PART III:
WRITING EXERCISE

This Section Contains:

- *Rodriguez-Moreno* (7 pages)
- *Lozoya* (Main Case) (13 pages)
- *Breitweiser* (6 pages)

Note—Make sure your packet is complete, and Part III contains **26 pages.**

119 S.Ct. 1239
Supreme Court of the United States

UNITED STATES, petitioner,
v.
Jacinto RODRIGUEZ–MORENO.

No. 97–1139.
|
Argued Dec. 7, 1998.
|
Decided March 30, 1999.

Opinion

Justice THOMAS delivered the opinion of the Court.

This case presents the question whether venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence," in violation of 18 U.S.C. § 924(c)(1), is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in a single district.

I

During a drug transaction that took place in Houston, Texas, a New York drug dealer stole 30 kilograms of a Texas drug distributor's cocaine. The distributor hired respondent, Jacinto Rodriguez–Moreno, and others to find the dealer and to hold captive the middleman in the transaction, ***277** Ephrain Avendano, during the search. In pursuit of the dealer, the distributor and his henchmen drove from Texas to New Jersey with Avendano in tow. The group used Avendano's New Jersey apartment as a base for their operations for a few days. They soon moved to a house in New York and then to a house in Maryland, taking Avendano with them.

Shortly after respondent and the others arrived at the Maryland house, the owner of the home passed around a .357 magnum revolver and respondent took possession of the pistol. As it became clear that efforts to find the New York drug dealer would not bear ****1242** fruit, respondent told his employer that he thought they should kill the middleman and end their search for the dealer. He put the gun to the back of Avendano's neck but, at the urging of his cohorts, did not

shoot. Avendano eventually escaped through the back door and ran to a neighboring house. The neighbors called the Maryland police, who arrested respondent along with the rest of the kidnapers. The police also seized the .357 magnum, on which they later found respondent's fingerprint.

Rodriguez–Moreno and his codefendants were tried jointly in the United States District Court for the District of New Jersey. Respondent was charged with, *inter alia,* conspiring to kidnap Avendano, kidnaping Avendano, and using and carrying a firearm in relation to the kidnaping of Avendano, in violation of 18 U.S.C. § 924(c)(1). At the conclusion of the Government's case, respondent moved to dismiss the § 924(c)(1) count for lack of venue. He argued that venue was proper only in Maryland, the only place where the Government had proved he had actually used a gun. The District Court denied the motion, App. 54, and the jury found respondent guilty on the kidnaping counts and on the § 924(c)(1) charge as well. He was sentenced to 87 months' imprisonment on the kidnaping charges, and was given a mandatory consecutive term of 60 months' imprisonment for committing the § 924(c)(1) offense.

***278** On a 2–to–1 vote, the Court of Appeals for the Third Circuit reversed respondent's § 924(c)(1) conviction. *United States v. Palma–Ruedas,* 121 F.3d 841 (1997). A majority of the Third Circuit panel applied what it called the "verb test" to § 924(c)(1), and determined that a violation of the statute is committed only in the district where a defendant "uses" or "carries" a firearm. *Id.,* at 849. Accordingly, it concluded that venue for the § 924(c)(1) count was improper in New Jersey even though venue was proper there for the kidnaping of Avendano. The dissenting judge thought that the majority's test relied too much "on grammatical arcana," *id.,* at 865, and argued that the proper approach was to "look at the substance of the statutes in question," *ibid.* In his view, the crime of violence is an essential element of the course of conduct that Congress sought to criminalize in enacting § 924(c)(1), and therefore, "venue for a prosecution under [that] statute lies in any district in which the defendant committed the underlying crime of violence." *Id.,* at 863. The Government petitioned for review on the ground that the Third Circuit's holding was in conflict with a decision of the Court of Appeals for the Fifth Circuit, *United States v. Pomranz,* 43 F.3d 156 (1995). We granted certiorari, 524 U.S. 915, 118 S.Ct. 2296, 141 L.Ed.2d 156 (1998), and now reverse.

II

Article III of the Constitution requires that "[t]he Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. Its command is reinforced by the Sixth Amendment's requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," and is echoed by Rule 18 of the Federal Rules of Criminal Procedure ("prosecution shall be had in a district in which the offense was committed").

***279** As we confirmed just last Term, the " '*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.' " *United States v. Cabrales,* 524 U.S. 1, 6–7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998) (quoting *United States v. Anderson,* 328 U.S. 699, 703, 66 S.Ct. 1213, 90 L.Ed. 1529 (1946)). [1] In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature ****1243** of the crime) and then discern the location of the commission of the criminal acts. [2] See *Cabrales, supra,* at 6–7, 118 S.Ct. 1772; *Travis v. United States,* 364 U.S. 631, 635–637, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961); *United States v. Cores,* 356 U.S. 405, 408–409, 78 S.Ct. 875, 2 L.Ed.2d 873 (1958); *Anderson, supra,* at 703–706, 66 S.Ct. 1213.

At the time respondent committed the offense and was tried, 18 U.S.C. § 924(c)(1) provided:

"Whoever, during and in relation to any crime of violence ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence ... be sentenced to imprisonment for five years ...." [3]

The Third Circuit, as explained above, looked to the verbs of the statute to determine the nature of the substantive offense. ***280** But we have never before held, and decline to do so here, that verbs are the sole consideration in identifying the conduct that constitutes an offense. While the "verb test" certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.

In our view, the Third Circuit overlooked an essential conduct element of the § 924(c)(1) offense. Section 924(c)(1) prohibits using or carrying a firearm "during and in relation to any crime of violence ... for which [a defendant] may be prosecuted in a court of the United States." That the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs does not dissuade us from concluding that a defendant's violent acts are essential conduct elements. To prove the charged § 924(c)(1) violation in this case, the Government was required to show that respondent used a firearm, that he committed all the acts necessary to be subject to punishment for kidnaping (a crime of violence) in a court of the United States, and that he used the gun "during and in relation to" the kidnaping of Avendano. In sum, we interpret § 924(c)(1) to contain two distinct conduct elements—as is relevant to this case, the "using and carrying" of a gun and the commission of a kidnaping. [4]

