Nos. 18-4081, 18-4099

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

MARK OLIC PORTER,

Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
THE HONORABLE DEE BENSON, NO. 2:17-CR-527-DB

REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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As the United States argued in its opening brief (U.S. Br. 40-46), this Court should vacate and remand this case for resentencing because the district court erred in calculating Porter's Sentencing Guidelines range.[1] First, the district court incorrectly used assault, rather than aggravated assault, as Porter's underlying offense. The evidence adduced at trial clearly established that Porter's offense

[1] This brief uses the following abbreviations: "U.S. Br. __" refers to page numbers in the United States' opening brief filed with this Court; "Def. R. Br. __" refers to page numbers in Porter's opposition/reply brief filed with this Court; and "Vol. __ at __" refers to the volume and page or exhibit number of the record on appeal filed with this Court.

constituted "a felonious assault that involved * * * *a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon.*" 2016 Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added). Correctly applying the aggravated assault guideline, the applicable base offense level would have been 14. Second, even if the district court were correct in declining to apply the aggravated assault guideline, the resulting base offense level would be 10, as required by Sentencing Guidelines § 2H1.1(a)(3)(A), because Porter's conviction necessarily involved the use of "force or threat of force" against a "person." 42 U.S.C. 3631(a). In any event, under no circumstances would Porter's base offense level be 7.

Porter argues (Def. R. Br. 26-32) that the district court correctly rejected the use of aggravated assault as the underlying offense because his actions with his stun cane do not show that he intended to cause bodily injury to Waldvogel. Porter also argues (Def. R. Br. 32-45) that even if the district court committed procedural error in failing to apply a base offense level of 10, the error is harmless because the court would have issued the same sentence, *i.e.*, one below the recommended Guidelines range. As described below, both arguments fail.

ARGUMENT

I

THE DISTRICT COURT'S FINDING THAT PORTER DID NOT INTEND TO CAUSE BODILY INJURY TO WALDVOGEL WAS CLEARLY ERRONEOUS AND UNSUPPORTED BY THE EVIDENCE

The district court's finding that Porter did not intend to cause bodily injury to Waldvogel, and therefore that the underlying offense was not aggravated assault, is clearly erroneous because it is "without factual support in the record[.]" *United States* v. *Todd*, 515 F.3d 1128, 1135 (10th Cir. 2008) (quoting *United States* v. *Dalton*, 409 F.3d 1247, 1251 (10th Cir. 2005)). Based on the underlying facts, aggravated assault, and not assault, is the appropriate cross-reference for purposes of calculating Porter's base offense level under Sentencing Guidelines § 2H1.1(a)(1). Porter's base offense level should therefore have been 14 and not 7. Compare Sentencing Guidelines § 2A2.2(a) with Sentencing Guidelines § 2A2.3(a)(1); see also U.S. Br. 41-45.

1. Porter's principal argument is that the evidence does not "compel[] a finding that [he] intended to cause bodily injury" when he struck Waldvogel with an activated stun cane. Def. R. Br. 29. Yet the facts establishing Porter's intent are not seriously in dispute or contravened by other evidence in the record. The evidence conclusively establishes that Porter, by deciding to activate the stun cane immediately before he attacked Waldvogel, used this "dangerous weapon" in

precisely the manner in which it was designed to be used. There is no allegation, let alone evidence, that Porter was trying "merely to frighten" Waldvogel but not injure him. See Sentencing Guidelines § 2A2.2, comment. (n.1). For example, Porter did not wave his cane at Waldvogel while hesitating to strike him, or use the cane without activating its electric shock device.

Every witness to the attack who testified at trial heard Porter activate the stun cane immediately upon using it. Waldvogel testified that Porter hid his cane behind his leg and then immediately lifted the cane up, activated it, and struck Waldvogel on the bare skin of his neck, causing him to be electroshocked and fall to the ground. Vol. V at 182-184, 207. Katelin Adair, the neighbor who witnessed the attack, testified that she heard a "snapping sound" when she saw Porter hit Waldvogel with the stun cane. Vol. V at 252. None of the trial evidence supports a theory that Porter was merely trying to frighten or intimidate, but not injure, Waldvogel.[2]

The lone piece of evidence Porter cites to justify the district court's finding is a summary in the Presentence Investigation Report (PSR) of an out-of-court interview of a young girl who lived above Porter and was present during the attack.

