NO OBJECTION TO ORAL ARGUMENT

No. 99-3285

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JAMES WHITNEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
Hon. Kathryn H. Vratil, District Judge

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF RELATED CASES

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction pursuant to 18 U.S.C. 3231. It sentenced defendant on August 23, 1999, and entered final judgment on August 25, 1999. Defendant filed a timely notice of appeal on August 31, 1999. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence is sufficient to sustain defendant's convictions.

2. Whether the prosecutor committed plain error in inquiring about the plea agreements of co-conspirators, who pled guilty and testified on behalf of the government.

3. Whether the district court committed plain error in assigning an additional point to defendant's criminal history for

his conviction for "Possession by a Minor" in violation of Section 4A1.2(c)(2) of the Federal Sentencing Guidelines.

STATEMENT OF THE CASE

A. Procedural History

On January 12, 1999, a federal grand jury returned a two-count indictment charging defendant, James Whitney, and two codefendants, Anthony Whitney (defendant's brother) and Raymond Roland, with a violation of 42 U.S.C. 3631(a) (interference with housing rights on the basis of race) and a violation of 18 U.S.C. 241 (conspiracy to interfere with those federal rights) (R. 1).[1/] The charges relate to a cross-burning in the yard of an African-American family living in defendant's neighborhood in Kansas City, Kansas.

Codefendants Anthony Whitney and Raymond Roland pled guilty to civil rights conspiracy in violation of 18 U.S.C. 241. They both testified at defendant's trial on behalf of the government pursuant to a plea agreement (R. 49, 52, 55, 56). On April 29, 1999, the jury found the defendant guilty on both counts (R. 78).

On August 23, 1999, the district court sentenced Whitney to 21 months' imprisonment on each count to run concurrently (R. 98). On August 31, 1999, defendant filed a timely notice of appeal (R. 100).

[1/] "R.__" refers to the record entry number on the district court docket sheet. "Tr.__" refers to the page number of the trial transcript. "Br.__" refers to the page number of appellant's brief.

B. Facts

In July 1998, 16 year-old Kenneth Green was walking home from the store with his seven year-old nephew, Fred Madkins, Jr., both of whom are African American (Tr. 31-32, 130). As they passed defendant's house, which was approximately a block from theirs, they heard someone repeatedly yelling "nigger" (Tr. 31-32). Defendant came out of his house with three or four other people and continued yelling "want to do something nigger?" and "[w]hat is up nigger?" (Tr. 33, 36-37, 49). Fred Jr., who was scared, immediately ran home (Tr. 36, 131). Kenneth Green walked more slowly to his house and when he got to his yard, defendant and the others were still yelling "nigger" and "talking trash" (Tr. 37).

Once inside, Green called his brother and told him what had happened (Tr. 37-38). His brother instructed him to go see whether Butch, who "used to come over to [the] house every now and then," still lived in the house where the incident had occurred (Tr. 38).

A couple of hours later, Green, along with a friend, drove back to defendant's house (Tr. 38). Green knocked on the front door as his friend stayed in the car (Tr. 38). When defendant came to the door, Green asked if Butch was there (Tr. 39). Defendant responded, "No, nigger" (Tr. 39). Green punched defendant in the nose through the screen door and then went home (Tr. 39, 50).

Approximately one week later, on July 25, 1998, defendant's brother, Anthony Whitney, who lives in the same neighborhood, was home with a friend, Raymond Roland (Tr. 40, 61-62). Starting sometime in the early afternoon, Anthony and Roland drank beer and worked on Anthony's truck for several hours (Tr. 61-62, 139). At approximately 6:00 p.m., defendant, who had a black eye from the incident with Green, arrived at his brother's house (Tr. 64, 141). Paul Geiger, a friend of defendant's, also came over a little later and they all continued drinking (Tr. 141, 166-167).[2/] When defendant showed up they all started to "talk[] about the Madkins" (Tr. 141-142). Anthony and Roland did not discuss the Madkins family or anything about defendant's incident until he arrived (Tr. 140-141). Defendant said the Madkins were "niggers" and that the "nigger up on the corner punched me in the eye" (Tr. 66, 142).

During the discussion, defendant suggested that they burn a cross in the Madkins' yard (Tr. 161). Someone said, "[w]e'll just go burn a cross in the mother fucker's yard" (Tr. 67). All four discussed the suggestion and the fact that Ku Klux Klan members burn crosses in the yards of African Americans out of hatred (Tr. 67, 143-144, 187, 264-265). They also talked about "other racial things that have happened in the community, throughout the United States" (Tr. 67).

[2/] Paul Geiger was not charged and testified on behalf of defendant.

Defendant, along with his brother Anthony and Roland, reached a "mutual understanding" that they would burn a cross (Tr. 118, 143). As Roland described it, they had an "unspoken agreement" (Tr. 67). They decided to burn a cross because the Madkins "were black" and "a burning cross symbolizes" "[h]ate for black people" (Tr. 67, 78, 143-144, 187, 192, 264).

As they were talking, Roland kicked a chunk of wood and broke it in half (Tr. 67, 168). Then Anthony got some nails and constructed a seven-foot cross (Tr. 68, 135, 168). Roland stated that he "believe[d]" defendant was present when the cross was built (Tr. 68). Initially, Anthony testified that defendant "could have" or "couldn't have" seen them building the cross (Tr. 145). On cross-examination, however, Anthony admitted that his brother was "in and out" of the house and it was "obvious" to anyone passing by what they were building (Tr. 183-184).

