government must prove beyond a reasonable doubt that the defendant: (1) entered into an agreement with another person; (2) agreed to commit a crime against the United States; and (3) committed at least one overt act in furtherance of the conspiracy. 18 U.S.C. 371[8]; see, *e.g.*, *United States* v. *Hayes*, 574 F.3d 460, 472 (8th Cir. 2009); *United States* v. *Farrell*, 563 F.3d 364, 376 (8th Cir. 2009); see also Tr. 488-492 (jury instructions).[9] A formal agreement is not required; the agreement may be either explicit or implicit, and "[e]vidence of a common plan or a tacit understanding, which may be shown by circumstantial evidence with respect to the conduct of the conspirators and any attendant circumstances, is sufficient." *United States* v. *Peterson*, 223 F.3d 756, 759-760 (8th Cir. 2000); *Farrell*, 563 F.3d at 376.

(…continued)
be fresh, "Is that all you have? Is that the best you have to prove my truck did this" (Tr. 211).

[8] 18 U.S.C. 371 provides, in relevant part: "If two or more persons conspire either to commit any offense against the United States * * * in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

[9] As the jury instructions indicate, subsumed in these elements is that defendant must have *known* the *purpose* of the agreement, and have *intentionally* joined it. Tr. 488; see, *e.g.*, *United States* v. *Johnson*, 450 F.3d 366, 374 (8th Cir. 2006); *United States* v. *Jolivet*, 224 F.3d 902, 908 (8th Cir. 2000).

Defendant makes the bare assertion that "the evidence [was] insufficient to show any agreement." Br. 36. There is ample evidence, however, from which a reasonable jury could find that defendant *agreed* with Popejoy to cause bodily injury to the five Hispanic men because of the victims' race or national origin. Popejoy testified that after the victims drove away from the gas station, they discussed going after the victims and assaulting them; a video from the gas station's security camera confirms that defendant and the two others waited nearly a minute before going to defendant's truck and leaving. Tr. 223-224, 412-413; see also Tr. 373. In addition, Popejoy and Simer variously testified that defendant referred to the victims in racially derogatory terms and agreed to chase the victims, and that defendant stated that he wanted to "go get" them and harm them. Tr. 372-373, 413-414. Defendant then chased the victims' car, rammed it several times, and forced it off the road – overt acts taken in furtherance of the conspiracy and fulfilling the goal of the conspiracy. See pp. 8-9, *supra*. In short, substantial evidence established that defendant agreed to chase after the victims and harm them (the purpose of the conspiracy), intentionally did so (stating let's "go get" them and, after the crash, I hope those "fuckin' beaners burn and die" so that he would not get caught (Tr. 390)), and took numerous actions in furtherance of the agreement. See pp. 7-9, *supra*.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

A. Standard Of Review

The Court reviews a denial of a motion for a new trial pursuant to Fed. R. Crim. P. 33[10] for abuse of discretion. *United States* v. *LeGrand*, 468 F.3d 1077, 1080 (8th Cir. 2006). "While the district court's discretion is quite broad – it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict – there are limits to it. Unless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand." *United States* v. *Campos*, 306 F.3d 577, 579 (8th Cir. 2002) (internal citations and quotation marks omitted).

B. The District Court Did Not Abuse Its Discretion In Denying Defendant's Motion For A New Trial

Defendant asserts that a new trial was warranted because (1) there was no testimony from a *victim* that he made any racist remarks, and that the only testimony to that effect was from Popejoy and Simer, both of whom lacked credibility because they received or expected to receive a benefit for their testimony; and (2) the exhibits and testimony concerning the victims' injuries, and

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[10] Rule 33 provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

the pictures of the burned vehicle, "although initially helpful for understanding, had the clear effect of inflaming the jury." Br. 38-39.

First, as we addressed in Issue I, the evidence of defendant's racial animus is overwhelming. See p. 18, *supra*. Moreover, the district court squarely addressed, and rejected, defendant's credibility argument, stating:

> [I]f the Court were to find it necessary to weigh evidence and evaluate credibility of witnesses, it would conclude that the findings were not against the weight of evidence nor was the jury's apparent belief of testimony supporting the charges unreasonable, suspect, or otherwise improper. It follows * * * that the Court does not believe the evidence * * * was against the verdict at all, and certainly not heavily so as to constitute a miscarriage of justice. To the contrary, it is the Court's view that the weight of the evidence is clearly in favor of the jury's verdict.

App. 26-27. Second, there is no basis for defendant's bare assertion that the exhibits of the victims' injuries and the burned vehicle "inflame[ed] the jury" and therefore rendered the guilty verdict a miscarriage of justice. Proof of the victims' injuries (*i.e.*, "bodily injury") was an element of the Section 249 offense, and photographs of the accident scene were relevant both to the injuries and to understanding the case.[11] In short, defendant has not shown how the denial of his motion for a new trial resulted in a miscarriage of justice.

