Nos. 07-1496/1531

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

JAMES BRADLEY WEEMS AND CHRISTOPHER MITCHELL,

Defendants - Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The defendants were convicted under 18 U.S.C. 241 of conspiracy to threaten and intimidate Anthony Briggins, an African American, in the exercise of his housing rights because of his race by burning a cross outside his residence. The United States appeals the defendants' sentence, challenging (1) the district court's refusal to apply a three-level enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a); and (2) the district court's application of a two-level reduction for the defendants' roles in the offense, pursuant to U.S.S.G. § 3B1.2(b).

The United States respectfully requests 15 minutes for oral argument. This appeal raises important legal issues regarding the proper interpretation and application of the Federal Sentencing Guidelines. The United States believes that argument would be helpful to the Court in understanding and resolving those issues.

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on February 8, 2007. The United States filed timely notices of appeal on February 28, 2007, pursuant to Federal Rule of Appellate Procedure 4(b)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court erred in refusing to apply a three-level sentencing enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a).

United States v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999)
United States v. *McDermott*, 29 F.3d 404 (8th Cir. 1994)
United States v. *Salyer*, 893 F.2d 113 (6th Cir. 1989)
United States v. *Skillman*, 922 F.2d 1370 (9th Cir. 1990)

2. Whether the district court erred in applying a two-level sentencing reduction for the defendants' roles in the offense, pursuant to U.S.S.G. § 3B1.2(b).

United States v. *Pospisil*, 186 F.3d 1023 (8th Cir. 1999)
United States v. *Hayes*, 391 F.3d 958 (8th Cir. 2004)

STATEMENT OF THE CASE

On May 3, 2006, a federal grand jury returned a two-count indictment against James Bradley Weems, Christopher Mitchell, and Clint Wurtele. Tr. 578-579. Count One charged the defendants with conspiracy against rights in violation of 18 U.S.C. 241, alleging that they "did knowingly and willfully combine, conspire and agree to injure, oppress, threaten and intimidate, Anthony Briggins, an African-American man, in the free exercise and enjoyment of * * * the right to lease, hold, and occupy a dwelling without injury, intimidation and interference because of race." Tr. 579. Count Two charged the defendants with violating 42

U.S.C. 3631, alleging that they "did erect and set on fire a cross, and did by force and threat of force and by use of fire, willfully intimidate and interfere with Anthony Briggins, an African-American male, who was a resident of a dwelling * * * [in] Fouke, Arkansas, and did attempt to intimidate and interfere with Anthony Briggins, because of his race and color and because he was occupying the dwelling." Tr. 580.

The defendants pleaded not guilty to both counts and went to trial. Tr. 574. On September 28, 2006, the jury found Mitchell and Weems guilty on Count One but not guilty on Count Two. Tr. 581. The jury found Wurtele not guilty on both counts.

On February 8, 2007, the court sentenced Mitchell and Weems to one month's imprisonment and five months' home detention. Tr. 606-607.

STATEMENT OF FACTS

1. The Offense

On August 5, 2005, James Bradley Weems, Christopher Mitchell, and Clint Wurtele attended a party in the home of Christopher Baird in Fouke, Arkansas. Tr. 199-200, 234-236, 362-363. During the party, Baird mentioned to the defendants that he had a black neighbor. Tr. 200, 218, 478. Baird, Weems, and Mitchell discussed the neighbor, referring to him as a "nigger" and "black

motherfucker." Tr. 159-160, 200-201, 219, 476, 479. Mitchell, who owns rental property, Tr. 361-362, said "it's okay * * * to rent to niggers in Texarkana, but not [in] Fouke." Tr. 202. Weems, Mitchell, and others began to discuss a way to scare the neighbor and run him off the property. Tr. 86-87.

Weems, Mitchell, and others decided to build a cross and burn it in the neighbor's yard. Tr. 83, 161, 201, 219. Weems instructed Baird to get some wood to build the cross. Tr. 472-473. When Baird returned with some driftwood, Weems teased Baird for not getting the right kind of wood. Tr. 83-84, 473. Baird became agitated and returned with some two-by-sixes. Tr. 85, 413, 473. Mitchell provided a hammer from his truck. Tr. 88, 413. Weems took the hammer and used it to nail the boards together in the shape of a cross while Mitchell stood behind him and watched. Tr. 84, 413-414, 475, 477-478. The cross measured seven by three feet. Tr. 477. Mitchell loaded the cross onto his truck, but the cross did not fit all the way on it. Tr. 88, 415, 481. Baird later removed the cross from the truck and placed it on his four-wheeler. Tr. 88, 240.

