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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANNON JAMES KEPLER,

Defendant - Appellant.

No. 22-5006

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:20-CR-00276-GKF-1)

Kathleen Shen, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Denver Colorado, for the Defendant - Appellant.

Leena Alam, Assistant United States Attorney (Clinton J. Johnson, United States Attorney with her on the brief), Tulsa, Oklahoma, for the Plaintiff - Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

Defendant-Appellant Shannon Kepler appeals his conviction for causing death by discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(j)(1). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*[1]

Mr. Kepler and his wife Gina Kepler both worked as officers for the Tulsa Police Department. During the summer of 2014, the Keplers began to experience conflict with their 18-year-old adopted daughter, Lisa.[2] Lisa was acting out, fighting with their other children, and engaging in other rebellious behavior. Mr. Kepler gained access to Lisa's Facebook account to monitor her activity. Eventually, the Keplers kicked Lisa out of their home and dropped her off at a homeless shelter.

Mr. Kepler continued to monitor Lisa's Facebook account and discovered she was dating a man named Jeremey Lake. Using police department resources, Mr. Kepler obtained Mr. Lake's address, phone number, and physical description.

On the same day he obtained this information, Mr. Kepler armed himself with his personal revolver and drove his SUV to Mr. Lake's address. He spotted Lisa and Mr. Lake walking together near the residence. Mr. Kepler stopped the SUV in the middle of the road, rolled down the window, and called out to Lisa. Lisa refused to talk to him and walked away. Mr. Kepler exited the vehicle to follow her.

At that point, Mr. Lake approached Mr. Kepler to introduce himself and shake his hand. Mr. Kepler drew his revolver. Mr. Lake tried to run away. Mr. Kepler

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[1] This factual summary derives from the evidence presented at trial, stated in the light most favorable to the jury's verdict. *See United States v. Kaspereit*, 994 F.3d 1202, 1207 (10th Cir. 2021).

[2] For clarity, we refer to Gina and Lisa Kepler as "Gina" and "Lisa."

shot him, once in the chest and once in the neck. Mr. Kepler then turned and fired shots in the direction of Lisa and Mr. Lake's half-brother, M.H., who was 13 years old.

Mr. Kepler then fled. Witnesses called 911. Paramedics arrived and declared Mr. Lake deceased. Later that night, Mr. Kepler turned himself in to the Tulsa Police Department. The same evening, witnesses to the shooting—including Lisa—were transported from the crime scene to the police station and interviewed by officers.

Mr. Kepler later claimed that Mr. Lake had a "shiny semiautomatic handgun" that he pointed at Mr. Kepler. ROA, Vol. I at 1240. But the evidence at trial showed that Mr. Lake had no gun: (1) no witness at the scene saw Mr. Lake holding a weapon, (2) no witness had ever seen Mr. Lake with a handgun, (3) Mr. Lake did not own a "shiny semiautomatic handgun," and (4) no weapon of any sort was discovered at the scene. *See id*. at 474, 558, 567-68, 573, 626-27, 636-37, 643-44, 646, 749, 774, 792-93, 813, 826, 925, 928-29, 939.

A few days after Mr. Lake's death, a janitor found a chrome pistol inside a garbage can in a Tulsa Police Department interview room. He could not remember the last time the garbage can had been emptied, so he did not know when the pistol might have been deposited there. On the night of Mr. Lake's death, only Lisa had been interviewed in that room. She had been transported to the police station directly from the scene.

B. ***Statutes***

This appeal requires analysis of two sets of statutes. We provide an overview of them here to facilitate understanding the district court proceedings.

1. **Federal Murder Statute**

The federal murder statute, 18 U.S.C. § 1111(a), states

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Thus, second-degree murder is the "killing of a human being with malice aforethought," but without the specific circumstances required for first-degree murder. 18 U.S.C. § 1111(a). Malice is the mens rea element for first- and second-degree murder.[3]

Section 1111(a) does not define "malice." Courts use common law legal principles to derive its meaning. *See United States v. Serawop*, 410 F.3d 656, 662 (10th Cir. 2005). This circuit has defined "malice," "for purposes of second degree murder, [to] require[] either: (1) general intent to kill, or (2) intent to do serious

[3] The "mens rea" is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." *Mens Rea*, Black's Law Dictionary (11th ed. 2019).

bodily injury; (3) depraved heart recklessness, or (4) a killing in the commission of a felony that is not among those specifically listed in the first degree murder statute." *United States v. Visinaiz*, 428 F.3d 1300, 1307 (10th Cir. 2005).

We refer to the latter two categories as "depraved-heart murder" and "second-degree felony murder." We also refer to felonies that are not listed in the first-degree murder provision as "non-enumerated felonies."

2. **Title 18 U.S.C. §§ 924(j)(1) and 924(c)**

Title 18 U.S.C. § 924(j)(1) provides: "A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life."[4]

Section 924(j)(1) cross-references § 924(c). Section 924(c)(1)(A) refers to "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." Section 924(c)(3)(A), known as the "elements clause" or the "force clause," defines "crime of violence" as "an offense that is

[4] We have held that § 924(j)(1) is a discrete offense. *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 (10th Cir. 2018).

a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[5]

C. ***Procedural History***

Mr. Kepler was initially charged with murder in Oklahoma state court. ROA, Vol. I at 102-03. A jury convicted him of "manslaughter in the first degree – heat of passion." *Id*.[6] He appealed. While the appeal was pending, the Supreme Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which held that Congress had not disestablished the Muscogee (Creek) Reservation. Because Mr. Kepler was a Creek tribal member at the time of the crime, ROA, Vol. I at 1073, and because, under *McGirt*, his crime occurred on the Muscogee (Creek) Reservation, *id*. at 304,

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[5] Section 924(c)(3)(B), the "residual clause," also defines "crime of violence," but the Supreme Court struck it down as unconstitutionally vague. *See United States v. Davis*, 139 S. Ct. 2319, 2324 (2019).

[6] As the district court recounted:

> Mr. Kepler was tried four times in state court. In the first trial, in November 2016, the jury convicted Mr. Kepler of two counts of reckless conduct with a firearm, but declared itself hung with respect to the murder charge. The second trial, which occurred in February 2017, resulted in a hung jury as to murder in the first degree. The third trial, which occurred in June and July 2017, also resulted in a hung jury as to the murder count. In October of 2017, the fourth jury convicted Mr. Kepler of the lesser-included offense manslaughter in the first degree—heat of passion and sentenced him to fifteen years imprisonment. Mr. Kepler appealed his convictions to the Oklahoma Court of Criminal Appeals.

United States v. Kepler, N. 20-CR-00276, 2021 WL 4027203, at *1 (N. D. Okla. Sept. 3, 2021) ("*Kepler*") (granting in part and denying in part Mr. Kepler's motion for judgment of acquittal under Fed. R. Crim. P. 29(c)(1)).

the Oklahoma Court of Criminal Appeals concluded the State of Oklahoma lacked jurisdiction to prosecute him. *Id*. at 274-75.

A federal grand jury indicted Mr. Kepler for Count 1 - first-degree murder in Indian country[7] in violation of 18 U.S.C. § 1111; Count 2 - causing death by discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(j)(1); and Count 3 - assault with a dangerous weapon in Indian country in violation of 18 U.S.C. § 113(a)(3).[8] ROA, Vol. I at 28-30. For the Count 2 § 924(j)(1) charge, the indictment listed first-degree or second-degree murder as the "crimes of violence" that could support a conviction. *Id*. at 29. The indictment did not charge Mr. Kepler with second-degree murder because the statute of limitations for that offense had run.

At trial, Mr. Kepler admitted he shot Mr. Lake. *Id.* at 1276-80. He did not contend that he acted out of anger, provocation, or passion. *Id*. Instead, he said he responded in self-defense to Mr. Lake's threatening him with a chrome pistol. *Id*. at 1276-82. He entered into evidence the pistol discovered in the trashcan and suggested that one of the witnesses took the pistol from Mr. Lake's body and smuggled it into the police station. *See, e.g., id.* at 1365-66.

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[7] Mr. Kepler was prosecuted under the Major Crimes Act, which provides that "[a]ny Indian who commits" certain enumerated offenses within "Indian country" "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[8] Count 3 was based on Mr. Kepler firing his revolver at M.H., Mr. Lake's half-brother. *See* ROA, Vol. I at 30.

The jury rejected Mr. Kepler's self-defense argument but did not find him guilty of Count 1, first-degree murder. Instead, it convicted him of Count 2, violating § 924(j)(1), and of Count 3, assault with a dangerous weapon. As to Count 2, the jury designated second-degree murder on the verdict form as the predicate "crime of violence" for the § 924(j)(1) conviction. The jury thus found that Mr. Kepler caused the death of another in Indian country through the use and discharge of a weapon during and in relation to the commission of second-degree murder.

Mr. Kepler moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c)(1), arguing his Count 2 conviction for violation of § 924(j)(1) should be dismissed because its second-degree murder predicate is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). ROA, Vol. I at 1484-86. The district court denied this part of the motion.[9] It sentenced Mr. Kepler to 300 months in prison. This appeal followed.

II. **DISCUSSION**

On appeal, Mr. Kepler argues:

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[9] In addition to arguing in his Rule 29(c)(1) motion that his § 924(j)(1) conviction should be dismissed because second-degree murder is not a crime of violence, he also argued that it should be dismissed because the statute of limitations had run on second-degree murder. The district court rejected that argument, reasoning that because a § 924(j)(1) violation is punishable by death, it has no statute of limitations. *Kepler*, 2021 WL 4027203, at *4; *see also* 18 U.S.C. § 3281 (no statute of limitations "for any offense punishable by death"). Mr. Kepler does not challenge this determination on appeal.