***281** Respondent, however, argues that for venue purposes "the New Jersey kidnapping is completely irrelevant to the firearm crime, because respondent did not *use* or *carry* a gun *during* the New Jersey crime." Brief for Respondent 12. In the words of one *amicus,* § 924(c)(1) is a "point-in-time" offense that only is committed in the place where the kidnaping and the use of a gun coincide. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 11. We disagree. Several Circuits have determined that kidnaping, as defined by 18 U.S.C. § 1201 (1994 ed. and Supp. III), is a unitary crime, see *United States v. Seals,* 130 F.3d 451, 461–462 (C.A.D.C.1997); ****1244** *United States v. Denny–Shaffer,* 2 F.3d 999, 1018–1019 (C.A.10 1993); *United States v. Godinez,* 998 F.2d 471, 473 (C.A.7 1993); *United States v. Garcia,* 854 F.2d 340, 343–344 (C.A.9 1988), and we agree with their conclusion. A kidnaping, once begun, does not end until the victim is free. It does not make sense, then, to speak of it in discrete geographic fragments. Section 924(c)(1) criminalized a defendant's use of a firearm "during and in relation to" a crime of violence; in doing so, Congress proscribed both the use of the firearm *and* the commission of acts that constitute a violent crime. It does not matter that respondent used the .357 magnum revolver, as the Government concedes, only in Maryland because he did so "during and in relation to" a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland. In our view, § 924(c)(1) does not define a "point-in-time" offense when a firearm is used during and in relation to a continuing crime of violence.

As we said in *United States v. Lombardo,* 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916), "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *Id.,* at 77, 36 S.Ct. 508; cf. *Hyde v. United States,* 225 U.S. 347, 356–367, 32 S.Ct. 793, 56 L.Ed. 1114 (1912) (venue proper ***282** against defendant in district where co-conspirator carried out overt acts even though there was no evidence that the defendant had ever entered that district or that the conspiracy was formed there). The kidnaping, to which the § 924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them. (Congress has provided that continuing offenses can be tried "in any district in which such offense was begun, continued, or completed," 18 U.S.C. § 3237(a).) Where

venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense. As the kidnaping was properly tried in New Jersey, the § 924(c)(1) offense could be tried there as well.

* * *

We hold that venue for this prosecution was proper in the district where it was brought. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

Justice SCALIA, with whom Justice STEVENS joins, dissenting.

I agree with the Court that in deciding where a crime was committed for purposes of the venue provision of Article III, § 2, of the Constitution, and the vicinage provision of the Sixth Amendment, we must look at "the nature of the crime alleged and the location of the act or acts constituting it." *Ante,* at 1242 (quoting *United States v. Cabrales,* 524 U.S. 1, 7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998), in turn quoting *United States v. Anderson,* 328 U.S. 699, 703, 66 S.Ct. 1213, 90 L.Ed. 1529 (1946)) (internal quotation marks omitted). I disagree with the Court, however, that the crime defined in 18 U.S.C. § 924(c)(1) is "committed" either where the defendant commits the predicate offense or where he uses or carries the gun. It seems to me unmistakably clear from the text of the law that this crime can be committed only where the ***283** defendant *both* engages in the acts making up the predicate offense *and* uses or carries the gun.

At the time of respondent's alleged offense, § 924(c)(1) read:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years."

This prohibits the act of using or carrying a firearm "during" (and in relation to) a predicate offense. The provisions of the United States Code defining the particular predicate offenses already punish all of the defendant's alleged criminal conduct except his use or carriage of a gun; § 924(c)(1) itself criminalizes and punishes such use or carriage "during" the predicate crime, because that makes the crime more dangerous. Cf. *Muscarello v. United States,* 524 U.S. 125, 132, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998). This is a ****1245** simple concept, and it is embodied in a straightforward text. To answer the question before us we need only ask where the defendant's alleged act of using a firearm during (and in relation to) a kidnaping occurred. Since it occurred only in Maryland, venue will lie only there.

The Court, however, relies on *United States v. Lombardo,* 241 U.S. 73, 77, 36 S.Ct. 508, 60 L.Ed. 897 (1916), for the proposition that " 'where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.' " *Ante,* at 1244. The fallacy in this reliance is that the crime before us does *not* consist of "distinct" parts that can occur in different localities. Its two parts are bound inseparably together by the word "during." Where the gun is being used, the predicate act must be occurring as well, and vice versa. The Court quite simply reads this requirement out of the statute—as though there were no difference between a statute making it a crime to steal a cookie ***284** and eat it (which could be prosecuted either in New Jersey, where the cookie was stolen, or in

Maryland, where it was eaten) and a statute making it a crime to eat a cookie while robbing a bakery (which could be prosecuted only where the ingestive theft occurred).

The Court believes its holding is justified by the continuing nature of the kidnaping predicate offense, which invokes the statute providing that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). To disallow the New Jersey prosecution here, the Court suggests, is to convert § 924(c)(1) from a continuing offense to a "point-in-time" offense. *Ante,* at 1244. That is simply not so. I in no way contend that the kidnaping, or, for that matter, the use of the gun, can occur only at one point in time. Each can extend over a protracted period, and in many places. But § 924(c)(1) is violated only so long as, *and where,* both continuing acts are being committed simultaneously. That is what the word "during" means. Thus, if the defendant here had used or carried the gun throughout the kidnaping, in Texas, New Jersey, New York, and Maryland, he could have been prosecuted in any of those States. As it was, however, he used a gun during a kidnaping only in Maryland.

Finally, the Government contends that focusing on the "use or carry" element of § 924(c)(1) is "difficult to square" with the cases holding that there can be only one § 924(c)(1) violation for each predicate offense. Reply Brief for United States 9 (citing *United States v. Palma–Ruedas,* 121 F.3d 841, 862–863 (C.A.3 1997) (Alito, J., concurring in part and dissenting in part) (case below)). See, *e.g., United States v. Anderson,* 59 F.3d 1323, 1328–1334 (C.A.D.C.) (en banc), cert. denied, 516 U.S. 999, 116 S.Ct. 542, 133 L.Ed.2d 445 (1995); *United States v. Taylor,* 13 F.3d 986, 992–994 (C.A.6 1994); *United States v. Lindsay,* 985 F.2d 666, 672–676 (C.A.2), cert. denied, 510 U.S. 832, 114 S.Ct. 103, 126 L.Ed.2d 70 (1993). This ***285** is an odd argument for the Government to make, since it has disagreed with those cases, see, *e.g., Anderson, supra,* at 1328, 66 S.Ct. 1213; *Lindsay, supra,* at 674, and has succeeded in persuading two Circuits to the contrary, see *United States v. Camps,* 32 F.3d 102, 106–109 (C.A.4 1994), cert. denied, 513 U.S. 1158, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995); *United States v. Lucas,* 932 F.2d 1210, 1222–1223(C.A.8), cert. denied *sub nom. Shakur v. United States,* 502 U.S. 869, 112 S.Ct. 199, 116 L.Ed.2d 159 (1991). But this dispute has nothing to do with the point before us here. I do not contend that using the firearm is "the entire essence of the offense." Reply Brief for United States 9. The predicate offense is assuredly an element of the crime—and if, for whatever reason, that element has the effect of limiting prosecution to one violation per predicate offense, it can do so just as effectively even if the "during" requirement is observed rather than ignored.