Afterwards, Anthony poured gasoline on the cross while it was in the driveway (Tr. 68, 136). Roland, accompanied by Anthony, carried the cross down the alley and the "plan" was to pour more gas on the cross at the Madkins' house (Tr. 69, 169). Because there were people around and it was still light, however, they decided to wait until later to set the cross on fire (Tr. 69, 145, 169). They left the cross in a woodpile at the edge of the alley and returned to Anthony's house (Tr. 69, 170).

Back at the house, Roland and Anthony met defendant in the driveway (Tr. 69). Roland told defendant that they had thrown the cross in the alley and would "[c]ome back later to it" (Tr.

70). In the meantime, defendant, Roland, and Anthony decided to drive to the fairgrounds to see the demolition derby (Tr. 70).

Once they reached the fairgrounds, they decided not to go to the derby (Tr. 71-72). While driving around in Anthony's truck, defendant yelled racial slurs such as "stupid nigger" and "jew get out of the way" (Tr. 73). They stopped at a liquor store, bought another case of beer, and returned to Anthony's house (Tr. 72-73).

Once back at the house, they "decided to go up and finish what [they] started" (Tr. 73). Roland, referring to defendant's black eye, told him "[t]hat was a fucked up deal. He shouldn't have got away [sic] with that" (Tr. 74). Right after that comment, Roland and Anthony went down the alley and retrieved the cross (Tr. 74). Together they poured gasoline on it and then stuck it in the ground (Tr. 74). Anthony then set the cross on fire (Tr. 75).

Anthony and Roland ran back to Anthony's house (Tr. 75). Roland told defendant "[w]e lit it and it burned (Tr. 75). Defendant's reaction was "okay[,] [c]ool, it's done" (Tr. 75).

When they checked on the cross, they noticed it was not on fire (Tr. 75-76). Anthony put some gasoline in a cup and returned with Roland to the Madkins' house (Tr. 76, 149). They once again poured gasoline on the cross and one of them lit it (Tr. 76, 150). Anthony threw the left-over gasoline on the wall of the garage, which caught on fire when the cross burst into flames (Tr. 76, 176).

Roland and Anthony ran back to Anthony's garage (Tr. 77). They talked to defendant and agreed that the cross-burning "would teach them not to fuck with [us and that] we weren't going to stand for anymore shit" (Tr. 77, 152). Afterwards, defendant walked home (Tr. 152-153). Roland testified that defendant did not pass out and was not too drunk to understand what they were doing (Tr. 86).

The night of the cross-burning was the Madkins' sixth wedding anniversary (Tr. 121). To celebrate, Renee Madkins and her husband went to the Double Tree Hotel in downtown Kansas City (Tr. 121). They left their one year-old son at home with their nephew, Kenneth Green, and Kenneth's sister (Tr. 122).

Late that night, a neighbor knocked on the Madkins' front door (Tr. 41). Green, who had been asleep, "panicked" after the neighbor said the house was on fire and he looked outside (Tr. 41). Green called his brother to report the incident (Tr. 42). He and some neighbors then put out the fire as the fire department and police arrived (Tr. 43, 191).

After the cross-burning, Roland picked up his wife at work and told her what they had done (Tr. 79-80). Anthony had a conversation with a neighbor who said he had seen them light the cross (Tr. 154).

The following day, Roland's wife was angry when she heard about the incident on the news (Tr. 81). She urged her husband to call the authorities and admit his involvement (Tr. 83). Roland called Anthony because he was worried that they were going

to get caught (Tr. 81-82). As a result, Anthony went to speak with defendant and told him he was leaving town and going to Texas with his wife (Tr. 156).

About a week after the cross-burning, Roland's wife called the Kansas City Fire Department because her husband had agreed to make a statement (Tr. 83, 214). Roland told the fire investigator "everything [he] knew" about the incident, including the fact that defendant and his brother were involved (Tr. 83, 215).

Subsequently, the investigator questioned defendant and asked him about his knowledge of the incident (Tr. 216-217). Defendant told the investigator that he did not learn of the cross-burning until the day after it occurred when his landlady mentioned it (Tr. 217).

As a result of the incident, the Madkins family was scared (Tr. 43, 125), and, within a month of the cross-burning, moved 70 miles away to another state (Tr. 44-45, 124-125).

In September and the following February, the FBI interviewed Anthony (Tr. 186). During the September interview, he said that the cross-burning was defendant's idea (Tr. 186).

At trial, defendant called two witnesses, Paul Geiger and his brother's wife, Joyce Whitney. Geiger testified that he was at Anthony's house, along with defendant, on the evening of the cross-burning (Tr. 243). He admitted that they had a discussion about burning a cross, that defendant talked about burning a cross and the fact that it was a symbol of hatred towards African

Americans, and that Anthony nailed together some boards (Tr. 246, 249, 263-264). He also acknowledged that after first taking the cross down to the Madkins' house, Roland came back and reported that he and Anthony had left the cross in the alley because someone was at the Madkins' house (Tr. 249). He further testified that Roland and Anthony later set the cross on fire and afterwards came back and said they had done it (Tr. 249-250).

Whitney's wife, consistent with her husband's testimony, claimed that on the evening of the cross-burning, defendant passed out because he had too much to drink (Tr. 276).[3/] She acknowledged, however, that defendant was awake and speaking when they returned from the derby and that he uses the word "nigger" "all the time" (Tr. 282-285).