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[11] Defendant cites to pages 137-143 of the trial transcript, where the government introduced 15 photographs of the crash scene (Exhibits 3-8, 11-17, 27-28). Br. 39. Of these exhibits, eight show the burned car, and defendant did not object to their admission. Tr. 137, 143.

III

SECTION 249(a)(1) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

A. Standard Of Review

Questions of law, including the constitutionality of a statute, are reviewed *de novo*. See, *e.g.*, *United States* v. *Zuniga*, 579 F.3d 845, 848 (8th Cir. 2009); *United States* v. *Johnson*, 56 F.3d 947, 953 (8th Cir. 1995).

B. Section 249(a)(1) Is A Valid Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment

As relevant here, Section 249(a)(1) makes it a crime to willfully cause bodily injury because of the "actual or perceived race, color, religion, or national origin of any person." Defendant asserts that Congress does not have the authority to enact this provision under Section 2 of the Thirteenth Amendment. Br. 39-49. The district court correctly rejected this argument.

1. Congress's Power Under Section 2 Of The Thirteenth Amendment

a. Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Although the "immediate concern" of this Amendment was with the pre-Civil War enslavement of African-Americans, the Amendment was

not limited to abolishing slavery. *United States* v. *Kozminski*, 487 U.S. 931, 942 (1988); see also *Bailey* v. *Alabama*, 219 U.S. 219, 241 (1911).

Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." The Supreme Court has made clear that Congress's power under Section 2 is to be interpreted broadly, "[f]or that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis added) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). The Supreme Court has also explained that "[b]y the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, 'Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.'" *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971) (quoting *Jones*, 392 U.S. at 440). It follows that Congress has the authority, not only to prevent the actual imposition of slavery or involuntary servitude, "but to ensure that none of the badges and incidents of slavery or involuntary servitude exists in the United States." S. Rep. No. 147, 107th Cong., 2nd Sess. 16 (2002) (internal quotation marks omitted).

The Supreme Court has recognized in several cases that Congress's power under Section 2 to penalize private conduct extends "far beyond the actual imposition of slavery and involuntary servitude." *Griffin*, 403 U.S. at 105. In *Griffin*, for example, African-American plaintiffs sued for damages under 42 U.S.C. 1985(3) after they were forced from their car and attacked because the defendants thought that the driver of the car was a civil rights worker. The Court upheld the constitutionality of Section 1985(3) on the ground that "Congress was wholly within its powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.* at 105. And in *Jones*, the Court upheld the constitutionality of 42 U.S.C. 1982 on the ground that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property." *Jones*, 392 U.S. at 439; see also *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (concluding that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts for private educational services and private employment is "appropriate legislation" for enforcing the Thirteenth Amendment) (citation omitted).[12]

[12] Cf. *Palmer* v. *Thompson*, 403 U.S. 217, 226-227 (1971) (declining to hold that the City of Jackson's decision to close rather than desegregate a

(continued…)

Noting theses cases, the Second Circuit concluded that "it is clear from many decisions of the Supreme Court that Congress may, under its Section Two enforcement power, now reach conduct that is not directly prohibited by Section One." *United States* v. *Nelson*, 277 F.3d 164, 181 (2d Cir. 2002); see also *id.* at 185 ("Congress, through its enforcement power under Section Two of the Thirteenth Amendment is empowered * * * to control conduct that does not come close to violating Section One directly."). This broad authority includes the power to criminalize individual conduct that runs afoul of the Thirteenth Amendment's purpose of ensuring universal civil freedom. See generally *Jones*, 392 U.S. at 438 ("It has never been doubted * * * that the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation * * * includes the power to enact laws direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.") (internal quotation marks and citation omitted); see also *Murray* v. *Earle*, 334 F. App'x 602, 607 (5th Cir. 2009) (Section

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(…continued)
municipal swimming pool violated Section 1 of the Thirteenth Amendment, but explaining in dicta that Congress might have the authority to regulate such action under Section 2); *City of Memphis* v. *Greene*, 451 U.S. 100, 128 (1981) (declining to hold that the closing of a city street which traversed predominantly black and white neighborhoods violated the Thirteenth Amendment but suggesting that this activity "does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to [Section] 2"). *Palmer* and *Memphis* do not undermine the rationale of *Jones*, but clarify that while Congress is empowered to identify and target badges of slavery, absent federal legislation the Court will not *sua sponte* identify such badges and enjoin them under the Thirteenth Amendment.

2 of the Thirteenth Amendment empowers Congress to both "define" and "legislatively abolish" badges and incidents of slavery).