The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was "committed," U.S. Const., Art. III, § 2, cl. 3; Amdt. 6, has been prosecuted ****1246** for using a gun during a kidnaping in a State and district where all agree he did not use a gun during a kidnaping. If to state this case is not to decide it, the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.

All Citations

526 U.S. 275, 119 S.Ct. 1239, 143 L.Ed.2d 388, 67 USLW 4219, 99 Cal. Daily Op. Serv. 2275, 1999 Daily Journal D.A.R. 2965, 12 Fla. L. Weekly Fed. S 175

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 When we first announced this test in *United States v. Anderson,* 328 U.S., at 703, 66 S.Ct. 1213, we were comparing § 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, in which Congress did "not indicate where [it] considered the place of

committing the crime to be," 328 U.S., at 703, 66 S.Ct. 1213, with statutes where Congress was explicit with respect to venue. Title 18 U.S.C. § 924(c)(1), like the Selective Training and Service Act, does not contain an express venue provision.

2 The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense. Brief for United States 16–17. Because this case only concerns the *locus delicti,* we express no opinion as to whether the Government's assertion is correct.

3 The statute recently has been amended, see Pub.L. 105–386, 112 Stat. 3469, but it is not argued that the amendment is in any way relevant to our analysis in this case.

4 By way of comparison, last Term in *United States v. Cabrales,* 524 U.S. 1, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998), we considered whether venue for money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." *Cabrales,* 524 U.S., at 7, 118 S.Ct. 1772. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct—defendant's money laundering activity—occurred " 'after the fact' of an offense begun and completed by others." *Ibid.* Here, by contrast, given the "during and in relation to" language, the underlying crime of violence is a critical part of the § 924(c)(1) offense.

920 F.3d 1231
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Monique A. LOZOYA, Defendant-Appellant.

No. 17-50336
|
Argued and Submitted March 7, 2019 Pasadena, California
|
Filed April 11, 2019

OPINION

M. SMITH, Circuit Judge:

***1233** Defendant-Appellant Monique A. Lozoya was convicted of assaulting a fellow passenger on a commercial flight from Minneapolis to Los Angeles. Following several months of pretrial activity, the government filed a superseding information charging Lozoya with simple assault, a Class B misdemeanor. At a bench trial, the magistrate judge rendered a guilty verdict, and the district court subsequently affirmed the conviction. We hold that venue was not proper in the Central District of California, and therefore reverse Lozoya's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

On the evening of July 19, 2015, Lozoya and her boyfriend, Joshua Moffie, flew on Delta Airlines Flight 2321 from Minneapolis to Los Angeles. Lozoya sat in the middle seat of the second-to-last row on the aircraft's starboard side; Moffie occupied the aisle seat to her left, while another passenger, Charles Goocher, sat in the window seat to her right. Oded Wolff, traveling with his wife Merav and their family, sat immediately behind Lozoya in the middle seat of the last row, with Merav in the window seat to his right.

As Flight 2321 soared above the Great Plains, Lozoya wanted to sleep. However, her attempts at slumber were foiled because the passenger behind her—Wolff—repeatedly jostled her seat. This purported annoyance was verified by Goocher, who recalled that "the people that were behind us were causing commotion behind—behind our chairs, wrestling around with their stuff .... hitting the chairs, the tray up and down, up and down, up and down." Wolff denied causing a commotion; instead, he claims that, after tapping the TV screen on the back of Lozoya's seat in a vain attempt to turn it off, he and Merav went to sleep.

The incident that led to this appeal occurred later in the flight, when Wolff and his wife left their seats to use the lavatory. While the pair was away, Lozoya told Moffie about the jostling. Although Moffie offered to say something, Lozoya opted instead to speak to Wolff herself when he returned to his seat. Lozoya claimed that when Wolff returned, while she was still seated, she turned to her left to address the standing Wolff and politely asked him to stop hitting her seat, to which Wolff abrasively shouted "What?" and "quickly" moved his hand to within a half-inch of her face. Lozoya testified, "I got really scared and nervous, and I didn't know what was going on, and it felt like he was about to hit me," and so "without even thinking ... pushed him away" with an open palm, which made contact with Wolff's face. Wolff and Merav, by contrast, testified that Wolff's hands were resting on the seats behind and in front of him, and that Lozoya yelled at him to stop tapping his ***1234** TV screen and then hit him with the back of her hand, causing his nose to bleed.

As the various parties responded in shock to the incident, flight attendant Divone Morris approached them to calm the situation, and lead flight attendant Terry Sullivan began to investigate. Sullivan spoke with Lozoya and Wolff, and asked the latter if he preferred to file charges or would instead accept an apology from Lozoya. Wolff agreed to meet with Lozoya at the airport after the flight, and indicated that he would listen to her explanation before deciding whether

to accept an apology. However, after discussing the issue with Moffie, Lozoya decided against meeting with Wolff, and left the airport without apologizing.

II. Procedural Background

A. Pretrial

In August 2015, about three weeks after the incident on Flight 2321, FBI special agent Meredith Burke, who had investigated the assault and interviewed the participants, issued Lozoya a violation notice charging her with assault pursuant to 18 U.S.C. § 113(a)(4). Because the maximum custodial status of this offense is one year, it is classified as a Class A misdemeanor. 18 U.S.C. § 3559(a)(6). Burke also prepared a fourteen-page statement of probable cause detailing her investigation. She dated the statement August 7, 2015.

On September 16, 2015, Lozoya was arraigned before a magistrate judge. Although the judge granted Lozoya's request for counsel, he also required a monthly contribution of $200 towards attorneys' fees. Lozoya pleaded not guilty, and the magistrate judge set a trial date of February 4, 2016. The judge warned Lozoya, "[I]f you fail to appear on the date of your trial, that will result in the issuance of an arrest warrant," but set no bond.

