Nos. 05-4744, 05-4745

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICKY CHASE HOBBS and JEREMY KRATZER,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

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UNITED STATES OF AMERICA,

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v.

RICKY CHASE HOBBS and JEREMY KRATZER,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in a criminal case entered by the United States District Court for the Eastern District of North Carolina. The

district court entered judgment on July 5, 2005. JA Vol. II at 691-703.[1] Each defendant filed a timely notice of appeal. JA Vol. II at 703, 705. The district court had subject matter jurisdiction under 18 U.S.C. 3231. This Court has appellate jurisdiction under 28 U.S.C. 1291.

GOVERNMENT'S RE-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to support defendants' convictions for conspiracy against rights under 18 U.S.C. 241.

2. Whether the district court correctly denied Kratzer's motion for a new trial, which was based on the prosecutor's statement during closing argument that the defendants had not called witnesses to refute the government witnesses' testimony.

3. Whether the district court correctly denied Kratzer's motion for a new trial, which was based on an isolated statement during the prosecutor's rebuttal closing argument that mischaracterized the defendants' closing argument.

4. Whether the district court abused its discretion in permitting a co-conspirator to testify as to whether he reached an understanding with the

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[1] Citations to "JA Vol. __ at __" refer to pages in the Joint Appendix by volume. Citations to "R. __" refer to documents in the record as entered on the district court's docket sheet. Citations to "Def. Br. __" refer to pages in defendants-appellants opening brief.

defendants.

5. Whether the district court clearly erred in sustaining the government's *Batson* challenge.

STATEMENT OF THE CASE

On February 19, 2004, a federal grand jury returned a three-count indictment against defendants Ricky Chase Hobbs, Jeremy Kratzer, Joshua Hancock, and Roston Chance Hobbs. Count 1, the only count applicable to this appeal, alleged that Ricky Chase Hobbs, Jeremy Kratzer, and Joshua Hancock[2] conspired to deprive members of an African-American family of their right to own and occupy a dwelling without injury, intimidation, and interference because of their race, in violation of 18 U.S.C. 241.[3] JA Vol. I at 25-28.

Defendants' trial began on March 9, 2005. At the close of the government's

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[2] Joshua Hancock entered a plea of guilty to Count 1 of the indictment and was sentenced to three years' probation, a fine, and a special assessment. R. 98. Roston Chance Hobbs entered a plea of guilty to Count 3 of the indictment, alleging a violation of 18 U.S.C. 1512(b)(3) (witness tampering), and was sentenced to three years' probation, a fine, and a special assessment. R. 97. Upon the government's motion, the court dismissed Count 2 of the indictment, which charged Roston Chance Hobbs with violating 18 U.S.C. 1001 (false statements).

[3] 18 U.S.C. 241 provides a criminal penalty if "two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

case, the defendants moved for judgments of acquittal on the ground that there was insufficient proof to support their convictions. JA Vol. II at 531-532. The district court denied their motions. JA Vol. II at 532. Defendants renewed their motions at the close of all evidence; the court again denied their motions. See U.S. District Court docket entries for March 11, 2005.

The jury convicted defendants Hobbs and Kratzer as charged. JA Vol. II at 609, 704. Both defendants moved for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29(c); defendant Kratzer also moved for a new trial pursuant to Federal Rule of Criminal Procedure 33(a). JA Vol. II at 610-613, 614-615, 616-617; see Fed. R. Crim. P. 29(c) and 33(a). The district court denied the motions. JA Vol. II at 668, 669-678.

On July 5, 2005, the district court sentenced each defendant to 21 months' imprisonment. JA Vol. II at 691-696, 697-702. This appeal followed.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, *United States* v. *Wilson*, 118 F.3d 228, 234 (4th Cir. 1997), the evidence presented at trial established the following facts.

