

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT LASHLEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States certifies that it is unaware of any additional interested persons beyond those identified in defendant-appellant's brief.

The United States further certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: August 7, 2023

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this case because defendant's sentencing arguments do not raise any complex or novel issues. Defendant also does not request oral argument.

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal is from a district court’s final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Robert Lashley on January 30, 2023. Doc. 94.¹ On

¹ Citations to “Doc. __, at __” refer to the docket entry number of documents filed in the district court. “Br. __” refers to page numbers in Lashley’s opening brief. For documents that are not available on the district court docket, this brief uses the following citations: “App. __” refers to the page number of the Appellant’s Appendix that was filed with Lashley’s opening brief; “Sealed App., Tab __” refers to the tab number of Appellant’s Sealed Appendix, filed with Lashley’s opening brief; and “Supp. App. __” refers to the page number of the Supplemental Appendix, filed by the United States along with this brief.

February 10, 2023, Lashley filed a timely notice of appeal from the court's judgment. Doc. 98. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUE

Whether the district court's decision to vary upward and sentence Lashley to 36 months' imprisonment for committing a brazen and prolonged assault of D.B. because of D.B.'s race was substantively reasonable.

STATEMENT OF THE CASE

1. Facts

The facts are set forth in an attachment to defendant-appellant Robert Lashley's plea agreement, entitled "Factual Basis." Doc. 60, at 15-17. Lashley and his brother Roy went to the Family Dollar store in Citrus Springs, Florida. Doc. 60, at 15. Lashley entered the store first. Doc. 60, at 15. Roy entered the store as D.B., a Black man, was leaving. Doc. 60, at 15. Once in the store, Roy asked Lashley "whether he saw 'that big Black nigger [D.B.]?'" Doc. 60, at 15 (alteration in original). Roy then asked the store clerk "if she saw D.B. push him as he walked through the door." Doc. 60, at 15. The clerk replied "no." Doc. 60, at 15. In fact, the store's surveillance video showed that D.B. did not make any contact with Roy when they passed each other. Doc. 60, at 15. But Roy insisted that D.B. pushed him and that "that nigger [D.B.] needs to be taught a lesson."

Doc. 60, at 15 (alteration in original). The clerk and store manager “admonished” Lashley and Roy for using racial slurs in the store. Doc. 60, at 15.

As the two men left the store, Roy told Lashley that they were “going to go get that nigger [D.B.]” Doc. 60, at 15-16 (alteration in original). They followed D.B. into the parking lot. Doc. 60, at 16. Lashley “ran to D.B. and struck him numerous times with his fists.” Doc. 60, at 16. While Lashley was striking D.B., Roy went to his truck to retrieve an axe handle and ran back to the scene to strike D.B. “multiple times with it.” Doc. 60, at 16. D.B. “raised his arms to block the blows or punched back in self-defense.” Doc. 60, at 16. Roy left again, driving away in his truck while Lashley continued hitting D.B. Doc. 60, at 16. Roy later “returned on foot and, alongside [] Lashley, resumed attacking D.B. with his fists.” Doc. 60, at 16. Both Lashley and Roy “directed racial slurs toward D.B. before, during, and after the attack.” Doc. 60, at 16.

This prolonged attack ended only when sheriff officers arrived and arrested both defendants. Doc. 60, at 16. Emergency Medical Services treated D.B. at the scene and then transported him to a local hospital for further evaluation and treatment. Doc. 60, at 16. D.B. suffered “injuries to his face and legs, including pain and a laceration to the inside of his mouth.” Doc. 60, at 16.

2. *Procedural History And Sentencing*

a. A federal grand jury returned a one-count indictment against Lashley and Roy, charging them with committing a hate crime, in violation of 18 U.S.C. 2 and 249(a)(1). Doc. 1, at 1. The indictment charged that by “aiding and abetting one another,” Lashley and Roy “willfully caused bodily injury to D.B., a Black man, and, through the use of a dangerous weapon, attempted to cause bodily injury to D.B.,” because of his “actual and perceived race.” Doc. 1, at 1. The indictment further alleged that Lashley and Roy “repeatedly called D.B. racial slurs and repeatedly struck D.B. with closed fists and an axe handle.” Doc. 1, at 1-2.