Finally, Congress's determination that a law is necessary and proper under Section 2 must be given effect so long as the decision is "rational." In *Jones*, the Court stated that Congress has the power "rationally to determine what are the badges and incidents of slavery," and concluded that Congress had not made an "irrational" determination in legislating under Section 2 when it enacted legislation to abolish both private and public discrimination in the sale of property. 392 U.S. at 440-441[13]; see also *Griffin*, 403 U.S. at 105 ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.") (citation omitted); *Nelson*, 277 F.3d at 185 (addressing "whether Congress could rationally have determined that the acts of violence covered by [Section] 245(b)(2)(B) impose a badge or incident of servitude on their victims").

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[13] In upholding Congress's power to enact 42 U.S.C. 1982, the Court in *Jones* also applied the test for the scope of federal legislative power set forth in *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Jones*, 392 U.S. at 443-444. The Court in *Jones* "agreed" that because the "end" of Section 1982 was defined by the Constitution itself – the "maintenance of freedom," a "man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery" – this "settles the appropriateness of this measure, and that settles the constitutionality." *Ibid.* (internal quotation marks omitted).

b. Most of the cases addressing the scope of Congress's power under Section 2 of Thirteenth Amendment address 18 U.S.C. 245(b)(2)(B), the first federal hate-crime statute, which was enacted in 1968. This statute makes it a federal crime to "willfully injure[], intimidate[], or interfere[] with, or attempt[] to injure, intimidate or interfere with * * * any person because of his race, color, religion, or national origin and because he is or has been * * * participating in or enjoying any [public] benefit, service, privilege, program, facility or activity." 18 U.S.C. 245(b)(2)(B). Although Section 245(b)(2)(B), like Section 249(a)(1), addresses race-based violence, Section 245(b)(2)(B) has a narrower focus. A defendant may be convicted of violating Section 245(b)(2)(B) only where he also has the specific intent to interfere with a victim's enjoyment of a federally protected right. See *United States* v. *Makowski*, 120 F.3d 1078, 1081 (9th Cir. 1999); S. Rep. No. 721, 90th Cong., 1st Sess. 8 (1967) (S. Rep. No. 721). As discussed below, however, that additional element is not essential to legislation enacted under the Thirteenth Amendment.

Congress was well aware of the association of private violence with slavery when it enacted Section 245(b)(2)(B). The House Committee found that "[v]iolence and threats of violence have been resorted to in order to punish or discourage Negroes from voting, from using places of public accommodation and public facilities, from attending desegregated schools, and from engaging in other

activities protected by Federal law." H.R. Rep. No. 473, 90th Cong., 1st Sess. 3-4 (1967). Similarly, the Senate Committee stated that Section 245 was enacted specifically "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721 at 3.

Congress's determination that violent interference with a person based on the person's race and use of a public facility imposed a "badge of slavery" was supported by the Supreme Court's decision in *Griffin*. *Griffin*, 403 U.S. at 105 (Congress's conclusion that violent assault of African-American men on a public highway constituted a badge or incident of slavery prohibited by the Thirteenth Amendment was not irrational). Moreover, in 1968, the same year in which Congress enacted Section 245(b)(2)(B), the Supreme Court held that the prohibition of racial discrimination in the sale and acquisition of real and personal property constituted a valid exercise of Congress's power to enforce the Thirteenth Amendment. *Jones*, 392 U.S. at 439. The Court explained:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-443. If Congress could have rationally concluded that segregation and non-violent discrimination in the sale of housing constituted badges and incidents

of slavery, Congress certainly could have also rationally concluded that *violent* race-based interference with a person's use of a public facility constituted a badge of slavery. See, *e.g.*, *Nelson*, 277 F.3d at 189-190 (the "practice of race-based private violence both continued beyond [emancipation] * * * and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights").

Given this background, every court of appeals to have addressed a constitutional challenge to Section 245(b)(2)(B) has upheld it as a valid exercise of Congress's Section 2 authority and, in so doing, has made clear that Congress may rationally link slavery and racial violence. This Court, in *Bledsoe*, upheld the statute as applied to the beating death of an African-American in a city park, concluding that the statute "does not exceed the scope of the power granted to Congress by the Constitution" because there can be little doubt "that interfering with a person's use of a public park because he is black is a badge of slavery." *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984); see also *United States* v. *Sandstrom*, 594 F.3d 634, 659-660 (8th Cir. 2010) (rejecting argument that that Section 245(b)(2)(B) exceeds Congress's power under the Thirteenth Amendment) (citing *Bledsoe*); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (holding that Section 245(b)(2)(B) is "a constitutional exercise of Congress's authority under the Thirteenth Amendment"); *Nelson*, 277 F.3d at 191

(concluding that Section 245(b)(2)(B) was "a constitutional exercise of Congress's power under the Thirteenth Amendment"). Indeed, the court in *Nelson*, citing various studies, concluded that "there exist indubitable connections (a) between slavery and private violence directed against despised and enslaved groups and, more specifically, (b) between American slavery and private violence and (c) between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places." *Nelson*, 277 F.3d at 190.