On February 1, 2016, before the magistrate judge heard Lozoya's motion to dismiss, the government filed an information charging her with the Class A misdemeanor.

Lozoya was arraigned on the Class A misdemeanor information on February 9, 2016, at which time she pleaded not guilty. [1]

[redacted]

B. Trial

At the bench trial, the government called Wolff and Merav, as well as Sullivan (the lead flight attendant) and Burke (the FBI special agent who investigated the incident). After the government rested, Lozoya moved for acquittal pursuant to Federal Rule of Criminal Procedure 29, arguing that venue in the Central District of California was improper. The magistrate judge denied the motion, stating that "[a]ny offense that involves transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district from, through or into which such commerce moves," and concluding that "to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce." As part of her defense, Lozoya called Morris (another flight attendant), Goocher (the passenger who sat next to Lozoya on the flight), and Moffie (her boyfriend), and testified on her own behalf.

Before pronouncing judgment, the magistrate judge acknowledged that "[t]his is really an unfortunate situation borne out of a misunderstanding in a situation that I think almost anybody that flies commercially can relate to." Nevertheless, she concluded that "in this case there was sufficient evidence to establish that the defendant struck the victim on his face, and ... striking the victim would be sufficient to meet the standard for simple assault."

She also found that

> defendant's testimony and her statements to the special agent and to the flight attendants contained inconsistencies regarding her perceived threat from the victim, and also the Court found that the testimony of the defendant's witnesses were themselves inconsistent and failed to establish beyond a reasonable doubt that the defendant was in a position where she felt threatened.

Thus, the magistrate judge concluded that, as to the issue of self-defense, "based on the testimony presented [ ] the defendant used more force than what was reasonably ***1236** necessary to defend herself against what she perceived to be a threat to her physical safety." The judge therefore found Lozoya guilty of simple assault.

C. Post-Trial

Following the trial, Lozoya again moved for a judgment of acquittal under Rule 29, based on an argument relating to venue. The magistrate judge denied the motion, finding her challenge to venue waived and her motion therefore untimely. The judge further concluded that the venue challenge was meritless in any event, as "[18 U.S.C.] § 3237(a)'s

broad language and the difficulties inherent in pinpointing the exact location of a crime occurring on an aircraft traveling in interstate commerce gave rise to venue in the arriving district."

Lozoya was ultimately sentenced to pay a fine of $750 and a special assessment of $10; she was not sentenced to any custodial term.

On August 11, 2016, Lozoya appealed to the district court, raising the same three claims now before us. In an eighteen-page order, the district court rejected her arguments and affirmed the conviction. This timely appeal followed.

STANDARD OF REVIEW AND JURISDICTION

"We review de novo a district court's application of, and questions of law arising under, the Speedy Trial Act. We review for abuse of discretion a district court's decision to dismiss an indictment without prejudice for a violation of the Speedy Trial Act." *United States v. Lewis*, 611 F.3d 1172, 1175 (9th Cir. 2010) (citations omitted). We review de novo whether venue was proper. *United States v. Hui Hsiung*, 778 F.3d 738, 745 (9th Cir. 2015). We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

I.

[redacted]

II. Venue

Although the government's conduct did not violate the Act, we conclude that reversal of Lozoya's conviction is nonetheless required because venue was improper in the Central District of California.

A. Waiver

As an initial matter, the government maintains that Lozoya waived her venue argument by failing to raise it until *after* the government's case-in-chief. Our decision in *United States v. Ruelas-Arreguin*, in which we "decide[d] whether [a defendant] preserved his objection to venue when he moved for a judgment of acquittal on grounds of improper venue at the close of the government's case," is directly on point. 219 F.3d 1056, 1060 (9th Cir. 2000). There, we held that "[i]f a defect in venue is clear on the face of the indictment, a defendant's objection must be raised before the government has completed its case." *Id.* However, "if the venue defect is not evident on the face of the indictment, a defendant may challenge venue in a motion for acquittal at the close of the government's case." *Id.*

Here, the superseding information alleged that Lozoya, while "in Los Angeles County, within the Central District of California and elsewhere," assaulted another passenger on Flight 2321. Therefore, on the face of the information, the

venue defect was not apparent. If true, the scant allegations in the information would have proven that at least part of the offense occurred in the Central District, and so venue there would have been proper. *See id.* ("The indictment alleged that [the defendant] was 'found in' the United States 'within the Southern District of California.' On its face, therefore, the indictment alleged proper venue because it alleged facts which, if proven, would have sustained venue in the Southern District of California."). That Lozoya might have known that venue was incorrect—and, as the government notes, "possessed [the] Statement of Probable Cause, which set forth that the assault took place about one-hour to one-hour-and-a-half before landing"—is immaterial, since "only the indictment may be considered in pretrial motions to dismiss for lack of venue, and [ ] the allegations must be taken as true." *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997).

Because venue was proper on the face of the superseding information, Lozoya was permitted to move for acquittal on venue grounds following the government's case-in-chief, and did not waive the issue. And, because she preserved the issue for appeal, we review it de novo. *See United States v. Hernandez*, 189 F.3d 785, 787 (9th Cir. 1999).

B. Whether Venue Was Proper in the Central District of California

The government asserts that because "[t]he evidence at trial showed—and [Lozoya] does not dispute—that Flight 2321 landed in Los Angeles," and "also showed that [she] assaulted the victim while the plane was in flight heading toward Los Angeles," it was therefore "entirely proper for the government to bring the case in the Central District." Given our case law, as well as the Supreme Court's guidance on the proper determination of venue, we disagree.

"Article III of the Constitution requires that '[t]he Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed.' " *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (alterations in original) (quoting U.S. Const. art. III, § 2, cl. 3); *see also* ***1239** *United States v. Lukashov*, 694 F.3d 1107, 1119–20 (9th Cir. 2012) (exploring the interests underlying venue and noting that it is "a question of fact that the government must prove by a preponderance of the evidence"). To ascertain venue,

> the " '*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.' " In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.

Rodriguez-Moreno, 526 U.S. at 279, 119 S.Ct. 1239 (alteration in original) (footnote and citation omitted) (quoting *United States v. Cabrales*, 524 U.S. 1, 6–7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998)).

Here, Lozoya correctly asserts that "[t]he only essential *conduct* element here is the assault," and so the first prong of this inquiry is straightforward. The second prong—the location of the assault—is a trickier matter.

