

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 4 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-10197

Plaintiff-Appellee,

D.C. No.

v.

3:19-cr-00038-MMD-CLB-1

EDWARD KNIGHT,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted November 16, 2022
San Francisco, California

Before: S.R. THOMAS and BENNETT, Circuit Judges, and LASNIK,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

In July 2019, two stores were robbed in Sparks, Nevada. After a six-day trial, Edward Knight was convicted of the robberies and sentenced to 169 months' imprisonment followed by five years of supervised release. Knight timely appealed, identifying jury problems, evidentiary errors, and failures of proof. He asks that his convictions be vacated and this matter remanded for a new trial. We address Knight's arguments regarding remote juror participation in a separate Opinion and consider the remaining arguments here.

I.

Knight argues that the District of Nevada's jury-selection procedures result in jury pools that do not fairly or reasonably reflect the jury-eligible population and therefore deprived him of his rights under the Fifth Amendment, Sixth Amendment, and the Jury-selection and Service Act ("JSSA"). Knight also argues that the demographic data collected and disclosed by the District of Nevada was so incomplete as to violate the JSSA and his due-process rights. "We review 'independently and non-deferentially a challenge to the composition of grand and petit juries' under both the Constitution and the Jury-selection Act." *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1158 (9th Cir. 2014) (en banc) (citation omitted).

A.

We use a three-part test for determining whether a defendant has established a prima facie violation of the Sixth Amendment and JSSA requirement that juries be drawn from a fair cross-section of the population.

[T]he defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). In order to satisfy the second prong of the *Duren* test—that the representation of distinctive groups on the jury wheels from which Knight’s grand and petit juries were chosen was not fair and reasonable—Knight relies exclusively on his expert’s conclusion that the observed underrepresentations were not the result of random factors. When questioned at oral argument regarding the alleged equivalence between “not fair” and “not random,” counsel acknowledged that there was a gap in the evidence and requested that the matter be remanded for a hearing so that the record could be better developed.

Knight’s appeal is based on the assertion that the jury-selection process of the District of Nevada violates constitutional and statutory requirements, and he seeks an order from this Court invalidating the process and vacating his conviction. He has essentially conceded that the existing record does not support his claim or the relief requested, however. In the absence of evidence showing that invalidation is

warranted, we affirm the district court's Sixth Amendment and JSSA determinations.¹

B.

In order to show that a jury-selection process violates the Fifth Amendment's Equal Protection Clause, Knight must show (1) "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied"; (2) "the degree of underrepresentation . . . by comparing the proportion of the group in the total population to the proportion called to serve as [] jurors, over a significant period of time"; and (3) that the disparity is substantial enough to give rise to an inference of discriminatory intent. *Castaneda v. Partida*, 430 U.S. 482, 495 (1977); see *Hernandez-Estrada*, 749 F.3d at 1166. Simply showing a disproportionate impact on a protected group is not sufficient. *Castaneda*, 430 U.S. at 493. Discriminatory intent is "the most crucial factor in an equal protection case." *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996). An expert opinion of non-randomness, standing alone, is insufficient to establish discriminatory intent.

C.

Knight asserts that the District of Nevada's failure to collect and disclose data on certain distinct groups, such as Middle Easterners, precluded him from assessing

¹ The district court correctly concluded that Knight's JSSA objection to the grand jury venire was not timely raised.

the jury-selection plan and therefore violated the JSSA and his right to due process. Knight was given full access to the district's jury lists and to all of the data that the district court collects regarding those jurors. He has not provided any authority for the proposition that the district was required to collect more or additional data.

II.

Knight argues that the jury was erroneously prejudiced by the district court's admission of (A) testimony regarding Knight's "prior booking photo," (B) lay opinion testimony regarding the similarities between the PJ's Discount Liquor and Rainbow Market robberies, and (C) Knight's phone records. We assume for purposes of this appeal that the evidence and testimony to which Knight objects was inadmissible but find that "it is more probable than not that the erroneous admission of the evidence did not affect the jury's verdict" given the other evidence in the record. *United States v. Charley*, 1 F.4th 637, 651 (9th Cir. 2021) (quoting *United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991)). Because any error was harmless, it must be disregarded on appeal. Fed. R. Crim. P. 52(a).

