

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

August 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFERY LEE HARRIS,

Defendant-Appellant.

No. 20-8032

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. NO. 1:19-CR-00200-ABJ-1)

Andrew Parnes, Law Office of Andrew Parnes, Ketchum, Idaho, for Appellant.

Thomas Szott, Assistant United States Attorney (Mark A. Klassen, United States Attorney, with him on the brief) Office of the United States Attorney for the District of Wyoming, Cheyenne, Wyoming, for Appellee.

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **McHUGH**, Circuit Judges.

TYMKOVICH, Chief Judge.

The states comprising the Tenth Circuit are home to thirteen of the sixty-three national parks in the United States. In addition to their extraordinary natural beauty, national parks present a recurring legal issue: because national

parks are located in states, but have the status of federal enclaves—areas in which the federal government is the sole sovereign—which laws may be applied to individuals there? Federal law allows some state crimes to be imported into federal enclaves in certain circumstances. That is the issue here.

During a heated argument at a campsite in Yellowstone National Park, Jeffery Lee Harris pointed a gun at another camper. Rather than charge Mr. Harris under the federal assault statute, the federal prosecutor applied the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, to charge Mr. Harris with a Wyoming statute that prohibits “threaten[ing] to use a drawn deadly weapon on another unless reasonably necessary [for defense.]” Wyo. Stat. Ann. § 6-2-502. Mr. Harris was convicted at trial. On appeal, he contends that the federal assault statute precludes assimilation of the Wyoming state assault statute in this case.

Determining whether the federal assault statute precludes conviction on the Wyoming state assault statute requires us to apply the analysis set forth in *Lewis v. United States*, 523 U.S. 155, 164 (1998), an issue of first impression in the Tenth Circuit. That case requires the use of federal law when a federal provision punishes a defendant’s conduct and that provision precludes application of a similar state law. We agree with Mr. Harris that the Wyoming statute should not have been assimilated and accordingly reverse and remand.

I. Background

A. *Factual Background*

Jeffery Lee Harris was vacationing in Yellowstone National Park, where he stayed at the Pebble Creek Campground. Another group, comprised of three campers, occupied a nearby campsite. The campers had spoken with Mr. Harris earlier in the day and—finding Mr. Harris pleasant and interesting—invited him to their campsite that evening.

But when Mr. Harris visited their campsite that evening, the visit went badly. After an innocuous start, the conversation soon turned geopolitical. Mr. Harris began talking about his view of the role of the United States in the world. One of the campers, Peter Janke, was insulted by Mr. Harris’s opinions and found them anti-American. The discussion became heated.

Mr. Janke stood up first, and then Mr. Harris stood up and pushed him. Another camper tried to deescalate the situation, and one moved between the two men. Mr. Harris pulled a handgun from his hip, pointed it at Mr. Janke, and threatened to kill him. Mr. Janke immediately turned and moved away while the other campers tried to convince Mr. Harris to calm down and leave. Mr. Harris was told to put his “toy” away, and Mr. Harris said the gun was not a toy and reiterated that he would kill Mr. Janke. Nevertheless, Mr. Harris lowered the gun and left the campsite. After Mr. Janke went to report the incident, Mr. Harris returned and told one of the campers that he did not want a confrontation and apologized. Mr. Harris returned to his campsite, where he was later arrested.

B. Procedural Background

A grand jury charged Mr. Harris with threatening to use a drawn deadly weapon on another, in violation of Wyo. Stat. Ann. § 6-2-502(a)(iii), assimilated through the ACA, 18 U.S.C. §§ 7(3) and 13. Mr. Harris filed a motion to dismiss, contending that the grand jury improperly assimilated the Wyoming offense. The district court denied the motion, finding that “the state and federal statutes do not seek to punish the same wrongful behavior” and that “Wyoming’s provision acts as the gap filler between [18 U.S.C. §] 113(A)(3) and [18 U.S.C. §] 113(A)(5).” Aplt. App. 35–36.

The case proceeded to trial. Although Mr. Harris claimed that he had acted in self-defense, he was convicted by the jury. Mr. Harris was sentenced to two years of supervised probation, with various conditions. He timely appealed, arguing that application of the Wyoming statute (Wyo. Stat. Ann. § 6-2-502(a)(iii)) was precluded by the federal assault statute (18 U.S.C. § 113).