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[2] Although Porter emphasizes the lack of a jury finding as to his intent (Def. R. Br. 28), he later acknowledges that this is not dispositive for sentencing determinations: "District courts routinely make factual findings on a preponderance standard at sentencing." Def. R. Br. 31 (citations omitted).

Def. R. Br. 30. Even this statement, however, provides no support for the conclusion that Porter did not intend to injure Waldvogel. To the contrary, and consistent with the trial testimony, it confirms that Porter activated his stun cane. According to the PSR, the witness stated that after she saw Porter and Waldvogel arguing, she turned around to go inside and "heard a zapping sound." Vol. IV at 6; see also Def. R. Br. 30. Only *after* hearing Porter activate the cane did she turn back to the scene, where she saw Porter "waiving [sic] the stun cane around in the air towards the victim and yelling at the victim to get out of there and leave" and Waldvogel grabbing the cane away. Vol. IV at 6. The only reason the witness did not see the attack itself was that she had turned away to go inside just as it occurred, *i.e.*, just after Porter activated his stun cane. Even if taken as true and reliable, nothing in this witness's statement forms the basis for finding that Porter did not intend to cause bodily injury to Waldvogel.[3]

[3] A district court may rely on hearsay evidence in sentencing only if it bears sufficient "indicia of reliability." *United States* v. *Fennell*, 65 F.3d 812, 813-814 (10th Cir. 1995) (finding that "[u]nsworn out-of-court statements made by an unobserved witness and unsupported by other evidence form an insufficient predicate for a sentence enhancement"). Here, the district court made no finding that the witness statement was reliable. Indeed, the court did not reference this statement at all during sentencing. See Vol. V at 449-453. And although the court adopted the PSR's sentencing calculation, the PSR provides no explanation or analysis for why this statement supported or established Porter's lack of intent to cause bodily injury, stating only that "[b]ased on this information, the probation office believes the Assault application is appropriate * * * and will defer to the Court or further judgment." Vol. IV at 24.

Porter's decision to activate the electric shock device on his stun cane, thereby transforming it into a potentially deadly weapon, and then use the cane to strike and inflict an electric shock against Waldvogel's bare skin, necessarily elevates Porter's offense to one of aggravated assault. Had Porter intended merely to frighten or intimidate Waldvogel, he would not have activated the electric shock device and struck Waldvogel with the stun cane in its activated state. Because the evidence supports only "one reasonable, factual conclusion" (Def. R. Br. 28), the district court clearly erred when it found that Porter did not intend to cause bodily injury to Waldvogel and that Porter's actions therefore did not constitute aggravated assault.[4]

2. Porter's other arguments also fail. First, he argues that the jury's finding that his offense involved a "dangerous weapon" is not "conclusive" as to his intent. Def. R. Br. 27. But Porter misses the relevance of the jury's verdict. The jury instructions defined a "dangerous weapon" as "any instrument capable of inflicting

[4] Also noteworthy is the complete lack of evidence that Waldvogel did or said anything that would reasonably cause Porter, or anyone else, to use a weapon to intimidate or frighten Waldvogel. Adair testified that Waldvogel "didn't seem threatening" to her. Vol. V at 250. The leasing agent at the apartment complex where the attack occurred testified that Waldvogel was a "[n]ice guy" and "[a]lways in a good mood." Vol. V at 115-116. Even Porter's counsel appeared to acknowledge that Waldvogel was justified in approaching Porter to ask him not to yell racial slurs at Waldvogel's son. See Vol. V at 396 ("I am not trying to blame Mr. Waldvogel or even say that I would do anything different if that had happened to my child[.]").

death or serious bodily injury." Vol. I at 146. The Guidelines use an identical definition. See Sentencing Guidelines § 1B1.1, comment. (n.1(D)(i)). While a "dangerous weapon" under the Guidelines also may include a facsimile (Sentencing Guidelines § 1B1.1, comment. (n.1(D)(ii)), it is undisputed that Porter used an actual weapon. See Vol. V at 152-155; Gov't Exs. 5-1, 5-2 (stun canes). The jury's verdict accordingly reflects a finding that Porter's weapon of choice, once activated, was "capable of inflicting death or serious bodily injury," namely "extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." Vol. I at 146 (jury instructions). See Sentencing Guidelines § 1B1.1, comment. (n.1(D) & (L)) (same definition). That Porter struck Waldvogel with a fully activated weapon that the jury found was capable of inflicting *death or serious bodily injury* belies the conclusion that he did so absent the intent to cause *bodily injury*.

