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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMY LEE BROOKS,

Defendant - Appellant.

No. 21-6059

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:20-CR-00113-G-1)

Dean Sanderford, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Nicholas Coffey, Assistant United States Attorney (Robert J. Troester, United States Attorney, with him on the brief), Office of the United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **MORITZ**, **SEYMOUR**, and **EID**, Circuit Judges.

SEYMOUR, Circuit Judge.

Mr. Jimmy Lee Brooks was convicted by jury of unlawful possession of ammunition and witness tampering. The ammunition charge stemmed from an incident

in which Mr. Brooks shot a firearm at a car his then-girlfriend was riding in, striking her in the buttocks. Over Mr. Brooks' objection, the sentencing court concluded he committed attempted second-degree murder and applied a cross-reference to the attempted murder guideline, U.S.S.G. § 2A2.1. The district court was also required to calculate the guidelines under U.S.S.G. § 2K2.1 and, in doing so, applied a heightened base offense level on the assumption that Oklahoma aggravated assault and battery is a crime of violence.

On appeal, Mr. Brooks renews his challenge to the attempted murder cross-reference, arguing that the district court was required to find he acted with specific intent to kill but instead found he acted with malice aforethought. We agree with Mr. Brooks that the attempted murder cross-reference is appropriate only when the defendant intended to kill and that the court's finding on malice aforethought was insufficient to support the cross-reference. Mr. Brooks also argues that the district court plainly erred because, under our decision in *United States v. Winrow*, 49 F.4th 1372 (10th Cir. 2022), Oklahoma aggravated assault and battery is not a crime of violence. The government concedes, and we agree, that Oklahoma aggravated assault and battery is not a crime of violence. But because Mr. Brooks' argument that his substantial rights were impacted by this error is speculative, we leave the issue open for the district court to consider on remand. Accordingly, we vacate Mr. Brooks' sentence and remand for resentencing.

Background

On March 18, 2020, Mr. Brooks visited a beauty supply store in Oklahoma City, Oklahoma, with his then-girlfriend, S.J. Surveillance footage from inside and outside of

the store captured the following events. Mr. Brooks became angry after a man approached S.J. inside the store and hugged her. S.J. quickly exited the store, but Mr. Brooks stayed to argue with the man. He then pulled out a large knife and began pacing before exiting the store.

Mr. Brooks met S.J. outside by his vehicle, which was parked in the parking lot. The pair began to argue, and Mr. Brooks brandished his knife, appearing to threaten her. When S.J. entered the driver's seat and closed the car door, Mr. Brooks punched the car window. He continued to brandish the knife, and eventually S.J. crawled out of the front passenger door. Mr. Brooks threw something at S.J., who then threw car keys at Mr. Brooks.

S.J. ran away from the car and got into the backseat of a black car pulling out of the parking lot. According to the driver of the black car, S.J. said Mr. Brooks had a gun. As the black car was backing out, Mr. Brooks went to the driver's seat of his vehicle to retrieve the gun. He walked toward the street and shot at the black car as it was driving away. Shell casings recovered at the scene indicate that Mr. Brooks fired at least eight times. One of the bullets entered the black car through the license plate and struck S.J. in the buttocks.

Mr. Brooks was charged in a two-count indictment for being a felon in possession of ammunition and a firearm.[1] In a superseding indictment, Mr. Brooks was also charged with one count of witness tampering, premised on calls he made to S.J. while in custody.

[1] The firearm charge was brought in connection with a separate incident, in which a shotgun was recovered from a closet in a relative's apartment.

Mr. Brooks proceeded to trial, where he was found guilty of being a felon in possession of ammunition and witness tampering but acquitted of the firearm charge.

Mr. Brooks' Sentencing

Under § 2K2.1(c)(1)(A), pertaining to unlawful possession of ammunition, sentencing courts should cross-reference to U.S.S.G. § 2X1.1 (Attempt, Solicitation, or Conspiracy) "[i]f the defendant used or possessed any . . . ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense." Section 2X1.1(a) in turn directs courts to apply the "base offense level from the guideline for the substantive offense." The guideline for assault with intent to commit murder and attempted murder is § 2A2.1. "[I]f the object of the offense would have constituted first degree murder," a base offense level of 33 applies. § 2A2.1(a)(1). "[O]therwise," a base offense level of 27 applies. § 2A2.1(a)(2).