2. In Enacting Section 249, Congress Rationally Determined That Bias-Motivated Violence Is A Badge And Incident Of Slavery

On October 28, 2009, the President signed into law the Shepard-Byrd Act. Pub. L. No. 111-84, Div. E, 123 Stat. 2835 (2009). The Act created a new federal hate crime statute, codified at 18 U.S.C. 249, which was intended, as relevant here, to address a serious limitation in the reach of Section 245 – that Section 245 applies only to hate-motivated violence in connection with the victim's participation in specifically defined federal activities. See H.R. Rep. No. 86, 111th Cong., 1st Sess. 5 (2009) (H.R. Rep. No. 86).[14]

[14] The Shepard-Byrd Act was also intended to remedy the fact that Section 245 does not address hate crimes based on the victim's sexual orientation, gender, gender identity, or disability. See H.R. Rep. No. 86 at 5; 18 U.S.C. 249(a)(2).

Section 249(a) contains three distinct provisions prohibiting willfully causing bodily injury to a person when the assault is motivated by a specific, statutorily-defined bias. 18 U.S.C. 249(a). All three provisions are directed at private conduct, and each was enacted pursuant to a different source of constitutional authority. Section 249(a)(1), the only provision relevant here, applies to violent acts undertaken "because of the actual or perceived race, color, religion, or national origin of any person." This subsection was enacted pursuant to Congress's Thirteenth Amendment authority to eradicate badges and incidents of slavery. 18 U.S.C. 249, Findings, sec. 4702(7)-(8); H.R. Rep. No. 86 at 15.[15] No federal prosecution may be undertaken under this provision unless the Attorney General certifies, *inter alia*, that the State does not have jurisdiction or has requested that the federal government assume jurisdiction. 18 U.S.C. 249(b)(1).

During its consideration of Section 249, Congress heard evidence about the prevalence of hate crimes and the need for further federal involvement to address the problem. The House Report states that "[b]ias crimes are disturbingly

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[15] With regard to the other subsections of Section 249, Section 249(a)(2) criminalizes acts of violence committed because of the actual or perceived religion, national origin, gender, disability, sexual orientation, or gender identity of any person. This subsection was passed pursuant to Congress's Commerce Clause authority, and requires proof that the crime was in or affecting interstate or foreign commerce. See H.R. Rep. No. 86 at 15. Section 249(a)(3) provides for prosecution of hate crimes, defined in Sections 249(a)(1) or (a)(2), whenever such crimes occur within the Special Maritime and Territorial Jurisdiction of the United States.

prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86 at 5. In 2007 alone, the FBI documented more than 7600 hate crimes, including nearly 4900 (64%) motivated by bias based on race or national origin. *Ibid.* Congress was also presented with testimony that

> [r]acially-motivated violence, from the First Reconstruction on, was in large part a means of maintaining the subjugation of Blacks that had existed under slavery. Violence was an integral part of the institution of slavery, and post-Thirteenth Amendment racial violence was designed to continue *de facto* what was constitutionally no longer permitted *de jure*.

Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong., 1st Sess. 59 (2007) (statement of Prof. Frederick M. Lawrence). Moreover, as one of the *opponents* of previous similar legislation acknowledged, "it was nearly impossible for a white slave owner to be found guilty of murdering a slave" and slave owners were "free to do what they wanted with their 'property.'" *Hate Crimes Violence: Hearing Before the H. Comm. on the Judiciary*, 106th Cong., 1st Sess. 31 (1999) (statement of Daniel E. Troy) (footnote omitted).

The congressional "Findings" section of the statute reflects this testimony. It states that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th [A]mendment to the Constitution of the United

States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry," and that "[a]ccordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." See 18 U.S.C. 249, Findings, sec. 4702(7). Congress, therefore, rationally found that racially motivated violence is a badge or incident of slavery, and had ample authority under Section 2 to enact Section 249(a)(1) and prohibit racially-motivated violent conduct.

The district court's conclusion to this effect is consistent with that of the only other court that has addressed this issue. In *United States* v. *Beebe*, 807 F. Supp. 2d 1045 (D.N.M. 2011), appeal docketed, No. 12-2040 (10th Cir. March 8, 2012), the court denied defendants' motion to dismiss the indictment charging a violation of Section 249(a)(1), stating that Congress "expressly identified racially motivated violence as a badge or incident of slavery," and that because the statute "targets a badge or incident of slavery * * * it contains a legitimate enforcement purpose under the Thirteenth Amendment." *Id.* at 1056. In addition, the court, citing numerous authorities, stated that "[a] cursory review of the history of slavery in America demonstrates that Congress' conclusion [that eliminating racially motivated violence is an important means of eliminating the badges and incidents of slavery] is not merely rational, but inescapable." *Id.* at 1052; see also *ibid.* ("In

light of this history, the Court could not possibly find irrational Congress' identification of racially motivated violence as a badge of slavery.").