Mr. Kepler also argued in his motion that the statute of limitations had run on his Count 3 charge for assault with a dangerous weapon. The district court agreed and granted judgment of acquittal. *Kepler*, 2021 WL 4027203, at *3-4. That ruling is not part of this appeal.

(A) Second-degree murder is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) and thus is not a predicate offense for his § 924(j)(1) conviction;

(B) The district court plainly erred in instructing the jury on the malice element of first- and second-degree murder;

(C) The Government's attorneys committed reversible prosecutorial misconduct at various points in the trial; and

(D) His conviction should be reversed based on cumulative error.

We reject these arguments and affirm.

A. ***Second-Degree Murder Is a "Crime of Violence" Under § 924(c)(3)(A)***

Mr. Kepler appeals his conviction under § 924(j)(1), arguing that federal second-degree murder is not categorically a crime of violence under § 924(c)(3)(A). We review de novo whether an offense qualifies as a crime of violence. *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 (10th Cir. 2018).

1. **Legal Background**

a. *Malice*

As noted above, malice is the mens rea element for second-degree murder. This court has said that it "requires either: (1) general intent to kill, or (2) intent to do serious bodily injury; (3) depraved heart recklessness, or (4) a killing in the commission of a felony that is not among those specifically listed in the first degree murder statute." *Visinaiz*, 428 F.3d at 1307.

Mr. Kepler contends that the third and fourth types of second-degree murder—depraved-heart murder and second-degree felony murder—are not crimes of violence under § 924(c)(3)(A). We conclude otherwise. As explained below, we also

conclude that, as a necessary part of our analysis of Mr. Kepler's felony-murder malice argument, the other types of malice—general intent and intent to do serious bodily injury—satisfy § 924(c)(3)(A).

The following provides additional background on the mental states required to commit depraved-heart murder and second-degree felony murder.

i. Depraved-heart murder

Second-degree murder "is a general intent crime," meaning the defendant need not act with a specific intent to kill the victim. *See United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000). For "depraved-heart" malice, a jury may find general intent if the defendant's conduct was so "reckless and wanton" that the jury "is warranted in inferring that [the] defendant was aware of a serious risk of death or serious bodily harm." *Id*. (quotations omitted). "Second-degree murder involves reckless and wanton disregard for human life that is extreme in nature." *Id*. at 1229.[10]

ii. Second-degree felony murder

Our cases have also explained how the mens rea requirements for first-degree and second-degree felony murder differ. *United States v. Chanthadara*, 230 F.3d 1237, 1258 (10th Cir. 2000). For first-degree felony murder, "malice aforethought is proved by commission of the [separate enumerated] felony" listed in 18 U.S.C.

[10] "The concepts of 'depraved heart' and 'reckless and wanton, and a gross deviation from a reasonable standard of care' are functionally equivalent." *Wood*, 207 F.3d at 1228.

§ 1111(a), so "there is no actual intent requirement with respect to the homicide." *Id*. "In contrast, the 'malice aforethought' that must be established for second-degree [felony] murder requires proof of malice with respect to the homicide"—the prosecution must prove both the commission of a separate non-enumerated felony and malice for the homicide itself. *Id*.

b. *Section 924(c)(3)(A) "crime of violence" and the categorical approach*

We must determine whether federal second-degree murder is a "crime of violence" under § 924(c)(3)(A). To do so, "we apply the categorical approach, which looks only to the fact of conviction and the statutory definition of the prior offense, and does not generally consider the particular facts disclosed by the record of conviction." *United States v. Baker*, 49 F.4th 1348, 1355 (10th Cir. 2022) (quotations and alterations omitted). "[W]e consider whether the elements of the offense are of the type that would justify its inclusion as a crime of violence, without inquiring into the specific conduct of a particular offender." *Id*. (quotations and alterations omitted); *see also Stokeling v. United States*, 139 S. Ct. 544, 554 (2019).

For this analysis, we "presume that an offender's conviction rested upon nothing more than the least of the acts criminalized" by the statute defining the putative crime of violence, and then "determine whether even those acts are encompassed by § 924(c)(3)(A)." *Id*. (quotations and alterations omitted). "[I]f the statute sweeps more broadly" than § 924(c)(3)(A)—here, if some conduct would garner a second-degree murder conviction but would not satisfy the "crime of violence" definition—then second-degree murder is not a crime of violence and

cannot serve as a predicate for a § 924(j)(1) conviction. *See Descamps v. United States*, 570 U.S. 254, 261 (2013); *see also Mathis v. United States*, 579 U.S. 500, 509 (2016). This is so even when, as here, the defendant's conduct leading to the underlying second-degree murder predicate would satisfy § 924(c)(3)(A)'s crime of violence definition. *See id.*; *Descamps*, 570 U.S. at 257.

Thus, federal second-degree murder is a "crime of violence" only if the conduct underlying every federal second-degree murder involves "the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). The underlined words in the statutory language below are the primary focus of our categorical approach analysis in this appeal.

Federal Second-Degree Murder 18 U.S.C. § 1111(a)	**Crime of Violence 18 U.S.C. § 924(c)(3)(A)**
"[U]nlawful killing of a human being with malice aforethought," which is: "(1) general intent to kill, or (2) intent to do serious bodily injury; (3) depraved heart recklessness, or (4) a killing in the commission of a felony that is not among those specifically listed in the first degree murder statute." 18 U.S.C. § 1111(a); *Visinaiz*, 428 F.3d at 1307.	A "crime of violence" is "an offense that is a felony and [] has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

c. Borden v. United States

The text of § 924(c)(3)(A) does not use any of the words that commonly signify a mens rea element—e.g., purpose, intent, knowledge, recklessness. But in *Borden v. United States*, 141 S. Ct. 1817 (2021), a Supreme Court plurality said the word "against" "incorporate[es] a *mens rea* requirement." *Id*. at 1827 (plurality

opinion). The question presented was whether crimes that can be committed with a "reckless" state of mind qualify as violent felonies under a provision of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which uses near-identical language to define "violent felonies" as § 924(c)(3)(A) uses to define "crimes of violence." *Id*. Justice Kagan, writing for a plurality, determined that a criminal statute that may be violated with only "reckless" conduct—"consciously disregard[ing] a substantial and unjustifiable risk" of harm to others, *id*. at 1824—does not satisfy § 924(e)'s elements clause. *Id*. at 1825.[11]

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[11] Justices Breyer, Sotomayor, and Gorsuch joined Justice Kagan's plurality opinion. *See* 141 S. Ct. at 1820-21. Justice Thomas concurred. *Id*. at 1834. Five justices thus concluded that a criminal offense with a reckless mens rea does not qualify as a violent crime entailing "use of physical force against the person . . . of another." *Id.* at 1825.

Justice Kavanaugh, joined by Chief Justice Roberts and Justices Alito and Barrett, dissented, positing that "the phrase 'against the person of another' . . . has zero to do with the required *mens rea* for predicate violent felonies." *Id*. at 1839 (Kavanaugh, J., dissenting).

"In the context of fractured Supreme Court opinions, [] of the various opinions concurring in the judgment, the one that sets out the narrowest decisional basis represents the opinion of the Court." *United States v. Shakespeare*, 32 F.4th 1228, 1237 (10th Cir. 2022) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). An opinion sets out the narrowest decisional basis if it "is a logical subset of the other opinion(s) concurring in the judgment." *Id*. at 1238 (quotations omitted).

Here, both parties rely on the plurality, and we have previously cited it as controlling. *See, e.g., United States v. Ash*, 7 F.4th 962, 963 (10th Cir. 2021). We conclude that the *Borden* plurality is a "logical subset" of Justice Thomas's concurrence and therefore the plurality "set[] out the narrowest decisional basis" for the Court's holding. *Shakespeare*, 32 F.4th at 1237-38.

Both the plurality and concurrence interpret the § 924(c)(3)(A) phrase "use of physical force against the person of another." *Borden*, 141 S. Ct. at 1822. As discussed below, the plurality focused on the word "against," stating that a defendant uses force "against" another person only if he "direct[s] his action at, or target[s], another individual." *Id*. at 1825. Justice Thomas, relying on his dissent in *Voisine v. United States*, 579 U.S. 686 (2016), focused only on the phrase "use of physical

The plurality focused on § 924(e)'s words "against the person or property of another," particularly "against." *Id*. It said that to use force "against" another person "demands that the perpetrator direct his action at, or target, another individual," *id*., and "[r]eckless conduct is not aimed in that prescribed manner." *Id*. In support, the plurality noted that "against another" modifies "use of physical force." *Id.* at 1826.

To show how a "knowing" mens rea satisfies "against the person of another" in § 924(e) and a "reckless" mens rea does not, the plurality contrasted two hypothetical scenarios. In the first, a "getaway driver sees a pedestrian in his path

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force." *Borden*, 141 S. Ct. at 1835. He said that "use of physical force" "appl[ies] only to intentional acts designed to cause harm." *Id*. (quoting *Voisine*, 579 U.S. at 713 (Thomas, J., dissenting)).

In *Voisine*, Justice Thomas presented a scenario in which "[a] person throws a plate in anger against the wall near where his wife is standing," and "[t]he plate shatters, and a shard injures her." 579 U.S. at 705 (Thomas, J., dissenting). According to Justice Thomas, even though the husband "did not intend to direct that force at" his wife, "[t]he Angry Plate Thrower . . . intentionally unleashed physical force" and therefore committed an intentional act designed to cause harm. *Id*.