Lashley subsequently pleaded guilty to a superseding information charging him with one count of committing a hate crime, in violation of 18 U.S.C. 249(a)(1). Doc. 57, at 1-2; Doc. 60, at 1-17. The superseding information charged Lashley with willfully causing bodily injury to D.B. because of his race by repeatedly calling D.B. racial slurs and repeatedly striking D.B. with closed fists. Doc. 57, at 1. It omitted the aiding and abetting charge and references to the axe handle or dangerous weapon. When he pleaded guilty, Lashley “admit[ted]” that “he willfully caused bodily injury to D.B. and acted because of the actual or perceived race or color of D.B.” Doc. 60, at 16-17. Lashley further “admit[ted]” that Roy “caused bodily injury to D.B. or attempted to do so through the use of a

dangerous weapon—specifically, an axe handle, and acted because of the actual or perceived race or color of D.B.” Doc. 60, at 17.

b. At sentencing, the district court adopted the description of the facts and Guidelines calculation in the Presentence Report (PSR), without objection by the parties. App. 171.² The PSR calculated Lashley’s adjusted offense level to be 13 and his criminal history category as I, resulting in an advisory Guidelines range of 12 to 18 months’ imprisonment. Sealed App., Tab 82 (PSR 6, 17). The government recommended a sentence at the high end of the Guidelines range, while Lashley urged the court to impose a sentence of one year and one day and allow some of that time to be served in home detention. Doc. 84, at 2; App. 180, 183.

Upon applying the 18 U.S.C. 3553(a) factors, the district court concluded that the advisory Guidelines range failed to reflect the seriousness of Lashley’s offense and satisfy the purposes of sentencing. The court varied upward from the recommended Guidelines sentence and imposed a sentence of 36 months’ imprisonment. App. 186-187 (stating that this case presented “a rare occasion” where the court “disagree[d] with both parties”). The court explained the basis for

² The court granted Lashley’s request to sentence defendants separately. Lashley wanted to avoid conflicts with his brother due to his position that Roy instigated the attack and that he followed Roy’s lead. App. 163-164.

its sentence in detail at Lashley's sentencing hearing and again set forth its sentencing rationale in an order attached to the Statement of Reasons. App. 185-191; Doc. 92, at 1 (stating that the order supplements "the explanations announced at the sentencing hearing[]"). See also Sealed App., Tab 96 (Statement of Reasons 3).

First, although the court agreed both that Roy "provoked" Lashley by falsely asserting that D.B. bumped into him and that Lashley "historically" has been "vulnerable to his brother's influence," the court pointed to Lashley's active role in the crime and his "responsib[ility] for his own conduct." App. 176-185; Doc. 92, at 7-8. The court emphasized that Lashley was the one who "pursued" and first "physically confronted the victim." App. 176-177. The court stated that even if Roy's accusations were true, it would not have "justified [Lashley's] going across the parking lot to confront the victim and beat the victim and remain engaged even after Roy got the axe handle and then drove off and parked his car and came back." App. 188-189. The court further noted that Lashley "could have withdrawn from the attack when Roy employed the axe handle, but he did not." Sealed App., Tab 96 (Order 6). The court emphasized that not only did Lashley fail to withdraw when Roy began using the axe handle, but he also continued hitting D.B. even after Roy left to move his truck and did not stop until officers eventually arrived at the scene. Sealed App., Tab 96 (Order 9).

Second, in response to Lashley's argument that the court should not consider Roy's use of the axe handle when sentencing Lashley, the court found that it was reasonable to conclude that Lashley was aware during the assault that Roy was using an axe handle to hit D.B. App. 174, 182-183. The court stated that although the government had "bargained away" the aiding and abetting language in the plea agreement, the court was obligated to consider "what actually happened during this fray." App. 178, 182-184. Even if Lashley did not know in advance that Roy was going to retrieve an axe handle from his truck, the court explained, Lashley must have known that Roy was striking D.B. with the axe handle during the assault. App. 188. The court found it inconceivable that Lashley did not know that Roy was using an axe handle during the two-on-one fight. App. 188; Doc. 92, at 5. The court observed that Lashley, in fact, "admitted to the axe handle being used" in his plea agreement. App. 188; see also App. 182-183; Doc. 92, at 5.