Baird hauled the cross on his four-wheeler toward the black neighbor's home. Tr. 88, 240-241, 417. He returned to the party, got on his tractor, and went back to where he left the cross. Tr. 88, 241, 417. Weems, Mitchell, and another man, Larry Wayne Crank, got into Mitchell's truck. Tr. 241. Mitchell drove

Crank and Weems in his truck to the site, where Baird and Wurtele were digging a hole in the ground. Tr. 88, 242, 417-418, 481. Baird and Wurtele attempted to erect the cross. Tr. 89, 243, 418, 481. Crank asked Mitchell to take him back to the party so that he could leave. Tr. 243, 419. Weems called Crank a "pussy." Tr. 246, 484. Mitchell took Crank back to the party and then returned to the site of the cross. Tr. 89, 244. Mitchell got out of his truck and helped Baird, Wurtele, and Weems set up the cross. Tr. 86, 89, 245, 482. They poured various fluids on the cross to make it flammable. Tr. 86, 245-246, 484. When the cross became lopsided, Mitchell used a cordless drill to put a screw in it to straighten it out. Tr. 89, 246-247, 419-420. Baird then lit the cross on fire. Tr. 245.

The cross burned about 100 yards from the home of Anthony Briggins, Baird's African-American neighbor. Tr. 42-43, 247. As it burned, Weems shouted to Briggins that he should go back to Texarkana because he did not belong in Fouke. Tr. 247-248. Briggins, who was living with his Caucasian girlfriend and her family, felt scared and threatened. Tr. 38, 46-47. Briggins also worried about the safety of his girlfriend and her family. Tr. 47. The following morning, Briggins moved out. Tr. 48. Twelve days later, as a result of the cross burning, Briggins, his girlfriend, and his girlfriend's family moved to Illinois. Tr. 13, 49.

2. Sentencing Of Christopher Baird

On April 21, 2006, the defendants' co-conspirator, Christopher Baird, pleaded guilty to one count of conspiracy against rights based upon the cross-burning incident, in violation of 18 U.S.C. 241. Tr. 565. A sentencing hearing was held on November 9, 2006. Tr. 561. In calculating Baird's sentence, the court applied an offense level of 12, pursuant to U.S.S.G. § 2H1.1(a)(2). Tr. 566. The court increased the offense level to 15 by applying a three-level enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a). Tr. 566. The court then decreased the offense level to 13, for the defendant's acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a). Tr. 566-567. Finally, the court granted the United States' motion for a downward departure based on cooperation, resulting in an offense level of ten. Tr. 567. After considering Baird's criminal history, attitude, and cooperation, the court sentenced him to six months' home detention. Tr. 568-570.

3. Sentencing Of The Defendants

After Weems and Mitchell were found guilty of violating 18 U.S.C. 241, their presentence investigation reports (PSIRs) were prepared using the 2005

version of the Federal Sentencing Guidelines. PSIR 3.[1] The PSIRs applied a base offense level of 12, pursuant to U.S.S.G. § 2H1.1(a)(2). PSIR 3. The United States and both defendants objected. The United States objected because the offense level failed to include a three-level enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a). See PSIR 11-12. The defendants, on the other hand, argued that their offense level should have included a two-level reduction pursuant to U.S.S.G. § 3B1.2(b), because they were minor participants in the conspiracy. See PSIR 12-13; Weems' PSIR 11-12.

The PSIRs were revised on January 24, 2007, to reflect the defendants' objections, but not the government's objection. PSIR 3. The revised PSIRs stated that the three-level enhancement for hate crime motivation was not warranted because the court had not applied the enhancement when it sentenced co-conspirator Baird. PSIR 12. No reason was given for incorporating the defendants' request for a two-level reduction. PSIR 13. The revised PSIRs thus applied a total offense level of ten and recommended a sentence of six months'

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[1] The PSIRs for Weems and Mitchell are exactly the same except for the sections on criminal history and offender characteristics, which are not relevant to this appeal. Accordingly, for simplicity and convenience, this brief will use the citation "PSIR" to refer to both PSIRs, but the page numbers will refer to Mitchell's PSIR. This brief will use the citation "Weems' PSIR" when it is necessary to cite to Weems' PSIR in addition to, or instead of, Mitchell's PSIR.

home detention. PSIR 14.

