In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2950

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEJUAN ANDRE WORTHEN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.
No. 15-cr-6 — **Sarah Evans Barker**, *Judge*.

ARGUED FEBRUARY 8, 2023 — DECIDED MARCH 2, 2023

Before FLAUM, SCUDDER, and ST. EVE, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Dejuan Worthen asks us to reconsider whether Hobbs Act robbery—even more specifically, aiding and abetting a Hobbs Act robbery—is a crime of violence for purposes of the sentencing enhancement Congress included in 18 U.S.C. § 924(c)(3)(A). We conclude that it is and affirm the district court's judgment.

I

Worthen, his brother Darryl, and their cousin Darion Harris planned to rob a gun store near North Vernon, Indiana and, if necessary, shoot the store owner, Scott Maxie, in the process. During the robbery, Darryl shot and killed Maxie. Worthen and Harris then loaded a large cache of guns into Darryl's car and the trio drove away. The police apprehended Worthen soon after.

Federal charges followed. Worthen faced charges of Hobbs Act robbery, see 18 U.S.C. § 1951(a), and discharge of a firearm resulting in death, see 18 U.S.C. § 924(j). Because Darryl directed the robbery and shot and killed Maxie, the government charged Worthen as an aider and abettor of both crimes under 18 U.S.C. § 2(a). For the § 924(j) charge, the government needed to show the discharge of a firearm in the course of a "crime of violence." Congress defined that term under the so-called force clause of § 924(c) as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The indictment alleged that the Hobbs Act robbery of Maxie's gun shop was the qualifying crime of violence.

Worthen invoked Federal Rule of Criminal Procedure 12 and moved to dismiss the § 924(j) charge on the ground that Hobbs Act robbery was not a crime of violence within the meaning of § 924(c)(3)(A). Nowhere in his motion did he mention accessory liability. Relying on our decision in *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017), the district court concluded that Hobbs Act robbery qualified as a crime of violence and denied Worthen's motion. Worthen then pled

guilty to the § 924(j) charge as an aider and abettor and received a sentence of 30 years' imprisonment. In his plea agreement with the government, Worthen preserved his right to seek review of the district court's denial of his motion to dismiss but otherwise waived his right to appeal.

On appeal Worthen renews his argument that the principal offense of Hobbs Act robbery is not a crime of violence. He also contends—for the first time—that aiding and abetting a Hobbs Act robbery is not a crime of violence and, separately, that the force clause of § 924(c) is unconstitutionally vague.

II

A

We begin by observing that the contention Worthen presses on appeal is not the one he advanced in the district court. Worthen never mentioned accessory liability in the district court. Nor did he say a word about the force clause of § 924(c) being unconstitutionally vague. Ordinarily we would have to decide whether he forfeited the arguments or, given the terms of his plea agreement, waived them. See *United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019) (defining waiver as the intentional relinquishment of a known right and forfeiture as the inadvertent failure to preserve an argument). The distinction matters. Forfeited arguments are subject to plain error review, whereas waived arguments are not reviewed at all. See *id.*; see also Fed. R. Crim. P. 52.

Here, however, we need not resolve the question. During oral argument, the government conceded that it had "waived waiver" by not seeking to enforce the broad appellate waiver in Worthen's plea agreement. See *United States v. Murphy*, 406

F.3d 857, 860 (7th Cir. 2005). We appreciate the government's candor. Our review, then, is only for plain error. We reverse if Worthen makes the fourfold showing of (1) an error (2) that is plain, (3) affected his substantial rights, and (4) seriously affected the fairness, integrity, or the public reputation of the judicial proceedings. See *United States v. Olano*, 507 U.S. 725, 732–37 (1993).

B

To decide whether Hobbs Act robbery is a "crime of violence" within the meaning of § 924(c)(3)(A), we apply the categorical approach. See *Taylor v. United States*, 495 U.S. 575, 600–02 (1990); see also *United States v. Rivera*, 847 F.3d 847, 848–49 (7th Cir. 2017). Under that approach, a Hobbs Act robbery qualifies as a crime of violence only if its statutory elements are the same as or narrower than those in § 924(c). See *Descamps v. United States*, 570 U.S. 254, 257 (2013). The proper inquiry asks whether there is some way to commit a Hobbs Act robbery without using, attempting to use, or threatening physical force. If so, then Hobbs Act robbery is not a crime of violence that could support the § 924(j) charge against Worthen. That outcome holds true regardless of whether Worthen's actual conduct would fit within the parameters of § 924(c), as the categorical approach disregards the actual facts of the defendant's offense conduct. See *id.* at 261.