III.

Knight argues that the district court's instructions to the jury were erroneous in that they (A) did not specify that the firearm he used, carried, or brandished during the robberies had to be a *real* firearm and (B) instructed the jury that Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3). Knight failed to raise

these objections below, so we review for plain error. Fed. R. Crim. P. 52(b). We review de novo whether jury instructions correctly state the law. *United States v. Miller*, 952 F.3d 1095, 1101 (9th Cir. 2020).

Even if we assume that the failure to instruct the jury that the firearm must be real was erroneous, the omitted element was undisputed and any error was therefore harmless. *United States v. Smith*, 282 F.3d 758, 767 (9th Cir. 2002) (citing *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993)) (stating that an element is undisputed where the testimony was uncontested). The district court’s instruction that Hobbs Act robbery is a crime of violence was not error. *See United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020), *cert. granted, judgment vacated*, 142 S. Ct. 2857 (2022), *and reinstated in part by* 48 F.4th 1040 (9th Cir. 2022) (“We reaffirm that Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A).”).²

IV.

“In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.” *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Having considered “the overall effect of all the errors in the context of

² Knight’s argument that his convictions rest on a non-qualifying predicate offense because Hobbs Act robbery is not a crime of violence under § 924(c)’s elements clause similarly fails.

the evidence introduced at trial against the defendant,” *id.*, 78 F.3d at 1381, we find that the district court’s errors, actual and presumed, do not cumulatively render the trial fundamentally unfair.

V.

The district court rejected Knight’s argument that the evidence against him was insufficient to support the convictions. We review challenges to the sufficiency of the evidence *de novo*. *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019). After viewing the evidence in the light most favorable to the prosecution, there is ample evidence to support the jury’s findings regarding the essential elements of the crimes charged beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Knight’s insufficiency arguments boil down to an insistence on direct evidence and the discounting of the circumstantial evidence against him. “Time and time again, we have said that circumstantial evidence is not inherently less probative than direct evidence.” *United States v. Miranda-Uriarte*, 649 F.2d 1345, 1352 (9th Cir. 1981) (citations omitted). The government was not required to put on direct evidence that Knight was the robber or that his firearm was real when the circumstantial evidence admitted at trial supports the jury’s findings on those issues.

VI.

Knight challenges two of the special conditions of supervised release imposed by the district court. The parties agree that the substance-abuse-treatment condition in the written judgment (Special Condition Two) fails to conform to the district court's oral pronouncement. Given the relatively minor nature of the error, we will strike from the judgment the instruction that Knight bear financial responsibility for the substance-abuse-treatment program and affirm the judgment and sentence as amended. *See, e.g., United States v. Peters*, 470 F.3d 907, 909 (9th Cir. 2006) (*per curiam*); *Royal Indem. Co. v. Olmstead*, 193 F.2d 451, 456 (9th Cir. 1951).

With regards to Special Condition Twelve, Knight argues that the language is unconstitutionally vague and overbroad. We review challenges to the constitutionality of conditions of supervised release *de novo*. *United States v. Ochoa*, 932 F.3d 866, 868-69 (9th Cir. 2019). The language tracks a standard condition of supervised release promulgated by the United States Sentencing Commission, and its constitutionality has been upheld by the Ninth Circuit. *See* U.S.S.G. § 5D1.3(c)(12) (setting forth the same condition without specifying that the “risk” is the “specific risk posed by your criminal record”); *United States v. Magdirila*, 962 F.3d 1152, 1159 (9th Cir. 2020) (explaining that U.S.S.G. § 5D1.3(c)(12) is read as limited to the specific risks posed by the defendant's criminal record to avoid vagueness); *United States v. Gibson*, 998 F.3d 415, 423 (9th Cir. 2021) (“Standard

Condition 12 is constitutional and may be imposed in appropriate cases.”). The imposition of Standard Condition Twelve is therefore affirmed.

AFFIRMED as amended.