A person thus can satisfy Justice Thomas's view of "use of physical force" without directing his conduct at another person, but this would not satisfy the plurality's interpretation of "against." Because Justice Thomas's reading of § 924(c)(3)(A) sweeps in conduct that the plurality's does not, the plurality is a logical subset of Justice Thomas's concurrence.

Every court to address the application of *Borden* in depraved-heart murder cases has reached the same conclusion. For example, in *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022), the Ninth Circuit cited the plurality as controlling. *Id*. at 1093. The dissent agreed, explaining that "the plurality reasons that the phrase 'use of force' must be modified by the phrase 'against another' in order to require that the perpetrator consciously 'direct his action at, or target, another individual,'" whereas Justice Thomas focused on the phrase "use of physical force" without otherwise narrowing it. *Id*. at 1100 n.2 (Ikuta, J., dissenting in part). *See also United States v. Manley*, 52 F.4th 143, 147-48 (4th Cir. 2022) (applying the *Borden* plurality's reasoning); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344 (11th Cir. 2022) (same); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022) (same).

but plows ahead anyway, knowing the car will run him over." *Id*. at 1827. This conduct satisfies the elements clause because the driver "consciously deployed the full force of an automobile at another person." *Id*. In the second scenario, "a commuter [], late to work, decides to run a red light, and hits a pedestrian whom he did not see." *Id*. The commuter, though reckless, does not satisfy the elements clause because "[h]e has not trained his car at the pedestrian understanding he will run him over." *Id*.

In a footnote, the *Borden* plurality recognized that some criminal statutes require mental states comparable to, but more culpable than, ordinary recklessness, such as "depraved heart" or "extreme recklessness." *Id*. at 1825 n.4. The plurality said its holding about reckless conduct did not address whether such statutes qualify as crimes of violence under the elements clause. *Id*.; *see also id*. at 1856 n.21 (Kavanaugh, J., dissenting) (noting that the plurality opinion has no impact on whether depraved-heart murder is a crime of violence).

2. **Application**

This appeal concerns whether second-degree murder is a crime of violence, specifically whether the malice element of second-degree murder satisfies the crime of violence definition of § 924(c)(3)(A), the elements clause.

Mr. Kepler contends that second-degree murder is not a crime of violence under § 924(c)(3)(A) because neither depraved-heart murder nor second-degree felony murder categorically involve the use of force against another person. We hold otherwise.

a. *Depraved-heart murder*

i. Section 924(c)(3)(A), *Borden*, and "against the person of another"

We hold that depraved-heart second-degree murder is a crime of violence under § 923(c)(3)(A). The *Borden* plurality decided that offenses with "reckless" mens rea elements are not crimes of violence. It declined to address "depraved heart recklessness," which it recognized as a more culpable mental state than ordinary recklessness. 141 S. Ct. at 1825 n.4.

Mr. Kepler presents two arguments.

First, he contends that depraved-heart recklessness does not satisfy the "against" requirement of § 924(c)(3)(A), as interpreted by the *Borden* plurality, because a defendant can commit depraved-heart murder without directing conduct at another person. Aplt. Br. at 15-16. We disagree. The *Borden* plurality interpreted "against" to mean "direct[ed]" or "aimed." 141 S. Ct. at 1825. Depraved-heart recklessness fits that definition.

Second, Mr. Kepler asserts that depraved-heart murder does not satisfy the "person of another" requirement of § 924(c)(3)(A) because an offense is a crime of violence only if the perpetrator must target "a *specific* person[]." Aplt. Br. at 18. Again, we disagree. The *Borden* plurality did not interpret the words "person of another," and the phrase is not limited to a particular individual.

We develop these points further below.

1) "Against"

Mr. Kepler's argument that depraved-heart second-degree murder is not a crime of violence because "against" in § 924(c)(3)(A) does not encompass depraved-heart recklessness, Aplt. Br. at 13, requires us to determine whether depraved-heart recklessness satisfies the *Borden* plurality's interpretation of "against."

Malice is the mens rea element of second-degree murder, and depraved-heart recklessness is one way to prove malice. The *Borden* plurality said that "against" in § 924(c)(3)(A) is a mens rea requirement. 141 S. Ct. at 1827. Thus, if "against" another person encompasses depraved-heart recklessness, then depraved-heart murder is a crime of violence.

Unlike reckless conduct, depraved-heart reckless conduct meets the *Borden* plurality's understanding of the word "against"—conduct "direct[ed]" or "aimed" toward another person. *Id*. at 1825. This is so because to kill with a "depraved heart," a defendant must act with "a gross deviation from a reasonable standard of care," and be "aware of a serious risk of death or serious bodily harm" to another. *Serawop*, 410 F.3d at 663 n.4 (quotations omitted). A depraved-heart murderer must consciously use deadly force "against" someone.

Under the *Borden* plurality's scenarios, the knowing getaway driver directed or aimed his conduct at another; the reckless commuter driver did not. A depraved-heart driver would fall somewhere in between. Under our definition of depraved-heart recklessness, he would have consciously "use[d] force against the person . . . of

another." § 924(c)(3)(A). For example, a driver would act with a depraved heart when driving at a group of people on a crosswalk, conscious of likely hitting at least one of them, thereby "aiming" the use of force as described in the *Borden* plurality.

As another example, a depraved-heart murderer who fires randomly into a crowd might not intend to kill any specific person—and might not be aware of which person is likely to be hit—but the conduct is "aimed" or "directed" at another. In *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc) (quotations omitted), *cert. denied*, 143 S. Ct. 340 (2022), the Ninth Circuit reinforced this point, stating that depraved-heart "murder does not require conduct intended to harm, nor that a defendant target his conduct at any particular individual, but . . . the conduct is fairly characterized as extreme and necessarily oppositional because a defendant certainly must be aware that there are potential victims before he can act with indifference toward them." *Id*. at 1095.[12]

The foregoing highlights the differences among mens reas. A "knowing" mens rea requires the perpetrator to be "practically certain" that his conduct will harm a

[12] *See also Bell v. Watkins*, 692 F.2d 999, 1004 n.7 (5th Cir. 1982) (discussing state definition of depraved-heart murder as "commission of an act eminently dangerous to others . . . regardless of human life, although without any premeditated design to effect the death of any particular individual"); *Harvey v. State*, 681 A.2d 628, 642 (Md. Ct. Spec. App. 1996) (in a homicide case involving an accidental shooting, "a depraved-heart theory would not be available to the prosecution unless the defendant were aware of the actual or probable presence of the unintended victim within the field of fire"); *State v. Young*, 40 S.E. 334, 334 (W. Va. 1901) ("If a father, with such a depraved heart, should shoot into a crowd of persons and kill his own son, he would be guilty of murder, although he might love his son dearly, and there was no unfriendly feeling between them." (quotations omitted)).

specific person. *Voisine v. United States*, 579 U.S. 686, 692-93 (2016) (quotations omitted). Depraved heart recklessness requires a defendant to use force with the awareness it will create a substantial risk of death or serious injury for another. *Serawop*, 410 F.3d at 663 n.4. Ordinary recklessness does not require defendants to be aware of potential victims.[13] *See Borden*, 141 S. Ct. at 1827 (a commuter who runs a red light and "hits a pedestrian whom he did not see" has acted recklessly).

We conclude that depraved-heart second-degree murder requires the perpetrator to "aim" or "direct" conduct at a person, thus satisfying the *Borden* plurality's requirement that conduct be "against" another.

2) "Person of another"

Mr. Kepler argues that depraved-heart second-degree murder is not a crime of violence because "person of another" in § 924(c)(3)(A) requires a perpetrator to be aware of a specific victim, which is narrower than depraved-heart recklessness. Aplt. Br. at 15 (arguing *Borden* and § 924(c)(3)(A) require "conscious targeting of *the victim*"); *id*. at 18 (suggesting a crime of violence must require the perpetrator to "kn[o]w that his conduct posed a risk to a *specific* person's life"). This argument requires us to interpret "person of another."

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[13] *See Borden*, 141 S. Ct. at 1827 (the "knowing" getaway driver "plows ahead anyway, knowing the car will run [the pedestrian] over"); *United States v. Báez-Martínez*, 950 F.3d 119, 127 (1st Cir. 2020) (a depraved-heart murderer must simply "be aware that there are potential victims" and take action "practical[ly] certain[]" to injure them); *Voisine*, 579 U.S. at 691 (simple recklessness means "to consciously disregard a substantial risk that the conduct will cause harm to another" (quotations and alterations omitted)).

Mr. Kepler's argument is viable only if § 924(c)(3)(A) requires a perpetrator to have a specific person in mind when committing the offense. That is, "person of another" must (1) be part of § 924(c)(3)'s mens rea requirement along with "against," and (2) mean "specific person." If both were so, second-degree murder would not be a crime of violence because depraved-heart recklessness may establish malice when the defendant directs his conduct at another person, whether or not he has a specific person in mind. But neither is so. Mr. Kepler fails to show how the text of § 924(c)(3)(A) could support his argument, nor could he.

First, the *Borden* plurality identified only "against" in § 924(c)(3)(A) as the mens rea requirement for a crime of violence. It did not say that other words in the elements clause, such as "person of another," concern a perpetrator's mental state. We see none that do because the remaining language in the clause describes the actus reus of a crime of violence.[14] The words "person of another" simply require that the perpetrator use physical force on a person other than himself.[15] Because "person of another" does not

[14] The "actus reus" is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability." *Actus Reus*, Black's Law Dictionary (11th ed. 2019).