In calculating Mr. Brooks' guidelines, the presentence report ("PSR") applied a cross-reference to § 2A2.1(a)(2) for attempted second-degree murder. Mr. Brooks objected to the cross-reference, arguing the government's evidence was insufficient to prove he harbored an intent to kill.

At sentencing, the government argued the cross-reference applied because second-degree murder is a general, not specific, intent crime that requires "only malice aforethought" and "can be satisfied by the intent to kill without premeditation, *intent to do serious bodily injury, a depraved heart, or the commission of certain felonies*." Rec., vol. III at 657–58 (emphasis added). It focused on depraved heart murder, asserting that malice aforethought was "established by evidence of conduct which is reckless and

wanton and a gross deviation from a reasonable standard of care of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *Id.* at 658.

Mr. Brooks responded that, while the government correctly described the elements of second-degree murder, the relevant question was whether Mr. Brooks committed *attempted* second-degree murder, which requires a specific intent to kill. When he argued there was no evidence that he had the requisite intent, the court responded: "Well, he shot eight times." *Id.* at 661. Seemingly rejecting Mr. Brooks' argument, the district court stated he "would have to have the necessary intent for the crime of second-degree murder; that is that he acted with malice aforethought." *Id.* at 665.

The government argued that Mr. Brooks' conduct satisfied the malice aforethought standard because he acted with intent to do serious bodily harm to S.J. It again asserted that Mr. Brooks acted with malice aforethought because his actions were reckless and wanton. The government argued the bullets were "undoubtedly" directed at S.J. *Id.* at 668. The district court then asked the government if there was anything prior to S.J. entering the black car "that would indicate either an intent to kill [S.J.] or malice aforethought towards [her]." *Id.* at 669. The government explained how Mr. Brooks had targeted S.J. leading up to the shooting.

After hearing argument on other objections, the district court found the ammunition was used in connection with an attempted second-degree murder and denied Mr. Brooks' objection to the § 2A2.1 cross-reference. The court found "Mr. Brooks had

the necessary intent for the crime of second-degree murder; that is, that he acted with malice aforethought." *Id.* at 684. It continued:

> To kill with malice aforethought means either to kill another person deliberately and intentionally but without the added requirements of premeditation or deliberation; *or to act with a depraved heart or, in more modern terms, with a reckless and wanton disregard for human life*.
>
> Malice aforethought may be inferred when the defendant engaged in conduct that grossly deviates from a reasonable standard of care of such a nature that the fact-finder is warranted in concluding that the defendant was aware of a serious risk of death or serious bodily harm.
>
> *The Court specifically finds that* the facts at issue here, particularly Mr. Brooks' acts of retrieving the firearm and shooting at [S.J.] eight times, caused the Court to draw the inference that *Mr. Brooks was acting with malice aforethought*.

Id. at 684–85 (emphasis added). Although the court recounted facts tending to show that Mr. Brooks targeted S.J. and concluded that the elements of federal attempted second-degree murder were shown by a preponderance of the evidence, it never made a specific finding on intent to kill.

The court then found Mr. Brooks' actions were "not merely the product of heat of passion," *id.* at 685, implying his actions constituted more than attempted manslaughter. It explained that Mr. Brooks "had the time and opportunity to consider the situation, and his acts . . . reflect that he had formed the intent required for second degree murder." *Id.*

The attempted murder cross-reference applies only "if the resulting offense level is greater than that" otherwise determined under the guideline for unlawful possession of ammunition. § 2K2.1(c)(1)(A). If a defendant has a prior "felony conviction of either a crime of violence or a controlled substance offense," the base offense level is 20.

§ 2K2.1(a)(4)(A). The PSR used this base offense level based on Mr. Brooks' 2009 Oklahoma conviction for aggravated assault and battery under Okla. Stat. tit. 21, § 646, which it treated as a crime of violence. At sentencing, the district court adopted this unchallenged portion of the PSR. This offense level was not used to calculate Mr. Brooks' guideline range, however, because the attempted murder guideline yielded a higher total offense level.

Based on the attempted murder guideline and other adjustments not challenged on appeal, the district court calculated a total offense level of 31 and a guideline range of 188 to 235 months. Mr. Brooks was sentenced to 235 months' incarceration: 120 months for the ammunition charge (the statutory maximum at the time) and 235 months for the witness tampering charge,[2] to be served concurrently.

