In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2534

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAVELLE HATLEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 2:20-cr-15 — **Philip P. Simon**, *Judge*.

ARGUED SEPTEMBER 13, 2022 — DECIDED MARCH 6, 2023

Before FLAUM, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Once again we find ourselves asking what qualifies for enhanced sentencing under the Armed Career Criminal Act. This time around we assess whether Hobbs Act robbery constitutes a "violent felony" within the meaning of 18 U.S.C. § 924(e). The district court answered in the affirmative and so do we, leaving us to affirm.

I

Police officers discovered a gun in Lavelle Hatley's possession during a traffic stop in Gary, Indiana, in January 2020. Hatley's criminal record at the time included multiple state and federal felony convictions. Federal charges followed and led to Hatley pleading guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which ordinarily carries a statutory maximum of 10 years. See 18 U.S.C. § 924(a)(2).

At sentencing the government contended that Hatley's criminal history exposed him to an enhanced sentence of at least 15 years under the Armed Career Criminal Act or (for short) ACCA—in particular under 18 U.S.C. § 924(e). The enhancement applies to offenders with "three previous convictions … for a violent felony … committed on occasions different from one another." 18 U.S.C. § 924(e)(i). The central question before the district court was whether Hatley had at least three predicate felonies to qualify for the enhancement.

Hatley's criminal history included convictions for both robbery and criminal battery under Indiana law. Everyone agreed that those two Indiana crimes qualified as violent felonies within the meaning of § 924(e). But ACCA requires at least three. Hatley also had eight separate convictions in federal court for Hobbs Act robberies committed on eight different occasions. He contended that these robbery convictions did not qualify as "violent felonies" and thus that he was ineligible for the § 924(e) enhancement.

The district court rejected Hatley's position, found him to be an armed career criminal, and sentenced him to the 15-

year minimum term mandated by § 924(e). Hatley now appeals his sentence.

II

A

In answering whether Hobbs Act robbery qualifies as a violent felony, we draw upon substantial instruction supplied by the Supreme Court beginning in its decision in *Taylor v. United States*, 495 U.S. 575 (1990). *Taylor* and its progeny require us to apply the categorical approach by comparing the prior offense of conviction with the sentencing enhancement statute. See *id.* at 602; see also *Shular v. United States*, 140 S. Ct. 779, 783 (2020). We have explained and applied this approach many times before. See, *e.g.*, *United States v. Campbell*, 865 F.3d 853, 855–57 (7th Cir. 2017); *Bridges v. United States*, 991 F.3d 793, 800–02 (7th Cir. 2021).

Under the categorical approach, the only question is whether the elements of the defendant's prior crime (here, Hobbs Act robbery) fit within the elements of the predicate crime in the enhancement statute (here, § 924(e)). See *Descamps v. United States*, 570 U.S. 254, 257 (2013). By elements we mean the "statutory definitions" of the crime. *Bridges*, 991 F.3d at 800. A defendant's prior conviction qualifies as an ACCA predicate, the Supreme Court has explained, "only if the statute's elements are the same as, or narrower than," the predicate crime listed in the ACCA enhancement. *Descamps*, 570 U.S. at 257.

By focusing on the elements of the prior offense of conviction rather than the facts, we ask whether the least serious acts satisfying the elements of the prior crime would

also satisfy the elements of the predicate crime under ACCA. See *Johnson v. United States*, 559 U.S. 133, 137 (2010). Put another way, if there is any way to commit Hobbs Act robbery without also committing a "violent felony" under § 924(e), there is no categorical fit—meaning Hobbs Act robbery is not a violent felony under ACCA. That conclusion holds even if Hatley's *actual* offense conduct for any of his eight prior Hobbs Act robbery convictions involved violent force. See *Descamps*, 570 U.S. at 261.