[15] This accords with the common meaning of the word "another." Webster's defines "another" as "one other than oneself." *Another*, Webster's Third New International Dictionary 89 (1976); *accord Another*, American Heritage Dictionary 74 (5th ed. 2011) (defining "another" as "[a]n additional one" or "a different one"). Thus, "the person . . . of another" in § 924(c)(3)(A) means a person "other than" the perpetrator of the crime of violence.

concern mens rea, it does not affect whether a depraved heart mental state satisfies the elements clause.[16]

Second, even if § 924(c)(3)(A)'s mens rea requirement goes beyond "against" to include "the person of another," it still encompasses depraved heart recklessness. This is so because the key language—"use of physical force against the person or property of another"—does not say "specific person," only "person . . . of another." Thus, the statute does not require use of force against a particular individual, just another person. Whether or not the perpetrator has a specific victim in mind, the crime is no less violent. *See Begay*, 33 F.4th at 1095 (finding depraved-heart murder is a crime of violence even though it "does not require . . . that a defendant target his conduct at any particular individual").

Other courts of appeals have held that a statutory reference to the "person of another" does not require the defendant to have a specific "other person" in mind when committing the crime. For example, in *United States v. Linehan*, 835 F. App'x 914 (9th Cir. 2020) (unpublished), the Ninth Circuit considered 18 U.S.C. § 875(c), which forbids transmitting a "threat to injure the person of another." *Id*. at 917. The defendant was convicted of violating this statute after threatening to firebomb an embassy. *Id*. at 916. On appeal, he argued that he was not guilty because he did not "threaten [] a specific natural person." *Id*. at 917. The Ninth Circuit rejected this

[16] *See also Janis v. United States*, --- F.4th ----, 2023 WL 4540528, at *6 (8th Cir. July 14, 2023) ("It would overstate the holding of *Borden* to require that every use of force against the person of another must purposefully target the specific person who is victimized.").

argument, finding that § 875(c) "does not require proof that a defendant threatened to injure any particular person," and his threat to injure all of "the people that [he] believe[d] are inside the [embassy]" satisfied the statute. *Id.*; *see also United States v. Teague*, 884 F.3d 726, 729 (7th Cir. 2018) (Illinois murder statute was categorically a crime of violence under the elements clause of U.S.S.G. § 4B1.2 even though the "doctrine of transferred intent" permitted murder convictions when a defendant "kills an unintended victim" (quotations omitted)).

When Congress has intended for a defendant to have a specific victim in mind, it has said so. *See, e.g.*, 18 U.S.C. §§ 1028(a)(7), (d)(7) (outlawing use of "a means of identification of another person" to commit fraud, and defining "means of identification" as "any name or number that may be used . . . to identify a specific individual"); 18 U.S.C. § 1514(d)(1)(B) (creating a civil cause of action to enjoin harassment of witnesses, and defining "harassment" as "a serious act or course of conduct directed at a specific person"). Congress thus knows how to legislate a specific-victim mens rea, and "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) (quoting *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005)).

In short, Mr. Kepler's arguments fail because (1) even if "person of another" means "specific person," it concerns actus reus, not mens rea, and thus is not a crime of violence requirement; and (2) even if "person of another" were a mens rea requirement, it does not refer to a specific victim, so depraved-heart recklessness

satisfies it. We conclude that the "person of another" in § 924(c)(3)(A) is not a mens rea requirement, and even if it were, it does not require the perpetrator to have a specific victim in mind when deploying deadly force.

* * * *

The elements clause of § 924(c)(3)(A) requires that a defendant use force "against"—aim or direct his conduct at—"the person . . . of another." As shown above, depraved-heart murder requires that the perpetrator direct conduct at another person, though not necessarily a particular person. And § 924(c)(3)(A) does not say that a defendant commits a crime of violence only with a specific victim in mind. We therefore conclude that depraved-heart murder is categorically a crime of violence.

ii. Out-of-circuit support

In reaching this conclusion, we join every other court of appeals to have considered this issue. *See Begay*, 33 F.4th at 1093-96 (because depraved-heart recklessness requires extreme indifference "*toward human life*," it is "oppositional" in the manner described in *Borden*); *Janis v. United States*, --- F.4th ----, 2023 WL 4540528, at *4-6 (8th Cir. July 14, 2023) (holding that the "extreme recklessness" standard required by depraved-heart murder "is close to knowledge and far from ordinary recklessness," and "necessarily denotes the oppositional conduct that the force clause requires"); *United States v. Manley*, 52 F.4th 143, 151 (4th Cir. 2022) (extreme recklessness "necessarily requires conduct that uses physical force *against* another"); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344 (11th Cir. 2022)

(holding that the Georgia murder statute, which includes killings committed with "an abandoned and malignant heart," is a "crime of violence" because it requires a mens rea that "goes beyond mere recklessness"); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022) (depraved-heart recklessness extends beyond ordinary recklessness, and "*Borden* didn't extend" to "more culpable mental state[s] than recklessness").

In *Begay*, the Ninth Circuit understood depraved-heart murder to require "depravity and such extreme and wanton disregard for human life as to constitute 'malice'. . . ." 33 F.4th at 1094 (quotations omitted). It recognized that "[s]econd-degree murder does not require . . . that a defendant target his conduct at any particular individual." *Id*. at 1095. It reasoned that depraved-heart murder "requires finding that the defendant acted with *extreme indifference*, and that the indifference was *toward human life*," meaning the defendant must have "be[en] aware that there are potential victims before he can act with indifference toward them." *Id*. at 1094-95 (quotations omitted). Thus, a depraved-heart murderer must have "actively employed force (i.e., 'used' force) against the person of another." *Id*. at 1095 (quotations and alterations omitted); *see also Báez-Martínez*, 950 F.3d at 127 (depraved-heart recklessness requires actions that result in "a much higher probability—a practical certainty—that injury to another will result," and so

categorically involves the conscious deployment of force under the elements clause of the ACCA).[17]

iii. Drunk-driving cases

Mr. Kepler contends that depraved-heart second-degree murder is broader than § 924(c)(3) because four Tenth Circuit second-degree murder cases involved drunk driving. Aplt. Br. at 16. But these cases are distinguishable and inapposite. Although some hold that drunk driving is relevant to whether the defendant acted with depraved-heart recklessness, none concerned the sufficiency of the evidence, none said drunk driving suffices to prove depraved-heart murder, and none informs a categorical approach analysis under § 924(c)(3)(A).[18] We discuss the cases below.

[17] Every district court to have considered the question has reached the same result. *United States v. Torres*, No. 1:19-CR-3333-WJ, 2023 WL 2821562, at *2 (D.N.M. Apr. 7, 2023) (holding that second-degree depraved-heart murder as defined in the Tenth Circuit is categorically a crime of violence); *Janis v. United States*, No. 5:20-CV-5043-CBK, 2022 WL 1500691, at *4-5 (D.S.D. May 12, 2022) (holding that depraved-heart recklessness satisfies *Borden*'s "against" requirement); *United States v. Thompson*, No. CR 14-302 (MJD), 2022 WL 138524, at *3 (D. Minn. Jan. 14, 2022) (same); *United States v. Jenkins*, No. CR DKC 12-0043, 2021 WL 5140198 (D. Md. Nov. 4, 2021) (holding second-degree depraved-heart murder as defined in the District of Columbia is categorically a crime of violence), *appeal dismissed*, No. 22-6039, 2022 WL 18145581 (4th Cir. Nov. 29, 2022); *Little v. United States*, No. 3:16-CV-314-MOC, 2021 WL 4494628, at *4-5 (W.D.N.C. Sept. 30, 2021) (holding second-degree depraved-heart murder as defined in North Carolina is categorically a crime of violence), *appeal dismissed*, No. 21-7746, 2022 WL 2989932 (4th Cir. July 28, 2022).

[18] *See also Janis*, 2023 WL 4540528, at *6 (rejecting a similar argument based on drunk-driving cases, and observing "[t]hat a jury can find malice aforethought based on a defendant's acts behind the wheel does not undermine the conclusion that malice aforethought satisfies the force clause.").

(1) In *United States v. Tan*, 254 F.3d 1204 (10th Cir. 2001), the defendant drove his pickup truck while intoxicated and crashed into two motorcycles, killing one of the drivers and seriously injuring the other. *Id*. at 1206. The defendant was charged with second-degree murder. *Id*. Before trial, the district court granted the defendant's motion *in limine* to exclude evidence of the defendant's prior drunk-driving convictions. *Id*. at 1207. The government brought an interlocutory appeal, and we reversed, holding that prior drunk-driving convictions are probative of malice. *Id*. at 1211. On interlocutory appeal, the defendant could not challenge the sufficiency of the evidence because no trial or conviction had occurred. *Id*. at 1206.

(2) In *United States v. Leonard*, 439 F.3d 648 (10th Cir. 2006), the defendant—who had not held a valid driver's license for several years—was high on alcohol, Xanax, Valium, Soma, and marijuana when he swerved into another lane, caused another car to swap lanes to avoid him, and swerved back into a head-on collision with the other car. *Id*. at 649-50. Mr. Leonard was charged with second-degree murder, but the jury found him guilty of the lesser-included offense of involuntary manslaughter. *Id*. at 650. On appeal, he argued only that his record of driving-related citations was not relevant and improperly admitted. *Id*. We disagreed, explaining that "[c]itations for driving with a suspended license, like citations for drunk driving, convey to the malefactor society's considered view that the cited conduct is dangerous." *Id*. at 651. *Leonard* fails to help Mr. Kepler because the defendant was acquitted of second-degree murder. As in *Tan*, the appellant could not have made a sufficiency-of-the-evidence challenge to depraved-heart murder.