Defendant also elicited testimony that after the incident with Kenneth Green, the week before the cross-burning, he called the police and had to have his eye stitched (Tr. 220, 223).

SUMMARY OF ARGUMENT

The evidence is sufficient to sustain defendant's convictions for a violation of 42 U.S.C. 3631 (interference with housing rights on the basis of race) and a violation of 18 U.S.C. 241 (conspiracy to interfere with federal rights). The evidence demonstrates that defendant was essential to the criminal venture

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[3/] Anthony admitted he did not "want to testify against [his] brother" (Tr. 134). Anthony's testimony was not entirely consistent with Roland's. Anthony testified that defendant passed out in the truck on the way home from the derby and that defendant seemed surprised when he woke him to tell him about the cross-burning (Tr. 148, 178).

and cross-burning. The evidence establishes that defendant devised the plan to burn the cross, discussed its significance with his co-conspirators, agreed with his co-conspirators that they would take action, was aware of his co-conspirators preparation, associated with his co-conspirators immediately prior to and after the incident, and provided false information to a fire inspector investigating the crime. Defendant is also guilty as an aider and abettor because he knowingly joined in the conspiracy to intimidate the victims, and the cross-burning was foreseeable and done in furtherance of the illegal venture.

Moreover, the prosecutor did not commit plain error when he inquired about the plea agreement of defendant's co-conspirators, both of whom testified at trial. The government's questions regarding the co-conspirators' plea agreements were proper because they were asked to bolster the witness's credibility. In any event, the questioning did not amount to plain error since defendant took advantage of his co-conspirators' guilty pleas during cross-examination and closing argument to attack the credibility of the government's witnesses, and his substantial rights were not impaired.

Finally, the district court did not commit plain error in assigning an additional point to defendant's criminal history for his conviction for "possession by a minor" since the offense is not a "juvenile status offense" within the meaning of Section 4A1.2(c)(2) of the Federal Sentencing Guidelines. Defendant's conviction for "minor in possession" is not a "juvenile status

offense" within the meaning of the Guidelines because defendant was 19 and not a "juvenile" as prescribed by federal law when he committed the offense, the conduct with which he was charged does not relate to his age, and his conduct was serious. In any event, the alleged error is not plain since the district court's interpretation of the Sentencing Guidelines is supportable.

ARGUMENT

I

THE EVIDENCE IS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTIONS

A defendant seeking to reverse his conviction on the basis of insufficiency of the evidence bears a heavy burden. United States v. Guidry, 199 F.3d 1150, 1156 (10th Cir. 1999). A jury verdict must be sustained if "'after viewing the evidence in the light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Woodlee, 136 F.3d 1399, 1405 (10th Cir.), cert. denied, 119 S. Ct. 107 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). In reviewing the evidence, this Court must consider all reasonable inferences to be drawn from direct and circumstantial evidence and "not second-guess the jury's credibility determinations or conclusions concerning the weight of the evidence presented." Guidry, 199 F.3d at 1156. See United States v. Lopez, 100 F.3d 113, 118 (10th Cir. 1996); United States v. Pretty, 98 F.3d 1213, 1217 (10th Cir. 1996), cert. denied, 520 U.S. 1266 (1997). As this Court has explained, "'[t]he jury, as fact finder, has discretion

to resolve all conflicting testimony, weigh the evidence, and draw inferences from the basic facts to the ultimate facts.'" United States v. Anderson, 189 F.3d 1201, 1205 (10th Cir. 1999) (quoting United States v. Valadez-Gallegos, 162 F.3d 1256, 1262 (10th Cir. 1998)).

A. The Evidence Is Sufficient To Sustain Defendant's Conviction For A Violation Of 18 U.S.C. 241

Defendant argues (Br. 18) that the evidence is insufficient to establish a violation of 18 U.S.C. 241 because he did not "knowingly and willfully agree[] to be part of the conspiracy." The evidence demonstrates otherwise.[4/]

Defendant not only knowingly participated in the conspiracy, but actually proposed the idea of burning a cross. In fact, the evidence implicates defendant at every stage of the criminal venture demonstrating that he actively participated in planning the crime, discussed the significance of the criminal conduct, agreed with his co-conspirators that they would commit the offense, was aware of his co-conspirators' preparation, was kept abreast of the venture's progress until its successful completion, and afterwards provided an official with false information about his knowledge of the crime. Thus, the evidence overwhelmingly establishes that defendant willfully participated in the conspiracy.

[4/] 18 U.S.C. 241 makes it unlawful to conspire "to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured * * * by the Constitution or laws of the United States."

Section 241 makes it a crime for "two or more persons [to] conspire to * * * threaten or intimidate * * * any person in the free exercise or enjoyment of any right or privilege secured * * * by the Constitution or laws of the United States." Thus, the essence of a civil rights conspiracy is an agreement to violate a right protected by law. See United States v. Cruz, 58 F.3d 550, 553 n.2 (10th Cir. 1995); United States v. Arutunoff, 1 F.3d 1112, 1116 (10th Cir.), cert. denied, 510 U.S. 1017 (1993).