To his credit, Worthen acknowledges our prior holdings that Hobbs Act robbery is a crime of violence. See *United States v. McHaney*, 1 F.4th 489, 491–92 (7th Cir. 2021) (collecting cases). The same goes for aiding a Hobbs Act robbery. See *United States v. Brown*, 973 F.3d 667, 697 (7th Cir. 2020). But he urges us to revisit our analysis of accessory liability in light of

the Supreme Court's recent decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). He also contends that any defendant can commit the principal offense of Hobbs Act robbery by using threats to property that fall short of force.

We see things differently. Hobbs Act robbery criminalizes an unlawful taking "against [the victim's] 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). We have determined many times that "committing such an act necessarily requires using or threatening force" against the person or property of another. *McHaney*, 1 F.4th at 491 (quoting *United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 126 (2017)). We follow the course here and reiterate that the principal offense of Hobbs Act robbery qualifies as a crime of violence within the meaning of § 924(c)(3)(A).

From there the question becomes whether accessory liability changes our analysis. Remember that Worthen was not the triggerman who shot and killed Scott Maxie during the robbery of the gun store. To the contrary, he aided and abetted the § 924(j) violation, which occurred during the course of the Hobbs Act robbery of the guns from the store. These facts explain why Worthen focuses the challenge to his conviction on whether aiding and abetting a Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A).

Section 2 of Title 18 does not create a separate offense—it instead establishes that someone who aids and abets a federal

crime has committed the federal crime itself. See 18 U.S.C. § 2 (providing that aiders and abettors are "punishable as a principal"). It is "hornbook law" that convicting an aider and abettor first requires showing that the underlying crime (here, Hobbs Act robbery) "was actually committed." *United States v. Motley*, 940 F.2d 1079, 1081 (7th Cir. 1991) (quoting *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979)). The government must also prove that the aider and abettor took some "affirmative act" to further the offense, with the intent of facilitating the commission of the offense. See *Rosemond v. United States*, 572 U.S. 65, 71 (2014). Because an aider and abettor does not need to participate in each element of the offense, a defendant can aid and abet a Hobbs Act robbery without personally using force—say, for example, by serving as the getaway driver from a violent robbery. See *id.* at 72–73. As Worthen sees it, that means that aiding and abetting a Hobbs Act robbery does not categorically match the force clause of § 924(c)—and therefore that Hobbs Act robbery (because it incorporates accessory liability) itself is not a predicate offense.

The Supreme Court rejected a similar argument in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). The issue in *Duenas-Alvarez* was whether a particular conviction for theft under California state law qualified under the categorical approach as a "theft offense" subjecting an immigrant to removal under 8 U.S.C. § 1227(a)(2)(A). The Ninth Circuit had held that the California statute did not qualify because it expressly included accessories and accomplices to theft. See *Duenas-Alvarez*, 549 U.S. at 187–88. A defendant, the Ninth Circuit reasoned, could aid a theft under the California law "without taking or controlling property," a necessary element of the federal definition of "theft offense." *Id.* at 188. The Supreme

Court reversed, concluding that criminal law "uniformly" treats aiders and abettors and principals as alike. *Id.* at 190. This meant that the federal definition of "theft offense" within the pertinent immigration statute included aiders and abettors along with principal offenders. See *id.* at 189–90.

The same reasoning applies here. "[E]very jurisdiction—all States and the Federal Government—has 'expressly abrogated the distinction' among principals" and most aiders and abettors. *Id.* (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.1(e) (2d ed. 2003)). Consistent with that principle, aiding and abetting under § 2 is "not a separate federal crime" from the underlying offense, *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015), but is instead an alternative theory of liability for the commission of the principal offense. Put more directly, "an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery." *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). And because the principal offense of Hobbs Act robbery satisfies the force clause of § 924(c), aiding and abetting a Hobbs Act robbery qualifies as a crime of violence too. See *id.*

We are far from alone in reaching this conclusion. Indeed, by our measure, every other circuit to have considered the issue has agreed that aiding and abetting a crime of violence is a crime of violence. See, *e.g.*, *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *DeMartino v. United States*, No. 20-1758, 2022 WL 2445435, at *3 (2d Cir. July 6, 2022); *United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019); *United States v. Ali*, 991 F.3d 561, 573–74 (4th Cir. 2021); *United States v. Richardson*, 948 F.3d 733, 741–42 (6th Cir. 2020); *Young v. United States*, 22 F.4th 1115, 1122–23 (9th Cir. 2022); *United States v. Deiter*, 890 F.3d 1203, 1214–16 (10th Cir. 2018);

Alvarado-Linares v. United States, 44 F.4th 1334, 1348 (11th Cir. 2022) (citing *Colon*, 826 F.3d at 1305).

