NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYA MAN, Defendant-Appellant.	No. 21-10241 D.C. No. 3:20-cr-00068-CRB-1 MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,[**] District Judge.

Raya Man appeals the fifteen-year sentence he received after pleading guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. §

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

[**] The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

3742. We vacate the sentence and remand to the district court for appropriate further proceedings.

The mandatory-minimum sentence was imposed under the Armed Career Criminal Act ("ACCA"), based on Man's three prior convictions for violent felonies. The Presentence Report ("PSR") prepared by the Probation Office indicated that Man was twice convicted of assault with a deadly weapon, and once convicted of assault with a firearm, in violation of sections 245(a)(1) and 245(a)(2) of the California Penal Code, respectively.

1. Man first argues that his assault convictions do not constitute violent felonies. We have repeatedly held that assaults under sections 245(a)(1) and 245(a)(2) of the California Penal Code are categorically "crimes of violence," as that term is used in the United States Sentencing Guidelines ("USSG"). *United States v. Jimenez-Arzate*, 781 F.3d 1062, 1064 (9th Cir. 2015) (per curiam); *United States v. Grajeda*, 581 F.3d 1186, 1196–97 (9th Cir. 2009); *see also United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067–68 (9th Cir. 2018); *United States v. Heron-Salinas*, 566 F.3d 898, 899 (9th Cir. 2009) (per curiam). A "crime of violence" in the USSG "is defined identically to the phrase 'violent felony' in the ACCA." *United States v. Walker*, 953 F.3d 577, 579 (9th Cir. 2020).

Man argues, however, that *Borden v. United States*, 141 S. Ct. 1817 (2021), abrogates this precedent. *Borden* held that an offense is not a violent felony "if it

requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge." *Id.* at 1821–22. But we have previously held that section 245 offenses are crimes of violence—and thus, violent felonies—precisely because the statute requires a mens rea greater than recklessness. *See Vasquez-Gonzalez*, 901 F.3d at 1067 ("[T]he California Supreme Court expressly rejected the conclusion that the mens rea for assault could be satisfied by negligent or reckless conduct." (citing *People v. Williams*, 29 P.3d 197, 203 (Cal. 2001)). *Borden* requires nothing more. *See Amaya v. Garland*, 15 F.4th 976, 983 (9th Cir. 2021) (citing *Borden*, 141 S. Ct. at 1825) (rejecting the argument that a crime of violence requires proof of specific intent after *Borden*). Therefore, Man's first argument is unavailing.

2. Man next argues that it was error under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for the district court to find that his violent felonies were "committed on occasions different from one another," as was required to trigger the ACCA mandatory-minimum sentence. *See* 18 U.S.C. § 924(e)(1). Man argues that absent his admission that the predicate offenses were committed on different occasions, a jury was required to make that finding. We have previously held that a district court does not commit an *Apprendi* error by differentiating the occasions on which ACCA violent felonies were committed. *Walker*, 953 F.3d at 580. But the Government concedes that following *Wooden v. United States*, 142 S. Ct. 1063 (2022), a jury must find, or a defendant must admit, that a defendant's ACCA

predicate offenses were committed on different occasions. We thus assume, without holding, that an *Apprendi* error occurred.

The Government argues that the error was harmless. To show an *Apprendi* error is harmless, the Government bears the burden to prove "beyond a reasonable doubt that the result 'would have been the same absent the error.'" *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006) (quoting *Neder v. United States*, 571 U.S. 1, 19 (1999)). This requires "overwhelming and uncontroverted" evidence of the fact improperly determined by the district court. *Id.* The PSR was the only evidence before the district court of the occasions on which Man committed his ACCA predicate offenses. And Man objected to basing his sentence on the PSR. We have held *Apprendi* errors were not harmless on records with similar objections and greater evidence than was presented here. *See United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193–95 (9th Cir. 2014); *United States v. Hunt*, 656 F.3d 906, 914–16 (9th Cir. 2011). Therefore, the district court's error was not harmless.

3. Because Man's contention that the district court must sentence him to a non-ACCA sentence on remand was raised for the first time on appeal, the district court should address that argument in the first instance. We similarly leave to the district court the issue of the proof necessary to establish that any prior convictions involve offenses committed on separate occasions.

VACATED AND REMANDED.