A sentencing hearing was held on February 8, 2007. Tr. 574. In support of its objection, the United States argued that the PSIRs should have included the three-level enhancement for hate crime motivation because the United States proved, and the jury found, that the defendants selected their victim because of his race. Tr. 583. The United States also reminded the court that it had in fact applied the enhancement in co-conspirator Baird's case.[2] Tr. 583. In opposition to the defendants' request for a two-level reduction for their roles in the offense, the United States cited trial testimony establishing that both Weems and Mitchell were deeply involved in the conspiracy. Tr. 584-585.

In response, Weems argued that he was entitled to the two-level reduction because there was a lapse of time between his involvement in the conspiracy and the burning of the cross; the defendants were found not guilty of burning the cross; and if the defendants had played a major role in the offense, the United States would have filed a motion for an enhancement based on leadership role. Tr. 586. Weems asked the court to adopt the recommendation of the revised PSIRs, reflecting the two-level reduction. Tr. 586-587. Weems also argued that the

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[2] The revised PSIRs incorrectly stated that the court did not apply the enhancement in Baird's case. See Tr. 587, 597.

enhancement for hate crime motivation should not apply to offenses that are inherently based on race, such as the conspiracy charge in this case. Tr. 587. Mitchell concurred with Weems on both issues. Tr. 588.

The court denied the United States' request that it apply the enhancement for hate crime motivation. Tr. 598-599. The court stated that although it had applied the enhancement in Baird's case, Tr. 597, it had "read several cases * * * "since then * * * where the Supreme Court overturned a case, I can't remember what it was, but the court enhanced a sentence beyond the statute under which they were convicted by applying 3A1.1 as here. Accordingly, this court felt and so feels now, and so finds in this case * * * such enhancement would be beyond the discretion of the court." Tr. 598.

The court agreed with the defendants that a two-level reduction for their roles in the offense was warranted. Tr. 600. The court, however, stated that "at first, I felt I would not give that 2-point reduction, because I felt all three of these defendants were basically equally at fault. I vacillated back and forth on this issue." Tr. 599. The court explained that it reviewed the guideline and accompanying application notes and concluded that application of the guideline is based primarily on facts. Tr. 599. The court stated that it reviewed the overt acts in the indictment, but "didn't do this but a moment," and observed that the acts

made more references to co-conspirator Baird than to the defendants. Tr. 599-600. As an example, the court stated that it was Baird, not Mitchell or Weems, who obtained the wood and provided the tractor. Tr. 599-600. The court acknowledged, however, that the defendants "did assist, no question about that." Tr. 599. The court explained that it also reviewed the trial testimony:

> The facts were abundantly clear for the court, co-defendant Baird's wife gave him a birthday party. Defendant[s] Weems and Mitchell were guests. All were drinking. However, Baird appeared to be the most intoxicated.
>
> Mitchell and Weems began to kid Baird about his neighbor, Anthony Briggins, a black neighbor living with a Caucasian girl in a trailer across the road not far from Baird's trailer. With the kidding from his friends, Baird became irate and got a tractor, got wood to build a cross. These defendants helped him do that.
>
> The actions terminated when Baird essentially, with some help, burned the cross. A very crude cross.
>
> Weems and Mitchell neither provided the wood, the tractor or anything but assistance at various stages in the hasty construction of the cross. Baird was incited to the point of cross burning, Weems and Mitchell egged him on, in what appeared to them was fun. This is not to excuse their culpability, merely to suggest to the court that they did not play as major a role as did Baird.

Tr. 600. Based on these facts, the court concluded that the two-level sentencing reduction was merited. Tr. 600.

Accordingly, the court adopted the recommendation of the revised PSIRs

and applied an offense level of ten. Tr. 602. The court noted that, based on the defendants' criminal histories, the guidelines advised a sentence of six to twelve months' imprisonment. Tr. 602. The United States asked the court to impose a sentence of 12 months' imprisonment. Tr. 606. Notwithstanding this request, the court sentenced the defendants to only one month's imprisonment and five months' home detention. Tr. 606-607.

SUMMARY OF ARGUMENT

The defendants were convicted of conspiracy to threaten and intimidate Anthony Briggins, an African American, in the exercise of his housing rights because of his race, in violation of 18 U.S.C. 241. The district court sentenced the defendants to one month's imprisonment. Had the court correctly calculated their offense level, the applicable sentencing range would have been 18 to 24 months' imprisonment. The court erred in two respects.