To establish a violation of 18 U.S.C. 241, the government need not offer "direct proof of an express agreement on the part of the [defendant] to commit the constitutional violations * * * at issue." United States v. Reese, 2 F.3d 870, 893 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994); United States v. McKenzie, 768 F.2d 602, 605 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); United States v. Redwine, 715 F.2d 315, 320 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984). Rather, the agreement can be informal and its existence entirely inferred from circumstantial evidence. See United States v. Bell, 154 F.3d 1205, 1208 (10th Cir. 1998); United States v. Johnston, 146 F.3d 785, 789 (10th Cir. 1998), cert. denied, 119 S. Ct. 839 (1999); Arutunoff, 1 F.3d at 1116.

"Once a conspiracy is established, the defendant must only have a slight connection" to it to be found guilty of having participated in the venture. United States v. Skillman, 922 F.2d 1370, 1373 (9th Cir.), cert. dismissed, 502 U.S. 922 (1991). See

Anderson, 189 F.3d at 1207. That connection may also be inferred from a combination of circumstances and reasonable inferences arising therefrom, including the relationship of the parties, statements and conduct showing an agreement or common motive, as well as comments and activities to cover-up the illegal activity. See United States v. Piche, 981 F.2d 706, 717 (4th Cir. 1992), cert. denied, 508 U.S. 916 (1993); Redwine, 715 F.2d at 320; United States v. Davis, 810 F.2d 474, 477 (5th Cir. 1987); United States v. Ellis, 595 F.2d 154, 160 (3d Cir.), cert. denied, 444 U.S. 838 (1979). Accordingly, a defendant may agree to burn a cross and deliberately refrain from participating in the acts necessary to complete the underlying offense, including constructing and lighting the cross, and nonetheless be guilty of conspiracy in violation of 18 U.S.C. 241. See, e.g., United States v. Montgomery, 23 F.3d 1130, 1132-1133 (7th Cir. 1994). See also United States v. White, 788 F.2d 390, 393 (6th Cir. 1986) (defendant, who did not personally participate in the arson of the home of an African-American family, was nonetheless guilty of conspiracy in violation of 18 U.S.C. 241).

In the instant case, defendant does not dispute (Br. 17) that there was a conspiracy to burn a cross to deny the Madkins family their civil rights in violation of 18 U.S.C. 241. Instead, he asserts (Br. 17) that the evidence is insufficient to sustain his conviction because "the government did not prove that he became a member of that conspiracy." In fact, the evidence

demonstrates that defendant was essential to the criminal venture and the cross-burning.

The evidence demonstrates that on the afternoon of the cross-burning, Raymond Roland and Anthony Whitney (defendant's brother), both of whom pled guilty to conspiracy and testified on behalf of the government, were together at Anthony's house for several hours fixing Anthony's truck (Tr. 61-62, 139). When defendant arrived, he began a conversation about the Madkins family (Tr. 141). Defendant was angry at the Madkins and referred to them as "niggers" (Tr. 141-142, 258). There had been no discussion between Anthony and Roland about the Madkins family or burning a cross until defendant arrived around 6:00 p.m. (Tr. 140-141).

As defendant spoke with the others, he devised a plan to take care of his problem with the Madkins family. Defendant proposed that they burn a cross in the Madkins' yard (Tr. 161). Anthony testified, "it was [defendant's] idea to burn a cross" and admitted that he initially told the FBI in September that the cross-burning was defendant's idea (Tr. 145, 161, 186).

After defendant proposed the idea, he and his co-conspirators discussed its significance. According to defendant's brother, they all "discussed" the cross-burning and the fact that the Ku Klux Klan burned crosses in the yards of African Americans out of hatred (Tr. 143-144, 187). Defendant "talked about burning a cross" and, according to both Anthony and Roland, a cross was selected because of the victims' race, the

fact that the Ku Klux Klan burn crosses, and a cross is a "symbol of hate" toward African Americans (Tr.67, 78, 143-144, 186-187, 264).

During the discussion, defendant and his co-conspirators agreed to take action. Roland explained that there was a "mutual understanding" of what they were going to do (Tr. 118, 143). Everyone "pretty much" agreed that "[w]e'll just go burn a cross" (Tr. 67). Anthony admitted that the three co-conspirators reached "an understanding" that "burning [a] cross" was "a good idea" and a symbol of "[h]ate for black people" (Tr. 143-144).

Roland testified that he "believe[d]" defendant was present when he and Anthony built the seven-foot cross in the garage (Tr. 8, 68). Defendant's brother explained, defendant was "in and out of [the] house" and the garage and "[p]robably" saw them building the cross, because it was "obvious" and "anyone who * * * c[ame] by would see what [they] were constructing" (Tr. 183-184).

Even though defendant did not burn the cross, defendant's association with the conspirators immediately prior to and after the incident demonstrates his involvement. Skillman, 922 F.2d at 1373. Not only were the co-conspirators together throughout the evening, but Roland and Anthony were careful to keep defendant informed about the progress of the criminal venture. For example, when Roland and Anthony aborted the original plan to burn the cross around 8:30 p.m. because it was light and people were around, Roland came back and immediately informed defendant

(Tr. 69-70, 145-146, 169). Roland testified that they went back to Anthony's house and told defendant they "threw [the cross] in the side of the alley" near the Madkins' house and would "come back later to it" that evening (Tr. 69-70). Afterwards, defendant, his brother, and Roland rode around for a few hours in Anthony's truck, during which time defendant incited his co-conspirators by yelling racial slurs, including "stupid nigger" (Tr. 73).

When defendant and his co-conspirators returned to the house, Roland and Anthony immediately set out to "finish what [they] had started" earlier that evening (Tr. 73, 185). Before leaving for the Madkins' house, Roland referred to defendant's encounter earlier in the week with a member of the Madkins family and told defendant, "[t]hat was a fucked up deal. He shouldn't have got away with that" (Tr. 74).