Third, the court highlighted the "viciousness" of the "unprovoked" two-on-one attack. App. 188-189; Doc. 92, at 9-10. In particular, the attack escalated from Lashley hitting D.B. with his fists to Roy striking D.B. with the axe handle, while Lashley continued to beat D.B. with his fists. App. 188-189. And "[t]he attack occurred in a parking lot in broad daylight in the presence of witnesses, one of which was recording the attack. App. 189; Doc. 92, at 9. "[Y]et the defendants were undeterred as they continued the beating," which the court stated was "laced

with racial slurs.” App. 189; Doc. 92, at 9. Although the court acknowledged that the record was silent on how long the attack lasted, it was long enough for Roy to retrieve the axe handle, beat D.B. with it, leave to park his truck elsewhere, and return to continue the beating. App. 188-189; Doc. 92, at 6. As the court recognized, the attack “persisted, and it persisted with people watching.” App. 189.

The court further explained that it was “hard to imagine” the reason for the prolonged attack. App. 189. Regardless of whether the defendants knew they were violating the law but thought no one would care because D.B. was Black, did not know they were violating the law because they felt entitled to beat and berate a Black man, or were so consumed with rage that they could not stop, none of these “possibilities weigh[ed] in the defendants’ favor.” App. 189-190.

In sum, the court concluded that Lashley’s recommended Guidelines range of 12 to 18 months’ imprisonment did not serve the purposes of sentencing—to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence, and protect the public from further crimes by Lashley—and did not reflect the full circumstances of the attack, including the use of the axe handle, a dangerous weapon, during the offense. Sealed App., Tab 96 (Order 8). Even when considering Lashley’s personal characteristics and “not terrible” criminal history, the court determined that the

seriousness of the offense and the fact that Lashley “in the presence of his brother has proved that he is a potential danger to the public” justified a 36-month sentence. App. 190.

After defense counsel objected that the sentence was procedurally and substantively unreasonable based on the court’s consideration of the axe handle, the court stated that it was not “reasonable to conclude that [Lashley] didn’t know about” Roy’s use of the axe handle during the attack. App. 194. The court further stated that Lashley’s sentence “would be the same” based on “the facts of this case,” regardless of whether Lashley knew or should have known beforehand that Roy would use the axe handle in the beating because Lashley must have known that Roy was hitting D.B. with the axe handle during the assault. App. 194.³

c. Lashley timely appealed his sentence. Doc. 98, at 1.

SUMMARY OF ARGUMENT

This Court should affirm Lashley’s sentence of 36 months’ imprisonment as substantively reasonable. The record shows that the district court followed the

³ Roy pleaded guilty to willfully causing bodily injury to D.B., or attempting to do so, through use of a dangerous weapon because of D.B.’s actual or perceived race, in violation of 18 U.S.C. 249(a)(1), under Count 1 in the indictment. Doc. 50, at 1-17. Based on his use of the axe handle, which constitutes a dangerous weapon, and criminal history category II, his Guidelines sentence was 41 to 51 months’ imprisonment. Supp. App. 9. As with Lashley, the court determined that an upward variance was warranted and sentenced Roy to 60 months’ imprisonment. Sealed App., Tab 96 (Order 2).

requirements by the Supreme Court, this Court, and 18 U.S.C. 3553(a), in determining Lashley's sentence. The district court correctly calculated the advisory Guidelines range, considered the sentencing factors in Section 3553(a), and provided a sound, fact-specific explanation for imposing the upward variance based on its consideration of the Section 3553(a) factors.

Despite the district court's detailed explanation for Lashley's sentence, Lashley contends that the court abused its discretion by placing undue weight on Lashley's awareness that his brother used an axe handle during the attack. Lashley further argues that the district court erred by giving Lashley a greater upward variance than his brother, who instigated the attack on D.B. and wielded the axe handle. Neither argument has merit.

First, the district court is afforded substantial deference in applying and assigning weight to the Section 3553(a) factors. Based on its independent review of the facts and circumstances of the offense, including any mitigating factors, the court found it appropriate to consider Roy's use of the axe handle in sentencing Lashley. The court reasonably found that, based on the description of the assault in Lashley's guilty plea and the undisputed PSR, Lashley must have been aware of Roy's conduct and yet persisted in beating D.B. Lashley does not argue that this finding was clearly erroneous, only that it was given outsized weight. But the

court considered the nature and seriousness of Lashley's offense alongside the other sentencing factors and amply explained the basis for its sentence.