Discussion

A. Attempted Murder Cross-Reference

On appeal, Mr. Brooks renews his challenge to the § 2A2.1 cross-reference because the district court did not find he intended to kill S.J. Whether or not the application of § 2A2.1 requires an intent to kill is a legal question we review de novo. *See United States v. Finnesy*, 953 F.3d 675, 688 (10th Cir. 2020).

"To prove an attempt crime, the government must prove an [] intent to commit the substantive offense . . . ." *United States v. Vigil*, 523 F.3d 1258, 1267 (10th Cir. 2008). Therefore, "[a]lthough a murder may be committed without an intent to kill, an attempt to

[2] The total offense level for the witness tampering count was 23, but it was grouped with the possession count under U.S.S.G. § 3D1.2(c).

commit murder requires a specific intent to kill." *Braxton v. United States*, 500 U.S. 344, 351 n.* (1991) (internal quotation marks and citation omitted). In *United States v. Currie*, we applied this principle to hold that assault with intent to commit murder under 18 U.S.C. § 113(a)(1) is a specific intent crime requiring the government to prove the defendant had an intent to kill. 911 F.3d 1047, 1054, 1058 (10th Cir. 2018). We clarified that "[a]cting with malice by committing a reckless and wanton act without also intending to kill the victim is not sufficient for conviction." *Id.* at 1054.

Relying on *Currie*, we recently stated in an unpublished decision that § 2A2.1 "applies when the evidence demonstrates 'a specific intent to kill the victim . . . .'" *United States v. Oloa*, 2022 WL 17663807, at *5 (10th Cir. Dec. 14, 2022) (quoting *Currie*, 911 F.3d at 1054) (alteration in original). We reiterated that malice demonstrated by reckless and wanton conduct is insufficient. *Id.* This understanding is consistent with the only circuit to directly address the issue. In *United States v. Morgan*, the Sixth Circuit held that "a finding of the specific intent to kill . . . is essential to the application of the attempted-murder cross-reference." 687 F.3d 688, 697 (6th Cir. 2012); *see also United States v. Turner*, 436 F. App'x 631 (6th Cir. 2011).

Although the government admits that Mr. Brooks could be correct if § 2A2.1 required the court to find the elements of attempted second-degree murder, it argues the guideline has no such requirement and instead hinges on whether the offense would have been a first- or second-degree murder if it had been completed. The government relies on the language of § 2A2.1(a)(1), asking courts to determine whether the "object of the offense would have constituted first degree murder."

However, there is nothing in the guideline's brief text suggesting that a defendant who did not have the intent required to commit attempted murder can be sentenced under § 2A2.1. The guideline's background commentary states that the "section applies to the offenses of assault with intent to commit murder and attempted murder," without mention of an altered mens rea. § 2A2.1, comment (backg'd). Furthermore, "object of the offense" is more naturally understood as the purpose or goal of the offense, rather than how the offense would have been classified if completed.

The government initially argued there was a circuit split on this issue but acknowledged at oral argument that *Morgan* was more apposite than decisions it cited from other circuits. Notably, none of the cases cited in support of its argument decided whether § 2A2.1 requires an intent to kill. *See, e.g.*, *United States v. Ashford*, 718 F.3d 377, 383–84 (4th Cir. 2013) (considering defendant's argument that application of the attempted murder cross reference was improper because he did not act with malice aforethought); *United States v. Terrell*, 854 F. App'x 537, 538 (4th Cir. 2021) (per curiam) (considering defendant's argument that his conduct constituted attempted voluntary manslaughter instead of attempted second-degree murder because he acted in the heat of passion); *United States v. Campos*, 136 F. App'x 557, 562 (4th Cir. 2005) (explaining the difference between the two base offense levels in § 2A2.1 is "whether the attempted murder, if completed, would have constituted first-degree or second-degree murder" but not suggesting the guideline could apply without an intent to kill).