After setting the cross on fire, Roland and Anthony returned to the house and they immediately told defendant that they had successfully completed their mission (Tr. 178). Roland testified that he told defendant "[w]e lit it and it burned" and that defendant knowingly reacted with approval saying, "okay[,] [c]ool it's done" (Tr. 75). They again discussed the incident with defendant after they returned a third time from the Madkins' house and relit the cross (Tr. 77, 152).

The day after the cross-burning, Anthony confided in defendant that he was leaving for Texas with his wife to avoid getting caught (Tr. 156). Sometime thereafter, defendant falsely

told a fire inspector, who was investigating the cross-burning, that he did not learn of the incident until his landlady mentioned it the day after it occurred (Tr. 157, 216-217).

Finally, Roland's comments to an official investigating the cross-burning leave no doubt that defendant knowingly participated in the criminal venture. Approximately a week after the incident, Roland gave a statement to an official with the Kansas City Fire Department and said that defendant participated in the criminal venture (Tr. 215). Thus, there is ample evidence to support defendant's conviction for a violation of 18 U.S.C. 241.

Despite the volume of evidence, defendant argues (Br. 18-23) that the evidence is insufficient to establish his knowing involvement in the conspiracy because of inconsistencies in witnesses's testimony. Inconsistencies in testimony do not, however, entitle a defendant to reversal of a conviction. Rather, the evaluation of conflicting testimony is a matter left to the jury. See Anderson, 189 F.3d at 1207; United States v. Edmonson, 962 F.2d 1535, 1548 (10th Cir. 1992). Accordingly, defendant's conviction for a violation of 18 U.S.C. 241 should be affirmed.

B. The Evidence Is Sufficient To Sustain Defendant's Conviction For A Violation of 42 U.S.C. 3631(a)

Section 3631(a) makes it a crime for anyone to intimidate or interfere by force or threat of force with "any person because of his race * * * and because he is * * * occupying * * * any

dwelling."[5/] Section 2 provides, "[w]hoever * * * aids, abets, counsels, commands, induces, * * * procures, * * * [or] causes an act to be done which if directly performed by him or another would be an offense * * * is punishable as a principal." 18 U.S.C. 2.

To be guilty as an aider and abettor, a defendant must deliberately associate himself in some way with a crime and either cause it to happen or participate in the venture in some way with the intent to bring about the result. United States v. Leos-Quijada, 107 F.3d 786, 794 (10th Cir. 1997). See United States v. Yazzie, 188 F.3d 1178, 1194-1195 (10th Cir. 1999). A defendant's "[p]articipation in the criminal venture may be established by circumstantial evidence and the level of participation may be of "'relatively slight moment.'" Anderson, 189 F.3d at 1207 (quoting Leos-Quijada, 107 F.3d at 794.)[6/]

[5/] 42 U.S.C. 3631(a) makes it unlawful to use "force or threat of force [to] injure[], intimidate[] or interfere[] with, or attempt[] to injure, intimidate or interfere with * * * any person because of his race * * * and because he is * * * occupying * * * any dwelling."

[6/] The jury was instructed that "[i]n order to be found guilty of aiding and abetting * * * , the United States must prove the following:

> First: That the crime * * * was committed by someone;
>
> Second: That the defendant knew the crime charged was to be committed or was being committed;
>
> Third: That the defendant knowingly did some act for the purpose of helping, aiding or encouraging the commission of that crime.

In the instant case, defendant does not dispute (Br. 17) that the evidence demonstrates that his brother and Roland were guilty of a violation of 42 U.S.C. 3631 when they burned a cross. Rather, his argument is that he was not sufficiently involved in the venture to be convicted for aiding and abetting.

The evidence shows that the cross-burning would never have occurred without the defendant. After all, he first raised the subject of burning a cross at the Madkins' house and conceived of the plan to burn the cross. Without his participation in the initial discussion with his codefendants, the Madkins family or a cross-burning would never have been considered. See Tr. 140-141 (testimony establishing that neither was mentioned until defendant arrived). Thus, defendant not only assisted with planning the crime, but was essential to its conception and commission.

The evidence demonstrates that his codefendants considered him a vital part of the venture. Their care in keeping him informed at various key stages — when they aborted the initial plan to burn the cross early in the evening; when they were ready to return to the Madkins' yard for a second attempt; after they attempted to set the cross on fire; and after they successfully set the cross and the Madkins' garage on fire — at a minimum suggests that defendant was involved. That inference was definitively confirmed, however, when Roland gave a statement to a fire inspector and said defendant was involved.

Finally, defendant's own conduct demonstrates that he assisted with the crime. Defendant chose to remain with his codefendants between the time they informed him they had left the cross in the alley near the Madkins' home and when they returned to set it on fire. During that interval, defendant expressed the same hatred of African Americans symbolized by a burning cross by yelling "nigger" at various individuals. Additionally, after the cross-burning he attempted to cover-up the incident by providing false information about his knowledge of the offense. Taken together, this evidence is sufficient to sustain the jury's verdict that defendant violated 42 U.S.C. 3631.