First, the court erred in refusing to apply the three-level enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a). Such enhancement is appropriate where it is found beyond a reasonable doubt that a defendant intentionally selected his victim because of race. Because racial intent was an element of the offense of conviction in this case, the enhancement was applicable. Such intent, however, is not a necessary element of all violations of 18 U.S.C. 241.

Moreover, the guideline for 18 U.S.C. 241 and other civil rights offenses, U.S.S.G. § 2H1.1, does not account for racial motivation because it does not apply exclusively to racially motivated hate crimes. Accordingly, as this Court and other courts have previously held, application of Section 3A1.1(a) in cases involving racially motivated conspiracies does not constitute improper "double counting." The district court erred, therefore, in refusing to apply the three-level enhancement for hate crime motivation in the defendants' case.

Second, the court erred in applying a two-level reduction for the defendants' roles in the offense, pursuant to U.S.S.G. § 3B1.2(b). The court clearly erred in finding that the defendants were minor participants. The record evidence clearly establishes that both Weems and Mitchell were deeply involved in the conspiracy. For this reason, the defendants were unable to cite a single fact in support of their request for a sentencing reduction. Accordingly, the court erred in granting the defendants' request for a two-level reduction based on their roles in the offense.

ARGUMENT

THE DISTRICT COURT ERRED IN CALCULATING THE DEFENDANTS' OFFENSE LEVEL

A. Standard Of Review

Following the Supreme Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), this Court reviews the district court's interpretation and application of the federal sentencing guidelines *de novo*, and its findings of fact for clear error. See *United States* v. *Mashek*, 406 F.3d 1012, 1016 (8th Cir. 2005). If this Court concludes that the district court incorrectly applied the guidelines, it will remand the case for resentencing as required by 18 U.S.C. 3742(f)(1), without examining whether the sentence was reasonable under 18 U.S.C. 3553(a). See *Mashek*, 406 F.3d at 1016.

B. The District Court Erred In Refusing To Apply The Three-Level Enhancement For Hate Crime Motivation Under U.S.S.G. § 3A1.1(a)

The district court erred as a matter of law in refusing to apply the three-level enhancement for hate crime motivation. Section 3A1.1(a) of the Federal Sentencing Guidelines states that a defendant's base offense level should be increased by three levels if "the finder of fact at trial * * * determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or

perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." The defendants were convicted of conspiracy to threaten and intimidate Anthony Briggins, an African American, in the exercise of his housing rights because of his race. Racial motivation was thus an element of the offense of conviction. Section 3A1.1(a), therefore, was clearly applicable in this case.

The court, however, concluded that it did not have discretion to apply the enhancement because it had "read several cases * * * [p]articularly where the Supreme Court overturned a case * * * [where] the court enhanced a sentence beyond the statute under which they were convicted by applying 3A1.1 as here." Tr. 598. The court stated that it could not remember the name of the Supreme Court case it had read, and did not cite any other authority in support of its ruling. Tr. 598. Although it is not entirely clear what the court meant, the record suggests that the court may have believed it did not have discretion to apply Section 3A1.1(a) because if it had, the sentence would have exceeded the statutory maximum penalty. If so, the court was mistaken. The statute under which the defendants were convicted authorizes a maximum sentence of ten years' imprisonment. See 18 U.S.C. 241. Even without the two-level reduction for the defendants' roles in the offense, application of the three-level enhancement under

U.S.S.G. § 3A1.1(a) only would have increased the defendants' base offense level to 15. Because the defendants' criminal histories fell within category I, the maximum guideline sentence would have been 24 months' imprisonment, well short of the statutory maximum. See U.S.S.G. Ch. 5, Pt. A. The court was incorrect, therefore, when it concluded that "such enhancement would be beyond the discretion of the court." Tr. 598.