Some of the cited cases do suggest that § 2A2.1 could apply without an intent to kill. *See, e.g.*, *United States v. Williams*, 41 F.4th 979, 986 (8th Cir. 2022) (upholding

application of § 2A2.1(a)(2) because the defendant's conduct "demonstrated an intent to kill or, at the very least, an act in callous and wanton disregard of the consequences to human life" (internal quotation marks and citation omitted)); *United States v. Wade*, 781 F. App'x 165, 167–68 (4th Cir. 2019) (per curiam) (upholding application of § 2A2.1(a)(2) because defendant's "conduct demonstrated reckless and wanton behavior and a gross deviation from a reasonable standard of care such that a factfinder would be warranted in inferring that [defendant] was aware that there was a risk of death or serious bodily harm"). However, these cases considered whether malice aforethought was established and did not consider whether intent to kill is required. Moreover, one of the government's cited cases suggests application of § 2A2.1 does require an intent to kill. *See United States v. Turnipseed*, 47 F.4th 608, 614 & n.1 (7th Cir. 2022) (attempted second-degree murder requires a showing of malice aforethought, which in turn requires the government to prove the defendant "harbored an intent to kill").

To the extent the out-of-circuit cases cited by the government, many of which are unpublished, suggest that § 2A2.1 can be applied without a finding of intent to kill, their persuasive value is significantly outweighed by our decisions in *Currie* and *Oloa*, as well as the Sixth Circuit's decision in *Morgan*.

The government contends that § 2A2.1 must apply because Mr. Brooks' conduct falls outside of the guideline concerning aggravated assault, U.S.S.G. § 2A2.2. This argument is based primarily on: (1) the fact that attempted manslaughter falls under § 2A2.2, *see* § 2A2.1, comment (backg'd); and (2) the district court's findings that Mr. Brooks acted with malice and not in the heat of passion. But, as Mr. Brooks recognizes,

the aggravated assault guideline applies to more than just attempted manslaughter. It includes other types of assault, including assault with a dangerous weapon with intent to cause bodily injury and assault resulting in serious bodily injury. § 2A2.2, comment (n.1). Therefore, even if the district court found Mr. Brooks did not have the intent to kill necessary under § 2A2.1, it was not necessarily precluded from applying § 2A2.2 after finding that the assault involved a gun or resulted in serious bodily injury to S.J.[3]

Because attempted murder requires an intent to kill, it was improper for the district court to apply the cross-reference based on a finding of only malice aforethought. *Cf. United States v. Fortier*, 180 F.3d 1217, 1228, 1229 (10th Cir. 1999) (although a court need not find a "perfect match" as the "most analogous" homicide offense guideline under § 2K2.1(c)(1)(B), it is improper for a court to use a guideline for an offense that requires a mens rea higher than possessed by the defendant).

B. Harmlessness

The government argues that any error was harmless because the record supports a finding of premeditation, warranting application of § 2A2.1(a)(1) for attempted first-degree murder. An error in calculating the sentencing guidelines necessitates remand unless the beneficiary of the error—in this case, the government—proves the error was

[3] In its brief, the government also argued that Mr. Brooks' conception of the attempted-murder guideline would negate any difference between § 2A2.1(a)(1) and (a)(2). At oral argument, however, it conceded that the difference between first- and second-degree murder is premeditation, not intent. *See United States v. Kelly*, 1 F.3d 1137, 1140 (10th Cir. 1993). Because it is well established that premeditation and intent to kill are separate elements, *see United States v. Barrett*, 797 F.3d 1207, 1221 (10th Cir. 2015) (citing *United States v. Chanthadara*, 230 F.3d 1237, 1258 (10th Cir. 2000)), this argument fails.

harmless by a preponderance of the evidence. *See United States v. Keck*, 643 F.3d 789, 798 (10th Cir. 2011). An error is harmless if it "did not affect the district court's selection of the sentence imposed." *United States v. Kieffer*, 681 F.3d 1143, 1169 (10th Cir. 2012) (quoting *United States v. Lente*, 647 F.3d 1021, 1037–38 (10th Cir. 2011)). The only way to know whether, absent the error, "the district court would have imposed the same sentence" is if "the district court indicated at sentencing that the sentence imposed would be the same under multiple sentencing approaches, one of which was the correct approach." *Id.* "To say that the district court would have imposed the same sentence given a new legal landscape places us in the zone of speculation and conjecture—we simply do not know what the district court would have done." *Id.* (internal quotation marks, citation, and alterations omitted)