For these reasons, Section 249(a)(1) is constitutional on its face. Moreover, in this case, the government charged the defendant with willfully causing bodily harm because the five victims in the car were Hispanic, *i.e.*, "because of th[eir] actual and perceived race, color, and national origin." See App. 24-25. Such a charge falls under Section 249(a)(1), and therefore Section 249(a)(1) is also constitutional as applied.

3. Defendant's Arguments Against The Constitutionality Of Section 249(a)(1) Are Without Merit

Defendant suggests that because Section 249(a)(1), unlike Section 245(b)(2)(B), does not contain the federal "activities" element (*i.e.*, that defendant's conduct occurred because the victim was participating in a federally protected activity), Section 249(a)(1) does not fall within Congress's Thirteenth Amendment enforcement powers. Br. 43-44. There is no basis, however, for so limiting Congress's Section 2 authority.

As discussed above, the Supreme Court has made clear that Congress "has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*, 392 U.S. at 440; see also *Griffin*, 403 U.S. at 105. This formulation of Congress's Thirteenth Amendment power is not limited

to interference with protected activities, as it is well-settled that racially discriminatory violence is itself a badge and incident of slavery. See pp. 30-31, *supra*. Courts addressing the constitutionality of Section 245(b)(2)(B) refer to this additional element not because it is essential to uphold the exercise of Congress's Section 2 power, but because it is an element of the statute before it.[16] See *Nelson*, 277 F.3d at 190 n.25 (that 18 U.S.C. 245(b)(2)(B) requires proof both that the activity occurred because of race, color, or national origin and because the victim was participating in a specific activity makes the court's constitutional ruling "easier," but the court is "not holding that both (and in particular the second) of the conditions are necessary to the statute's constitutionality").[17] The district court,

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[16] Section 245 included the "federally protected activities" element because the statute was intended to address the violent interference with activities protected by federal law (*e.g.*, the then-recently enacted Civil Rights Act of 1964) and the Constitution, *i.e.*, to address racial violence "used to deny affirmative federal rights." S. Rep. No. 721 at 4. As Senator Kennedy, a proponent of the bill, stated, "[i]f racial violence directed against activities closely related to those protected by the 1964 act is permitted to go unpunished, the exercise of the protected activities will also be discouraged." 114 Cong. Rec. 2269 (1968). As noted above, Section 249 was intended, in part, to cure limitations in the reach of Section 245 that "confined [the statute] to hate-motivated violence in connection with the victim's participation in one of six narrowly defined 'federally protected activities' (under 18 U.S.C. § 245)." H.R. Rep. No. 86 at 5. This deficiency "limit[s] the Federal Government's ability to prosecute certain hate crimes, and its ability to assist State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes." *Ibid.*

[17] We note that defendant does not cite any case suggesting that Congress intended the limitation he advocates, *i.e.*, that Congress's power to legislate in this

(continued…)

therefore, correctly held that there is no basis to conclude that "in order to be constitutional under the Thirteenth Amendment, a statute must include not only a requirement that the conduct sought to be prohibited be such as to constitute a 'badge or incident of slavery,' but also a requirement that the conduct must also involve the use of a public facility, etc." App. 34. In short, given that Congress, in enacting Section 249(a)(1), specifically found that eliminating racially motivated violence is an important means of eliminating badges or incidents of slavery, and that these findings are rational (as discussed above), Section 2 provides ample authority for Congress to prohibit racially-motivated violence, regardless of whether a defendant also intended to interfere with certain protected activities.

Defendant also suggests that Congress never mentioned the Thirteenth Amendment when it promulgated Section 249. Br. 44. As noted above, however, in the Findings section of the Shepard-Byrd Act, Congress made clear that it was invoking its Thirteenth Amendment authority in enacting Section 249(a)(1). See p. 33, *supra*. In any event, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). This argument was also rejected by the court in *Nelson* in concluding that Section

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(…continued)
area is limited to abolishing badges and incidents of slavery that interfere with a federally-protected right (as in Section 245).

