

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-1302

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFRED E. JERRY,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.

No. 2:19-cr-20040-MMM-EIL-1 — **Michael M. Mihm**, *Judge.*

ARGUED NOVEMBER 29, 2022 — DECIDED DECEMBER 22, 2022

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN,
Circuit Judges.

BRENNAN, *Circuit Judge.* After robbing a cellphone store at gunpoint, Alfred Jerry pleaded guilty to three crimes, including Hobbs Act robbery. The district court sentenced Jerry as a career offender under the Sentencing Guidelines. Jerry appealed that designation, and we remanded for resentencing based on our holding in *Bridges v. United States*, 991 F.3d 793, 797 (7th Cir. 2021), that Hobbs Act robbery is not categorically

a “crime of violence.” *United States v. Jerry*, 996 F.3d 495, 496–97, 499 (7th Cir. 2021) (*Jerry I*). On remand, the district court resentenced Jerry to 171 months’ imprisonment and a period of supervised release. Jerry appeals the new sentence, arguing that the district court committed procedural error and that the sentence is substantively unreasonable. We affirm.

I. Background

On May 2, 2019, Alfred Jerry entered a cellphone store with a revolver. He encountered an employee and instructed him not to move. When a second employee entered the store, Jerry threatened to shoot both employees. He ordered one to lock the front door and turn off the “open” sign and directed the other to the safe room where the store kept its phones. Jerry handed the employee a bag and told him to fill it with phones, and he instructed the other employee to turn off the surveillance cameras. Once the bag had been filled, Jerry took one employee’s personal phone and both employees’ keys. He also took \$12 from the wallet of one of the employees while holding that employee at gunpoint. Jerry next ordered both employees to lie on the floor of the safe room before shutting the door and locking it from the outside. He placed the gun in his jeans and removed his gloves, throwing them in a trash can that he took with him as he exited the store. The cellphone store later determined that Jerry had taken 45 phones and watches, valued at \$31,599.86.

Jerry pleaded guilty to three crimes: obstruction of commerce by robbery (Hobbs Act robbery) in violation of 18 U.S.C. § 1951 (Count One), brandishing of a firearm in furtherance of a robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Two), and possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) (Count Three). At

Jerry's first sentencing, the district court applied a career offender enhancement based on the classification of Hobbs Act robbery as a "crime of violence" under the Sentencing Guidelines. This designation carries with it an assignment to criminal history category VI and to offense levels at or near the statutory maximum.

Jerry's career offender designation meant he was subject to a Guidelines range of 292 to 365 months' imprisonment for all counts. The district court imposed an aggregate sentence of 264 months. We reversed, *Jerry I*, 996 F.3d at 496, in light of *Bridges*, 991 F.3d at 797.

On remand, the Probation Office prepared a resentencing memorandum which explained that the effective Guidelines range on all counts was 135 to 147 months' imprisonment. A range of 51 to 63 months applied to Counts One and Three, and Count Two carried a mandatory minimum of 84 months. At the resentencing hearing, the government argued that despite the "esoteric application of the categorical approach" that resulted in a lower Guidelines range, "the same facts" and "the same history" applied except for Jerry's completion of 213 hours of self-study. It therefore recommended 264 months' imprisonment, the same as the first sentence. The defense, on the other hand, pointed out that many courts have agreed with this court that Hobbs Act robbery is not a crime of violence. If the district court disagreed with the Guidelines' assumption that Hobbs Act robbery is committed non-violently, the defense emphasized that it was "the Sentencing Commission's responsibility" to amend the Guidelines. But the district court bears responsibility to correctly calculate the applicable Guidelines range. Per the defense, the district court was "starting at a very different place than the [c]ourt started

during the last sentencing.” The defense thus recommended a lower sentence of 107 months.

Before imposing sentence, the district court relayed the applicable Guidelines ranges for Jerry’s offenses and remarked it had occasionally thought about Jerry’s crimes since the original sentencing. The court had considered “what was in the mind of those two people in the store when [Jerry] went in there and what was going through their mind[s] as [Jerry] w[as] committing th[e] robbery.” Jerry had directed the employees to the safe room, and the district court recognized that such a scenario often results in death. Although Jerry had not killed the employees, he had “left them permanently scarred.” The district court noted the employees would carry the experience with them for “the rest of their li[ves].”