The government relies on an unpublished decision in which we upheld, on plain error review, the application of (a)(1) despite the fact that the district court did not make an explicit finding of intent to kill. *United States v. Alexander*, 2022 WL 2763689, at *8 (10th Cir. July 15, 2022). There, we concluded that "the district court's thought process was clearly evident from the record alone." *Id.* We explained the fact the defendant aimed a firearm at another person and pulled the trigger "certainly provided a plausible basis for the court to find that [he] intended to kill." *Id.*

Although *Alexander* is non-binding, it is also easily distinguishable from the instant case in two material ways. First, the defendant in *Alexander* did not object to the cross-reference at sentencing. *Id.* Therefore, in reaching our decision, we declined to

"impose a duty upon district courts to go beyond summarily adopting a PSR's factual findings without a specific objection or dispute." *Id.*

Second, unlike in *Alexander*, the district court's thought process here is not evident from the record alone. Despite Mr. Brooks' repeated argument that the cross-reference could not be applied without a finding of intent to kill, the court never made a specific finding on the issue. The court instead found Mr. Brooks acted with malice aforethought, arguably rejecting his argument. While it clearly contemplated that malice could be established by an intent to kill, it also contemplated it could be established through "a reckless and wanton disregard for human life." Rec., vol. III at 684.

At sentencing, the district court emphasized the number of shots fired when Mr. Brooks' argued there was no evidence of intent to kill, but this only indicates that the court believed there was some evidence of intent. It does not persuade us that the court certainly would have found Mr. Brooks intended to kill S.J. Likewise, the fact that the court found Mr. Brooks had the time and opportunity to consider the situation is not dispositive. *See Morgan*, 687 F.3d at 697 ("[T]he district court's finding that [defendant] 'had the ability to form the intent' to kill is not the equivalent of finding that he actually formed that intent."). Importantly, this finding was made in the context of explaining why Mr. Brooks did not act in the heat of passion, not in the context of establishing premeditation or intent. Overall, "the facts as presented do not inevitably lead to a finding of the specific intent to kill." *Id.* This is especially true because the government did not argue Mr. Brooks intended to kill S.J. at sentencing. Rather, it advanced theories

that Mr. Brooks intended to cause her serious bodily harm and acted with extreme recklessness.

We are not suggesting that the district court could not have reasonably found Mr. Brooks intended to kill S.J. We and other courts have held that specific intent to kill can be inferred from a defendant firing a gun aimed at an individual or firing multiple rounds. *See, e.g.*, *Oloa*, 2022 WL 17663807, at *6 n.2; *Alexander*, 2022 WL 2763689, at *7, 8; *United States v. Grant*, 15 F.4th 452, 458 (6th Cir. 2021); *Turnipseed*, 47 F.4th at 615; *United States v. Greer*, 57 F.4th 626, 629 (8th Cir. 2023); *Ngo v. Giurbino*, 651 F.3d 1112, 1114 (9th Cir. 2011). However, if the court made such an inference here, it is not clear from the record. We decline to engage in speculation or make factual determinations in the first instance.

Of note, the district court explicitly stated it would have reached the same 235-month sentence if it were only considering the witness tampering count. However, the 235-month sentence is clearly tied to the 188-to-235-month guideline range calculated by the court. As explained below, the guideline range could have been significantly lower without the attempted murder cross-reference. Therefore, the court's statement that it would have imposed the same sentence if it considered only the witness tampering count does not convince us it certainly would have imposed that sentence absent its legal error. Accordingly, we conclude that the error was not harmless.

C. Crime of Violence

Mr. Brooks argues for the first time on appeal that Oklahoma aggravated assault and battery is not a crime of violence under the guidelines and, therefore, that the district

court erred in adopting a base offense level under § 2K2.1(a)(4)(A). We review this claim for plain error. *See United States v. Wilkins*, 30 F.4th 1198, 1203 (10th Cir. 2022). "To satisfy the plain error standard, a defendant must show that (1) the district court erred; (2) the error was plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014).

In *Winrow*, we held that Oklahoma aggravated assault and battery under Okla. Stat. tit. 21, § 646 is not categorically a violent felony under the Armed Career Criminal Act ("ACCA"). 49 F.4th at 1382. Although the instant case involves the guidelines' definition of "crime of violence," the "ACCA's definition of 'violent felony' is virtually identical to the guidelines' definition of a 'crime of violence.'" *United States v. Williams*, 893 F.3d 696, 700 (10th Cir. 2018). "Thus, we have drawn on our ACCA case law when interpreting the guideline term 'crime of violence.'" *Id.* Accordingly, under *Winrow*, an Oklahoma aggravated assault and battery is not a crime of violence and the first prong of the plain error test is met.

