In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1690

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAQUWON RICHARDSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:19-cr-00365-JMS-TAB-1 — **Jane Magnus-Stinson**, *Judge*.

ARGUED JANUARY 6, 2023 — DECIDED FEBRUARY 17, 2023

Before EASTERBROOK, ST. EVE, and KIRSCH, *Circuit Judges*.

KIRSCH, *Circuit Judge*. Driving alone in Indianapolis, Daquwon Richardson committed a traffic violation and was stopped by police. A subsequent inventory search of the car uncovered a gun that, as a three-time convicted felon, Richardson could not lawfully possess. A jury convicted him of that offense, and the district court sentenced him as an armed career criminal to the mandatory-minimum 15 years in

prison. Richardson asks us to overturn the jury's verdict or, short of that, vacate his sentence. Finding no error, we affirm.

Richardson argues that the government's evidence was insufficient to support his conviction for possession of a firearm. See 18 U.S.C. § 922(g)(1). Since he never made that argument below by moving for a judgment of acquittal, we ask only whether his conviction reflects a "manifest miscarriage of justice." *United States v. Chaparro*, 956 F.3d 462, 468 (7th Cir. 2020) (citations omitted). "Under this standard, we will overturn the jury's verdict only if the record is devoid of evidence pointing to guilt, or if the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Id.*

Lacking evidence of actual possession—DNA, fingerprints, an eyewitness, etc.—the government proceeded on a constructive possession theory. The key issue, therefore, was whether Richardson "had both the power and intention to exercise dominion and control over the firearm." *United States v. Washington*, 962 F.3d 901, 906 (7th Cir. 2020) (citations omitted). To prove that he did, the government introduced the following evidence at trial: Richardson was the driver and sole occupant of the car. When stopped, he initially gave the police false names. In an effort to identify him, officers conducted an inventory search of the car. That search uncovered a firearm stashed beneath the passenger seat, within the driver's reach. Before telling Richardson about the gun, officers asked him whether he had a firearms license, to which he responded, "That gun's not mine." The search uncovered other items belonging to Richardson, including a pay stub bearing his name. When Richardson started having an asthma attack, he told officers that his inhaler could be found in the car's glove box.

And on jail calls with his girlfriend, who owned the gun, he confirmed that the gun was "in the same place that it's always in." The jury heard all of this and found Richardson guilty. Far from a "manifest miscarriage of justice," the jury's conclusion that Richardson constructively possessed the gun was entirely reasonable.

After Richardson was convicted, the district court turned to sentencing. When he was 16, Richardson and an accomplice committed a series of armed robberies in Indianapolis. The pair first robbed the CVS at 7240 East 82nd Street at 4:48 am on December 31, 2011. They hit the CVS at 1030 North Arlington Avenue at 6:03 that morning. And they struck again at 7:26 pm the next day, targeting the Dollar General at 3725 North Keystone Avenue. Based on those prior convictions, the district court concluded that Richardson fell under the auspices of the Armed Career Criminal Act, which imposes a mandatory-minimum sentence of 15 years on any person convicted of possessing a firearm as a felon if that person has three or more prior convictions for violent felonies or serious drug offenses "committed on occasions different from one another." 18 U.S.C. § 924(e). Richardson argues that the district court erred in concluding that his three prior violent felonies were "committed on occasions different from one another."

In *Wooden v. United States*, the Supreme Court explained how district courts should evaluate whether crimes are committed on different occasions. 142 S. Ct. 1063 (2022). The inquiry is both "multi-factored in nature" and "straightforward and intuitive," *id.* at 1070, 1071:

> Offenses committed close in time, in an uninterrupted course of conduct, will often count as

> part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

Id. at 1071. "In many cases, a single factor—especially of time or place—can decisively differentiate occasions." *Id*.

We agree with the district court's conclusion that each robbery was committed on a different occasion. There is no colorable argument that the second and third robberies occurred on the same occasion given the 36 hours that separated them. See *id.* ("Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart."). Although a closer call, the first and second robberies also constitute two separate occasions. Just as a significant temporal separation can differentiate two occasions, so too can significant distance. See *id.* (citing *United States v. Rideout*, 3 F.3d 32 (2d. Cir. 1993)). In *Rideout*, the Second Circuit held that "offenses committed against different victims separated by at least twenty to thirty minutes and twelve to thirteen miles" constituted separate occasions. 3 F.3d at 35. The story is much the same here. The second robbery was committed more than an hour after and 12 miles away from the first. As the district court noted, Richardson "could have chosen to stop [his] criminal behavior"

between those robberies but did not. With a meaningful gap in time and space between them and notwithstanding the similarities in victim, perpetrators, and methodology, all three robberies were "committed on occasions different from one another." And since Richardson's argument that his age at the time he committed the robberies should affect ACCA's applicability is meritless, see *United States v. Ramsey*, 840 F. App'x 23, 24 (7th Cir. 2021) (deeming frivolous the same argument in a materially identical case), we affirm the district court's application of ACCA.

We pause to note that the Supreme Court limits the documents a district court can look to when evaluating a defendant's criminal history for ACCA purposes. *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Kirkland v. United States*, 687 F.3d 878, 883–87 (7th Cir. 2012). The original state court indictments, jury instructions and verdict forms, plea colloquy transcripts and the like are in, but police reports, trial transcripts, and complaint applications are out. *Shepard*, 544 U.S. at 21–26; *Kirkland*, 687 F.3d at 884. The record below contains only an amended indictment from Richardson's state court case; that document says nothing about the time or place of the robberies. R.93-4. Those details are contained in an affidavit attached to the complaint filed in this case, R.2 at 7–8, ¶ 23, but an affidavit that draws on unspecified records is not a *Shepard* document. It is unclear what the probation officer had before him when he completed the PSR, so we cannot know whether his sources complied with *Shepard*'s strictures. But since Richardson never objected to the PSR's description or sought clarification from the district court as to what it was relying upon in making its ACCA determination, we assume that the PSR—and, in turn, the district court—relied only on those documents countenanced by *Shepard*. The better course would be

to file the *Shepard* documents on the docket. But, through his silence, Richardson forfeited any relief *Shepard* might have offered in the district court and, by not making the argument to us, has waived it on appeal.

Richardson also contends that the district court erred when it applied a two-level enhancement for obstruction of justice when determining his Guidelines range. In the government and district court's view, Richardson attempted to suborn perjury from his girlfriend about whether they cohabitated. We affirm ACCA's applicability, so we need not resolve whether there was any error in the district court's analysis: Richardson's sentence was as lenient as it could be, so any Guidelines error was harmless. *United States v. Cheek*, 740 F.3d 440, 454 (7th Cir. 2014).

One final note: The district court's judgment incorrectly states that Richardson was convicted after pleading guilty. We modify the judgment to reflect Richardson's conviction by the jury. 28 U.S.C. § 2106.

* * *

By a separate nonprecedential order, we resolve the order to show cause we issued to Theodore J. Minch, counsel for Richardson, for his persistent violation of court orders and his deficient performance in this appeal.

AFFIRMED AS MODIFIED