Lozoya demonstrates, and the government does not dispute, that the trial evidence established that the brief assault occurred *before* Flight 2321 entered the Central District's airspace. Therefore, there is no doubt that the assault did not occur within the Central District of California, since we have held that "the navigable airspace above [a] district is a part of [that] district." *United States v. Barnard*, 490 F.2d 907, 911 (9th Cir. 1973).

In response, the government argues, and the magistrate judge and district court agreed, that either of two statutes conferred venue in the Central District. We consider each statute in turn.

i. Section 3237(a)

The government first argues that 18 U.S.C. § 3237 provided the needed statutory conferral of venue. The relevant provision reads,

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States *begun in one district and completed in another, or committed in more than one district*, may be inquired of and prosecuted *in any district in which such offense was begun, continued, or completed.*
>
> Any offense involving the use of the mails, *transportation in interstate or foreign commerce*, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, *or into which such commerce, mail matter, or imported object or person moves.*

18 U.S.C. § 3237(a) (emphases added).

We agree with Lozoya that the first paragraph of § 3237(a) does not apply here. By its plain text and obvious meaning, it concerns *continuing offenses* that occur in multiple districts. *See Barnard*, 490 F.2d at 910–11 (applying § 3237(a) in a case where the defendant imported marijuana from Mexico into the Central District, and concluding that venue in the Southern District of California was proper because the offense continued through its airspace). Here, by contrast, Lozoya's offense—the assault—occurred in an instant and likely in the airspace of only one district, and the government did not prove that *any part* of that assault occurred once Flight 2321 entered the airspace over the Central District; indeed, it concedes that the assault ended before then. Section 3237(a) does not provide a basis for extending venue into the Central District simply because Flight 2321 continued into its airspace after the offense was complete. Once the assault had concluded, any subsequent activity was incidental and therefore irrelevant for venue purposes. *See* ***1240** *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011) ("Venue is not proper when all that occurred in the charging district was a 'circumstance element ... [that] occurred after the fact of an offense begun and completed by others.' " (alterations in original) (quoting *Rodriguez-Moreno*, 526 U.S. at 280 n.4, 119 S.Ct. 1239)).

The magistrate judge also determined that § 3237(a)'s second paragraph supported the government's position. But that paragraph, in relevant part, pertains to "offense[s] involving the ... transportation in interstate or foreign commerce." 18 U.S.C. § 3237(a). The government maintains that "[b]ecause the charged offense involved transportation in interstate commerce, it was a continuing offense" for purposes of § 3237(a). This assertion is untenable, however, because although the assault occurred on a plane, the offense itself did *not* implicate interstate or foreign commerce. *Cf. United States v. Morgan*, 393 F.3d 192, 200 (D.C. Cir. 2004) ("[R]eceipt of stolen property ... is not an 'offense involving' transportation in interstate commerce, for it does not require any such transportation for the commission of the offense."). Here, the conduct constituting the offense was the assault, which had nothing to do with interstate commerce. As Lozoya notes, "[T]he *jurisdictional* element requiring the offense to have occurred on an aircraft does not convert the offense to one that involves transportation in interstate commerce," and even if it could be so construed, if would not be a *conduct* element of the offense, but rather a "circumstance element" that does not support venue. *Stinson*, 647 F.3d at 1204; *see also United States v. Auernheimer*, 748 F.3d 525, 533 (3d Cir. 2014) ("Only 'essential conduct elements' can provide the basis for venue; 'circumstance elements' cannot." (quoting *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000))).

It is true, as recognized by the district court, the magistrate judge, and the government, that other circuits have rejected our interpretation of § 3237(a) in cases with similar facts. However, the reasoning in those cases is not persuasive. In *United States v. Breitweiser*, 357 F.3d 1249 (11th Cir. 2004), the Eleventh Circuit determined that an inflight assault

could be prosecuted where the aircraft landed, but it did not analyze the conduct of the charged offense, as required by *Rodriguez-Moreno*. Instead, the court merely emphasized that "[i]t would be difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane when [the defendant] committed the crimes." *Id.* at 1253. In reaching this decision, the *Breitweiser* court relied primarily on a pre-*Rodriguez-Moreno* case, *United States v. McCulley*, 673 F.2d 346 (11th Cir. 1982), which had concluded that § 3237 "is a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue" without citing any authority for that proposition. *Id.* at 350.[4] Similarly, the Tenth Circuit in ***1241** *United States v. Cope*, 676 F.3d 1219 (10th Cir. 2012), simply relied on *Breitweiser*, without considering *Rodriguez-Moreno* or the conduct of the offense with which the defendant was charged. *Id.* at 1225. Accordingly, we decline to adopt the reasoning or holding of these opinions.

ii. Section 3238

Alternatively, the district court concluded that venue was proper under § 3238, which provides that "[t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought ...." 18 U.S.C. § 3238. To support application of this statute to the facts here, the district court relied on *United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986), which is readily distinguishable. There, the defendant made a false statement in Canada—an offense committed outside U.S. borders—and so the court concluded that venue was proper in the U.S. district where the defendant was later arrested. *Id.* at 853–55. That holding was consistent with the rule that "§ 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was 'begun' there)." *United States v. Pace*, 314 F.3d 344, 351 (9th Cir. 2002). Although the government argues that "[j]ust as offenses committed on the 'high seas' are considered to be outside the jurisdiction of any particular state or district, offenses committed in the 'high skies' are similarly not committed," that position is at odds with our binding precedent, which holds that "the navigable airspace above [a] district *is a part of the district*." *Barnard*, 490 F.2d at 911 (emphasis added). Here, the assault occurred *entirely* within the jurisdiction of a particular district. It neither began nor was committed entirely outside the United States, and so § 3238 is inapplicable.

C. Remedy

"When venue has been improperly laid in a district, the district court should either transfer the case to the correct venue upon the defendant's request, or, in the absence of such a request, dismiss the indictment without prejudice." *Ruelas-Arreguin*, 219 F.3d at 1060 n.1 (citation omitted) (citing Fed. R. Crim. P. 21(b); *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988)).[5] We therefore direct the district court, on remand, to dismiss the charge without prejudice, unless Lozoya consents to transfer the case to the proper district.