The district court also considered who Jerry was and what he had experienced prior to committing the crimes, noting his background and criminal history. The court commented it was “a very good thing” that, since Jerry had been in prison, he had not had any write-ups and engaged in self-study. The court acknowledged the government’s argument that Jerry might have done the self-study because he knew he was going to be resentenced, but the court commended Jerry, noting that not all defendants did so.

Explaining that the sentence should reflect the seriousness of the offense, promote respect for law, provide just punishment, and provide adequate deterrence, the court described the robbery as a “very, very serious crime” and opined that Jerry was “headed down a totally self-destructive road.” Although the court did not entirely disagree that the “sentence shouldn’t be disproportionate to what others have received,”

it observed that Jerry should be sentenced under “all of the circumstances.”

The district court also labeled the applicable Guidelines range of 51 to 63 months for Counts One and Three as “frankly, ridiculous” and stated, “But then, I’m only a district judge, and so what do I know?” To the court, Jerry’s crime was only “one heartbeat away from murder,” which “ha[d] to be reflected in the sentence.” The court declined to adopt the government’s recommendation to impose the same sentence, observing that the new sentence should “reflect in some way the new guideline range.”

The district court resentenced Jerry to a total of 171 months’ imprisonment, with 87 months on Counts One and Three to run consecutively to 84 months on Count Two. This new sentence was approximately 16 to 27 percent above the Guidelines range for all counts but reflected a reduction of 93 months from the prior aggregate sentence. Jerry appeals.

II. Discussion

We review the resentencing here in two steps. *United States v. Major*, 33 F.4th 370, 378 (7th Cir. 2022). We first evaluate the sentence de novo for procedural error. *Id.* at 378–79. The district court is to begin by calculating the applicable Guidelines range and then must explain the chosen sentence. *See United States v. Morgan*, 987 F.3d 627, 632 (7th Cir. 2021). If the court varies from the Guidelines, it “must adequately explain the chosen sentence to allow for meaningful appellate review.” *Gall v. United States*, 552 U.S. 38, 50 (2007). Procedural errors include “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence

based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Major*, 33 F.4th at 378 (quoting *United States v. Faulkner*, 885 F.3d 488, 498 (7th Cir. 2018)) (internal quotation marks omitted).

If there is no procedural error, we next review the sentence for substantive reasonableness. *Id.* at 379. “[S]ubstantive reasonableness occupies a range, not a point, and ... the sentencing judge is in the best position to apply the § 3553(a) factors to the individual defendant.” *Morgan*, 987 F.3d at 632 (quoting *United States v. Warner*, 792 F.3d 847, 856 (7th Cir. 2015)) (internal quotation marks omitted). We therefore review the sentence deferentially, remanding for resentencing only if we find an abuse of discretion. *See id.* For sentences above the Guidelines range, we “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance.” *Id.* (quoting *Gall*, 552 U.S. at 50).

A. Procedural Error

Jerry argues the district court procedurally erred at the resentencing in three ways. First, he contends the court permitted the government to argue that *Bridges* and *Jerry I* were wrongly decided and that the same sentence should be imposed. Second, he asserts the court’s comment that in its “personal belief,” the range was “frankly, ridiculous,” reflected a “mind-set of un-seriousness” and was “not at all the kind of comment[] that should inform an appropriate sentence.” Third, he submits the district court failed to adequately explain the reason it varied upward.

The Government's Arguments at Resentencing. According to Jerry, the district court bypassed the Guidelines and allowed the government to argue that the same, 264-month sentence should be imposed. The government disputes Jerry's assertion; it says the district court identified the correct Guidelines range and correctly decided that an upward variance was appropriate. The government also contests Jerry's characterization of its argument at resentencing that applying the categorical approach produced an absurd result. Because Hobbs Act robbery can be committed non-violently, applying the categorical approach meant that Hobbs Act robbery could not be considered a "crime of violence" under the Guidelines, even though Jerry's robbery had, in fact, been committed violently. Even if the government had taken the position that *Bridges* and *Jerry I* were wrongly decided, it argues that a district court does not commit procedural error simply by listening to purportedly incorrect arguments.