Porter also argues that the jury's failure to find that he in fact caused bodily injury to Waldvogel suggests that Porter merely intended to "cause pain" to Waldvogel. Def. R. Br. 27. But as the United States argued in its opening brief (U.S. Br. 43), whether Porter actually succeeded in inflicting bodily injury on Waldvogel has no bearing on whether Porter intended to do so. Just like a defendant who, instead of waving an unloaded gun in the air, loads a gun, aims at

his victim, fires, and misses or lightly grazes his victim, Porter activated his stun cane, took aim at Waldvogel, and struck him on the neck. In both cases, the defendant clearly intended to cause bodily injury, despite not having actually done so. The fact that Waldvogel did not suffer more serious physical injury is not attributable to any mitigating action or self-restraint by Porter—indeed, there was none—but rather to Waldvogel's attempts to defend himself and thwart the attack by grabbing the cane away from Porter. See U.S. Br. 7-8, 43.

Finally, Porter argues that the evidence does not support a finding of intent to cause bodily injury with the stun cane because he "said nothing as to his intentions in using the cane." Def. R. Br. 29. Whether Porter stated his intentions, however, is not determinative of his intent to cause bodily injury. "The intent to do bodily harm is not measured by the actor's subjective motivation, but rather, it is measured objectively, by what someone in the victim's position might reasonably conclude from the assailant's conduct." *United States* v. *Velasco*, 855 F.3d 691, 693 (5th Cir. 2017); accord *United States* v. *Worsham*, 565 F. App'x 158, 159 (4th Cir.) (unpublished) ("[T]he requisite intent to commit bodily injury can be reasonably inferred from Worsham's actions."), cert. denied, 135 S. Ct. 206 (2014).

Thus, in *United States* v. *Serrata*, this Court rejected the defendant prison guard's subjective claims that he did not intend to injure his victim, an inmate,

during an assault and was merely trying to subdue him. 425 F.3d 886, 909 (10th Cir. 2005). As here, the defendant in *Serrata* also cited the victim's lack of serious injury as evidence that the defendant did not intend to cause him injury. See *ibid.* This Court nevertheless found intent to cause bodily injury based on the facts and circumstances of the attack, namely that the defendant had attacked his victim with his boots while the victim was lying on the ground and, on this basis, upheld the use of aggravated assault as the base offense. *Ibid.*[5]

The undisputed facts and circumstances of this attack similarly necessitate a finding that Porter intended to cause bodily injury to Waldvogel. The record is devoid of any evidence that Porter used his stun cane to frighten or intimidate Waldvogel but not injure him. Rather, the facts demonstrate that Porter deliberately activated his stun cane's electric shock device and then struck

[5] The district court's statements at sentencing that "this was not a case of Mr. Porter going out to seek out a minority in order to do something bad to them" and that the offense was "an altercation between two men" (Vol. V at 451) also do not negate a finding of intent to cause bodily injury. This Court and others have repeatedly upheld the application of the aggravated-assault guideline where there was no evidence of the defendant's premeditation, planning, or efforts to seek out the victim. See, *e.g.*, *United States* v. *Quiver*, 805 F.3d 1269, 1271 & n.3 (10th Cir. 2015) (aggravated assault applied where the defendant, while intoxicated, attacked a police officer inside his grandmother's house after the officer responded to a disturbance call); *United States* v. *Jackson*, 728 F. App'x 969, 973-974 (11th Cir. 2018) (unpublished) (aggravated assault applied where defendant hit officer with car after trying to escape from traffic stop); *United States* v. *Broussard*, 882 F.3d 104, 109 (5th Cir. 2018) (aggravated assault applied where correctional officer failed to intervene to stop attack on inmate).

Waldvogel with it. Under these circumstances, the victim—Waldvogel—reasonably concluded that Porter was trying to injure him and acted to defend himself. See U.S. Br. 7-8.

The district court clearly erred in finding that Porter did not intend to cause bodily injury to Waldvogel. Because all of Porter's arguments to the contrary fail, this Court should vacate Porter's sentence and remand for re-sentencing with directions to apply aggravated assault as the appropriate cross-reference for determining Porter's base offense level under Section 2H1.1(a)(1).