In any event, defendant is likewise guilty as an aider and abettor because he knowingly joined in the conspiracy to intimidate the Madkins family, and the cross-burning was done in furtherance of that illegal venture. See Anderson, 189 F.3d at 1207 n.3.; see, e.g., United States v. Willis, 102 F.3d 1078, 1083 (10th Cir. 1996), cert. denied, 521 U.S. 1122 (1997); United States v. Self, 2 F.3d 1071, 1088-1089 (10th Cir. 1993). Under the Pinkerton doctrine of vicarious liability, see Pinkerton v. United States, 328 U.S. 640, 646-648 (1946), a defendant is liable for the illegal acts of his co-conspirators in which he does not participate so long as they are reasonably foreseeable and committed in furtherance of the conspiracy.

In the instant case, because defendant and his co-conspirators discussed the cross-burning and it was the actual object of the conspiracy, there can be no doubt that the

criminal conduct was clearly foreseeable and in furtherance of the conspiracy. Accordingly, the evidence is sufficient to sustain defendant's conviction for a violation of 42 U.S.C. 3631.

II

THE PROSECUTOR DID NOT COMMIT PLAIN ERROR WHEN HE INQUIRED ABOUT THE PLEA AGREEMENTS OF CO-CONSPIRATORS WHO TESTIFIED AT THE TRIAL

For the first time on appeal, defendant argues (Br. 27-30) that the prosecutor committed plain error when he inquired about the plea agreements of co-conspirators, who testified on behalf of the government. The prosecutor's questions were proper, and in any event, did not amount to plain error.

"The admissibility of testimony regarding the conviction of a codefendant depends on the purpose for which such evidence is offered." United States v. Peterman, 841 F.2d 1474, 1479 (10th Cir. 1988), cert. denied, 488 U.S. 1004 (1989); United States v. Dunn, 841 F.2d 1026, 1030 (10th Cir. 1988). A co-conspirator's guilty plea may not be used as substantive evidence of a defendant's guilt. Peterman, 841 F.2d at 1479; United States v. Baez, 703 F.2d 453, 455 (10th Cir. 1983).

When a co-conspirator pleads guilty and "testifies [that] he took part in the crime * * *, his credibility will automatically be implicated." United States v. Gaev, 24 F.3d 473, 477 (3d Cir.), cert. denied, 513 U.S. 1015 (1994). See Baez, 703 F.2d at 455. Thus, both the government and defense are allowed to elicit evidence regarding the guilty plea of a co-conspirator who testifies at trial for purposes such as to establish his motive,

dampen or anticipate attacks on his credibility, demonstrate his acknowledged participation in the offense, or explain his first hand knowledge of and defendant's involvement in the crime. Indeed, "[e]vidence elicited by the government * * * that [a] co-defendant witness entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt." Gaev, 24 F.3d at 477 (internal quotations and brackets omitted) (quoting United States v. Ben M. Hogan Co., 769 F.2d 1293, 1303 (8th Cir. 1985), vacated on other grounds, 478 U.S. 1016 (1986)). See United States v. Pedraza, 27 F.3d 1515, 1525 (10th Cir.), cert. denied, 515 U.S. 941 (1994); Peterman, 841 F.2d at 1479; Dunn, 841 F.2d at 1030; United States v. Davis, 766 F.2d 1452, 1456 (10th Cir.), cert. denied, 474 U.S. 908 (1985); Baez, 703 F.2d at 455.

Defendant argues (Br. 27-28) that the prosecutor committed plain error when he asked Anthony Whitney whether, when entering his guilty plea, he had agreed that defendant was a co-conspirator. The prosecutor's question was proper because his reference to Whitney's guilty plea was not to establish defendant's guilt, but to bolster the witness's credibility.

During cross-examination of Whitney, defense counsel elicited testimony regarding the favorable terms of his plea agreement to imply that he had pled guilty and testified on behalf of the government to receive a more lenient sentence. For example, defense counsel's questions were intended to demonstrate that, in exchange for testifying against defendant, the

government promised to recommend a two-point reduction in sentencing for acceptance of responsibility at Whitney's sentencing (Tr. 177). He also established that Whitney was testifying only because of the plea agreement and because he was under subpoena (Tr. 177).

To bolster the inference that Whitney colored his testimony because of the plea agreement, defense counsel brought out the fact that Whitney had repeatedly given statements consistent with defendant's innocence prior to entering his plea. In response to defense counsel's questioning, Whitney, contrary to his testimony on direct, stated that he had previously told an investigator in February that he was not sure who suggested the cross-burning, he was too drunk to recall what had happened, and he had stated during a March 1999 deposition that he had in fact come up with the idea of burning a cross (Tr. 177-179). He also testified that defendant was so drunk on the night of the cross-burning that he had to shake and awaken him after he passed out (Tr. 178).

On redirect, the prosecutor properly attempted to rehabilitate Whitney's credibility by making it clear that, at the time he entered his guilty plea, Whitney acknowledged that defendant had participated in the conspiracy. Indeed, "[t]he government's sole purpose in [mentioning Whitney's] guilty plea was the entirely permissible one of minimizing damage to the witness[]' credibility [following vigorous cross-] examination" in which defense counsel implied that the witness had implicated

defendant to obtain a more lenient sentence. Pedraza, 27 F.3d at 1526. See Davis, 766 F.2d at 1456 (reference to codefendant's guilty plea proper "to blunt defense efforts at impeachment * * * that appellant had not conspired with him"). In addition, the prosecutor's reference to Whitney's guilty plea was merely a reminder to the jury to consider all the witness's statements about the crime, including the disposition of charges against him, when assessing his credibility. See Pedraza, 27 F.3d at 1526; United States v. Massey, 48 F.3d 1560, 1569 (10th Cir.), cert. denied, 515 U.S. 1167 (1995); Davis, 766 F.2d at 1456. Accordingly, the prosecutor's mention of Whitney's guilty plea on redirect to discredit Whitney's claims that defendant was not involved in the conspiracy was not error. See United States v. Allemand, 34 F.3d 923, 929 (10th Cir. 1994) (no abuse of discretion in allowing prosecutor to ask co-conspirator "[w]ith whom did you conspire?").