We see no procedural error in the district court's calculation and application of the Sentencing Guidelines range. "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and this range should serve as "the initial benchmark" for the sentence. *Gall*, 552 U.S. at 49. The court here correctly calculated the applicable range. It recognized that the Probation Office had filed a revised report for purposes of resentencing, which reflected a "new penalty range." Accepting that initial benchmark, the court explained that the range did not account for Jerry's actual conduct during the offense, which it described as "one heartbeat away from murder." Because this conduct "ha[d] to be reflected in the sentence," the court decided to deviate from the range. But the substantial deviation the government recommended was not warranted, in the court's

judgment, because the sentence “ha[d] to reflect in some way the new guidelines range.”

The decisions Jerry cites do not support his claim that the district court procedurally erred by permitting the government to offer certain arguments. He refers to *United States v. Dearborn*, 873 F.3d 570, 573 (7th Cir. 2017), and *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011), for the proposition that the government’s arguments about *Bridges* and *Jerry I* were irrelevant and should not have been permitted, as this court had not ordered a general remand for resentencing. In *Barnes*, we explained that on a general remand, “a district court *may* permit new arguments and evidence as it deems necessary to re-fashion its sentence.” 660 F.3d at 1006. Similarly, in *Dearborn*, after a reversal to correct certain supervised release conditions, the scope of remand did not include a defendant’s challenge to the earlier denial of his motion to suppress and that ruling’s implications on his guilt. 873 F.3d at 571, 573.

In *Jerry I*, we remanded for resentencing because an incorrect Guidelines range had been applied. 996 F.3d at 499. We also recognized that “a sentencing judge can address” the factual circumstances of the offense under the § 3553(a) factors, even though those circumstances are not accounted for in the range itself. *Id.* at 498. Here, the district court did not err in permitting the government to argue that Jerry’s actual conduct during the offense was not accounted for by the new Guidelines range, an argument within the scope of our remand for resentencing.

Comments at Resentencing. The district court stated that the Guidelines range for Counts One and Three was “frankly ridiculous,” and referenced its “personal belief” and

knowledge as a district court judge. Jerry submits this reflected a “mind-set of un-seriousness.” Jerry relies primarily on *United States v. Robinson*, 829 F.3d 878 (7th Cir. 2016), and *United States v. Figueroa*, 622 F.3d 739 (7th Cir. 2010). To the government, the “record is replete with evidence” that the resentencing was a serious proceeding and that the district court imposed a just sentence.

In *Robinson*, this court observed that “[w]hen a district court makes ‘extraneous and inflammatory comments during the sentencing hearing,’ it ‘casts doubt on the validity of the sentence.’” 829 F.3d at 880 (quoting *Figueroa*, 622 F.3d at 741). There, the district court’s focus on “urban decay” and “social unrest” was improper in that it attributed local and national issues to the defendant that were largely peripheral to his crime. *Id.* That court also erred in relating the defendant’s crime to events occurring in other parts of the country. *Id.* Further, the district judge’s personal recollections of the neighborhood in which the crime occurred could be perceived as a personal grudge against the defendant and contributed to the court’s decision to remand for resentencing. *Id.*

In *Figueroa*, this court likewise remanded for resentencing where the district court engaged in “an extended discussion of topics that [were] both outside of the record and extraneous to any proper sentencing consideration,” including the district court’s position on Mexico’s contribution to drug and immigration issues. 662 F.3d at 743. The government’s argument was rejected that “the discussion of the Mexican drug wars was sufficiently germane to the underlying conduct.” *Id.* at 744. But had these been “the only extraneous comments, then we might give the district court the benefit of the doubt.” *Id.*

The district court's remarks during Jerry's resentencing are not like the comments in *Robinson* and *Figueroa*. Its label of the Guidelines range of 51 to 63 months as "frankly, ridiculous" as a matter of "personal belief" is permitted, as a court may express "disagree[ment] with the sentencing philosophy of the guidelines." *United States v. Asbury*, 27 F.4th 576, 580 (7th Cir. 2022). Moreover, the district court's statement of "personal belief" cannot reasonably be understood to indicate a personal grudge against Jerry as in *Robinson*. These comments thus do not constitute procedural error.