II

THE DISTRICT COURT'S PROCEDURAL ERROR OF FAILING TO APPLY A BASE OFFENSE LEVEL OF 10 WAS NOT HARMLESS

Porter appears to concede that, even if aggravated assault does not apply, the district court committed clear procedural error by failing to apply a base offense level of 10. Def. R. Br. 32-33. Porter also acknowledges (Def. R. Br. 33 n.7), as he must, that because of this error, his nine-month sentence fell below the recommended Guidelines sentence of 12 to 18 months' imprisonment that would have otherwise applied to a non-aggravated assault.[6] Moreover, Porter's nine-month sentence was in the middle of the Guidelines range of six to twelve months

[6] If aggravated assault applied, Porter's total offense level would be 21, resulting in a recommended Guidelines range of 37 to 46 months' imprisonment. U.S. Br. 10-11.

that the court incorrectly used. Had the court similarly issued a sentence in the middle of the correct Guidelines range of 12 to 18 months, Porter's custodial sentence would have been at least 15 months—six months, or two-thirds longer, than the term of imprisonment the court actually issued.

Porter nevertheless argues that this clear procedural error was "harmless," and that remand is unnecessary, because the district court nevertheless would have imposed the same sentence. See Def. R. Br. 32-43. Porter bears the burden of making this showing. *United States* v. *Cerno*, 529 F.3d 926, 939 (10th Cir. 2008) ("Harmlessness must be proven by a preponderance of the evidence, and the burden of making this showing falls on the beneficiary of the error."), cert. denied, 556 U.S. 1167 (2009). He attempts to do so by arguing that his sentence, though procedurally erroneous, was nevertheless substantively reasonable and that the court would have issued a downward variance, based on inferences Porter draws from various statements the court made during sentencing. Def. R. Br. 36-41. This "harmless error" argument fails because it requires this Court to address prematurely the substantive reasonableness of his sentence and speculate as to whether and why the district court would have granted Porter a downward variance—something Porter never asked the district court to do. Vol. V at 433 (requesting that the court impose a within-Guidelines sentence).

1. Despite conceding procedural error, Porter asks this Court to review the substantive reasonableness of his sentence and the appropriateness of any downward variance, before the parties and the district court have had the opportunity to address these questions below and with the benefit of a correctly calculated Guidelines recommendation. Porter's request is both premature and inappropriate.

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall* v. *United States*, 552 U.S. 38, 49 (2007). "[T]he Guidelines should be the starting point and the initial benchmark." *Ibid.* Accordingly, the court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Id.* at 51. "Only if the district court follows sound procedure may we then consider whether the resulting sentence is reasonable in substance." *Cerno*, 529 F.3d at 937. "When the court's starting point is skewed a 'reasonable probability' exists that its final sentence is skewed too." *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). Because the district court did not follow "sound procedure," this Court cannot consider the substantive reasonableness of Porter's sentence.

2. The district court's error is furthermore not "harmless." As a general matter, where a "sentence was imposed * * * as a result of an incorrect

application of the sentencing guidelines, the court shall remand the case for further proceedings." 18 U.S.C. 3742(f)(1); see also *United States* v. *Kieffer*, 681 F.3d 1143, 1169 (10th Cir. 2012), cert. denied, 568 U.S. 1149 (2013). "When a district court has not intended to depart [or vary] from the Guidelines, a sentence is imposed '*as a result of*' an incorrect application of the Guidelines when the error results in the district court selecting a sentence from the wrong guideline range." *Ibid.* (quoting *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (brackets omitted)). Thus, "unless the district court indicated at sentencing that the sentence imposed would be the same under multiple sentencing approaches, one of which was the correct approach," this Court is "compelled to remand for resentencing" upon finding that the district court applied "an improper offense level." *Ibid.* (citation omitted). "Absent such an indication in the record," this Court has "no way of knowing whether the district court would have imposed the same sentence *under a proper application of the Guidelines*." *Ibid.* (emphasis added).