(3) In *United States v. Antonio*, 936 F.3d 1117 (10th Cir. 2019), the defendant was prosecuted for second-degree murder after driving under the influence in the wrong lane of a highway and causing a fatal crash. *Id*. at 1119. The only issues he raised on appeal were (1) whether the crime took place in Indian country and (2) whether the jury instructions were adequate. *Id*. at 1120-27. As in *Tan*, he did not contest the sufficiency of the evidence for depraved-heart recklessness, and we therefore did not address it.

(4) In *United States v. Merritt*, 961 F.3d 1105 (10th Cir. 2020), the defendant was prosecuted for second-degree depraved-heart murder after driving under the influence in the wrong lane of a highway and causing a fatal crash. *Id*. at 1108. On appeal, he argued only that the district court erred in admitting evidence of his other drunk-driving incidents. He did not challenge the sufficiency of the evidence or argue that his conduct did not satisfy the "depraved-heart" standard. *Id*. at 1111-17. We said the admission of a separate drunk-driving incident was harmless error because the remaining evidence was "overwhelming": (1) the defendant had previously driven drunk in a reckless fashion; (2) he had alcohol in his car; (3) his blood alcohol content was three times the legal limit; and (4) his car was "almost entirely in the wrong lane when the vehicles collided." *Id*. at 1118. We did not address whether drunk driving is sufficient to prove depraved-heart murder. *See Janis*, 2023 WL 4540528, at *6 (In *Merritt*, "[t]he Tenth Circuit emphasized the defendant's special knowledge of just how risky his conduct was.")

The defendant in each case did not challenge on appeal the sufficiency of the evidence for second-degree murder. The cases do not purport to give a full account of the evidence and thus shed little or no light on whether depraved-heart murder is a crime of violence under § 924(c)(3)(A).

Mr. Kepler notes some of these cases said that evidence of driving under the influence or of having prior drunk driving citations is admissible to show depraved-heart recklessness. Aplt. Br. at 16. But he mistakes relevant evidence for sufficient evidence. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 775 (5th Cir. 2018) ("Relevance, however, does not imply sufficiency."). Drunk driving may relate to a defendant's state of mind, but none of Mr. Kepler's cases holds that drunk driving is sufficient to prove the mens rea of depraved heart recklessness.

iv. *United States v. Taylor* (2022)

The Supreme Court recently considered a § 924(c)(3)(A) crime-of-violence issue in *United States v. Taylor*, 142 S. Ct. 2015 (2022). Neither Mr. Kepler nor the Government has cited this case. We discuss it here to show it does not alter our conclusion that depraved-heart second-degree murder is a crime of violence.

Taylor addressed whether attempted Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). *Id*. at 2018-19. To prove this crime, the government must show "(1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." *Id*. at 2020. *Taylor* held that neither of these elements categorically

require the use of force, and thus attempted Hobbs Act robbery does not satisfy § 924(c)(3)(A)'s elements clause. *Id*. at 2020-21.

The government argued that "threatened" in § 924(c)(3)(A) refers to "a more . . . abstract risk," such as an "objective, if uncommunicated, threat to community peace and order." *Id*. at 2023. And it argued that a person with a concrete plan to commit Hobbs Act robbery posed such an "abstract risk." *Id*.[19] The Court disagreed, pointing to the language in § 924(c)(3)(A) that "speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another.'" *Id*. It then said, "Plainly this language requires the government to prove that the defendant took specific actions against specific persons or their property." *Id*. The Court rejected the government's broad interpretation of "threat" because it "would vastly expand the statute's reach by sweeping in conduct that poses an abstract risk to community peace and order, whether known or unknown to anyone at the time." *Id*.

Taylor does not affect our analysis. Unlike *Borden*, it focused on the actus reus requirements of § 924(c)(3)(A), not its mens rea requirement. The Court repeated the phrase "the use, attempted use, or threatened use" of force at least six times for its categorical analysis. *Id.* at 2019-25. In responding to the government's argument on "threatened use," the Court used the words "specific persons" to contrast § 924(c)(3)(A)'s "use of physical force against the person or property of

[19] "So, for example, a critic might say that a prison board's decision to parole a particular felon 'threatens' community safety." *Taylor*, 142 S. Ct. at 2023.

another" with an "uncommunicated[] threat to community peace and order." *Id*. at 2023. Thus, the object of a threat must be another person, not the community at large. *Id*. The Court did not say that "person" in § 924(c)(3)(A) requires the perpetrator of the underlying crime of conviction to aim his conduct at a particular individual.

Other courts understand *Taylor* similarly. The Eleventh Circuit recently rejected a *Taylor*-based argument that Georgia attempted murder does not satisfy § 924(c)(3)(A). *See Alvarado-Linares*, 44 F.4th at 1346-47. The court interpreted *Taylor* to hold only that if a crime can be "committed by the threatened use of force, an attempt to commit that crime—*i.e*., an attempt to threaten—falls outside the elements clause." *Id*. at 1346. But "unlike Hobbs Act robbery, a criminal cannot commit murder by threat." *Id*. Murder always entails an actus reus of "the use of physical force because it is impossible to cause death without applying force that is capable of causing pain or physical injury." *Id*. at 1346-47 (quotations omitted). In *United States v. Linehan*, 56 F.4th 693, 703 (9th Cir. 2022), the court held that transporting an explosive device was a crime of violence under *Taylor*—even if the specific potential victims of the device were unknown at the time of the transport—because the "defendant [must] t[ake] the specific action of transporting or receiving a readied explosive device . . . [knowing] it would be used to kill, injure, or intimidate a person or damage property." *Id*. at 703.

The *Taylor* opinion thus used the phrase "specific persons" to rebut the government's argument that § 924(c)(3)(A) encompasses threats to the community at

large. It did not analyze the "person of another" language in § 924(c)(3)(A), nor did it conclude that a crime of violence requires the perpetrator to have a specific victim in mind at the time of the crime.

* * * *

In sum, we conclude that depraved-heart second-degree murder is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)—"an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against or property of another." Second-degree murder is a "felony" and requires proof of "physical force against . . . another." It also requires proof of malice. The question here is whether malice may be proved based on evidence that does not categorically satisfy § 924(c)(3)(A).

In *Borden*, the plurality interpreted "against" to embody a mens rea element and to mean conduct "aimed" or "targeted" at another. 141 S. Ct. at 1824. It concluded that recklessness does not always require proof that conduct was "aimed" at another. *Id*. at 1825. By contrast, it said use of force with knowledge requires proof of conduct aimed at another. *Id*. at 1830. The plurality noted that depraved-heart recklessness falls in between recklessness and knowledge. *Id*. at 1825 n.4. It declined to say whether an offense requiring proof of the use of force with depraved-heart recklessness may be a crime of violence. *Id*.

Our analysis concludes that use of force with depraved-heart recklessness must be aimed at or "against . . . another." It might not be aimed at a specific person, but as long as force is targeted at someone, the depraved-heart offense is a crime of violence. The

statute's text—"against the person . . . of another"—is consistent with this conclusion. And so is the case law.

b. *Second-degree felony murder*

Mr. Kepler contends that second-degree felony murder is not categorically a crime of violence. He claims that its "requirement of malice can be satisfied merely by the commission of a non-enumerated felony," and because the felony may not require conscious use of force against another, second-degree murder cannot be a crime of violence under § 924(c). Aplt. Br. at 19. He has misread our cases that have addressed the mens rea requirement for second-degree felony murder.

For first-degree felony murder, "malice [] is proved by commission of the [enumerated] felony," so "there is no actual intent requirement with respect to the homicide." *Chanthadara*, 230 F.3d at 1258. But, in a case where a defendant has committed a felony that is not enumerated in the federal murder statute, second-degree felony murder "requires proof of malice with respect to the homicide." *Id*. In *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000), in which the defendant accidentally killed a victim during a robbery, we said the commission of the robbery was not "the type of constructive malice aforethought required to prove second degree murder" because there was no malice tied to the homicide itself. *Id*. at 1271.[20]

[20] Our circuit has decided two cases called *United States v. Pearson* that concern the malice requirement for second-degree felony murder. Both involved a person convicted of second-degree murder who committed an accidental killing during a robbery. *See* 159 F.3d 480 (10th Cir. 1998) ("*Pearson One*"); 203 F.3d 1243 (10th Cir. 2000) ("*Pearson Two*"). Mr. Kepler relies on *Pearson One* and the Government cites *Pearson Two*. Aplt. Br. at 19; Aplee. Br. at 23. Both cases held

Similarly, in *United States v. Barrett*, 797 F.3d 1207 (10th Cir. 2015), we explained that "second-degree murder is not a lesser-included offense of [first-degree] felony murder" because "second-degree murder requires proof that [the] defendant acted with malice aforethought" with respect to the killing, while first-degree felony murder "requires the commission of an enumerated felony with the requisite mens rea for the underlying offense." *Id*. at 1221-22 (quotations omitted); *accord Chanthadara*, 230 F.3d at 1259 ("[S]econd-degree murder under federal law requires proof of malice towards the homicide whereas [first-degree] felony murder does not.").

When the defendant has killed a human being during the commission of a non-enumerated felony, our cases thus hold that the prosecution must prove the defendant committed homicide with malice to establish second-degree murder. In effect, the

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that simply committing the underlying robbery did not establish malice for purposes of second-degree murder. *See Pearson One*, 159 F.3d at 486; *see also Pearson Two*, 203 F.3d at 1271. Mr. Kepler claims that "*Pearson* [*One*] plainly states that the requirement of malice can be satisfied merely by the commission of a non-enumerated felony," Aplt. Br. at 19, but we said the opposite:

> [T]he only reason the government was able to convict Mr. Pearson of first degree murder was because Mr. Pearson's commission of the robbery constructively supplied the malice aforethought required to satisfy the definition of [first-degree] "murder" in § 1111(a). While the underlying robbery is constructive or implied malice aforethought for first degree felony murder, neither the robbery nor the accidental killing satisfies the types of constructive or implied malice aforethought described above that are required to prove second degree murder.