After her husband was killed in a trucking accident, Deborah Edwards spent nearly a year looking for a new house in which to raise her four children, who

ranged in age from 6 to 14. JA Vol. I at 121-123. She eventually decided to move near her church in Richlands, North Carolina. JA Vol. I at 123. In March of 1999, she found a house located at 1206 Ben Williams Road and "fell in love with it instantly." JA Vol. I at 123, 125, 127. It was a big, new house in the country, with four bedrooms, a two-car garage, and a large backyard. JA Vol. I at 125-126. The new house was in a neighborhood called Nine Mile. JA Vol. I at 154-156. Ms. Edwards did not know much about the neighborhood or anyone who lived there. JA Vol. I at 125. She was simply excited about her new surroundings because the atmosphere was "slow-paced," and because her kids "could run and play outside and have a good time." JA Vol. I at 126.

Some of the residents of Nine Mile, however, were angered and "disgusted" that the Edwards family had bought a home in Nine Mile, and they wanted the family to leave. JA Vol. I at 159-161, 195-196, 287-288, 366-367, 371, 412; JA Vol. II at 471-472, 473-474. In the spring of 1999, Nine Mile was a predominantly white neighborhood. See, *e.g.*, JA Vol. I at 153, 193, 316. Ms. Edwards and her children are African-American. JA Vol. I at 316.

Shortly after the Edwards family moved to Nine Mile, defendant Hobbs, defendant Kratzer, and their co-conspirators Joshua Hancock (Hancock), Philip Foy (Foy), and Roston Chance Hobbs (Chance, and younger brother to defendant

Hobbs) began discussing what they could do to threaten and intimidate the Edwards family into leaving Nine Mile. JA Vol. I at 159-160, 193-194, 284, 287-288, 370-373; JA Vol. II at 473-476. These conversations usually took place outside Rocky's convenience store or the Nine Mile Game Room, two local hangouts. JA Vol. I at 191, 203, 378-379; JA Vol. II at 483-484.

Specifically, about a week before Easter, defendant Hobbs, defendant Kratzer, Foy, and Chance were outside Rocky's one evening with a few of their friends. JA Vol. I at 370-371, 414. They stood around Alex Smith's truck and talked about the Edwards family having moved into Nine Mile, and about ways they could get the "niggers" and "coons" to leave. JA Vol. I at 160, 195, 287, 414-415; JA Vol. II at 474. Everyone was "pretty mad" that the Edwards family had moved to Nine Mile. JA Vol. I at 415. During this particular conversation, defendant Hobbs, defendant Kratzer, Foy, and Chance were the more vocal of the group, and "were just louder" and "kind of pumped up more than anybody else." JA Vol. I at 416.

Defendant Hobbs told the others that he wanted to run the Edwards family out of Nine Mile, and defendant Kratzer said he would help get them out. JA Vol. I at 195-196, 416. Defendant Hobbs also said they should hang a noose and burn a cross at the Edwards's house. JA Vol. I at 416. While discussing hanging a noose

on the Edwards's door, the defendants, Foy, Chase, and some others passed around a noose that had been in the back of Smith's truck. JA Vol. I at 160-161, 163, 195, 197-198, 287, 371, 417; JA Vol. II at 475-476. Defendant Hobbs said that if hanging the noose did not succeed in scaring the Edwards from their home, then they would burn a cross and throw a raccoon or possum on their doorstep. JA Vol. I at 201. Defendant Hobbs, defendant Kratzer, and Foy then discussed how, specifically, to burn a cross so that the Edwards family would leave: nail two-by-fours together, douse it with gasoline, and burn it in the Edwards's backyard. JA Vol. I at 198-199, 257. Defendant Kratzer also volunteered to assist defendant Hobbs and Foy if they needed help or someone to accompany them. JA Vol. II at 256, 258.

The group eventually left Rocky's and headed to the Game Room in separate trucks. JA Vol. I at 199, 418. To get to the Game Room from Rocky's, one had to turn off Bachellor Road and then travel down Ben Williams Road past the Edwards's house. JA Vol. I at 157, 199-200, 247. As the group passed the Edwards's home that evening, "everybody was hollering out the windows" and calling the Edwards family "niggers and coons." JA Vol. I at 418. Kyle Gwynn, a friend who was with the defendants that evening, yelled out his window, as did the occupants of the truck in front of him – Jason Watkins and defendant Hobbs. JA

Vol. I at 419. In fact, defendant Hobbs, defendant Kratzer, Hancock, Foy, and Chase often yelled racial epithets out their windows or threw trash in the Edwards's yard while passing in front of their house. JA Vol. I at 111, 202, 380-381; JA Vol. II at 488-489. Indeed, Ms. Edwards and her children often heard people shouting "nigger" and yelling threats as they drove past their home. JA Vol. I at 137-138. Hearing these things made Ms. Edwards "uneasy" and "afraid." JA Vol. I at 137-138.