B

The starting point with the categorical approach, then, is to assess whether the elements of Hobbs Act robbery under 18 U.S.C. § 1951 fit within ACCA's definition of a violent felony. The Hobbs Act is divisible into two separate offenses: robbery and extortion. See *King v. United States*, 965 F.3d 60, 69 (1st Cir. 2020) (collecting cases treating the Hobbs Act as divisible). All of Hatley's convictions are for Hobbs Act robbery, so we focus only on whether the statutory elements of Hobbs Act robbery (and not Hobbs Act extortion) fit within § 924(e). See *Descamps*, 570 U.S. at 261–64; see also *Bridges*, 991 F.3d at 799–802 (treating Hobbs Act robbery separately from Hobbs Act extortion under the categorical approach). Both parties agree with this analytical approach.

Next we compare the elements of Hobbs Act robbery with the elements of a violent felony under ACCA. Congress defined Hobbs Act robbery as

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury,

> immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1). As for the sentencing enhancement imposed by ACCA, Congress defined "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year … that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion ….

18 U.S.C. § 924(e)(2)(B). Everyone refers to the first clause of the definition—the one in subparagraph (i)—as the "force clause" or the "elements clause" and the second as the "enumerated clause." See, *e.g.*, *United States v. Dowthard*, 948 F.3d 814, 818–19 (7th Cir. 2020).

The language Congress used in § 1951(b)(1) tells us that defendants can commit Hobbs Act robbery by using force against either a person or property. To qualify as a violent felony under ACCA, then, *both* ways of committing Hobbs Act robbery must fit within ACCA. See *Descamps*, 570 U.S. at 261 (explaining that a crime constitutes a predicate offense within the meaning of § 924(e) only if every person convicted under the predicate offense is necessarily guilty of an offense under § 924(e)).

All agree that a Hobbs Act robbery committed by using force against a person fits within ACCA's force clause. Both

statutes require actual or threatened physical force against another person: the Hobbs Act provides for "actual or threatened force, or violence, or fear of injury, immediate or future, to [another's] person," with ACCA's force clause likewise covering "the use, attempted use, or threated use of physical force against the person of another." 18 U.S.C. §§ 1951(b)(1), 924(e)(2)(B).

But the other way of committing Hobbs Act robbery—by using force against property—does not fit within ACCA's force clause. The force clause in § 924(e) only provides for committing force against *persons*, not property. As a result, we have to look beyond the force clause to determine if Hobbs Act robbery committed using force against property qualifies as a violent felony under some other provision of ACCA.

That inquiry takes us to ACCA's enumerated clause. That clause expressly lists extortion as a violent felony. See 18 U.S.C. § 924(e)(2)(B)(ii). The question then becomes whether a conviction of Hobbs Act robbery for using force against property fits within ACCA extortion. Because ACCA does not define extortion, we import the generic definition from the common law. See *Mathis v. United States*, 579 U.S. 500, 503 (2016) (explaining that enumerated offenses are given their generic meaning). Generic extortion, the Supreme Court has explained, requires "obtaining [] something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 410 (2003).

A careful reader may be pausing at this point and questioning why we are using the generic definition of extortion to interpret ACCA's enumerated clause when the

Hobbs Act provides its own, similar definition. See 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."). But remember the question we are trying to answer and the analysis that the categorical approach requires. We look to the Hobbs Act only to understand the elements of Hobbs Act robbery, the prior conviction at issue here. Once we understand those elements, our focus turns to ACCA, the statute under which Hatley received an enhanced sentence. We assess whether each way of committing Hobbs Act robbery fits within ACCA's definition of "violent felony" in § 924(e)(2)(B). Put most simply, the Hobbs Act does not tell us what constitutes extortion under ACCA. That answer has to come from ACCA itself. See *Descamps*, 570 U.S. at 261 (applying the categorical approach and considering whether "the relevant statute has the same elements as the 'generic' ACCA crime").

Now we can turn to the final step of our analysis and decide whether generic extortion within the meaning of § 924(e)(2)(B)(ii) encompasses Hobbs Act robbery committed using force against property. Admittedly, the definitions of each offense differ. Generic extortion means "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler*, 537 U.S. at 409. Hobbs Act robbery, on the other hand, requires an "unlawful taking or obtaining of personal property from the person … against his will, by means of actual or threatened force" to property. 18 U.S.C. § 1951(b)(1). The core disagreement between the parties is whether taking something from someone "with his consent induced by the

wrongful use of force" against property encompasses taking something from someone "against his will" by means of force against property.