Second, the court did not abuse its discretion by varying upward to a greater degree when sentencing Lashley, as compared to his brother, given that Roy's Guidelines calculation already accounted for Roy's use of the axe handle while Lashley's did not. The court ultimately sentenced Lashley to 36 months' imprisonment and sentenced Roy to a significantly longer sentence of 60 months' imprisonment. Because Lashley cannot show that his sentence was substantively unreasonable, this Court should affirm the judgment.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY VARYING UPWARD FROM LASHLEY'S RECOMMENDED GUIDELINES SENTENCE AFTER CONSIDERING THE SECTION 3553(a) FACTORS

A. Standard Of Review

This Court reviews the reasonableness of a district court's sentencing decision for abuse of discretion. See *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015).

Reasonableness review consists of two components, procedural and substantive.

See *Gall*, 552 U.S. at 51.

With respect to substantive reasonableness, the Court must determine whether the sentence imposed was substantively reasonable under the totality of

the circumstances, including the factors listed in 18 U.S.C. 3553(a), *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008), and it reviews the district court’s findings of fact for clear error. *United States v. Matthews*, 3 F.4th 1286, 1289 (11th Cir. 2021). This review is “deferential,” *Rosales-Bruno*, 789 F.3d at 1254, and the Court “will not second guess the weight (or lack thereof) that the [district court] accorded to a given factor * * * as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.” *United States v. Snipes*, 611 F.3d 855, 872 (11th Cir. 2010) (citation and emphasis omitted), cert. denied, 563 U.S. 1032 (2011). The party challenging the sentence “bears the burden of establishing that the sentence is unreasonable.” *United States v. Docampo*, 573 F.3d 1091, 1103 (11th Cir. 2009) (citation omitted), cert. denied, 559 U.S. 1050 (2010).

B. Lashley’s Sentence Was Substantively Reasonable

On appeal, Lashley challenges only the substantive reasonableness of his sentence. Br. 16-22; see also Br. 16 (agreeing that the Guidelines calculation was correct). For the reasons explained below, this Court should affirm.

1. The District Court Imposed A Substantively Reasonable Sentence

The crux of substantive reasonableness review focuses on the district court’s weighing of the sentencing factors under 18 U.S.C. 3553(a) and their connection to the sentencing goals. A sentence is substantively unreasonable “only if” the Court

is “left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.” *United States v. Irely*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc) (citation omitted), cert. denied, 563 U.S. 917 (2011); *Rosales-Bruno*, 789 F.3d at 1256 (“[I]t is only the rare sentence that will be substantively unreasonable.”) (quoting *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013)).

Section 3553(a) mandates that courts impose sentences that are “sufficient, but not greater than necessary” to comply with the purposes listed in Section 3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from further crimes of the defendant. 18 U.S.C. 3553(a)(2). In determining the sentence to be imposed, the sentencing court also must consider the following factors: the nature and circumstances of the offense; the history and characteristics of the defendant; the applicable advisory Guidelines range for the defendant; the pertinent policy statements of the Sentencing Guidelines; the need to avoid unwarranted sentence disparities; and the need to provide restitution to any victims of the offense. 18 U.S.C. 3553(a)(1)-(6).

Here, the district court correctly calculated the applicable Guidelines range and then properly considered the Section 3553(a) factors in fashioning “an

individualized assessment based on the facts presented.” *Gall*, 552 U.S. at 49-50. This is clear from both the sentencing hearing and the court’s Statement of Reasons and attached order. The court considered *all* of the Section 3553(a) factors and highlighted several of those factors in its written order to explain the basis for the upward variance and supplement the reasons the court articulated at sentencing. See Sealed App., Tab 96 (Order 1, 10); see also *United States v. Amedeo*, 487 F.3d 823, 833 (11th Cir.) (stating that district court need only acknowledge Section 3553(a) factors and need not discuss each of them), cert. denied, 552 U.S. 1049 (2007).