159 F.3d at 486.

government must show either general intent to kill, specific intent to inflict serious bodily injury, or depraved-heart recklessness. *See Visinaiz*, 428 F.3d at 1307. General intent to kill and intent to inflict serious bodily injury both require conscious deployment of force. Both require the perpetrator to direct conduct at the victim, thus satisfying the *Borden* plurality and § 924(c)(3)(A). And we concluded above that depraved-heart recklessness does so as well. Thus, because proof of these types of malice satisfies the "against the person . . . of another" language in § 924(c)(3)(A), we reject Mr. Kepler's argument.[21]

B. ***The District Court's Malice Instruction Was Not Plainly Erroneous***

Mr. Kepler claims the district court plainly erred because it did not instruct the jury that malice requires the absence of "justification, excuse, or mitigation." Aplt. Br. at 21-22. Because Mr. Kepler has not shown plain error, we affirm.

1. **Additional Procedural Background**

For Count 2, the § 924(j)(1) charge, the district court instructed on two predicate crimes of violence: first- and second-degree murder. The jury convicted

[21] Our cases discussing second-degree felony murder state (1) that commission of a non-enumerated felony is a form of malice giving rise to second-degree murder, but (2) second-degree felony murder requires proof of malice "with respect to the homicide." *Chanthadara*, 230 F.3d at 1258. This apparent tension suggests that the first three forms of malice listed in our cases—general intent to kill, intent to do serious bodily injury, and depraved heart recklessness—subsume the fourth form—commission of a non-enumerated felony. *See Visinaiz*, 428 F.3d at 1307. This raises the question of whether the federal murder statute, 18 U.S.C. § 1111(a), includes a second-degree felony murder offense. We need not resolve these issues here.

Mr. Kepler for violating § 924(j)(1) by finding that he had committed second-degree murder.

At trial, Mr. Kepler asserted that he shot Mr. Lake in self-defense, claiming that Mr. Lake drew a chrome pistol similar to the one later found in the police station. ROA, Vol. I at 1280. Mr. Kepler did not acknowledge that he might have been wrong about Mr. Lake's possession of this weapon. He agreed that he was "100 percent certain[]" he saw Mr. Lake holding a shiny semiautomatic handgun. *Id*. at 1280-81. When asked, "It's not like you made some sort of mistake; you're telling us you saw it?", Mr. Kepler responded, "I'm not mistaken." *Id*. at 1281. Mr. Kepler also stated that he was calm and not emotionally disturbed at the time. *Id*. at 1280 ("Q: This is not a case where you're alleging that you lost your cool; correct? A: Correct.").

After the close of evidence, the district court instructed the jury on the elements of second-degree murder, and defined "malice" as follows: "To kill 'with malice aforethought' means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life." ROA, Vol. I at 250. This instruction matches the definition of malice in the Tenth Circuit pattern jury instruction on second-degree murder. *See* Tenth Circuit Criminal Pattern Jury Instruction 2.53. Mr. Kepler did not propose an alternative instruction defining malice, ROA, Vol. I at 127-31, nor did he object to the instruction the district court delivered. *Id*. at 1327-32. He did not propose an instruction on imperfect self-

defense, *id*. at 127-31,[22] and he disavowed any desire for an instruction on a lesser-included offense. *Id*. at 390-92. But at Mr. Kepler's request, *id*. at 131, the district court instructed the jury on his self-defense theory. *Id*. at 169.

2. **Plain Error Review**

We review a district court's decision to give a particular jury instruction for abuse of discretion, and we review the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law. *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014). But because Mr. Kepler did not object to the district court's malice instruction, we review this argument for plain error. *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010).

Under plain error review, the appellant must "show the district court committed (1) error (2) that is clear or obvious under current law, and which both (3) affected [his] substantial rights and (4) undermined the fairness, integrity, or public reputation of judicial proceedings." *Id*.

We focus here on the second element. "In general, for an error to be [clear or obvious and] contrary to well-settled law, either the Supreme Court or this court must have addressed the issue." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (quotations omitted). A court's use of language from our pattern jury instructions weighs against a finding of plain error. *See United States v. Ramos-Arenas*, 596 F.3d 783, 786-87 (10th Cir. 2010) (looking to "the pattern jury

[22] We explain imperfect self-defense below.

instructions," among other sources, in determining that the district court's treatment of a legal issue was not plainly erroneous).[23]

3. **Legal Background**

A defendant may negate the malice element of murder by showing he had "justification, excuse, or mitigation" when he committed the killing. *Serawop*, 410 F.3d at 664. One such justification is self-defense. *Id*. at 664 n.5. And one such mitigation is imperfect self-defense.

"A person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response." *Toledo*, 739 F.3d at 567. Self-defense thus requires both (1) a perception of danger that is objectively reasonable, even if inaccurate; and (2) a necessary response that is proportional to the perceived danger. *Id*. at 568. Because self-defense completely negates malice, it entitles a defendant to acquittal from federal first- or second-degree murder. *Id*.

When a defendant responds with force based on an unreasonable perception of danger, we have recognized an "imperfect self-defense." *Id*. at 568-69. "Imperfect self-defense" applies in a homicide case when a defendant "acts in self-defense but is

[23] *See also United States v. McGlothin*, 705 F.3d 1254, 1267 n.19 (10th Cir. 2013) (fact that the challenged instruction "is consistent with [the] Tenth Circuit Pattern Jury Instruction" undermined argument that delivering the instruction was plainly erroneous); *but see United States v. Cortes-Gomez,* 926 F.3d 699, 707 n.5 (10th Cir. 2019) (pattern instructions are not authoritative and must undergo "case-by-case review" where appropriate (quotations omitted)).

criminally negligent in doing so." It may reduce a federal murder charge to the lesser-included offense of involuntary manslaughter. *United States v. Brown*, 287 F.3d 965, 975 (10th Cir. 2002).

"[T]he distinguishing factor between perfect and imperfect self-defense [is] the reasonableness of the defendant's belief that deadly force was necessary to prevent death or great bodily harm—if reasonable, then he is entitled to a self-defense acquittal; if criminally negligent, then he is guilty of involuntary manslaughter." *Toledo*, 739 F.3d at 569 (footnote omitted).

We recently discussed *Serawop* and imperfect self-defense in *United States v. Sago*, --- F.4th ----, 2023 WL 4696258 (10th Cir. July 24, 2023). There, a jury convicted the defendant of (1) first-degree murder in Indian country and (2) causing death by use of a firearm during and in relation to a crime of violence (based on first-degree murder). *Id*. at *4. On appeal, he argued that the district court plainly erred by failing to instruct the jury that malice requires the absence of "justification, excuse, or mitigation"— the language from *Serawop*—and by failing to instruct on imperfect self-defense. *Id*. at *5-6.

We rejected these arguments, stating that "[w]e would never suggest, or tolerate, an instruction that simply said: 'Malice requires committing the wrongful act without justification, excuse, or mitigation.' Such an instruction would be lawless, giving free rein to the jury to apply its own notions of *justification*, *excuse*, and *mitigation*." *Id*. at *5 (footnote omitted). We also said that "a mitigating-circumstances instruction," such as an imperfect self-defense instruction, "is

inappropriate unless accompanied by a lesser-included-offense instruction." *Id*. at *7. *Sago* concluded that the district court's failure to give an imperfect self-defense instruction *sua sponte* was not plain error. *Id*.

4. **Application**

Mr. Kepler contends that the district court's malice instruction was plainly erroneous because it did not state that malice "requires committing the wrongful act without justification, excuse, or mitigation." Aplt. Br. at 22 (quoting *Serawop*, 410 F.3d at 664). He argues he suffered prejudice because even though the jury rejected his self-defense argument, "there was substantial evidence from which a jury could have found that Mr. Kepler subjectively believed that it was necessary for him to act in self-defense, even if that belief was objectively unreasonable." *Id*. at 24. Mr. Kepler thus contends that, had the court given the proper instruction, the jury could have found that he acted with imperfect self-defense and therefore without malice. *Id*. at 24-25. We conclude that any error was not plain.

Mr. Kepler argues the district court plainly erred because it did not *sua sponte* include the *Serawop* phrase "without justification, excuse, or mitigation" in the malice instruction. Unlike Mr. Sago, Mr. Kepler does not contend the district court should have instructed the jury on the elements of imperfect self-defense. *See* Aplt. Br. at 21-22. He does not even mention "imperfect self-defense" in his briefs. Under *Sago*, this omission is fatal. We explained there that simply instructing that the "wrongful act [was committed] without justification, excuse, or mitigation" without instructing on the elements of the justification, excuse, or mitigation defense would

"giv[e] free rein to the jury to apply its own notions" of what those words mean. *Sago*, 2023 WL 4696258, at *5.

Further, Mr. Kepler cites no authority suggesting that a court must include the language from *Serawop* in the malice instruction. The district court instructed the jury, consistent with our pattern instruction, that to kill with malice "means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life." ROA, Vol. I at 250. *Serawop* itself does not help Mr. Kepler. It held that malice may be negated by certain defenses—e.g., heat of passion—but said nothing about how the district court should instruct the jury. 410 F.3d at 664. Indeed, *Serawop* said that "to establish malice the prosecution must prove beyond a reasonable doubt the *absence* of heat of passion" or another "legal excuse," "when it is an issue in the case." *Id*. It did not say the district court must instruct the jury about "justifications, excuses, or mitigations" that have not been raised. Also, *Serawop* was a voluntary manslaughter case, not a murder case. Malice is not required for voluntary manslaughter, so *Serawop*'s discussion of malice was arguably dicta. *Id*.