In our view, generic extortion encompasses Hobbs Act robbery using force against property. Make no mistake, the analysis is difficult, and the issue is close. Wrongfully induced consent is one of only a few elements that sets generic extortion and Hobbs Act extortion apart from Hobbs Act robbery. The Supreme Court has said that induced consent is therefore "designed to distinguish" extortion from robbery. *Ocasio v. United States*, 578 U.S. 282, 297 (2016).

But Hatley cannot show a categorical mismatch simply by pinpointing a textual difference, especially when that difference proves to be "superficial" in the specific context of Hobbs Act robbery using force against property. *United States v. Turner*, 47 F.4th 509, 514 (7th Cir. 2022). Neither can he show a categorical mismatch by invoking a "purely abstract possibility" that Hobbs Act robbery using force against property may somehow be broader than generic extortion. *United States v. Jennings*, 860 F.3d 450, 460 (7th Cir. 2017). Instead, the question we ask ourselves is whether there is a "realistic probability" that someone could commit a Hobbs Act robbery by using force against property without also committing generic extortion. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Hatley has not identified any examples, let alone one rising above a "fanciful hypothetical[]." *United States v. Maxwell*, 823 F.3d 1057, 1062 (7th Cir. 2016). Neither have we, after conducting our own independent review.

Our conclusion is broadly consistent with three other circuits and a leading criminal law treatise. See *United States*

v. Becerril-Lopez, 541 F.3d 881, 891–92, 892 n.9 (9th Cir. 2008) ("The 'with consent' element of generic extortion is not inconsistent with the 'against the will' element of a Cal. Penal Code § 211 conviction for a taking involving threats to property."); *United States v. Castillo*, 811 F.3d 342, 348 (10th Cir. 2015) ("We see no meaningful difference in this context between a taking of property accomplished against the victim's will and one where the victim's consent is obtained through force or threats."); *United States v. Montiel-Cortes*, 849 F.3d 221, 228 (5th Cir. 2017) (concluding that consent wrongfully induced by force "is against the victim's will" for purposes of Nevada's robbery statute); 3 Wayne R. LaFave, *Substantive Criminal Law*, § 20.4(b) (3d ed. 2022) (explaining that "there is no difference" between taking property against a victim's will and doing so with wrongfully induced consent). True enough, *Becerril-Lopez* no longer controls following amendments to the Sentencing Guidelines' definition of extortion. See *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018). But the underlying rationale of *Becerril-Lopez* has survived. See *id.* at 1104–05 (continuing to apply *Becerril-Lopez* to defendants sentenced before the amendments to the Guidelines' definition of extortion).

By contrast, the Sixth Circuit has adopted a different approach. See *Raines v. United States*, 898 F.3d 680, 689–90 (6th Cir. 2018) (per curiam). The Fourth Circuit did as well in a case later overruled on a different ground. See *United States v. Gardner*, 823 F.3d 793, 802 n.5 (4th Cir. 2016), *overruled by United States v. Dinkins*, 928 F.3d 349, 355–56 (4th Cir. 2019). In both cases, the court found a categorical mismatch based partly on the same discrepancy between a nonconsensual taking and a taking with a victim's wrongfully induced consent. See *Raines*, 898 F.3d at 689–90 (concluding that

credit extortion under 18 U.S.C. § 894(a)(1) does not fit within generic extortion); *Gardner*, 823 F.3d at 802 n.5 (determining that generic extortion does not encompass North Carolina common law robbery).

Raines and *Gardner* do not persuade us to change course. Neither case identified an example of a nonconsensual taking that did not involve the victim's induced consent, let alone an example that would apply to Hobbs Act robbery committed using force against property. Instead, *Raines* explained how a defendant could commit credit extortion without committing generic extortion based on a *different* discrepancy between the two offenses. See *Raines*, 898 F.3d at 690. For its part, *Gardner* leaned heavily on the fact that the state and federal government each had separate laws for extortion and robbery. See *Gardner*, 823 F.3d at 802 n.5. But the Supreme Court has warned against fixating on "technical definitions and labels" in applying the categorical approach. *Taylor*, 495 U.S. at 590.