The proper district is, pursuant to our reasoning and holding, the district above which the assault occurred. The government stressed at oral argument that it ***1242** would be "impossible" to pinpoint this location, but we are not so pessimistic. There is no doubt that such an undertaking would require some effort. At the time Flight 2321 made its Minneapolis-to-Los Angeles run in December 2018, it apparently traveled at an average speed 368 miles-per-hour, and its route map suggests that is crossed over at least eight different districts during its flight time.[6] But Sullivan, Flight 2321's lead flight attendant, testified (for the government, incidentally) that the flight lasted "[a]pproximately three hours," that he received word of "an assault of some sort" "at least an hour" after takeoff, that he spent "30 to 45 minutes at least" investigating the incident, and that the captain made the announcement that the aircraft would soon be landing—which usually occurs "[t]wenty-five minutes before landing"—after Sullivan finished his investigation. Accordingly, it seems

wholly reasonable, using this and other testimony as well as flight data, for the government to determine where exactly the assault occurred by the preponderance of the evidence necessary to establish venue. *See* *Lukashov*, 694 F.3d at 1120.

We acknowledge a creeping absurdity in our holding.[7] Should it really be necessary for the government to pinpoint where precisely in the spacious skies an alleged assault occurred? Imagine an inflight robbery or homicide—or some other nightmare at 20,000 feet—that were to occur over the northeastern United States, home to three circuits, fifteen districts, and a half-dozen major airports, all in close proximity. How feasible would it be for the government to prove venue in such cluttered airspace? And given that the purpose of venue is to prevent "the unfairness and hardship to which trial in an environment alien to the accused exposes him," *United States v. Johnson*, 323 U.S. 273, 275, 65 S.Ct. 249, 89 L.Ed. 236 (1944), is it not fair to conclude, as the First Circuit did, that setting venue in a district where a plane lands "creates no unfairness to defendants, for an air passenger accused of a crime of this type is unlikely to care whether he is tried in one rather than another of the states over which he was flying"? *United States v. Hall*, 691 F.2d 48, 50–51 (1st Cir. 1982).

However valid these questions and the practical concerns that underlie them might be, they are insufficient to overcome the combined force of the Constitution, *Rodriguez-Moreno*, and our own case law. These authorities compel our conclusion: that the proper venue for an assault on a commercial aircraft is the district in whose airspace the alleged offense occurred. The dissent contends that common sense supports the positions of the Tenth and Eleventh Circuits, as well as its own conclusion. Dissent at 1244–45. Fair enough. But while "there is no canon against using common sense in construing laws as saying what they obviously mean," *Roschen v. Ward*, 279 U.S. 337, 338, 49 S.Ct. 336, 73 L.Ed. 722 (1929), the statutes at issue here are *not* obviously applicable, ***1243** and we cannot ignore the binding effect of precedent and the Constitution.

Congress can—consistent with constitutional requirements, of course—enact a new statute to remedy any irrationality that might follow from our conclusion. Indeed, we share the dissent's hope, considering the "significant increase" in inflight criminal activities and the myriad federal offenses that can occur on an aircraft, Dissent at 1243–44, 1244–45, that Congress will address this issue by establishing a just, sensible, and clearly articulated venue rule for this and similar airborne offenses. For now, though, if the government wishes to reprosecute Lozoya, it will need to dust off its navigational charts and ascertain where in U.S. airspace her hand made contact with Wolff's face. We know that it did not happen in the Central District of California. That conclusion provides sufficient ground to reverse Lozoya's conviction.[8]

CONCLUSION

We conclude that the proper venue for Lozoya's prosecution is the district in whose airspace the assault occurred. Because the parties do not dispute that the assault ended before Flight 2321 entered the airspace of the Central District of California, venue in that district was improper. We therefore REVERSE Lozoya's conviction and REMAND for further proceedings consistent with this opinion.

OWENS, Circuit Judge, concurring in part and dissenting in part:

While I agree with much of the majority opinion, I disagree with its ultimate holding on venue, which creates a circuit split and makes prosecuting crimes on aircraft (including cases far more serious than this one) extremely difficult.

The friendly skies are not always so friendly. You do not need to watch *Passenger 57*, *Flightplan*, *Turbulence*, or even the vastly underrated *Executive Decision* to know that dangerous criminal activity occurs on airplanes. For example, federal law enforcement has tracked a significant increase in sexual assaults on airplanes in recent years (including abuse of children), and yet there remains little ability to combat these crimes 30,000 feet in the air. [1]

Congress recognized this problem over 50 years ago when it passed comprehensive legislation to protect flight crews and passengers from serious crimes. *See* Federal Aviation Act Amendments of 1961, Pub. L. No. 87-197, 75 Stat. 466, 466–68. Congress extended the application of certain federal criminal laws, including the assault statute at issue in this case, to acts on airplanes to combat the "unique problems" ***1244** involved in determining jurisdiction for state prosecutions:

> In this age of jet aircraft a moment of time can mean many miles have been traversed. Present aircraft pass swiftly from county to county and from State to State. As a result serious legal questions can arise as to the situs of the aircraft at the time the crime was committed. The question as to the law of which jurisdiction should apply to a given offense can be the subject of endless debate, and excessive delay in the prosecution becomes inevitable. The difficulties encountered by the overflown State in collecting evidence sufficient to support an indictment are obvious .... "To contrast, if the offense were also a crime under Federal law, the aircraft would be met on landing by Federal officers. The offender could be taken into custody immediately and the criminal prosecution instituted."

S. Rep. No. 87-694, at 2–3 (1961) (quoting the testimony of Najeeb Halaby, Administrator of the Federal Aviation Agency). Until now, no court has disturbed the ability to prosecute federal offenders in the district where the airplane landed. *See* *United States v. Cope*, 676 F.3d 1219, 1224–25 (10th Cir. 2012); *United States v. Breitweiser*, 357 F.3d 1249, 1253–54 (11th Cir. 2004); *United States v. McCulley*, 673 F.2d 346, 349–50 (11th Cir. 1982); *cf.* *United States v. Hall*, 691 F.2d 48, 50–51 (1st Cir. 1982).

I acknowledge that the venue provision at issue—the second paragraph of 18 U.S.C. § 3237(a)—could be clearer. But considering what the majority recognizes as the "creeping absurdity" of its position, Majority Opinion 1242, we should heed the advice of our court—and the Supreme Court—that "statutory interpretations which would produce absurd results are to be avoided." *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013) (citation and alteration omitted); *see also* *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993) (describing "the common mandate of statutory construction to avoid absurd results"); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) (stating that "interpretations of a statute which would produce absurd results are to be avoided"). I agree with the Tenth and Eleventh Circuits that the "transportation in interstate ... commerce" language in § 3237(a) covers the conduct at issue here. It may be that the Tenth and Eleventh Circuits' opinions are not "tenure track" in their analyses, but not every legal question requires a law review article. Sometimes, common sense is enough.