II. Analysis

We agree with Mr. Harris that the federal assault statute precludes assimilation of the Wyoming state statute through the ACA. We first examine the history of the ACA and then the Supreme Court’s discussion of its modern application in *Lewis v. United States*, 523 U.S. at 158. We then apply the *Lewis* analysis to the state and federal statutes at issue here, concluding that the Wyoming aggravated assault provision, Wyo. Stat. Ann. § 6-2-502(a)(iii), should

not have been assimilated through the ACA. Instead, Mr. Harris should have been charged under the federal assault statute, 18 U.S.C. § 113.

A. The Assimilative Crimes Act

Before the 1820s, the fledgling United States government had a problem. Federal enclaves—or the areas where states have ceded jurisdiction over land within their borders to Congress, such as military bases, federal facilities, and national parks and forests, *see Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012)—were “pretty literally lawless.” *United States v. Christie*, 717 F.3d 1156, 1170 (10th Cir. 2013). Because federal criminal laws were few (“different days than our own,” noted then-Judge Gorsuch in *Christie*, *id.*), most crimes that occurred on federal enclaves were not punishable by the areas’ sole sovereign. *See id.*, 717 F.3d at 1170.

To solve this problem, Congress passed the Assimilative Crimes Act in 1825. The ACA provides:

Whoever within or upon any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to like punishment.

18 U.S.C. § 13. The ACA “assimilates into federal law, and thereby makes applicable on federal enclaves . . . , certain criminal laws of the State in which the enclave is located.” *Lewis*, 523 U.S. at 158. Put simply, the ACA “borrow[s] from preexisting state law” to provide more comprehensive criminal laws in

federal enclaves. *Christie*, 717 F.3d at 1170; *see also United States v. Jones*, 921 F.3d 932, 935 (10th Cir. 2019) (“Thus, the ACA performs a gap-filling function by ‘borrowing state law’ to bolster the ‘federal criminal law that applies on federal enclaves,’ and that function has been described as the ACA’s ‘basic purpose.’” (quoting *Lewis*, 523 U.S. at 160)).

But determining when the ACA applies is a more complicated question now than it was in the 1820s. Initially conceived as a gap-filling measure, the ACA now has fewer gaps to fill than it did then—in short, because so many more federal criminal laws exist today. And often, federal criminal law and state law overlap. By its own terms, the “ACA applies only if the ‘act or omission’ in question is *not* made punishable by ‘any enactment of Congress.’” *United States v. Rocha*, 598 F.3d 1144, 1147–48 (9th Cir. 2010) (quoting 18 U.S.C. § 13) (emphasis in original). In other words, the ACA “does not adopt state law ‘where there is no gap to fill.’” *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1891 (2019) (quoting *Lewis*, 523 U.S. at 163) (discussing OCSLA as an analog of the ACA).

The Supreme Court has thus outlined a two-step inquiry for courts to utilize in determining when the ACA makes state law applicable to federal enclaves. The court must first ask: “Is the defendant’s ‘act or omission . . . made punishable by *any* enactment of Congress[?]’” *Lewis*, 523 U.S. at 164 (quoting the ACA) (emphasis in original). If not, then the state statute may be assimilated. But if the answer is “yes,” the court must ask

whether the federal statutes that apply to the “act or omission” preclude application of the state law in question, say, because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue.

Id. at 164. If any of these situations apply, then the state statute should not be assimilated, and the charge should be brought under the federal statute. *See* 8A Fed. Proc., L. Ed. § 22:24, *Effect of overlap or conflict between federal and state law*; *see also Christie*, 717 F.3d at 1170–71 (“If, for example, it’s clear that a federal statute applies to the defendant’s conduct and that the assimilation of a state law applying to that same conduct would ‘interfere with the achievement of a federal policy’ or ‘effectively rewrite an offense definition that Congress carefully considered,’ or enter a field Congress has expressed an ‘intent to occupy,’ then the need for dismissing an assimilated crime may be evident even before trial.” (citations omitted)).