C

Worthen urges a different conclusion by pointing us away from *Duenas-Alvarez* and instead to *United States v. Taylor*, 142 S. Ct. 2015 (2022). No doubt *Taylor* is a more recent decision than *Duenas-Alvarez*. But we see no tension between the two decisions.

Taylor held that attempted Hobbs Act robbery is not a crime of violence. See *id.* at 2021. The Court reasoned that the crime of attempt requires only that a defendant who intends to commit a Hobbs Act robbery take a "'substantial step' toward that end." *Id.* at 2020 (citation omitted). And a "substantial step" does not necessarily require using, attempting to use, or threatening force. See *id.* Worthen latches on to this conclusion and reads *Taylor* as overruling *Duenas-Alvarez* and thereby limiting crimes of violence to those requiring proof that the defendant himself used force.

But *Taylor* left *Duenas-Alvarez* undisturbed. See *id.* at 2024–25 (distinguishing *Duenas-Alvarez* without overruling it). *Taylor* hinged on the fact that attempt is a separate crime from the underlying offense, with the distinct element of a "substantial step." See *id.* at 2020; see also *Ali*, 991 F.3d at 574 & n.5 (underscoring that the crime of attempt adds a new element that allows the government to secure a conviction without showing any violence). A defendant could take that substantial step—completing the crime of attempt—without also committing all the elements of Hobbs Act robbery. Not so with accessory liability. If a defendant aids a completed Hobbs Act robbery, the law deems him to have committed every element

of Hobbs Act robbery—including the element of using or threatening force. That is what it means to say that the law does not distinguish between primary violators and aiders and abettors. See *Duenas-Alvarez*, 549 U.S. at 189–90 (citing 2 LaFave, § 13.1(e)).

Worthen's reliance on *Taylor* runs into another problem. Assume that Worthen has the law right: aiding and abetting is not a crime of violence. If he is correct, any offense charged and committed under an aiding and abetting theory could not qualify as a crime of violence. That poses a problem because every jurisdiction, as we have explained, has eliminated the distinction between aiding and abetting liability and principal liability. See *id.* Under Worthen's approach, then, no offense would qualify as a crime of violence. A defendant could always argue that the offense includes aiding and abetting liability but that aiding and abetting liability does not qualify as a crime of violence under § 924(c) because the defendant can aid and abet without engaging in any use of force. There is no indication that *Taylor* intended the categorical approach to apply to aiding and abetting liability in that way. See *United States v. Cammorto*, 859 F.3d 311, 316 (4th Cir. 2017) (rejecting a similar challenge as "untenable" because it would preclude any categorical match).

Worthen tells us that to the extent there is any ambiguity in how *Taylor* applies, we should read aiding and abetting liability in harmony with the crime of attempt under the canon of *in pari materia*. That canon provides that "different acts which address the same subject matter, which is to say are *in pari materia*, should be read together such that the ambiguities in one may be resolved by reference to the other." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001).

The canon has no application here. Worthen cannot identify any ambiguities in the crime of aiding and abetting that could be resolved by reference to the crime of attempt. To the contrary, our analysis of accessory liability clearly follows from the text of 18 U.S.C. § 2 itself, as well as the universal principle, emphasized by the Supreme Court in *Duenas-Alvarez*, that criminal law treats principals and aiders and abettors alike. See 549 U.S. at 190.

D

One last issue warrants our attention. Worthen sees the force clause of § 924(c) as unconstitutionally vague because "it fails to give ordinary people fair notice of the conduct it punishes," and is "so standardless that it invites arbitrary enforcement." See *Johnson v. United States*, 576 U.S. 591, 595 (2015). In particular, he focuses on the fact that § 924(c) leaves the term "physical force" undefined.

Worthen has not identified any plain error. There is no hint in our case law that the term "physical force" presents a constitutional problem. Nor are we aware of anything from the Supreme Court or any other circuit suggesting that the force clause is unconstitutionally vague. What Worthen objects to is run-of-the-mill statutory interpretation, which "lies at the heart of the judicial function." *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1017 (7th Cir. 1998). Indeed, the Supreme Court has said that the "clear" meaning of physical force is "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (analyzing the term in 18 U.S.C. § 924(e)(2)(B)(i)). We have applied that standard many times over without difficulty. See, *e.g.*, *United States v. Duncan*, 833

F.3d 751, 754 (7th Cir. 2016) ("While mere touching is not enough to show physical force, the threshold is not a high one; a slap in the face will suffice.").

For these reasons, we AFFIRM.