The troubling result of this case is not limited to these rather innocuous facts. It applies to any offense that the majority deems non-continuous, which includes sexual assault, murder, and so on. *See* 49 U.S.C. § 46506 (applying certain criminal laws to acts on aircraft, including, but not limited to, 18 U.S.C. §§ 113 (assaults), 114 (maiming), 661 (theft), 1111 (murder), 1112 (manslaughter), 2241 (aggravated sexual abuse), and 2243 (sexual abuse of a minor or ward)).

Nor is the result limited to the smaller states of the Northeastern United States. *See* Majority Opinion 1242. Under the majority's rule, the government must prove which district—not merely which state—an airplane was flying over when the crime was committed. A flight from San Francisco to Houston potentially crosses eight judicial districts. A flight from San Francisco to Miami crosses far more. Asking a traumatized victim, especially a child, to pinpoint the precise minute when a sexual assault occurred is something I cannot imagine the Framers intended, or the more recent Congress wished when it enacted our venue and flight laws. Yet without ***1245** the precision that the majority now requires, prosecutions of violent crimes on board aircraft could be impossible. In fact, the government insists that it cannot pinpoint when the

assault occurred in this case, and I doubt that the majority's back-of-the-envelope calculation will be of much assistance. *See* Majority Opinion 1241–42.

Venue in criminal cases protects defendants' rights to a fair trial. But here, limiting venue to a "flyover state," where the defendant and potential witnesses have no ties, makes no sense. In contrast, a prosecution in the landing district "creates no unfairness to defendants." *Hall*, 691 F.2d at 50. And a defendant who is truly inconvenienced may request a transfer of venue. Fed. R. Crim. P. 21(b).

I respectfully dissent, and urge the Supreme Court (or Congress) to restore quickly the just and sensible venue rule that, until now, applied to domestic air travel.

All Citations

920 F.3d 1231, 19 Cal. Daily Op. Serv. 3279, 2019 Daily Journal D.A.R. 3053

Footnotes

* [redacted]

1 [redacted]

2 At her initial court appearance, the magistrate judge ordered Lozoya to contribute $200 per month towards attorneys' fees, and warned her of the possibility of an arrest warrant if she did not appear for trial.

3 [redacted]

4 Certain aspects of the legislative history suggest that § 3237 might have been intended as something of a catchall provision. As part of Congress's revision of Title 18 during the 1940s, the venue provisions for several enumerated crimes were omitted because they were "covered by section 3237." H.R. Rep. No. 79-152, at A109, A112, A120, A133–35 (1945); *see also* H.R. Rep. No. 80-304, at A161 (1947) (indicating that § 3237 "was completely rewritten to clarify legislative intent and in order to omit special venue provisions from many sections"). But one relevant report also explained that

> [t]he phrase "committed in more than one district" may be comprehensive enough to include "begun in one district and completed in another", but the use of both expressions precludes any doubt as to legislative intent. ... The revised section removes all doubt as to the venue of *continuing offenses* and makes unnecessary special venue provisions ....

H.R. Rep. No. 80-304, at A161 (emphasis added). If the purpose of § 3237 were to "make[ ] unnecessary special venue provisions," then a catchall intent might be inferred, but this report also clarified that § 3237 was directed at *continuing offenses*, not to offenses generally. And at any rate, even if the legislative history were more conclusive, the text of § 3237 is not ambiguous, and "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147–48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994).

5 Lozoya observes that there is a circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial, and urges us to adopt the approach taken by the Fifth and Eighth Circuits—remanding for a judgment of acquittal.

See United States v. Strain, 407 F.3d 379, 379–80 (5th Cir. 2005); *United States v. Greene*, 995 F.2d 793, 801 (8th Cir. 1993). But we are bound by *Ruelas-Arreguin*, and will follow the remedy prescribed in that opinion.

6 *See DL2321 Delta Air Lines Flight: Minneapolis to Los Angeles 22/12/2018*, Airportia, http://www.airportia.com/flights/dl2321/minneapolis/los_angeles/2018-12-22 (last visited Apr. 4, 2019).

7 The dissent suggests that the Supreme Court's admonition that "interpretations of a statute which would produce absurd results are to be avoided" requires that we reach a contrary conclusion, Dissent at 1244 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)), but that canon does not permit us to ignore the plain texts of the statutes at issue. *See United States v. Ezeta*, 752 F.3d 1182, 1184 (9th Cir. 2014) ("In interpreting a criminal statute, we begin with the plain statutory language.").

8 Lozoya also contends that the magistrate judge applied the wrong legal standard for self-defense when rendering the guilty verdict. The parties agree that "[t]he government must prove beyond a reasonable doubt that [a] defendant did not act in reasonable self-defense," which becomes an element of the charged offense. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 6.8 (Ninth Cir. Jury Instructions Comm. 2010). But because improper venue provides sufficient ground to reverse Lozoya's conviction, we need not determine whether the magistrate judge applied the wrong standard.

1 *See Sexual Assault Aboard Aircraft*, FBI (Apr. 26, 2018), https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618 (reporting that sexual assaults aboard aircraft are "on the rise"); Lynh Bui, *Sexual Assaults on Airplanes are Increasing, FBI Warns Summer Travelers*, Wash. Post (June 20, 2018), https://www.washingtonpost.com/local/public-safety/sexual-assaults-on-airplanes-are-increasing-fbi-warns-summer-travelers/2018/06/20/64d54598-73fd-11e8-b4b7-308400242c2e_story.html (FBI in Maryland alerting the public that sexual assaults on commercial flights are "increasing every year ... at an alarming rate").

[redacted]

357 F.3d 1249
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Russell A. BREITWEISER, Defendant–Appellant.

No. 02–15095.
|
Jan. 26, 2004.

[redacted]

Opinion

GOODWIN, Circuit Judge:

A jury convicted defendant Russell Breitweiser of abusive sexual contact with a minor as a repeat sex offender in violation of 18 U.S.C. §§ 2244(a)(3) and 2247, and simple assault of a minor in violation of 18 U.S.C. § 113(a)(5). Breitweiser contends on appeal that the district court abused its discretion in admitting some evidence and excluding other evidence, erred in finding that venue was proper in the Northern District of Georgia, and incorrectly enhanced his sentence. Because the district court did not err, we affirm both the conviction and sentence.