245(b)(2)(B) fell within Congress's power under the Thirteenth Amendment rationally to determine the badges and incidents of slavery. *Nelson*, 277 F.3d at 190-191 & n.26. The court stated that although Congress "did not expressly make this determination," Congress is not obligated to do so when enacting its statutes. *Id.* at 191 n.26. The court added that, in any event, "even though the Congress that enacted [Section] 245(b)(2)(B) made no findings *under the headings* of the Thirteenth Amendment and badges of servitude, it manifestly did make the underlying factual findings on which the determination that the conduct reached by the statute imposed badges and incidents of slavery depends." *Ibid.*

IV

DEFENDANT'S REMAINING ARGUMENTS SUGGESTING THAT HIS CONVICTIONS AND SENTENCE SHOULD BE REVERSED ARE WITHOUT MERIT

The first three arguments defendant makes in this appeal (Issues I-III above) were raised in defendant's post-conviction motion in the district court. See App. 9-21. Defendant asserts that he is presenting additional arguments "from [an] abundance of caution" in the event they "may be derived" from the district court's decision denying his post-trial motion. Br. 1. He also suggests that other issues may be implicated by the district court's decision, but does not identify them. Some of these arguments are conclusory, or otherwise not well-developed. Issues raised on appeal but not supported with argument are deemed abandoned. See,

e.g., *United States* v. *Aldridge*, 561 F.3d 759, 765 (8th Cir. 2009). In all events, defendant's additional arguments are baseless

1. First, defendant asserts that the court should have instructed the jury on entrapment and self-defense, and that trial counsel rendered ineffective assistance by failing to propose these instructions.[18] Br. 49-51. Entrapment – *i.e.*, where the government "implanted the criminal design in [defendant's] mind and induced him to commit the offense," is irrelevant to this case. See generally *United States* v. *Wilder*, 597 F.3d 936, 944 (8th Cir.), cert. denied, 131 S. Ct. 169 (2010). To the extent defendant is referring to the fact that Popejoy and Simer testified pursuant to agreements with the government, that is not entrapment.

Defendant's suggestion (Br. 51) that testimony that Vital took aggressive action by slamming on the brakes, "causing the incident to occur," warranted a self-defense instruction, is baseless. It is difficult to see how defendant's characterization of the cause of the crash, even if supported by the evidence, implicates self-defense. In any event, there is overwhelming testimony that the crash was caused by defendant intentionally ramming into the victim's car and performing a pit maneuver, and that defendant did so because of racial hostility

[18] Because defendant did not move at trial for entrapment and self-defense jury instructions, this issue is reviewed for plain error. *United States* v. *Wilder*, 597 F.3d 936, 944 (8th Cir.), cert. denied, 131 S. Ct. 169 (2010).

toward the victims. See pp. 8-9, *supra*.[19] Therefore, because the evidence did not support it, the court did not plainly err by failing to give a jury instruction on self-defense. See *United States* v. *Angelle*, 352 F. App'x 118, 119 (8th Cir. 2009). To the extent that defendant suggests how the crash occurred may be relevant to a finding of willfulness, the jury was instructed that, in considering this element, it could consider all the "facts and circumstances received in evidence which may aid in your determination of the defendant's intent." Tr. 495.

Finally, defendant suggests that trial counsel rendered ineffective assistance of counsel by failing to propose the entrapment and self-defense jury instructions. Br. 49. Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal, but instead must be raised in a 28 U.S.C. 2255 action, because they involve the development of facts outside the record. See, *e.g.*, *Wilder*, 597 F.3d at 944; *United States* v. *Lewis*, 483 F.3d 871, 873 n.2 (8th Cir. 2007). The Court has explained that it will "consider an ineffective assistance of counsel claim on direct appeal only in exceptional cases where the district court has developed a record on the ineffectiveness issue or where the result would otherwise be a plain miscarriage of justice." *Lewis*, 483 F.3d at 873 n.2 (internal quotation marks omitted). Neither exception applies here. In particular, as set

[19] Defendant does not cite to anything in the record to support the notion that the crash was caused by the victim slamming on the brakes of the car.

forth above, because there was no basis for such instructions to be given, the failure to propose them could not have resulted in a miscarriage of justice.

2. Defendant suggests that the jury instructions on the conspiracy count are inconsistent with the indictment with respect to *willfulness*, and therefore the jury instructions constructively amended the indictment and did not give him sufficient notice of the charge against him.[20] Br. 52-57. These arguments are baseless.

Jury instructions "constructively amend" an indictment if they have "modified the essential elements of the offense charged so that a substantial likelihood exists that the defendant was convicted of an offense other than that charged in the indictment." *United States* v. *Morton*, 412 F.3d 901, 905 (8th Cir. 2005) (internal quotation marks and brackets omitted); *Barrios-Perez*, 317 F.3d at 779. In other words, a constructive amendment "changes the charge" against the defendant. *Farish*, 535 F.3d at 822.