The Court went on to note that the variety and number of state and federal laws preclude an “automatic general answer” to the second question. *Lewis*, 523 U.S. at 164. Nevertheless, “it seems fairly obvious that the Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional[] or other technical[] considerations, or where differences amount only to those of name, definitional language, or punishment.”

Id. at 165. Nor may assimilation “rewrite distinctions among the forms of criminal behavior that Congress intended to create.” *Id.* So there is “no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime.” *Id.*

But at the same time, “a *substantial* difference in the kind of wrongful behavior covered (on the one hand by the state statute, on the other, by federal enactments) will ordinarily indicate a gap for a state statute to fill—unless Congress, through the comprehensiveness of its regulation, or through language revealing a conflicting policy, indicates to the contrary in a particular case.” *Id.* at 165–66 (citations omitted) (emphasis supplied). At the end of the day, the Court stated, the “primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant’s to the exclusion of the particular state statute at issue?” *Id.* at 166.

In reaching this conclusion, the Court rejected approaches on both ends of the spectrum. The literal interpretation of the ACA’s “any enactment” language—which would greatly decrease the amount of state law assimilated—was too broad. *Id.* at 161–62. And the interpretation that the ACA “would assimilate a state law so long as that state law defines a crime [with] one element that does not appear in the relevant federal statute” was too narrow. *Id.* at 162–

63. The two-step test was a Goldilocks solution, landing somewhere in the middle.

B. The ACA and Wyoming's Aggravated Assault Statute

Whether a state law crime was properly assimilated under the ACA is a question of law we review de novo. *Christie*, 717 F.3d at 1176 (Briscoe, C.J., concurring); *see also United States v. Chapman*, 839 F.3d 1232, 1241 (10th Cir. 2016).

Although we have discussed the sentencing implications of assimilation of state laws, *see, e.g., Christie*, 717 F.3d at 1171, *Jones*, 921 F.3d at 935, *Chapman*, 839 F.3d at 1241, and *United States v. Wood*, 386 F.3d 961 (10th Cir. 2004), we have yet to apply *Lewis*'s two-step inquiry. In doing so here, we conclude that the ACA does not permit the assimilation of the Wyoming aggravated assault provision under which Mr. Harris was charged.

Mr. Harris was charged with violating Wyo. Stat. Ann. § 6-2-502(a)(iii), but he argued in his motion to dismiss that he should have been charged with a provision of the federal assault statute, 18 U.S.C. § 113.

The federal assault statute, entitled "Assaults within maritime and territorial jurisdiction," provides in part that

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

[. . .]

(3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.

[. . .]
(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

18 U.S.C. § 113. Assault under subsection (3) is a felony, but conviction under subsection (5) of the federal assault statute would result in a misdemeanor.

In turn, the Wyoming aggravated assault statute provides, as relevant here, that

(a) A person is guilty of aggravated assault and battery if he engages in any of the following:
[. . .]
(iii) Threatens to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another[.]

Wyo. Stat. Ann. § 6-2-502(a)(iii). A conviction under this provision is a felony.

We first turn to *Lewis*'s initial inquiry: "Is the defendant's act or omission made punishable by *any* enactment of Congress?" *Lewis*, 523 U.S. at 164 (cleaned up; emphasis in original). The government concedes—and we agree, of course—that the answer to this question is "yes." Mr. Harris's actions at the campsite that night could be punishable under § 113(a)(5) as simple assault.¹

Adopting common-law principles, the Tenth Circuit has defined simple assault as either "an attempted battery" or "placing another in reasonable apprehension of a

¹ We make no determination as to whether Mr. Harris could have been charged under a different provision within § 113, such as assault with a deadly weapon.

battery.” *United States v. Gauvin*, 173 F.3d 798, 802 (10th Cir. 1999) (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 16.3).

Pointing a gun at Mr. Janke and threatening to kill him clearly placed Mr. Janke in reasonable apprehension of a battery.

We then turn to the second question: whether the federal assault statute (18 U.S.C. § 113) precludes application of the Wyoming assault statute (Wyo. Stat. Ann. § 6-2-502). The layering of multifarious state and federal laws on federal enclaves, as well as the range of circumstances in which they apply, prevent “an automatic general answer to this second question.” *Lewis*, 523 U.S. at 165.