Accordingly, as this Court explained in *United States* v. *Todd*, where a district court "expressly relie[s] upon the lesser Guidelines range when passing sentence" rather than "seek[s] to depart or vary from the Guidelines in some way," this Court "cannot say the district court's erroneous calculation was immaterial." 515 F.3d 1128, 1139 (10th Cir. 2008). In such circumstances, this Court "must remand for resentencing, whether or not the district court's chosen sentence is

substantively reasonable," because it cannot conclude that the district court's calculation was harmless. See *id.* at 1135.[7]

This is exactly the case here. The district court relied on an incorrect Guidelines range to issue Porter's nine-month sentence and did not base that sentence on any other alternative sentencing theory. Vol. V at 449-450. Thus, this case is unlike those cases in which a district court relies on an incorrect offense level but, on review, this Court nevertheless finds the error harmless because the district court clearly indicated at sentencing that "the sentence imposed would be the same under multiple sentencing approaches, one of which was the correct approach." *Kieffer*, 681 F.3d at 1169. Here, the only approach was an incorrect one. Nor did the district court purport to issue a downward variance. Indeed, had it done so, the court would have had to "provide the specific reason for the imposition of a sentence different from the Guideline range." *United States* v.

[7] Porter relies on this Court's decision in *United States* v. *Gieswein* (Def. R. Br. 35 n.8), but that decision is consistent with this analysis. Although the district court in *Gieswein* miscalculated the Guidelines range, it also stated that it intended to impose the maximum statutory sentence, which exceeded both the correctly- and incorrectly-calculated Guidelines ranges. 887 F.3d 1054, 1063 (10th Cir.), cert. denied, 139 S. Ct. 279 (2018). The court further provided specific reasons for varying upward from the recommended sentence, which would have applied regardless of the sentencing error. *Ibid.* Accordingly, *Gieswein* was the "rare case" in which this Court could "confidently state that a Guidelines calculation error 'did not affect the district court's selection of the sentence imposed.'" *Id.* at 1061 (quoting *United States* v. *Snowden*, 806 F.3d 1030, 1034 (10th Cir. 2015)).

Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008) (citation and internal quotation marks omitted).

Because the district court did not use a correct approach or purport to deviate from the recommended Guidelines range, Porter can offer nothing more than speculation and conjecture that, *first*, the court would have granted a downward variance, and, *second*, the court would have justified this variance with the same comments it made with respect to Porter's within-Guidelines sentence.[8] Such speculation cannot form the basis for harmless error. As this Court has frequently held, "[a]n error is not harmless if it requires us to 'speculate on whether the court would have reached [the same] determination' absent the error." *United States* v. *Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014) (quoting *United States* v. *Padilla*, 947 F.3d 893, 895 (10th Cir. 1991)); accord *Kieffer*, 681 F.3d at 1169 ("[T]o say that the district court would have imposed the same sentence given [a] new legal landscape … places us in the zone of speculation and conjecture—we

[8] Although the district court, after adopting the PSR's erroneous sentencing calculation, stated, "I would reach the same sentence under the 3553 factors" (Vol. V at 450), this does not suffice to demonstrate harmless error. See *Gieswein*, 887 F.3d at 1062-1063 ("We give little weight to the district court's statement that its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.' Our court has rejected the notion that district courts can insulate sentencing decisions from review by making such statements.") (citation omitted).

simply do not know what the district court would have done.") (quoting *United States* v. *Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. 2005)).

Accordingly, the district court's error was not harmless, and this Court must remand to the district court for resentencing with instructions to apply a base offense level of at least 10.

CONCLUSION

For the reasons stated in this brief and the United States' opening brief, this Court should vacate Porter's sentence and remand for resentencing with instructions to recalculate his recommended Guidelines sentence using aggravated assault as the underlying offense or, in the alternative, to recalculate Porter's recommended Guidelines sentence using a base offense level of 10.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 3851 words according to the word processing program used to prepare the brief.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman 14-point font.

s/ Max Lapertosa
MAX LAPERTOSA
Attorney

Dated: February 15, 2019

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT, prepared for submission via ECF, complies with all privacy redaction requirements under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; is exactly the same as the hard copies of this brief submitted to the clerk's office; has been scanned for viruses with the most recent version of Symantec Endpoint Protection (version 14) and is virus-free according to that program; and complies with the applicable type-volume limit in Federal Rule of Appellate Procedure 32(f), in that it contains 3851 words according to the word-processing program used to prepare the brief.

s/ Max Lapertosa
MAX LAPERTOSA
Attorney

Dated: February 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing REPLY BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT with the United States Court of Appeals for the Tenth Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

s/ Max Lapertosa
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