Conspiracy under Section 371 requires that the defendant *knowingly* entered into an *agreement* to commit *an offense against the United States*, and that at least

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[20] Jury instructions that constructively amend an indictment constitute reversible error. *United States* v. *Farish*, 535 F.3d 815, 822 (8th Cir. 2008); *United States* v. *Barrios-Perez*, 317 F.3d 777, 779 (8th Cir. 2003). The Court reviews challenges to the sufficiency of the indictment de novo. *United States* v. *Cuervo*, 354 F.3d 969, 983 (8th Cir. 2004). But where "a defendant does not attack the sufficiency of the indictment before trial, * * * [the Court] appl[ies] a more deferential standard of review." *Ibid.* (internal quotation marks omitted); *United States* v. *Mitchell*, 613 F.3d 862, 865-866 (8th Cir. 2010).

one overt act was taken in furtherance of the conspiracy. The underlying offense (Section 249(a)(1)) requires that the defendant *willfully* caused *bodily injury* to any person because of such person's actual or perceived race, color, religion, or national origin. See note 2, *supra*.

The indictment and jury instructions provided as follows:

- Count One charged defendant with violating Section 371 by "*willfully*" *conspiring* "to commit offenses against the United States constituting violations of [18 U.S.C. 249(a)(1)], that is, to cause bodily injury to persons because of the persons' actual or perceived race, color and national origin." App. 2 (emphasis added).
- The jury instructions for Count One stated that conspiracy, "as charged in Count 1[,] * * * has four elements," which include that "two or more persons reached an agreement * * * to commit a hate crime by *willfully causing bodily injury* to a person because of that persons' * * * race, color, or national origin," and that defendant "voluntarily and intentionally joined the agreement" and at that time "knew the purpose of the agreement." Tr. 488 (emphasis added).
- The jury instructions on Count One further stated that "[t]o assist you in determining whether there was an agreement or understanding to commit hate crimes, * * * the elements of a federal hate crime * * * [include] that

> the defendant *acted willfully* to cause bodily injury" and that "the defendant acted because of the actual or perceived race, color, or national origin of a person." Tr. 490-491 (emphasis added).

Although Count One unnecessarily uses the word "willfully" to modify conspiracy (*i.e.*, that defendant "*willfully* conspire[d]" to commit a federal offense), rather than as an element of the Section 249(a)(1) violation (proscribing *willfully* causing bodily injury on the basis of race or national origin), this does not mean the defendant was convicted of a crime for which he was not charged. The jury instructions on the elements of conspiracy were correct, and make clear that it is the underlying federal crime (Section 249(a)(1)) that requires that the defendant acted *willfully*. See Tr. 488-495. Adding the word "willfully" to modify "conspire" in the indictment is, essentially, surplusage.

Likewise, the fact that Count One, in summarizing what constitutes a violation of Section 249(a)(1) for purposes of a conspiracy, *omitted the word* "*willfully*," does not mean that defendant was not given fair notice of the conspiracy charge against him. See generally *United States* v. *Redzic*, 627 F.3d 683, 688-689 (8th Cir. 2010) ("An indictment is sufficient if it fairly informs the accused of the charges against him and allows him to plead double jeopardy as a bar to a future prosecution," and "in determining whether an essential element has been omitted, a court may not insist that a particular word or phrase appear in the

indictment when the element is alleged in a form which substantially states the element.") (internal quotation marks omitted), cert. denied, 131 S. Ct. 2126 (2011); Br. 56. The indictment provided defendant with sufficient notice of the charged conspiracy, particularly given the six overt acts listed in Count One. The "essence of the crime of conspiracy is the agreement, and not the commission of the crime which is the object of the conspiracy." *United States* v. *Civella*, 648 F.2d 1167, 1174 (8th Cir. 1981) (quoting *United States* v. *Carlton*, 475 F.2d 104, 106 (5th Cir. 1973)).[21]

3. Next, defendant challenges the jury instructions on aiding and abetting. Although defendant captions this issue as raising a variance argument,[22] what he really seems to be arguing is that the jury instructions on aiding and abetting (for Counts Two through Six, the Section 249(a)(1) violations) were either improper or

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[21] We note that Counts Two through Count Six, alleging the substantive violations of Section 249(a)(1), correctly include the word "willfully." See App. 3-5.

[22] A variance occurs when the evidence at trial proves facts materially different from those alleged in the indictment. See, *e.g.*, *United States* v. *Renner*, 648 F.3d 680, 685 (8th Cir. 2011) ("a variance changes the evidence, while the charge remains the same") (citation omitted); *United States* v. *Fiorito*, 640 F.3d 338, 350 (8th Cir. 2011), cert. denied, No. 11-7217, 2012 WL 685786 (Mar. 5, 2012). As discussed above (Issue I), here the evidence established all of the elements of the charges in the indictment – that defendant conspired to commit a racial hate crime and did commit a racial hate crime. In all events, "the defendant suffers no prejudice if the indictment has fully and fairly apprised him of the charges," which is the case here. *United States* v. *Moore*, 639 F.3d 443, 446-447 (8th Cir. 2011).

confused the jury.[23] Br. 55. Defendant also suggests that aiding and abetting a violation of Section 249(a)(1) is a separate offense from violating Section 249(a)(1) itself, and that this somehow tainted his convictions and final judgment.[24] Br. 57.