Mr. Kepler's lack of authority for his argument and our reasoning in *Sago* preclude a finding that the district court's alleged error was "contrary to well-settled law." *DeChristopher*, 695 F.3d at 1091. Moreover, we have repeatedly said that delivering a jury instruction that matches the pattern instructions weighs against a finding of plain error. *Ramos-Arenas*, 596 F.3d at 786-87; *McGlothin*, 705 F.3d at 1267 n.19.

C. *No Reversible Prosecutorial Misconduct*

Mr. Kepler contends for the first time on appeal that the Government committed prosecutorial misconduct at various points throughout the trial and that the district court erred in not declaring a mistrial. His arguments do not pass plain error review. None of the prosecutor's questions or statements were plainly improper, and Mr. Kepler fails to show that any of the alleged misconduct affected the outcome of his trial.

1. **Plain Error Review**

Because Mr. Kepler did not make prosecutorial misconduct objections at trial, we "review the district court's failure to grant a mistrial sua sponte based on prosecutorial misconduct for plain error." *United States v. Anaya*, 727 F.3d 1043, 1059 (10th Cir. 2013). When applying plain error review to prosecutorial misconduct claims, "reversal is warranted only when: [1] the prosecutor's statement is plainly improper and (2) the defendant demonstrates that the improper statement affected his or her substantial rights." *Id*. at 1053 (quotations omitted).

To establish that an error affects a defendant's "substantial rights," the appellant must show "there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc) (quotations omitted).

2. **Legal Background**

A prosecutor may commit misconduct by eliciting improper and prejudicial witness testimony. *See, e.g.*, *United States v. Green*, 435 F.3d 1265, 1268-69 (10th Cir. 2006). "A prosecutor's questions to witnesses are not improper if the questions elicit testimony for a 'permissible purpose.'" *United States v. Coulter*, 57 F.4th 1168, 1185 (10th Cir. 2023) (quoting *United States v. Shamo*, 36 F.4th 1067, 1080 (10th Cir. 2022)), *cert. denied*, No. 22-7557, 2023 WL 3937724 (U.S. June 12, 2023); *see also United States v. Lonedog*, 929 F.2d 568, 573 (10th Cir. 1991).

A prosecutor may also commit misconduct by making improper comments during closing argument. *United States v. Christy*, 916 F.3d 814, 824-25 (10th Cir. 2019). In assessing a misconduct claim on this ground, "(1) the court first decides whether the prosecutor's comments were improper, and (2) if so, it examines their likely effect on the jury's verdict." *Id*. at 824. A prosecutor's comments are improper if they "encourage[e] the jury to allow victim sympathy to influence its decision," "distort[] the record by misstating the evidence," or otherwise invite the jury to base its decision on irrelevant considerations. *Id*. at 825.

But "the Government is entitled to a reasonable amount of latitude in drawing inferences from the evidence during closing arguments." *United States v. Hammers*, 942 F.3d 1001, 1016 (10th Cir. 2019) (quotations omitted). "Arguments may be forceful, colorful, or dramatic, without constituting reversible error. Counsel may resort to poetry, cite history, fiction, personal experiences, anecdotes, biblical stories, or tell jokes." *United States v. Gregory*, 54 F.4th 1183, 1210-11 (10th Cir. 2022)

(quoting *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1133 (10th Cir. 2009)), *cert. denied*, 143 S. Ct. 1756 (2023).

If a prosecutor acted improperly, we must then assess "whether the [conduct] affected the jury's verdict" in light of "the trial as a whole." *Christy*, 916 F.3d at 826 (quotations omitted). This is a high standard and requires Mr. Kepler to show that the Government's statement was "so egregious as to influence the jury to convict" Mr. Kepler on an improper basis. *Hammers*, 942 F.3d at 1016 (quotations omitted).

3. **Application**

The alleged misconduct falls into three categories: (1) questions to various witnesses about the disordered state of Mr. Kepler's home; (2) cross-examination of Mr. Kepler; and (3) closing argument commenting on (a) physical evidence gathered from Mr. Lake's corpse and (b) expert testimony.

None of the prosecutor's conduct was plainly improper. Mr. Kepler otherwise fails to show a reasonable likelihood that the alleged impropriety influenced the result of his trial. We therefore affirm.

a. *Questions about Mr. Kepler's home*

i. Additional procedural background

The record suggests that Mr. Kepler and/or his wife hoarded items in their home. *See* ROA, Vol. I at 384. Before trial, the Government and Mr. Kepler agreed that the prosecution could introduce a photograph of Mr. Kepler's house taken shortly after the shooting that depicted the inside in a state of disarray, *see* Suppl.

ROA at 22, but it could not present "additional argument about hoarding and a hoarding disorder." ROA, Vol. I at 384.

At various points during the trial, the prosecution referenced the disordered state of Mr. Kepler's house.

> **Redirect examination of Mark Kennedy**. Detective Mark Kennedy executed the search warrant on Mr. Kepler's house and testified for the Government. He said that Mr. Kepler had an "excellent reputation" in the workplace. ROA, Vol. I at 505. On redirect, the Government asked whether "the condition of [Mr. Kepler's] house [was] surprising to you given what you knew from your role as a police officer?" *Id.* at 538. Detective Kennedy responded, "Very surprising." *Id*.
>
> **Redirect examination of Linda Hamlett**. Ms. Hamlett, Mr. Kepler's mother-in-law, lived near his house. On cross-examination, she testified that Mr. Kepler was a responsible and loving parent. On redirect, the prosecutor asked, "Is it fair to say that you were surprised by the condition of [the Keplers'] house?" ROA, Vol. I at 553. Ms. Hamlett responded that she was not surprised the house was "messy" given the Keplers' personal and professional responsibilities. *Id*.
>
> **Cross-examination of Brenda Smith**. Brenda Smith, professional counselor, treated Lisa since her childhood. She testified that Lisa had "reactive attachment disorder" when Mr. and Mrs. Kepler adopted her, and that they were thoughtful and concerned parents. ROA, Vol. I at 1165-66. On cross-examination, the prosecutor showed Ms. Smith the picture of Mr. Kepler's house and asked, "Did you know about the condition of their residence, ma'am?" *Id.* at 1175. Ms. Smith said no. *Id*. The prosecutor then asked whether the picture "affect[ed] [her] opinion and your testimony" about the Keplers' parenting. *Id*. She said it did not. *Id*. at 1175-76. The prosecutor then asked, "Actually, isn't it true that nobody is doing what they're supposed to do and somebody's gathering excessive materials and nobody's getting rid of it?" *Id*. at 1176. Ms. Smith responded that the Keplers' house "is very cluttered, you are correct." *Id*.

ii. Analysis

The Government's questions about Mr. Kepler's home were not plainly improper. Mr. Kepler cites no factually similar case, so he has not met his burden to

show that the questions were "plainly improper." *Christy*, 916 F.3d at 824-25. And the Government points to plausible "permissible purpose[s]" for each instance it discussed the home. *See Coulter*, 57 F.44th at 1185.

Detective Kennedy and Ms. Hamlett both offered positive character evidence about Mr. Kepler's role as a police officer or a parent. The Government was entitled to rebut that evidence by demonstrating that neither witness was familiar with Mr. Kepler's circumstances. *See, e.g., United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1133 (10th Cir. 2014) (noting a party can impeach a witness by asking questions to show a lack of personal knowledge of the subject of the witness's testimony).

In the same vein, Ms. Smith opined that the Keplers were thoughtful and concerned parents. Once again, the Government was entitled to rebut that testimony by demonstrating that Ms. Smith lacked knowledge of the conditions in the Keplers' home.

Because the Government had a case-related purpose for asking questions about the home, Mr. Kepler has not shown the prosecutor's conduct was plainly improper.

Additionally, the questions about house clutter were fleeting compared with the evidence as a whole and did not elicit especially damaging evidence. Mr. Kepler thus has not shown that the questions were "so egregious as to influence the jury to convict" Mr. Kepler on an improper basis. *Hammers*, 942 F.3d at 1016 (quotations omitted).

b. *Cross-examination of Mr. Kepler*

i. Additional procedural background

During cross-examination of Mr. Kepler, the prosecutor repeatedly asked him questions about conflicts between his testimony and that of the Government's witnesses. After Mr. Kepler discussed his version of events, the prosecutor asked, "You agree with me that in order for your story to be accurate, essentially every government witness has to be inaccurate or lying, one of those two?" ROA, Vol. I at 1286. Mr. Kepler gave unresponsive answers, but the prosecutor persisted, asking, "If you're telling the truth, they're not?", and "They're inaccurate and you are accurate?" *Id*. at 1287. Mr. Kepler said, "They're inaccurate," referring to the Government's witnesses. *Id*.

Throughout this exchange, Mr. Kepler's attorney objected based on the form of the prosecutor's questions but did not suggest prosecutorial misconduct. *Id*. at 1286-88.

ii. Analysis

The Government's cross-examination of Mr. Kepler was not plainly improper. Again, Mr. Kepler fails to cite any Supreme Court or Tenth Circuit authority stating that a prosecutor cannot question a defendant regarding the incompatibility of his testimony with the testimony of other witnesses. He cites *United States v. Richter*, 826 F.2d 206 (2d Cir. 1987), which established a per se rule that a prosecutor cannot "compel[] a defendant to state that law enforcement officers lied in their testimony."

Id. at 208. But we have declined to adopt the *Richter* rule. *United States v. Williamson*, 53 F.3d 1500, 1523 (10th Cir. 1995).