In particular, the court explained that a 36-month sentence was necessary because the advisory Guidelines range of 12 to 18 months’ imprisonment failed to serve the goals of sentencing and adequately account for the severity and brazen nature of the offense. App. 190; Sealed App., Tab 96 (Order 8-10). The court emphasized the “viciousness” of the attack and Lashley’s role in the hate crime. App. 188-190; Sealed App., Tab 96 (Order 4-6). Lashley initiated the physical attack on D.B. and continued to pummel D.B. with his fists while hurling racial slurs at him over a protracted period that persisted even when his brother was not present and lasted until officers arrived. App. 177, 188-190; Sealed App., Tab 96 (Order 4-6). The court, moreover, did not clearly err in finding that Lashley must have been aware that Roy was hitting D.B. with the axe handle but continued to

beat D.B. anyway. App. 188-189; Sealed App., Tab 96 (Order 5-6). Because the Guidelines range did not encompass the use of the axe handle in the attack or capture the other “shocking” circumstances of Lashley’s crime, the court concluded that an upward variance was warranted to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. Doc. 92, at 4; see also Doc. 92, at 8-10; App. 186.

The court also expressly considered Lashley’s mitigating factors, including his criminal history and Roy’s influence over Lashley, and weighed them against the seriousness of his crime and the need for deterrence and to protect the public. App. 187-190; Sealed App., Tab 96 (Order 6-10). Specifically, based on Lashley’s relationship with his brother, the court opined that a sentence of 36 months’ imprisonment was appropriate and necessary to provide adequate deterrence and protect the public from further crimes. App. 190; Sealed App., Tab 96 (Order 8-10). These goals of sentencing are closely tied considering the long history of Roy’s manipulation of Lashley. As the court explained, Lashley alone may not pose a significant threat to the public, but Lashley, under Roy’s influence, “engaged in this conduct enthusiastically and without hesitation.” Sealed App., Tab 96 (Order 9-10); see also App. 190.

This Court has found more dramatic upward variances than the one in this case to be reasonable. In *United States v. Osorio-Moreno*, for example, this Court

affirmed the district court's imposition of a 120-month sentence, the statutory maximum, because the advisory Guidelines range of 51 to 63 months' imprisonment did not "accurately or adequately reflect the defendant's history and underrepresent[ed] the seriousness of his criminal history." 814 F.3d 1282, 1286 (11th Cir. 2016). Similarly, in *United States v. Mateos*, the Court upheld a sentence equal to the statutory maximum of 360 months' imprisonment, which was eight years above the top of the Guidelines range. 623 F.3d 1350, 1366 (11th Cir. 2010), cert. denied, 562 U.S. 1222 (2011). Here, the fact that Lashley's 36-month sentence was well below the ten-year maximum sentence for his violation of 18 U.S.C. 249(a)(1), see Sealed App., Tab 82 (PSR 2), and 24 months less than the 60-month sentence imposed on his brother, further underscores the reasonableness of his sentence. See *United States v. Gonzales*, 550 F.3d 1319, 1323-1324 (11th Cir. 2008), cert. denied, 557 U.S. 928 (2009); see also *Rosales-Bruno*, 789 F.3d at 1256-1257.

Thus, under the totality of the facts and circumstances, Lashley's sentence of 36 months' imprisonment was substantively reasonable. The court provided a fact-specific explanation and thoroughly articulated its reasons for imposing the upward variance based on its consideration of the Section 3553(a) factors. See *United States v. Green*, 981 F.3d 945, 953 (11th Cir. 2020) (stating that "the sentencing court need only set forth enough to demonstrate that it 'considered the parties'

arguments and ha[d] a reasoned basis” for the sentence) (quoting *United States v. Carpenter*, 803 F.3d 1224, 1232 (11th Cir. 2015)), cert. denied, 141 S. Ct. 2690 (2021). Accordingly, there is no abuse of discretion.

2. *Lashley’s Arguments To The Contrary Lack Merit*

Lashley argues (Br. 16-23) that his 36-month sentence was substantively unreasonable because the court abused its discretion by (a) giving undue weight to Roy’s use of an axe handle during the assault, and (b) committing a clear error of judgment in its consideration of the totality of the circumstances by varying upward to a relatively greater degree for Lashley than for Roy. See *Irey*, 612 F.3d at 1189 (citation and quotation marks omitted). He is incorrect as to both.

a. Lashley first contends (Br. 16-21) that the court’s upward variance was based on its improper weighing of the Section 3553(a) sentencing factors. He argues that the court gave too much weight to any awareness during the fight that Roy wielded an axe handle to beat D.B. and too little weight to mitigating factors, such as Lashley’s limited criminal history and record of working and supporting his family.

i. As an initial matter, it is well-established that the weight given to any specific Section 3553(a) factor is committed to the discretion of the district court, see *United States v. Brown*, 772 F.3d 1262, 1266 (11th Cir. 2014), and “[i]t is not an abuse of discretion to afford more weight to one of the § 3553(a) factors.”