The defendants argued to the district court that U.S.S.G. § 3A1.1(a) was not applicable to their case because racial motivation was already taken into consideration in their base offense level. Tr. 587-588. That argument lacks merit. The applicable offense guideline for violations of 18 U.S.C. 241 and other civil rights violations is U.S.S.G. § 2H1.1. Section 2H1.1 applies to offenses involving individual rights. The guideline does not apply exclusively to crimes in which racial motivation is an element of the offense. Moreover, racial intent is not always an element of a violation of 18 U.S.C. 241. Nor is it a necessary element of a violation of the other offenses for which Section 2H1.1 is the applicable guideline. Accordingly, the guideline does not take racial motivation into account. Indeed, the guideline's commentary clearly states that "[i]f the finder of fact at trial * * * determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the

actual or perceived race * * * of any person, an additional 3-level enhancement from § 3A1.1(a) will apply." U.S.S.G. § 2H1.1, comment. n.4. Section 3A1.1(a), therefore, clearly applies to racially motivated conspiracies committed in violation of 18 U.S.C. 241, and punished pursuant to U.S.S.G. § 2H1.1. See, *e.g.*, *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (affirming application a Section 3A1.1(a) enhancement because, "[a]lthough section 241 is not on its face limited to racially motivated crimes," the jury found beyond a reasonable doubt that the defendant took part in the cross-burning conspiracy to intimidate and interfere with the victims because of their race), cert. denied, 529 U.S. 1089 (2000).

The guidelines recognize only two circumstances where Section 3A1.1 should not be applied. First, the enhancement does not apply if the base offense level is already increased by six levels because the defendant was a public official at the time of the offense or because the offense was committed under color of law, pursuant to U.S.S.G. § 2H1.1(b). See U.S.S.G. § 3A1.1(c); U.S.S.G. § 2H1.1, comment. n.4; U.S.S.G. § 3A1.1, comment. n.1. Second, the enhancement does not apply on the basis of gender in cases of sexual assault because gender is already taken into consideration in the applicable base offense guideline for such cases. See U.S.S.G. § 3A1.1, comment. n.1. The guidelines, however, do not

provide any exception to Section 3A1.1's applicability in cases involving racially motivated conspiracies committed in violation of 18 U.S.C. 241.

Moreover, this Court and other circuit courts have previously rejected the defendants' "double counting" argument. In *United States* v. *McDermott*, 29 F.3d 404, 405 (8th Cir. 1994), for example, the defendants were found guilty of violating 18 U.S.C. 241 for their involvement in a racially motivated conspiracy that culminated in a cross burning. The district court enhanced their sentence pursuant to U.S.S.G. § 3A1.1. See *McDermott*, 29 F.3d at 411. The defendants appealed, arguing that the enhancement "is duplicative because blacks are the typical victims of section 241 crime." *Ibid*. This Court disagreed, noting that their argument had already been rejected by at least two other circuits. See *ibid*. (citing *United States* v. *Skillman*, 922 F.2d 1370, 1377-1378 (9th Cir. 1990), cert. dismissed, 502 U.S. 922 (1991), and *United States* v. *Salyer*, 893 F.2d 113, 115-116 (6th Cir. 1989)).[3]

Indeed, in *Salyer*, the defendant, who was convicted of conspiracy for his

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[3] This Court has also rejected the "double counting" argument in another, analogous context. See *United States* v. *Webb*, 214 F.3d 962, 965 (8th Cir. 2000) (holding that application of sentencing enhancement for defendants who were public officials at the time of the offense does not constitute improper double counting where defendant is convicted of an offense requiring proof that he acted under color of law).

participation in a cross burning, argued that race was already incorporated in the calculation of the base offense level for a violation of 18 U.S.C. 241. See 893 F.2d at 114-115. The Sixth Circuit disagreed, explaining that "[r]ace is not part of the definition of the conspiracy prohibited by 18 U.S.C. 241," and that "[a]lthough the civil right violated in [a cross-burning] case concerns race, 18 U.S.C. § 241 does not assume that a victim of a civil rights conspiracy will be a member of a racial minority group." *Id*. at 115-116. The court noted that a violation of 18 U.S.C. 241 "could involve a conspiracy to deny interstate travel, * * * or the right to procedural due process." *Id.* at 116. The court also reviewed the applicable base offense guideline for violation of 18 U.S.C. 241 and concluded that the guideline does not assume racial motivation or otherwise preclude application of Section 3A1.1. See *ibid*. Accordingly, the court held, "[t]here is nothing in the statute or the guidelines which already incorporates race as a factor." *Ibid*.; accord *Skillman*, 922 F.2d at 1377-1378.[4] Thus, contrary to the defendants' argument in