Consequently, *Lewis*’s second step is designed to be a fairly broad inquiry, represented by a non-exhaustive list of circumstances in which a federal statute would preclude application of a state law. *See id.* at 164. In any event, we need not look further than the second and third scenarios given by the Supreme Court: when a “state law would effectively rewrite an offense definition that Congress carefully considered,” or when “federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue.” *Id.*

We conclude that assimilating the Wyoming statute in this case would “effectively rewrite an offense definition that Congress carefully considered.” *Lewis*, 523 U.S. at 165. The full federal assault statute lays out eight different assaultive acts, each with a corresponding punishment—from assault with intent

to commit murder to simple assault. *See* 18 U.S.C. § 113.² It then provides specific definitions of terms used in the statute, including terms such as

² The complete text of § 113 reads:

- (a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
- (1) Assault with intent to commit murder or a violation of section 2241 or 2242, by a fine under this title, imprisonment for not more than 20 years, or both.
 - (2) Assault with intent to commit any felony, except murder or a violation of section 2241 or 2242, by a fine under this title or imprisonment for not more than ten years, or both.
 - (3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.
 - (4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than 1 year, or both.
 - (5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.
 - (6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.
 - (7) Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both.
 - (8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.
- (b) Definitions.--In this section--

“substantial bodily injury” and “serious bodily injury.” *Id.* Congress clearly and precisely explicated the range of conduct that qualifies as assault within areas of federal jurisdiction. It is true that Mr. Harris’s conduct is more easily mapped onto the Wyoming statute here. But that is not the test. *See Lewis*, 523 U.S. at 169 (declining to find state statute assimilable even when the state statute was “focuse[d] upon a narrower (and different) range of conduct”). Assimilating the more specific Wyoming law to punish the same conduct covered by § 113 would

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- (1) the term “substantial bodily injury” means bodily injury which involves--
 - (A) a temporary but substantial disfigurement; or
 - (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty;
 - (2) the term “serious bodily injury” has the meaning given that term in section 1365 of this title;
 - (3) the terms “dating partner” and “spouse or intimate partner” have the meanings given those terms in section 2266;
 - (4) the term “strangling” means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and
 - (5) the term “suffocating” means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.

18 U.S.C. § 113.

substantially disrupt Congress’s careful assault definitions. The text and structure of § 113 “indicate an intent to punish conduct such as [Mr. Harris’s] to the exclusion of the particular state statute at issue.” *Id.* at 166.

The detailed and comprehensive nature of the federal assault statute also suggests Congress “inten[ded] to occupy so much of a field as would exclude use of the particular state statute at issue.” *Id.* at 164; *see also id.* at 169 (pointing to the “detailed manner in which the federal . . . statute is drafted” to conclude the state statute is not assimilable). The wide spectrum of assaultive conduct prohibited by § 113 evinces a “considered legislative judgment” to punish a variety of behavior in federal jurisdictions. *Id.* at 169. And the broad range of punishments in § 113—from mere fines to twenty years’ imprisonment—gives “complete coverage” that should not be undermined by the assimilation of the Wyoming statute. *Id.* at 169; *see also id.* (concluding that the “extreme breadth of the possible sentences” reinforced the conclusion that there was “no gap for the [state’s] statute to fill”).

The ACA is only meant to fill gaps in state law, not to provide an additional criminal legal scheme on every federal enclave. The Wyoming assault statute and the federal assault statute “seek to punish approximately the same wrongful behavior.” *Id.* at 165. The federal statute punishes Mr. Harris’s wrongful behavior at the campsite, just as the Wyoming statute does. The differences between the federal and the Wyoming provisions “amount only to those of name, definitional language, or punishment.” *Id.* Had Mr. Harris been

in Wyoming outside of Yellowstone National Park, a state prosecutor could have successfully brought charges under Wyo. Stat. Ann. § 6-2-502. But he was not. Mr. Harris was on federal territory, and the federal assault statute thoroughly covers his conduct. Consequently, he should have been charged with violation of the federal assault statute.³