Although *Winrow* was decided after Mr. Brooks' sentencing, and even after he filed his opening brief, "[a]n error is plain if it is 'clear or obvious at the time of the appeal.'" *United States v. Koch*, 978 F.3d 719, 726 (10th Cir. 2020) (quoting *United States v. Salas*, 889 F.3d 681, 686–87 (10th Cir. 2018)); *see also Henderson v. United States*, 568 U.S. 266, 279 (2013). The error is plain now, and therefore the second prong of the plain error test is met.

Mr. Brooks argues the third and fourth prongs of the plain error test are also met if we agree that the district court erred in cross-referencing the attempted murder guideline. He reasons that if the district court had not applied the cross-reference, the total offense level for the ammunition charge would have been 26 and the guideline range would have been 120 to 150 months. If the district court had neither applied the cross-reference nor treated the Oklahoma offense as a crime of violence, Mr. Brooks argues that his total offense level would have been 20, which is lower than the total offense level of 23 adopted by the court for the witness tampering charge. Moreover, he argues the guideline calculation for the witness tampering charge was tainted by the attempted murder cross-reference and that, without the cross-reference, his total offense level would have been 22 and the guideline range would have been 84 to 105 months.

Among other things, this argument presupposes that the district court on remand would not: (1) find Mr. Brooks harbored an intent to kill and continue to cross-reference to § 2A2.1; or (2) cross-reference to another offense, like aggravated assault under § 2A2.2. The district court also stated it would have sentenced Mr. Brooks to 235 months even if it were only considering the witness tampering count. This statement creates doubt about whether correcting the error would alter the court's sentencing decision. In sum, Mr. Brooks' argument about the impact of the court's error on his substantial rights invites us to make assumptions we cannot make with confidence.

The government concedes that *Winrow* controls this case and argues that, if we remand the case on the attempted murder guideline, we should leave this issue open for the district court to consider in the first instance. In light of the uncertain impact of the

error on Mr. Brooks' substantial rights, we agree and leave the issue open for the district court to consider on remand.

Conclusion

We hold that a defendant can only be sentenced under § 2A2.1 if he intended to kill. Accordingly, the district court erred in applying the cross-reference based on a finding of malice aforethought alone. Because we are not convinced this error was harmless, we vacate Mr. Brooks' sentence and remand for resentencing. On remand, the district court should consider the impact of *Winrow* if it becomes relevant to its guideline calculations.

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EID, Circuit Judge, dissenting.

After holding that "a defendant can only be sentenced under § 2A2.1 [the attempted murder cross-reference] if he intended to kill," the majority vacates and remands this case for the district court to make such an express finding. Maj. op. at 17. But the majority need not have reached the question of whether the district court erred by applying the attempted murder cross-reference. Instead, this case can be resolved on harmless error grounds because the district court's "error"—if there was an error—did not affect Brooks' sentencing outcome. Contrary to the majority's understanding, the record plainly demonstrates that the district court found Brooks had a specific intent to kill—a finding that accords with our case law about when courts can make such a conclusion. Accordingly, I would affirm the district court's sentencing decision and respectfully dissent from the majority's decision.

In *United States v. Alexander*, the defendant made claims similar to Brooks': "that the district court 'made no factual findings regarding the shooter's intent, and instead simply adopted the PSR's opinion that the appropriate cross reference was the guideline for attempted murder.'" No. 20-6154, 2022 WL 2763689, at *8 (10th Cir. July 15, 2022) (unpublished).[1] However, we upheld the district court's sentence on appeal, finding that "the district court's thought process was clearly evident from the record alone. . . .

[1] "Unpublished decisions are not precedential, but may be cited for their persuasive value." 10th Cir. R. 32.1 (2023); *see also* Fed. R. App. P. 32.1.