[4] Although *McDermott*, *Skillman*, and *Salyer* all refer to U.S.S.G. § 3A1.1 as the "vulnerable victim" guideline, Section 3A1.1 was subsequently amended to apply to crimes motivated by race and other characteristics. See U.S.S.G., App. C, Vol. 1, Amend. 521 (1995). Before it was amended, however, the "vulnerable victim" guideline also applied in cases where "the defendant knew or should have known that a victim of the offense was * * * particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 (1994). The guideline applied, therefore, in cases involving offenses that were racially motivated if it was found that the defendant knew or should have know that the victim, because of his or her race,

the instant case, application of U.S.S.G. § 3A1.1 would not result in improper "double counting."[5]

Accordingly, the district court erred as a matter of law in refusing to apply U.S.S.G. § 3A1.1(a) in the defendants' case.

C. The District Court Erred In Applying A Two-Level Reduction Under U.S.S.G. § 3B1.2(b) For The Defendants' Roles In The Offense

The court erred in applying a two-level reduction under U.S.S.G. § 3B1.2(b) for the defendants' roles in the offense. Section 3B1.2(b) applies only in cases where the defendant was a "minor participant" in the criminal activity. A "minor participant" is someone who is "substantially less culpable than the average participant" but "whose role could not be described as minimal." U.S.S.G. § 3B1.2(b), comment. n.3(A) & n.5. "[A] defendant decidedly less culpable than his

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was "particularly susceptible to threats of racial violence." *McDermott*, 29 F.3d at 411; see also *Salyer*, 893 F.2d at 115 (concluding that Section 3A1.1 applied "because the defendant knew or should have known that the [victims] were unusually vulnerable to the threat of cross burning because they are black"); accord *Skillman*, 922 F.2d at 1378.

[5] The same district court that sentenced the defendants in this case summarily rejected the "double counting" argument just three months earlier, in the case of Christopher Baird. Tr. 566. In sentencing the defendants' co-conspirator for the same offense conduct, the court applied the three-level enhancement for hate crime motivation, pursuant to U.S.S.G. § 3A1.1(a). Tr. 566. When Baird argued that application of the enhancement would constitute improper double counting under the guidelines, the court disagreed. Tr. 566.

co-defendants, however, is not entitled to a reduction if he was deeply involved in the offense of conviction." *United States* v. *Johnson*, 474 F.3d 515, 520 (8th Cir. 2007), cert. denied, 545 U.S. 1109 (2005). Whether a defendant is a minor participant is "heavily dependent upon the facts of the particular case," and "the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." U.S.S.G. § 3B1.2(b), comment. n.3(C). The court in this case clearly erred in finding that the defendants were minor participants. Indeed, the record evidence clearly establishes that both Weems and Mitchell were deeply involved in the conspiracy. For this reason, the defendants were unable to cite a single fact in support of their request for a sentencing reduction.

The record evidence, largely ignored by the district court at sentencing, does not support the court's finding that the defendants were minor participants in the conspiracy. Indeed, Weems' own testimony establishes that he was deeply involved in every aspect of the conspiracy. Weems admitted on cross-examination that he participated in the conversation in which the conspiracy was formed, Tr. 476, 479; directed Baird to get wood, Tr. 472-473; sent Baird back when he did not get the right kind of wood, Tr. 473, 479; was primarily responsible for building the cross, including hammering the boards together, Tr. 478-479; was

present at the cross-burning site, where he helped set up the cross and also poured fluids over it to make it flammable, Tr. 482-484; rebuked another man for declining to participate, Tr. 484. Another witness testified that while the cross burned, Weems shouted to Briggins that he should go back to Texarkana because he did not belong in Fouke. Tr. 247-248.

Similarly, witnesses, including both defendants, testified that Mitchell was actively involved in every step of the conspiracy. The evidence establishes, for example, that Mitchell participated in the conversation in which the conspiracy was formed, where he said "it's okay * * * to rent to niggers in Texarkana, but not [in] Fouke," Tr. 159-160, 201-202, 219; provided a hammer to build the cross and watched Weems nail the boards together, Tr. 84, 413, 475, 477-479; loaded the cross onto his truck, Tr. 88, 415, 481; drove Weems to the burn site, Tr. 88, 242-243, 417, 481; helped set up the cross and poured fluids over it to make it flammable, Tr. 86, 245-246, 482-484; and drilled screws in the cross to straighten it out when it became lopsided, Tr. 89, 246-247, 419.