Defendant also maintains (Br. 29) that the prosecutor erred in asking both Roland and Anthony Whitney's wife whether he and Whitney, respectively, pled guilty to conspiracy. The prosecutor's purpose in questioning Roland and Anthony Whitney's wife about the guilty pleas was to inform the jury of the circumstances under which he was testifying and his knowledge of the offense. Not only did defense counsel not object, but he introduced Roland's plea agreement into evidence and asked him no less than 35 questions about its terms (Tr. 112-117). As to Whitney's wife, the prosecutor was entitled to ask whether she

knew of her husband's guilty plea to test whether she was knowledgeable about all the facts of the case. In addition, the prosecutor merely established that the co-conspirators had pled guilty and never suggested that their pleas were substantive evidence of defendant's guilt. Thus, the prosecutor did not err in referring to the guilty pleas.

Even if the government's questioning were somehow error, defendant is not entitled to reversal of his convictions.[7/] Defense counsel did not object below and instead took advantage of the co-conspirators' guilty pleas during both cross-examination (Tr. 113-117, 177) and closing argument (Tr. 311) to attack the credibility of the government's witnesses. Thus, defendant was not prejudiced. See Davis, 766 F.2d at 1456 (no plain error because of defendant's effective use of his codefendants' guilty pleas and strength of the evidence).

Furthermore, the alleged error could not have impaired defendant's substantial rights since the prosecutor did not dwell on the co-conspirators' guilty pleas and never argued that they were substantive evidence of defendant's guilt. In addition, any reference to Roland's guilty plea had to be harmless since it was merely cumulative of Roland's admission to an investigator with the Kansas City Fire Department that defendant participated in

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[7/] Because defendant's claims relate only to his conviction for conspiracy in violation of 18 U.S.C. 241, it has no bearing on his conviction for a violation of 18 U.S.C. 3631.

the criminal conspiracy (Tr. 83, 215).[8/] Finally, because the evidence of defendant's guilt was overwhelming, the prosecutor's questioning did not "affect[ ] [defendant's] 'substantial rights'" so as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. Davis, 766 F.2d at 1456 (quoting United States v. Young, 470 U.S. 1 (1985)). Accordingly, because there is no plain error, defendant is not entitled to relief.

III

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN ASSIGNING AN ADDITIONAL POINT TO DEFENDANT'S CRIMINAL HISTORY FOR HIS CONVICTION FOR "POSSESSION BY A MINOR" SINCE THE OFFENSE IS NOT A "JUVENILE STATUS OFFENSE" WITHIN THE MEANING OF SECTION 4A1.2(c)(2)OF THE FEDERAL SENTENCING GUIDELINES

For the first time on appeal, defendant argues (Br. 30-33) that the district court committed plain error when it considered his conviction for "Minor in Possession," when calculating his

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[8/] When evaluating the impact of defendant's claim of error regarding the prosecutor's questioning of Anthony Whitney, it is important to note that each of the co-conspirators testified against defendant and that Roland's testimony was far more damaging to defendant's guilt than his brother's account. At various points throughout his testimony, Anthony either contradicted Roland's account or attempted to minimize defendant's involvement. For example, during his direct testimony, Anthony maintained that he did not "know who discussed" the cross-burning (Tr. 142), did not recall an agreement to burn a cross (Tr. 163-164), whether defendant saw him building the cross (Tr. 145), or whether they reported back to his brother that they had left the cross in the alley and would complete the job later (Tr. 146-147). In addition, Anthony attempted to suggest that defendant was too drunk to have participated and had in fact passed out when the cross was burned. Given the inconsistencies in Anthony's account and the fact that it is corroborated by Roland's testimony, it is hard to imagine how the prosecutor's questioning of his brother could have impacted the jury's verdict.

criminal history.[9/] Defendant is not entitled to relief because his prior conviction is not excludable as a "juvenile status offense" pursuant to Section 4A1.2(c)(2) of the Federal Sentencing Guidelines, and the alleged error is not "plain."

Guideline Section 4A1.2, entitled "Definitions and Instructions for Computing Criminal History," governs the computation of criminal history points. The interpretation of that Guideline, like all the Sentencing Guidelines, and the computation of defendant's sentence, must be in accordance with federal law. See United States v. Carney, 106 F.3d 315, 317 (10th Cir. 1997); United States v. Unger, 915 F.2d 759, 762-763 (1st Cir. 1990), cert. denied, 498 U.S. 1104 (1991); United States v. Aichele, 912 F.2d 1170, 1171 (9th Cir. 1990).

Guideline Section 4A1.2(c) provides that "[s]entences for misdemeanor and petty offenses are counted" except when specifically excluded. Guideline Section 4A1.2(c)(2) states that sentences for "juvenile status offenses" should be excluded and "never counted" when computing a defendant's criminal history. See United States v. Miller, 987 F.2d 1462, 1465 (10th Cir. 1993).