BACKGROUND

On January 11, 2001, fourteen-year-old A.B. and J.B., her eighteen-year-old sister, ***1252** were at the Houston International Airport, waiting to board their flight to Atlanta, Georgia. Breitweiser, who was waiting for the same flight, approached the girls and began speaking with them. When the girls' row was called to board, Breitweiser told them to wait for him. Breitweiser boarded directly after the girls, first going to his seat and then returning to the girls' row. He asked the girls if he could sit in the empty seat beside A.B. and they agreed.

At takeoff the lights dimmed and Breitweiser told the girls to hold hands with each other during this "romantic part" of the flight. During the plane ride, Breitweiser talked constantly to the girls, listened in on their conversations and asked personal questions. Although A.B. was uncomfortable, she said nothing but attempted to move further away from Breitweiser in her seat. Breitweiser took a crayon that A.B. was using and put it in his mouth and nose before returning it. Breitweiser put his hand on A.B.'s leg with his fingers spread out and rubbed it up and down her inner thigh. At some point, A.B. looked over at Breitweiser and saw his hand moving in his lap underneath some pillows and a magazine. A.B. testified that she thought he was masturbating.

Breitweiser left his seat to visit the restroom and a passenger behind the girls asked them if they knew Breitweiser. They replied that Breitweiser was making them uncomfortable and the passenger offered to walk them to their connecting flight to Florida. The passenger then notified the flight attendants that Breitweiser was making the girls uncomfortable. Towards the end of the flight, the flight attendants asked the girls to wait in the first class cabin when the plane landed in Atlanta. After the other passengers had deplaned, one flight attendant walked the girls to their connecting flight.

Breitweiser was charged with two counts of inappropriate contact with A.B. The first count, abusive sexual contact with a minor, involved Breitweiser's rubbing of A.B.'s thigh. Count two, simple assault of a minor, involved Breitweiser's unwanted touching of A.B.'s legs, hands, face, and hair.

Prior to trial, the government filed a notice of its intention to introduce evidence, pursuant to Federal Rule of Evidence 413, of Breitweiser's prior acts of sexual contact with minors. The evidence consisted of the accusation and judgment of conviction arising from incidents in which Breitweiser fondled two thirteen-year-old girls, and testimony from a store clerk who saw Breitweiser masturbating near a girl several months after the events at issue in this case. The district court admitted the evidence under Rule 404(b). The court refused to allow Breitweiser to introduce testimony of a doctor who examined Breitweiser during his hospitalization at the Carrier Clinic, a New Jersey psychiatric hospital, eleven days after his alleged assault of A.B. Breitweiser claimed that the doctor's testimony would show that he suffered from a bipolar disorder and made "bizarre movements" during his hospitalization, which would explain the touching and the alleged masturbation. The court ruled that this evidence was irrelevant and inadmissible under Rule 403.

After the jury convicted Breitweiser on both counts, the district court spent two days addressing his sentence. The conviction on the count one violation normally triggers a two-year maximum sentence, but 18 U.S.C. § 2247(a) allows for a doubling of the maximum for a defendant with a "prior sex offense conviction." The court held that Breitweiser's 1996 conviction under a New Jersey criminal statute triggered the sentence enhancement under § 2247(a) and issued an order explaining ***1253** its holding. *United States v. Breitweiser,* 220 F.Supp.2d 1374 (N.D.Ga.2002). The second sentencing issue involved the application of a Sentencing Guidelines provision increasing the base offense level if an offense was committed by the means set forth in 18 U.S.C. § 2242. A defendant violates § 2242 when he "causes another person to engage in a sexual act by placing that other person in fear." The court held that an offense level increase was warranted because Breitweiser committed the offense in question by placing A.B. in fear. Breitweiser was sentenced to forty-six months of imprisonment on count one and a concurrent twelve-month sentence on count two.

A. *Venue*

The Constitution, the Sixth Amendment, and Rule 18 of the Federal Rules of Criminal Procedure guarantee defendants the right to be tried in the district in which the crime was committed. *United States v. Cabrales,* 524 U.S. 1, 6, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998); *United States v. Roberts,* 308 F.3d 1147, 1152 (11th Cir.2002). The standard this court applies when venue is challenged is "whether, viewing the evidence in the light most favorable to the government and making all reasonable inferences and credibility choices in favor of the jury verdict ... the Government proved by a preponderance of the evidence" that the crimes occurred in the district in which the defendant was prosecuted. *United States v. Males,* 715 F.2d 568, 569 (11th Cir.1983) (quoting *United States v. White,* 611 F.2d 531, 535 (5th Cir.1980)). The "*locus delicti* [of a crime] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez–Moreno,* 526 U.S. 275, 279, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (quoting *Cabrales,* 524 U.S. at 6–7, 118 S.Ct. 1772).

Congress has provided a means for finding venue for crimes that involve the use of transportation. The violations of the statutes here are "continuing offenses" under 18 U.S.C. § 3237. *United States v. McCulley,* 673 F.2d 346, 350 (11th Cir.1982). The second paragraph of § 3237(a) reads:

> Any offense involving the use of ... transportation in interstate or foreign commerce ... is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce ... moves.

There are no venue provisions in either 18 U.S.C. §§ 2241 *et seq.* or 18 U.S.C. § 113 that preclude the application of § 3237. To establish venue, the government need only show that the crime took place on a form of transportation in interstate

commerce. *See McCulley,* 673 F.2d at 350 (holding that to prosecute a crime that involved hiding in an airplane's luggage compartment and cutting open mail pouches, venue was proper in any state through which the plane passed).

The government met its burden by showing that Breitweiser committed the crimes on an airplane that ultimately landed in Georgia. Breitweiser's argument that the government must show that the crime was committed in the Northern District of Georgia or its airspace fails; a showing that transportation in interstate commerce was involved is sufficient. It would be difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane when Breitweiser committed the crimes. In *McCulley,* this court explained, "[§ 3237] is a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of ***1254** venue. Its enactment was designed to eliminate the need to insert venue provisions in every statute where venue might be difficult to prove." 673 F.2d at 350. Accordingly, we conclude that the district court properly found that there was venue under § 3237(a) to prosecute this case in the Northern District of Georgia.

B. [redacted]

AFFIRMED.

All Citations

357 F.3d 1249, 63 Fed. R. Evid. Serv. 460, 17 Fla. L. Weekly Fed. C 193

Footnotes

END OF THE PROBLEM PACKET