United States v. Fox, 926 F.3d 1275, 1282 (11th Cir.), cert. denied, 140 S. Ct. 639 (2019). This Court does not substitute its own judgment for that of the district court in weighing the relevant sentencing factors or second guess the weight the district court assigned a particular sentencing factor absent a clear error of judgment. See *United States v. Early*, 686 F.3d 1219, 1223 (11th Cir. 2012); *Pugh*, 515 F.3d at 1191. Lashley has not shown such an error.

Here, there is nothing unreasonable about how the court weighed the Section 3553(a) factors. Like in *Rosales-Bruno*, 789 F.3d at 1259, the court correctly calculated the advisory Guidelines range, “gave both parties the opportunity to argue for the sentence they thought appropriate,” and then considered the Section 3553(a) factors in “deciding what the sentence should be.” The court was not required to “give the advisory [G]uidelines range as much weight as it gives to any other § 3553(a) factor or combination of factors.” *Ibid.* The court properly focused on the specific facts involving Lashley’s role in the offense and the severity of his conduct and, by assigning weight to certain Section 3553(a) factors, made “an individualized assessment based on the facts.” *Gall*, 552 U.S. at 49-50. At bottom, the court considered all the Section 3553(a) factors and did not “write out” or “ignor[e]” any undisputed facts. See *Irey*, 612 F.3d at 1190. Nothing in the record could leave this Court “with the definite and firm conviction that the district court committed a clear error of judgment.” *Ibid.*

ii. Lashley primarily disagrees with the district court's consideration of the axe handle. Lashley notes (Br. 19) that he argued below that it was "unjust" and "unfair" for the court to even consider the axe handle, "given the lack of evidence that [Lashley] knew [it] was being used during the fight." To be sure, Lashley objected to the court's consideration of the axe handle. App. 193-195; Sealed App., Tab 96 (Order 5, 8). The court, however, stressed that it was appropriate to consider the full circumstances of the attack and, in any event, Lashley admitted in his plea agreement that an axe handle was used in the attack. App. 188; Sealed App., Tab 96 (Order 5). As this Court has held, sentencing courts may make factual findings based on facts admitted in the defendant's guilty plea or undisputed statements in the PSR, and may make inferences from that undisputed information based on "common sense and ordinary human experience." *Matthews*, 3 F.4th at 1289 (quoting *United States v. Philidor*, 717 F.3d 883, 885 (11th Cir. 2013) (per curiam)).

The district court did that here, relying on undisputed facts from both the Factual Basis and the PSR. See Doc. 60, at 17; Sealed App., Tab 82 (PSR 5). The court reasonably inferred from the description of the attack—*i.e.*, that both Lashley and Roy were within striking distance of D.B.—that Lashley was aware during the attack that Roy was beating D.B. with an axe handle and yet persisted in punching D.B. App. 177, 188; Sealed App., Tab 96 (Order 5-6). The court was "free to

make” such a reasonable inference, which was “not speculative to the point of being clearly erroneous.” See *United States v. Chavez*, 584 F.3d 1354, 1366-1367 (11th Cir. 2009) (affirming sentence where the district court inferred that the cash found in defendant’s home constituted proceeds from drug trafficking and determined drug quantity by converting the quantity of cash into the quantity of drugs), cert. denied, 562 U.S. 990 (2010); see also *Matthews*, 3 F.4th at 1290 (holding that sentence was reasonable because district court’s inference was “plausible in light of the record viewed in its entirety”) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).⁴

At sentencing, Lashley’s counsel asserted that Lashley would not have been aware of Roy’s use of the axe handle because Lashley “was injured and dazed.” Br. 19. Counsel also suggested Lashley at some point was lying face down on D.B. and presumably did not see Roy hit D.B. with the axe handle. App. 178; Sealed App., Tab 96 (Order 5-6). But Lashley has not identified any undisputed facts or reasonable inference from those facts to support such findings. And even where the facts give “rise to two reasonable and different constructions,” the