Alexander aimed his pistol at Hurst and pulled the trigger. This certainly provided a plausible basis for the court to find that Alexander intended to kill Hurst." *Id.*

The majority attempts to distinguish *Alexander* from this case on two grounds: (1) the defendant in *Alexander* did not object to the cross-reference at sentencing, and (2) the district court's thought process in *Alexander*, unlike in this case, was evident from the record alone. *See* maj. op. at 12-13. The majority is wrong on both grounds. Whether or not Brooks objected to the cross-reference at sentencing is immaterial to our analysis because the appropriateness of his sentence is based solely on the district court's factual findings. And there is abundant evidence in the record that the district court found that Brooks possessed the specific intent to kill. The district court noted at sentencing that, "[g]iven the extreme overreaction by [] Brooks to the events inside the beauty store, the amount of time between those events, and [] Brooks shooting at [S.J.] and the number of shots fired, I find by a preponderance of the evidence that [] Brooks' conduct was not merely the product of heat of passion." R. Vol. III at 685. Instead, the district court found that Brooks "had the time and opportunity to consider the situation" before shooting S.J., or, in other words, that he acted with premeditation.[2] *Id.* Additionally,

[2] The majority contends that having the "time and opportunity to consider the situation" is not dispositive, citing a Sixth Circuit case that distinguishes between having the *ability to form* the intent to kill and *actually forming* that intent. *See United States v. Morgan*, 687 F.3d 688, 696–97 (6th Cir. 2012). This is a distinction without a difference. The only logical reason that the district court would have raised Brooks' "time and opportunity to consider the situation" is if it believed that Brooks *used* that time and opportunity. Insofar as he did, the act of shooting at S.J. was deliberate and premeditated.

when defense counsel contended that there was nothing indicating "that [] Brooks acted with any specific intent to kill anyone," the district court responded, "[w]ell, he shot eight times." *Id.* at 661.

As the majority acknowledges, the district court's finding comports with our case law about when courts can conclude a specific intent to kill. As this Court noted in *Alexander*, pointing a gun at someone and pulling the trigger is a "plausible basis" for finding a specific intent to kill. 2022 WL 2763689, at *8. "The fact that [the defendant] aimed a lethal weapon directly at [the victim]—seemingly as [the victim] tried to get away—and then pulled the trigger is significant. This sequence of events . . . provides sufficient evidence of both malice aforethought and an intent to kill." *Id.* at *7. The majority cites a Sixth Circuit case, *United States v. Morgan*, 687 F.3d 688, 697 (6th Cir. 2012), to support its proposition that a finding of a specific intent to kill is necessary, but the Sixth Circuit has also "upheld a district court's finding of the intent to kill based solely on the fact that the defendant shot in the victim's direction such that the bullet could have struck him," as Brooks did in this case. *United States v. Caston*, 851 F. App'x 557, 564 (6th Cir. 2021) (unpublished).

Here, Brooks fired eight rounds at the vehicle in which S.J. sat, ultimately striking her in the buttocks. *See* R. Vol. III at 682. The majority concedes that "the district court emphasized the number of shots fired when Mr. Brooks' argued there was no evidence of intent to kill," but concludes that "this only indicates that the court believed there was *some evidence of intent*." Maj. op. at 13 (emphasis added). The majority's conclusion is

flat wrong. As noted above, defense counsel made the argument that there was no evidence that Brooks "acted with any specific intent to kill anyone," to which the district court responded, "[w]ell, he shot eight times." This is not a conclusion that there was "some evidence of intent," as the majority would have it, but rather, that there was evidence of a specific intent to kill. Further, the majority acknowledges that the events leading up to the shooting demonstrate that Brooks had the "time and opportunity to consider the situation," but concludes that this is not enough to show that the district court would *actually* have found a specific intent to kill. *Id.* Again, the majority misreads the district court, which emphasized that the shots were the culmination of a series of violent actions on Brooks' part: Brooks "confronted a male customer who had hugged [S.J.] and pulled a knife during that confrontation. He then . . . [chased S.J.] around their car while holding the knife. . . . [H]e yelled at her and attempted to break the window of the car." R. Vol. III at 682. As the district court noted at sentencing, "[t]he nature and circumstances of the crimes at issue are particularly concerning," and the fact that no one was killed "was only a matter of pure luck." *Id.* at 717–18. Based on these findings, the district court was entirely justified in concluding that Brooks possessed a specific intent to kill S.J., and any "error" the district court may have made did not affect the sentence it imposed.

For these reasons, I respectfully dissent.