The Government's questions were otherwise proper. Mr. Kepler tries to frame the questions as seeking lay testimony from Mr. Kepler about the credibility of other witnesses. But they more accurately reflect the prosecution's efforts to show that Mr. Kepler's account was at odds with the testimony of others. As noted, Mr. Kepler's testimony that Mr. Lake pointed a chrome pistol at him flatly contradicted the testimony from the Government's witnesses, who testified that they had never seen Mr. Lake with a handgun, that he did not draw a handgun when Mr. Kepler confronted him, or both. *See* ROA, Vol. I at 474, 558, 567-68, 573, 626-27, 636-37, 643-44, 646, 749, 774, 792-93, 813, 826, 925, 928-29, 939. To accept Mr. Kepler's testimony would thus mean, as the prosecutor said, that the other witnesses who saw the shooting were "inaccurate or lying." ROA, Vol. I at 1286.

Further, the challenged questions were a "small fraction" of Mr. Kepler's testimony, *Coulter*, 57 F.4th at 1184, and underscored a point that was already clear—that other witnesses contradicted Mr. Kepler's testimony. Thus, Mr. Kepler has again failed to show any likelihood that "the c[onduct] affected the jury's verdict" in light of "the trial as a whole." *Christy*, 916 F.3d at 826 (quotations omitted).[24]

[24] Mr. Kepler filed a Rule 28(j) letter drawing our attention to *United States v. Jones*, --- F.4th ----, 2023 WL 4167529 (10th Cir. June 26, 2023). *See* Fed. R. App. P. 28(j). He contends that *Jones* supports his position that "the government committed plain error" by "repeatedly asking Mr. Kepler about the truthfulness of

c. *The Government's closing argument*

i. Additional procedural background

The Government introduced expert testimony on various forms of forensic evidence to show that Mr. Lake had not drawn or possessed a weapon when Mr. Kepler shot him. For example, it presented blood spatter evidence suggesting that Mr. Lake had tried to run away after Mr. Kepler drew his gun, *see* ROA, Vol. I at 994; bloodstains on Mr. Lake's hands showing that he was not holding anything when Mr. Kepler shot him, *id*. at 997; and a DNA profile obtained from the chrome pistol, which "excluded" Mr. Lake as a contributor. *Id*. at 1094. Mr. Kepler contends the prosecutor improperly referred to this evidence in his closing argument.

1) Discussion of physical evidence taken from Mr. Lake

During closing argument, the prosecutor delivered what Mr. Kepler describes as a "soliloquy from the perspective of the victim." Aplt. Br. at 29. Specifically, the prosecutor discussed inferences he believed the jury could make from physical evidence taken from Mr. Lake's corpse. The challenged portion of the closing argument reads in full as follows:

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other witness' testimony." Kepler 28(j) letter at 1. *Jones* is inapposite and does not establish plain error. There, the district court allowed a prosecution witness to testify during direct examination on the truthfulness of future witnesses' testimony. *Jones*, 2023 WL 4167529, at *3. We held this was improper under Federal Rule of Evidence 608(a), which "only permits testimony about a witness's character for truthfulness after that witness's character for truthfulness has been attacked." *Id*. Here, as discussed, the prosecutor's questions did not implicate Rule 608(a) because they highlighted the contradictions between Mr. Kepler's testimony and that of other witnesses.

> What did Jeremey Lake tell you? No, I'm not crazy. I know that Jeremey Lake is deceased. But nonetheless Jeremey Lake told you things. Jeremey Lake told you the defendant said, I had a gun out, that I had recovered a shiny semiautomatic handgun from my pocket and had already pulled it out, but my head wounds tell you that that's not what happened. I did not have my hands out. I did not try to break my fall. My head broke my fall. Jeremey Lake himself told you that.
>
> The defendant said that he shot at Jeremey Lake and that Jeremey Lake then ran at him. Jeremey Lake told you with his blood that he was running away.
>
> The defendant said that it was a shiny semiautomatic handgun that I had in my hand that day. I used every drop of blood in my heart to tell you that this gun was not at the scene.
>
> Jeremey Lake told you by the blood patterns and the voids on his hands and in other locations, I did not have a gun, my hands were on my chest.

ROA, Vol. I at 1351.

2) Characterization of expert testimony

Also during closing argument, the prosecutor discussed the absence of physical evidence connecting the chrome handgun found in the Tulsa Police Department trashcan to Mr. Lake. He summarized the expert testimony as follows:

> The professionals told you that there w[ere] no prints or DNA on the shiny semiautomatic handgun at all. The professionals told you that Jeremey's DNA was not on the defendant's gun. He was excluded as being the person whose DNA was there; the defendant, again, not surprisingly, was not excluded. *What the professionals told you in sum is, that Jeremey Lake did not have a gun*.

ROA, Vol. I at 1350 (emphasis added).

ii. Analysis

1) Discussion of physical evidence taken from Mr. Lake

The prosecutor's monologue from the perspective of Mr. Lake was unusual but not plainly improper. It fell within the prosecutor's leeway to make "forceful, colorful, or dramatic" closing arguments. *Gregory*, 54 F.4th at 1210-11 (quotations omitted).

Mr. Kepler has failed to present any Supreme Court or Tenth Circuit authority suggesting that a prosecutor may never speak from the perspective of the victim. He therefore has not shown plain error. He cites *Drayden v. White*, 232 F.3d 704 (9th Cir. 2000), which is factually inapposite. In *Drayden*, the prosecutor sat in the witness chair, acted like the victim, and delivered a prolonged and impassioned monologue where he editorialized about the victim's good character. *Id*. at 711-13. After finding this improper, the Ninth Circuit declined to "adopt a per se rule that a prosecutor's 'testimony' in the voice of the victim during closing argument violates a defendant's due process rights." *Id*. at 713 ("[I]n a particular case, a prosecutor's brief excursion into a dramatic role could be wholly innocuous.").

The prosecutor's use of Mr. Lake's persona did not "encourag[e] the jury to allow victim sympathy to influence its decision" or "distort[] the record." *Christy*, 916 F.3d at 825. Instead, he focused on the factual inferences the jury could draw from the physical evidence derived from Mr. Lake's corpse. ROA, Vol. I at 1350. For example, he discussed the blood spatter patterns showing that Mr. Lake was running away when Mr. Kepler shot him, the forensic analysis showing that Mr. Lake

was not holding anything when he died, and the absence of any handgun from the scene of the crime. Although some of these statements used arguably emotional or inflammatory language, they accurately summarized the evidence, and Mr. Kepler has not shown that they were plainly improper.

Finally, Mr. Kepler has not shown a reasonable likelihood that the prosecutor's monologue influenced the outcome of the trial. As discussed, the central issue in the case was whether Mr. Lake pulled a gun—as Mr. Kepler claimed—or whether he was unarmed. The evidence that Mr. Lake did not have a gun was ample and came from multiple sources, and the prosecutor's comments summarized that evidence.

2) Characterization of expert testimony

The prosecutor did not mischaracterize the expert testimony in his closing argument. Because his comments did not "distort[] the record," they were not improper. *Christy*, 916 F.3d at 825. The prosecutor summarized expert testimony showing the absence of any DNA or fingerprint evidence tying Mr. Lake to the gun found in the trashcan. He then said, "What the professionals told you in sum is, that Jeremey Lake did not have a gun." ROA, Vol. I at 1350. Mr. Kepler claims that "no 'professional' testified that 'Jeremey Lake did not have a gun.'" Aplt. Br. at 32. But in context, the prosecutor was asking the jury to draw the reasonable inference that Mr. Lake did not have a gun from the absence of evidence connecting him to the gun discovered in the police trashcan. *See Hammers*, 942 F.3d at 1016 (prosecutors are "entitled to a reasonable amount of latitude in drawing inferences from the evidence

during closing arguments" (quotations omitted)). At the very least, Mr. Kepler has not shown the prosecutor's comments were plainly improper.

Further, as noted, extensive evidence supported the Government's position that Mr. Lake did not have a gun, let alone the chrome handgun described by Mr. Kepler. Mr. Kepler has therefore failed to show a reasonable likelihood that the prosecutor's statements changed the outcome.

D. ***No Cumulative Error***

Mr. Kepler contends that the cumulative effect of the errors he identifies rendered his trial unfair. Aplt. Br. at 49-51. When an appellant presents a mix of preserved and unpreserved errors on appeal, we proceed with the cumulative error analysis as follows:

> First, the preserved errors should be considered as a group under harmless-error review. If, cumulatively, they are not harmless, reversal is required. If, however, they are cumulatively harmless, the court should consider whether those preserved errors, when considered in conjunction with the unpreserved errors, are sufficient to overcome the hurdles necessary to establish plain error. In other words, the prejudice from the unpreserved error is examined in light of any preserved error that may have occurred.

United States v. Caraway, 534 F.3d 1290, 1302 (10th Cir. 2008). If we dispose of an unpreserved error on the second prong of plain error review—that is, we decide the error was not "plain"—then it does not factor into the cumulative error analysis. *United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1268 (10th Cir. 2020) (where "we disposed of [an asserted error] on the ground that any error was not plain," that error did "not factor into the cumulative-prejudice analysis").

Here, Mr. Kepler argued one preserved error (his claim that second-degree murder is not categorically a crime of violence) and two unpreserved errors (his arguments about the malice instruction and the alleged prosecutorial misconduct). Because we hold that the district court did not err in finding second-degree murder is a crime of violence and that Mr. Kepler's remaining arguments fail on prong two of the plain error analysis, there was no cumulative error.

III. **CONCLUSION**

We affirm the district court.