NOT FOR PUBLICATION

FILED

DEC 16 2022

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. MICHAEL AARON STUKER, Defendant-Appellant.	No. 21-35466 D.C. No. 1:11-cr-00096-DLC-2 MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted December 6, 2022
Seattle, Washington

Before: McKEOWN, MILLER, and MENDOZA, Circuit Judges.

Michael Stuker was convicted of witness tampering, in violation of 18 U.S.C. § 1512(a)(2)(A), and possession of a firearm in furtherance of a crime of violence, under 18 U.S.C. § 924(c). Stuker contends that witness tampering does not qualify as a crime of violence for two reasons: first, witness tampering can be committed by confinement, which he argues does not require the use of physical

---

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

force, and second, witness tampering is overbroad because it punishes the attempt to threaten to use physical force. We have jurisdiction under 28 U.S.C. §§ 2253(a) and (c)(1), and we affirm.

We are not persuaded by Stuker's position that the definition of physical force under 18 U.S.C. § 1515(a)(2) is broader than the force described in § 924(c)(3)(A). The district court correctly reasoned that by including confinement in the context of physical action and defining it as physical force, Congress required a physical restriction on movement that would constitute physical force under § 924(c)(3)(A).

Without deciding the issue, we acknowledge the parties' positions that the statute covers attempts to threaten to use physical force and is therefore overbroad. Nevertheless, accepting the parties' interpretation of § 1512(a)(2), the attempt-to-threaten offense is divisible from the other offenses created by the statute. Applying the modified categorical approach, the government emphasizes that the indictment's language was limited to "used and attempted to use physical force," while Stuker points out that the jury was instructed that the United States had to prove that "the defendant used or attempted to use physical force or the threat of physical force against any person." The jury was instructed on the entire definition, a portion of which the government concedes is broader than § 924(c) allows.

Nevertheless, "[t]he Supreme Court has held that instructional errors are generally subject to harmless error review," *United States v. Reed*, 48 F.4th 1082, 1088 (9th Cir. 2022), and "cases in which harmless error review would *not* apply 'are the exception and not the rule,'" *id.* (quoting *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam)). Under harmless error review, relief is appropriate if the instructional error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Two witnesses testified that Stuker was armed and relayed some communication that the victim should not testify against J.L. Because the threat was relayed, it was a threat rather than an attempted threat. Nothing suggests that Stuker attempted to reach the victim and carry out a threat but was unable to do so. The inclusion of attempt to threaten in the jury instruction was harmless.

AFFIRMED.