Explanation for the Upward Variance. Although Jerry acknowledges that sentences may exceed the Guidelines range, he contends the district court's explanation for the upward variance was "terse" and did not "reveal[] how the particular sentence was determined."

In *Gall*, the Supreme Court stated that "failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range" is procedural error. 552 U.S. at 51. It suggested that a district court adequately explains a sentence or deviation when it "thoroughly document[s] [its] reasoning" therefor. *Id.* at 53. Consistent with this requirement, we have stated that "[w]hen evaluating the procedural soundness of a sentence, we do not explore its reasonableness; that inquiry is reserved for a substantive challenge." *Morgan*, 987 F.3d at 632. So, in *Morgan*, we limited our discussion of procedural error to whether the record revealed the district court's reasons for imposing the sentence. *See id.* at 632–33. Only in evaluating the defendant's substantive challenge did we assess the reasonableness of the district court's proffered reasons for the sentence. *See id.* at 633.

Here, the district court explained that because the Guidelines range did not account for Jerry's violent conduct and the impact that conduct had on his victims, a sentence 16 to 27 percent above that range for all counts was appropriate. It was "certainly not true here," the court observed, that Hobbs Act robbery was committed without violence, as was assumed under the applicable Guidelines range. Rather, the court emphasized, Jerry had committed a "terrible crime" just to obtain some cell phones and his victims were "permanently scarred" by the experience and could not continue working at the store. The court concluded that Jerry's conduct was "one heartbeat away from murder" and this "ha[d] to be reflected in the sentence." These statements sufficiently document the reasons for the upward variance.

B. Substantive Reasonableness

Jerry also contends his new sentence is substantively unreasonable. Although he recasts some of his procedural challenges as substantive ones, *see United States v. Smith*, No. 22-1447, -- F.4th --, 2022 WL 17494689, at *2 (7th Cir. Dec. 8, 2022), we discern three distinct arguments addressing the substantive reasonableness of the sentence. First, Jerry claims the district court's conclusion that his conduct was "one heartbeat away from murder" is an improper justification for the upward variance because it reflects the view of the government and the district court that *Bridges* and *Jerry I* were wrongly decided. Jerry suggests that to justify this variance, the district court must have made findings specific to his risk to reoffend or respect for the law. Second, Jerry contends the district court described his conduct during the offense using more extreme rhetoric than at the first sentencing. Third, he argues the

district court discounted his lack of write-ups in prison and his engagement in self-study.

Justification for the Upward Variance. Although Jerry frames his first argument as a procedural error, his reasoning raises a substantive challenge to the district court's consideration of his actual conduct and victim impact in imposing an above-Guidelines sentence. In *Gall*, the Court analyzed, under an abuse-of-discretion standard, whether the district court properly relied on a particular factor—the defendant's immaturity at the time of the offense—in selecting a sentence. *See* 552 U.S. at 58. It explained that the district court's use of that factor was reasonable, in part because “consideration of that factor finds support in our cases.” *Id.* Therefore, when a defendant claims that the district court's justification for a sentence was grounded in an inappropriate consideration, he challenges the substantive reasonableness of the sentence.

It was reasonable for the district court to consider Jerry's actual conduct and victim impact. Both considerations are encompassed within “the nature and circumstances of the offense” under 18 U.S.C. § 3553(a)(1). *See United States v. Propst*, 959 F.3d 298, 305 (7th Cir. 2020) (victim impact); *United States v. Durham*, 967 F.3d 575, 580 (7th Cir. 2020) (violent conduct). Our case law also supports their consideration in varying upward from a Guidelines range reflecting the categorical approach to the classification of an offense. In *United States v. Carter*, 961 F.3d 953, 954 (7th Cir. 2020), we observed that “the classification of prior convictions under the Sentencing Guidelines can produce abstract disputes that bear little connection to the purposes of sentencing.” We therefore explained that a judge may consider reliable information about a conviction and use its “discretion under § 3553(a) to impose

a sentence that does not depend on that categorical classification.” *Id.* at 959–60.

Although our observations in *Carter* were made about the district court’s consideration of the factual circumstances surrounding prior convictions, they readily extend to those offenses that are the immediate subject of sentencing. Congress provided that “[n]o limitation shall be placed on the information concerning the ... conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. This broad language includes conduct related to both prior convictions and the conduct for which the defendant is being sentenced. The district court therefore did not act unreasonably in considering Jerry’s violent conduct despite the categorical classification of Hobbs Act robbery.