⁴ The district court’s inference that Lashley must have been aware that Roy was hitting D.B. with the axe handle was consistent with the government’s representation at Roy’s sentencing hearing that witness testimony placed Lashley and Roy on either side of D.B. during the attack. Supp. App. 14. Indeed, the court stated at Roy’s sentencing that knowing about this witness testimony “would have helped in [Lashley’s] sentencing.” Supp. App. 14.

district court's "choice between them cannot be clearly erroneous." *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir.) (quoting *United States v. Izquierdo*, 448 F.3d 1269, 1278 (11th Cir. 2006)), cert. denied, 568 U.S. 1018 (2012). "For a finding to be clearly erroneous, this Court must be left with a definite and firm conviction that a mistake has been committed." *Ibid.* (citation omitted). Lashley has not shown that on this record.⁵

b. Lashley next argues (Br. 22-23) that the court committed a clear error in judgment by giving him an 18-month upward variance while imposing only a 9-month upward variance for Roy. Lashley acknowledges that the court recognized all the "facts mitigating [Lashley's] actions" but asserts that the greater upward variance for Lashley was contrary to facts showing that Roy was more culpable. Br. 21-23. This argument also lacks merit.

Lashley challenges the disparity between his and Roy's sentences, see 18 U.S.C. 3553(a)(6), but Roy's 60-month sentence is nearly double Lashley's 36-

⁵ Lashley suggests that the district court erred in considering the axe handle and unreasonably varied upward because his plea agreement contained no aiding-and-abetting language and because the government recommended a within-Guidelines sentence. Br. 16, 18-20. But Lashley's plea agreement made clear that the court would sentence him based on all available information (Doc. 60, at 6), and that his sentence would be determined solely by the court (Doc. 60, at 7-8). The sentencing court, not the government, is responsible for determining the appropriate sentence after considering the Section 3553(a) factors, see *United States v. Booker*, 543 U.S. 220, 249-250 (2005), and the parties' agreement is clear that the government reserved the right to support and defend the district court's decision even if it differed from the government's recommendation (Doc. 60, at 8).

month sentence. The district court explained that Roy's higher sentence was "warranted" based on Roy's guilty plea to using a dangerous weapon and more severe criminal history; Roy "provoked [Lashley] to participate in attacking D.B., and Roy is the one who used the axe handle during the attack." Sealed App., Tab 96 (Order 10-11).

Nor do the different sentences the district court imposed, or the relative degree of its upward variances, establish substantive unreasonableness. Roy's Guidelines range of 41 to 51 months' imprisonment already encompassed his use of the axe handle and more severe criminal history. Doc. 50, at 2; Doc. 88, at 1, 6; Sealed App., Tab 96 (Order 8); see also Br. 22. In contrast, Lashley's Guidelines range of 12 to 18 months' imprisonment did not reflect that a dangerous weapon was used during the attack. Sealed App., Tab 96 (Order 8); see also App. 182-183. Therefore, it was not surprising that the district court applied a greater variance when sentencing Lashley. Nor did the district court commit an error in judgment by doing so. Indeed, "[w]hen it comes to sentencing, particularized facts about the defendant matter," *Rosales-Bruno*, 789 F.3d at 1259 (citing *Gall*, 552 U.S. at 54), since the purpose of the district court's consideration of the Section 3553(a) factors is to make "an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50. The court did exactly that here—it considered the facts as they

applied to Lashley and imposed a sentence based on its consideration of the totality of the facts and circumstances in the record.

* * *

In sum, the record demonstrates that the district court considered the Section 3553(a) factors in imposing the total sentence, and Lashley has not established that his sentence was substantively unreasonable based on those factors. See *Irey*, 612 F.3d at 1189 (explaining that a sentence is substantively reasonable where the sentence is “in the ballpark of permissible outcomes”) (citation and quotation marks omitted). The court’s application of the Section 3553(a) factors and the weight given to them, combined with the substantial deference afforded to sentencing courts, support finding that Lashley’s sentence of 36 months’ imprisonment conforms with the sentencing goals set forth in 18 U.S.C. 3553(a)(2). Accordingly, this Court should affirm Lashley’s sentence.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) 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 Word for Microsoft 365, in 14-point Times New Roman font.

s/ Teresa Kwong
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Attorney

Date: August 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2023, I electronically filed the forgoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

s/ Teresa Kwong
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