The jury instructions on aiding and abetting were correct. Compare Tr. 493-494 with *United States* v. *Devries*, 630 F.3d 1130, 1133 (8th Cir. 2011) (elements of aiding and abetting); see also 18 U.S.C. 2 (aiding and abetting).[25] They made clear that defendant could be found guilty on the Section 249(a)(1) counts either by proof that he met all of the elements of the statute, *or* if he aided or abetted in the commission of the hate crime.[26] Tr. 492-494. In this regard, aiding and abetting is not a separate offense; "it simply makes those who aid and abet in a crime

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[23] Because defendant did not object to the jury instructions below, this issue is reviewed for plain error. *United States* v. *Vanover*, 630 F.3d 1108, 1119 (8th Cir. 2011).

[24] The question whether aiding and abetting a violation of Section 249(a)(1) is a separate offense from violating Section 249(a)(1) is a legal question subject to de novo review.

[25] 18 U.S.C. 2(a) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[26] Of course, as the jury instructions correctly stated, for a defendant to be guilty of aiding and abetting, the government must prove that "all of the elements of [Section 249(a)(1)] were committed by some person or persons, and that the defendant aided and abetted the commission of that crime." Tr. 494.

punishable as principals." *United States* v. *Zackery*, 494 F.3d 644, 648 (8th Cir. 2007) (quoting *United States* v. *Thirion*, 813 F.3d 146, 151 (8th Cir. 1987)); see also *id.* at 649 (aiding and abetting, "not itself an offense," is "simply one way to prove [defendant] guilty of [the charged offense]").

Defendant further suggests that, because the *verdict form* on Counts Two through Six does not specifically refer to aiding and abetting, the jury could have been confused. Br. 55. This argument is baseless. The verdict form is simply a short-hand reference to the various counts against the defendant, so the jury can reach its verdict as to each count. It is not intended to replace the indictment or the jury instructions. See R. 37. Defendant further suggests that Popejoy's guilty plea to Count One (conspiracy) and Count Two (Section 249(a)(1) and aiding and abetting a violation of Section 249(a)(1)), was somehow prejudicial to his convictions. Br. 57. Nothing in this argument suggests how his convictions are legally infirm.

4. Finally, defendant argues that he is entitled to a minor role adjustment pursuant to Section 3B1.2 of the Sentencing Guidelines because he was convicted of aiding and abetting and was relatively less culpable than the others involved in the crimes.[27] Br. 57-59. Section 3B1.2 (Mitigating Role) provides that if

[27] Because defendant did not make this argument below, this issue is reviewed "for plain error resulting in a miscarriage of justice." *United States* v.

(continued…)

defendant was a "minimal" participant in a crime, decrease by four levels, and that if the defendant was a "minor" participant, decrease by two levels. This section applies to defendants who are substantially less culpable than the average participant. See *United States* v. *Bradley*, 643 F.3d 1121, 1128-1129 (8th Cir. 2011). Application Note 4 explains that the "Minimal Participant" provision "is intended to cover defendants who are plainly among the least culpable of those involved," and that the "defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant." U.S.S.G. § 3B1.2, cmt. (n.4). Application Note 5 explains that "Minor Participant" covers defendants who are "less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, cmt. (n.5).

Based on the testimony presented at trial, and the factual allegations in the presentence investigation report that were not subject to an objection, defendant cannot be considered a "minimal" or "minor" participant in the conspiracy and hate crimes, or somehow less culpable than Popejoy or Simer. Indeed, the evidence shows the opposite. Defendant referred to the victims in racially derogatory terms, agreed to chase the victims, and stated that he wanted to "go get"

(…continued)
Tung Thanh Nguyen, 371 F. App'x 701, 702 (8th Cir. 2010) (internal quotation marks omitted).

them and harm them. Maybee then *drove his truck* to chase the victims' car, rammed it several times, and ultimately forced it off the road, stating after the crash that he hoped those "fuckin' beaners burn and die" so that he would not get caught. See pp. 6-9, *supra* (summarizing facts).

Moreover, whether defendant was convicted as a principal or for aiding and abetting is a distinction without a difference in this context. In either case, the issue is whether defendant was less culpable than the others involved in the crimes. Defendant has not cited any facts to suggest that there was error, much less that such error "was so prejudicial as to have affected substantial rights resulting in a miscarriage of justice." *United States* v. *Weaver*, 554 F.3d 718, 722 (8th Cir. 2009) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's convictions and sentence.

Respectfully submitted,

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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 12,151 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: April 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, 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 Eighth Circuit by using the appellate CM/ECF system.

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