Similarly, in *United States v. Jones*, 962 F.3d 956, 962 (7th Cir. 2020), we acknowledged that victim impact may support an upward variance. There, the defendant was subject to a lower Guidelines range after it was determined that he could no longer be designated a career offender. *See id.* at 959. We stated that the “Guidelines may well fail to account for the devastating effects [the defendant]’s crimes had on his victims,” and we observed that it was appropriate for the district court to “so state and clarify how it uses those findings to calculate” the appropriate sentence. *Id.* at 962. The district court thus did not abuse its discretion in considering victim impact.

Jerry’s violent conduct and victim impact also must constitute sufficiently compelling justifications to support the degree of variance for the sentence to be substantively reasonable. “When examining above-Guidelines sentences, we

'consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance.'" *United States v. Wood*, 31 F.4th 593, 600 (7th Cir. 2022) (quoting *Gall*, 552 U.S. at 50). The district court determined that because the Guidelines range did not account for Jerry's violent conduct and victim impact, a sentence 16 to 27 percent above that range was proper. In *Wood*, a district court sentenced a defendant who committed wire and bankruptcy fraud to a term of imprisonment that exceeded the top of the Guidelines range by approximately 66 percent. 31 F.4th at 596, 600. We concluded that the inability of the Guidelines "to capture the nature of [the defendant]'s crime, its impact upon his victims, and his dogged pursuit of the [fraudulent] scheme" were sufficiently compelling justifications for this deviation. *Id.* at 600. Here, the violent nature of Jerry's conduct and its impact on his victims are "factors sufficiently particularized to the individual circumstances of the case" and provide compelling justifications for a moderate upward variance. *Id.* (quoting *United States v. Stinefast*, 724 F.3d 925, 932 (7th Cir. 2013)) (internal quotation marks omitted).

Comments at Resentencing. When the district court said Jerry's crimes were "one heartbeat away from murder," to Jerry, the court employed more extreme rhetoric to describe his conduct at resentencing than at his initial sentencing. This comment is a problem for Jerry because he says it formed "the largest part of the reason for imposing a sentence above the recommended guideline range." He brings this as a substantive challenge, so we understand him to contest the weight

the district court afforded his violent conduct and victim impact in choosing an above-Guidelines sentence.¹

We reject this argument because the district court consistently described the offense at each sentencing hearing. At the first sentencing, the court stated of the robbery: “If I were in that same situation, I would be, as a good religious person, saying my final prayers because I would believe that I was go[ing to] die at that moment.” Given Jerry’s conduct during the offense, the court observed that the victims “might have” in fact died that day. These statements, like the district court’s comments at the resentencing, reflect the court’s view that the sentence should account for the violent nature of Jerry’s conduct and the impact his crimes had on his victims.

Consideration of Self-Study and Lack of Write-ups. Last, Jerry contends the district court unreasonably discounted his self-study and lack of write-ups in prison, erroneously presuming Jerry acted with an eye toward receiving a more favorable sentence. This contention lacks merit. First, the government offered this point at the resentencing about Jerry’s self-study, not his lack of write-ups. Regardless, the district court rejected the government’s argument at the resentencing. The court observed that although Jerry knew while in prison that he would be resentenced, the court had “seen many other

¹ Even if Jerry’s challenge is that the district court “select[ed] a sentence based on clearly erroneous facts,” a procedural challenge, *Gall*, 552 U.S. at 51, that argument fails. The court adopted the factual findings in the presentence report, which stated that Jerry brandished a gun and threatened to “shoot the shit out of” the employees of the cellphone store. The court did not commit procedural error in characterizing Jerry’s offense as “one heartbeat away from murder.”

examples where people did not act that way.” It therefore “commend[ed]” Jerry for these actions.

III. Conclusion

Jerry’s new sentence is both procedurally and substantively reasonable. The district court correctly calculated the applicable Guidelines range, thoroughly considered the relevant § 3553(a) factors, and fashioned a sentence that varied upward to account for Jerry’s conduct during his crimes and his impact on the victims. For these reasons, we AFFIRM.