"The Guidelines do not define 'juvenile status offenses' as used in [Section] 4A1.2(c)(2)." Miller, 987 F.2d at 1465. In general terms, this Court has construed "juvenile status offenses" "to mean those offenses, such as truancy or loitering,

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[9/] Consideration of the defendant's prior conviction increased his criminal history points from one to two, and his overall guideline range from 18 to 24 months to 21 to 27 months.

where otherwise legal conduct is criminalized only because of the actor's status" as under age. Miller, 987 F.2d at 1465. Consistent with this principle, the First Circuit has provided that an offense constitutes a "juvenile status offense" within the meaning of the Guidelines only if: "(1) the defendant committed the crime as a juvenile * * *; (2) the conduct would have been lawful if engaged in by an adult * * *; and (3) the offense is not serious." United States v. Correa, 114 F.2d 314, 318-319 (lst Cir.) (citations omitted), cert. denied, 522 U.S. 927 (1997).

Applying that definition, defendant's conviction for a "Minor in Possession" does not constitute a "juvenile status offense" within the meaning of Section 4A1.2(c)(2). Federal law defines the term "juvenile" as "a person who has not attained his eighteenth birthday," see 18 U.S.C. 5031, and the sentencing guidelines contemplate that the term be given the meaning contained in the federal statute. See Section 4A1.2(d) of the Sentencing Guidelines, entitled "Offenses Committed Prior to Age 18" and Commentary, Application Note 7 ("[t]o avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a 'juvenile,' this provision applies to all offenses committed prior to age eighteen").

The presentence report reflects that defendant was 19 when he committed the prior offense in question. Because defendant was not a "juvenile" as prescribed by federal law when he committed the prior offense, that crime cannot constitute a

"juvenile status offense" within the meaning of the Guidelines. Correa, 114 F.3d at 319 (concluding that prior offense cannot be a "juvenile status offense" in part because defendant was 19 at the time of its commission).

Defendant's prior offense also does not qualify as a status offense because the unlawfulness of his conduct does not relate to his age. "In determining whether a prior conviction falls within the ambit of section 4A1.2(c)(2), courts traditionally 'look to the substance of the underlying state offense'" or defendant's actual conduct. Correa, 114 F.3d at 318 (quoting Unger, 915 F.2d at 763). See United States v. Ward, 71 F.3d 262, 263 (7th Cir. 1995).

The presentence report strongly implies that defendant's age was irrelevant to the illegality of his conduct. After all, defendant pled guilty to "Minor in Possession" after having been charged with "Transporting an Open Container" and "Driving Under the Influence." Because both the latter charges are criminal offenses regardless of a defendant's age, the unlawfulness of defendant's conduct is unrelated to his status as a minor. See United States v. Kemp, 938 F.2d 1020, 1023 (9th Cir. 1991) (examining charging papers to determine whether actual conduct constituting a crime should be considered in computing criminal history).

Finally, although the severity of an offense is a "judgment call," the charges as reported suggest that the conduct underlying defendant's prior offense was serious. Correa, 114

F.3d at 319. Both the Sentencing Guidelines and caselaw recognize that "driving under the influence" is a significant offense that warrants consideration when computing a defendant's criminal history. See Section 4A1.2(c)(1) and Commentary, Application Note 5; United States v. Loeb, 45 F.3d 719, 721-722 (2d Cir. 1995); Aichele, 912 F.2d at 1171; United States v. Wilson, 901 F.2d 1000, 1002 (11th Cir. 1990), cert. denied, 501 U.S. 1235 (1991). In addition, it hardly can be disputed that possession of liquor in a vehicle is predictive of the more serious offenses of driving under the influence and careless driving, as well as defendant's more serious, future criminal conduct. See Sentencing Guidelines, Commentary, Chapter 4, Pt. A (noting that defendant's criminal history is a component of defendant's sentence precisely because it is considered to be a predictor of recidivist potential); Ward, 71 F.3d at 264.[10/]

In any event, consideration of defendant's prior offense did not amount to plain error. Plain error is a mistake that is "clear" and "obvious." United States v. Olano, 507 U.S. 725, 734 (1993). An error is "clear" and "obvious" when it is contrary to well-settled law. United States v. McSwain, 197 F.3d 472, 481 (10th Cir. 1999). Consequently, when a defendant's alleged sentencing error touches on an unsettled area of the law, and the district court's interpretation of the guidelines is supportable — even though not the only permissible interpretation — the

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[10/] The presentence report reflects that subsequent to the contested conviction, defendant was arrested at least once for "Driving Under the Influence."

defendant's sentence cannot be clearly wrong and will not be disturbed under "plain error" analysis. United States v. Herndon, 982 F.2d 1411, 1419-1420 (10th Cir. 1992); Correa, 114 F.2d at 317.

This Court has never considered whether a crime similar to defendant's prior offense qualifies as a "juvenile status offense" or adopted a formal test for making such a determination. Consequently, so long as there is a permissible rationale for concluding that defendant's conviction is not a "juvenile status offense," his sentence is not plain error. Accordingly, the district court did not commit plain error when it failed to exclude defendant's prior conviction for "Minor in Possession" as a "juvenile status offense" pursuant to Section 4A1.2(c)(2) of the Federal Sentencing Guidelines.

CONCLUSION

The judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 7862 words. This brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2000, two copies of the Brief For The United States As Appellee were served by first-class mail, postage prepaid, to the following counsel of record:

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