In the end, the approach we employ aligns with our prior decisions. Consider, for example, our 2021 decision in *Bridges v. United States*, 991 F.3d 793. There we analyzed whether Hobbs Act robbery is a "crime of violence" within the meaning of the Sentencing Guidelines' career offender provisions. And there, as here, we focused on Hobbs Act robbery, not Hobbs Act extortion. See *id.* at 801. There, too, we looked at the realistic and probable ways that a defendant could commit Hobbs Act robbery and determined whether each of those ways fits within the definition of "crime of violence" in U.S.S.G. § 4B1.2. See *id.* at 801–02. Like ACCA, the Guidelines' career offender provision has both a force clause and an enumerated clause. But the Guidelines

define extortion more narrowly than the generic definition we apply here, allowing a defendant to commit Hobbs Act robbery without committing extortion under the Sentencing Guidelines. See *id.* at 802. We therefore concluded in *Bridges* that Hobbs Act robbery was not a crime of violence for purposes of the Sentencing Guidelines. See *id.*

We have applied the exact same analytical approach here. That we have reached a different conclusion reflects only the differences in how the enumerated clause of § 924(e) and the Guidelines' career offender provision define extortion.

C

Hatley urges a different course of reasoning. He observes that under the district court's analysis, Hobbs Act robbery qualifies as a violent felony because every way of committing the offense *either* fits within the force clause *or* the enumerated clause of § 924(e). He believes that by using this "either/or" analysis, the district court improperly treated Hobbs Act robbery as a divisible offense, consisting of the *separate* crimes of robbery against persons and robbery against property. As he sees it, Hobbs Act robbery is a violent felony only if the different ways of committing the offense all fit under the same clause of ACCA.

But the district court never suggested that a Hobbs Act offense, while generally divisible between robbery and extortion, was further sub-divisible between robbery committed by using force against persons and robbery committed by using force against property. Instead, the district court considered the different ways to commit the same, single offense of Hobbs Act robbery. From there the

district court compared those ways to the force clause and to the enumerated clause under ACCA. That is exactly what a proper application of the categorical approach requires and what we have done here.

III

One final matter requires our attention. Recall that the ACCA sentencing enhancement applies only if the prior violent felonies were "committed on occasions different from one another." 18 U.S.C. § 924(e)(i). The district court found that Hatley met the separate occasions requirement because his eight prior Hobbs Act convictions involved different victims and were separated over time and place. Hatley now argues that the Sixth Amendment requires a jury, rather than a judge, to make this finding beyond a reasonable doubt. But Hatley did not raise these arguments below, so our review is only for plain error. See Fed. R. Crim. P. 52(b).

Hatley's position is foreclosed by precedent. In *United States v. Elliott*, 703 F.3d 378 (7th Cir. 2012), we determined that a sentencing judge may make a separate occasions finding for purposes of applying the ACCA enhancement. See *id.* at 382. We grounded our holding in longstanding Supreme Court precedent allowing a sentencing judge to find facts related to the existence of prior crimes. See *id.* at 381–82 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998)). In terms fully applicable here, we underscored in *Elliott* that we would not revisit our holding "unless and until the Supreme Court overrules *Almendarez-Torres* or confines it solely to the fact of a prior conviction." *Id.* at 383.

The Supreme Court has not overruled or limited *Almendarez-Torres*. The Court recently reversed a sentencing judge's separate occasions finding but expressly reserved the Sixth Amendment issue. See *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3, 1071 (2022). The Court did not reconsider or otherwise question *Almendarez-Torres*. And in *Wooden*'s wake, other circuits have continued to recognize the propriety of sentencing judges making this finding. See, *e.g.*, *United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022); *United States v. Reed*, 39 F.4th 1285, 1296 (10th Cir. 2022). We do the same.

For these reasons, we AFFIRM.