The government makes two arguments that merit discussion. First, it contends, the two provisions' difference in scienter requirement dictates that the Wyoming statute can be assimilated. Conviction under the Wyoming provision requires general intent. *See Streitmatter v. State*, 981 P.2d 921, 927 (Wyo. 1999) (“The crime of aggravated assault [under Wyo. Stat. Ann. § 6-2-502(a)(iii)] is a general intent crime, and its commission requires only that intent which the jury may infer from the commission of the proscribed act.”). The federal simple assault provision—§ 113 (a)(5)—has no intent requirement. Subsection (a)(3) in that same statute, which prohibits assault with a dangerous weapon, requires specific intent.

³ We are not the only circuit to reach this conclusion. In *United States v. Dat Quoc Do*, prosecutors assimilated Oregon's unlawful use of a weapon statute, which prohibits “[a]tttempt[ing] to use unlawfully against another . . . any dangerous or deadly weapon,” Or. Rev. Stat. § 166.220(1)(a), against a defendant who had drawn and fired a gun into the sky. *United States v. Dat Quoc Do*, 994 F.3d 1096, 1098–99 (9th Cir. 2021). On step two of the *Lewis* analysis, the Ninth Circuit concluded that the Oregon statute should not have been assimilated because (1) the federal assault statute (§ 113) and Oregon's statute seek to punish the same wrongful behavior, (2) § 113 occupies the field of assault to the exclusion of Oregon's statute, and (3) assimilating the Oregon statute would rewrite § 113's definitions. *Id.* at 1100; *accord Rocha*, 598 F.3d at 1149–50 (concluding § 113 precluded assimilation of a California state assault law).

But this argument is unpersuasive. For one, the range of scienter requirements in the federal statute—from no intent to specific intent—demonstrates that Congress intended this statute to occupy the field of assault with all associated states of mind. And for another, “there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime.” *Lewis*, 523 U.S. at 165. The federal assault statute does exactly this: set out the different methods and states of mind for committing the same basic crime of assault. That the elements—here, the mens rea requirement—of the Wyoming statute and the federal assault statute do not precisely align is inconsequential. *Lewis* explicitly rejected this approach to assimilation. *See id.* at 162–63 (rejecting the approach that “the ACA would assimilate a state law so long as that state law defines a crime in terms of at least one element that does not appear in the relevant federal enactment”).

Second, the government argues that because the Wyoming provision is a felony and the federal simple assault provision is a misdemeanor, there is a gap allowing for assimilation of the Wyoming statute. That argument fails because *Lewis* instructs us not to assimilate a state law merely because there is a difference in punishment. *See id.* at 165 (approvingly citing a case where a “misdemeanor/felony difference did not justify assimilation”). In *Lewis*, the state law at issue—and the one which had been assimilated against the defendant—

punished first-degree murder, while the federal statute was for second-degree murder. *See id.* at 169. Nevertheless, the Court found that such a difference did not require assimilation because “other features of the federal statute convince[d]” the Court that Congress had intended to preclude application of the state law. *Id.* We are similarly convinced that § 113 was intended to preclude application of the Wyoming state law here.

Finally, we note that to allow assimilation here “threatens not only to fill nonexistent gaps, but also to rewrite each federal enclave-related criminal law in 50 different ways, depending upon special, perhaps idiosyncratic, drafting circumstances in the different States.” *Id.* at 163. It is not so much the breadth of this power but its uneven nature that *Lewis* was designed to resolve. Such an interpretation would leave visitors—like Mr. Harris—and “residents of federal enclaves randomly subject to three sets of criminal laws (special federal territorial criminal law, general federal criminal law, and state criminal law) where their state counterparts would be subject only to the latter two types.” *Id.* The ACA was designed to solve a lawlessness problem, not create legal hodgepodge from which prosecutors could pick and choose.

A federal statute prohibits the behavior Mr. Harris exhibited at the campsite that evening, and he should have been charged accordingly.

III. Conclusion

We conclude that the ACA does not permit assimilation of the Wyoming assault provision at issue here. For the foregoing reasons, we REVERSE the district court and REMAND for proceedings consistent with this opinion.