The record does not support the district court's finding that the defendants were minor participants. Indeed, the testimony summarized above, which was also cited by the United States at sentencing, Tr. 584-585, clearly establishes that the defendants were deeply involved in every aspect of the conspiracy, and that both

Weems and Mitchell played a useful and active role in every step of the offense. Accordingly, they were not entitled to a sentencing reduction under U.S.S.G. § 3B1.2(b). See, *e.g.*, *United States* v. *Denton*, 434 F.3d 1104, 1115 (8th Cir. 2006) (The defendant "is not a minor participant because his acts do not demonstrate less culpability than the other individuals involved in the conspiracy, but rather show that he was an active and useful part of the conspiracy."). Even if it were reasonable for the court to conclude that Baird was more culpable than Weems and Mitchell (which the United States does not concede), such finding would not justify a sentencing reduction under U.S.S.G. § 3B1.2(b)). See, *e.g.*, *Pospisil*, 186 F.3d at 1032 ("[T]he mere fact that a defendant was less culpable than his co-defendant does not entitle the defendant to a 'minor participant' status as a matter of law."); *ibid.* (concluding that a defendant who incited others and assisted in making a cross flammable was not eligible for a sentencing reduction under U.S.S.G. § 3B1.2(b)). Accordingly, the court clearly erred in finding that the defendants were minor participants.

The defendants failed to satisfy their burden of proving that they were entitled to a sentencing reduction based on their roles in the offense. "It is well-settled that a defendant bears the burden of showing facts entitling him to receive a sentencing reduction, including a reduction for being a minor participant."

United States v. *Hayes*, 391 F.3d, 958, 964 (8th Cir. 2004). The defendants, however, were unable to point to a single, relevant fact showing that they were minor participants in the conspiracy. See PSIR 12-13; Weems' PSIR 11-12; Tr. 586-588.[6] Instead of citing evidence in support of their request, the defendants simply told the court that they concurred with the revised PSIRs. Tr. 586, 588. The PSIRs, however, contained no findings in support of the reduction. PSIR 13. On the contrary, the PSIRs did not distinguish the acts of any of the conspirators except for singling out Weems as the one who initially incited Baird. PSIR 2-3. The defendants were not entitled to a sentencing reduction based on their bare assertions that they were minor participants. See U.S.S.G. § 3B1.2(b), comment. n.3(C).

Finally, the defendants' legal arguments at sentencing were frivolous. The defendants argued that they were entitled to the reduction because they were acquitted on Count Two. See PSIR 12-13; Weems' PSIR 11-12; Tr. 586-588.

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[6] Weems did make reference to one "fact." He claimed that he "only assisted Co-Defendant, Christopher Baird, in assembly of the cross almost two hours prior to Baird's unilateral act of taking the cross to the site where it was burned." Weems' PSIR 11; accord Tr. 586. Even if true, such fact would not make Weems a minor participant in the conspiracy. The record clearly indicates, however, that Weems' participation in the conspiracy continued after Baird took the cross to the burn site. See, *e.g.*, Tr. 481-484 (Weems testifying that he went to the burn site, helped set up the cross, poured fluids over the cross, and called Crank a "pussy" for leaving the burn site).

Their acquittal on Count Two, however, is not relevant to their roles in the conspiracy charged in Count One, of which they were both convicted. See, *e.g.*, *Pospisil*, 186 F.3d at 1032 (holding that defendant who was acquitted of cross burning but convicted of conspiracy was not eligible for a Section 3B1.2(b) reduction based on his relatively minor role in the cross burning). In addition, Weems argued that had he "played a major role in this," the United States would have asked for a sentencing enhancement based on leadership role. Tr. 586. Whether the defendants were equal or major participants in the conspiracy, and thus not entitled to the reduction, is an entirely different question than whether they were organizers or leaders of the criminal activity, and thus eligible for a sentencing enhancement. Compare U.S.S.G. § 3B1.2(b), with U.S.S.G. § 3B1.1(a). One is not deemed a minor participant simply because he is not a leader. Accordingly, the defendants failed to satisfy their burden of showing that they were minor participants in the conspiracy.

In sum, the court erred in granting the defendants' request for a two-level reduction based on their roles in the offense, pursuant U.S.S.G. § 3B1.2(b).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand the case for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLANT is proportionally spaced, has a typeface of 14 points, and contains 5,496 words.

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Date: May 24, 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2007, a copy of the foregoing Brief for the United States as Appellant was served by overnight carrier on the following counsel of record:

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