After arriving at the Game Room, defendant Hobbs, defendant Kratzer, Hancock, Foy, Chance, and others continued to discuss ways to get the Edwards family to leave Nine Mile. JA Vol. I at 200, 319-320; JA Vol. II at 479. At one point, Chance asked Hancock to show him how to make a noose. JA Vol. I at 322. Chance got some rope from the back of his truck, and Hancock began making a noose. JA Vol. I at 322; JA Vol. II at 479. While Hancock was making the noose, the defendants, Hancock, and Chance were calling the family names. JA Vol. I at 320, 322. One of them then said that "the niggers should see [the noose]." JA Vol. I at 320, 322-323; see also JA Vol. II at 478. According to Chance, they were "fixing to do something to frighten the family" so that they would be forced to move from Nine Mile. JA Vol. I at 377.

At the end of the conversation, Chance, Foy, and Hancock left the Game

Room. JA Vol. I at 324-325, 377; JA Vol. II at 480. According to Chance, he knew exactly where he was headed and why: to the Edwards's house to hang the noose on their doorknob. JA Vol. I at 377. Chance and Hancock drove from the Game Room and ended up at Gertie Davis's house, which was across the street from the Edwards's house. JA Vol. I at 324, 377; JA Vol. II at 480. Defendant Kratzer, who was Davis's grandson and lived next door to Davis, was out front when Hancock arrived. JA Vol. I at 283-284, 324. Foy then met up with the group at Davis's house. JA Vol. II at 480. Someone took the noose that Hancock had made at the Game Room, and then Hancock, Chance, and defendant Kratzer ran toward the Edwards's house. JA Vol. I at 325; JA Vol. II at 480. Foy remained across the street. JA Vol. I at 378; JA Vol. II at 480. Chance and Hancock ran up to the Edwards's front porch, and one of them hung the noose on the door. JA Vol. I at 325, 377; JA Vol. II at 480. Chance, Hancock, and Foy then left. JA Vol. I at 326, 378; JA Vol. II at 480.

That same night, Ms. Edwards and her children attended her church's annual banquet. JA Vol. I at 127-128. Following the banquet, the family decided to spend the night in their new home even though they had not yet finished moving all of their belongings into it. JA Vol. I at 128-129. They arrived after midnight and entered their new home through the garage. JA Vol. I at 129. The next

morning, the Edwards family found a noose hanging from their front doorknob. JA Vol. I at 130. At the time, Ms. Edwards and her family did not realize it was a noose. JA Vol. I at 131, 144, 147.

Even after the incident with the noose, the defendants and their co-conspirators continued to discuss the Edwards family, whom they often referred to as "coons," see, *e.g.*, JA Vol. I at 321-322; JA Vol. II at 474, and how to get them to leave Nine Mile. While at the Game Room one night, defendant Hobbs held up a dead raccoon and said that they should throw it in the Edwards's yard, JA Vol. I at 425-426; JA Vol. II at 485-486, to send the message that they were not welcome in Nine Mile, JA Vol. II at 488. Defendant Hobbs, Foy, and others then left the Game Room in a truck. JA Vol. II at 486-487. Defendant Hobbs and Foy were in the cab of the truck; others were in the back. JA Vol. II at 487. Foy knew they were heading to the Edwards's house and knew that someone was going to throw the raccoon in their yard because they had "just got done talking about it." JA Vol. II at 487. Once there, someone in the back of the truck threw the dead raccoon into the Edwards's yard. JA Vol. II at 487. Defendant Hobbs, Foy, and the others returned to the Game Room later that night and were "laughing and joking around." JA Vol. I at 427.

Ms. Edwards found the dead racoon in her yard. JA Vol. I at 138-139. The

racoon did not appear to have been struck by a car; rather, "it was in perfect condition," just dead. JA Vol. I at 139. When she saw the racoon, she thought of the derogatory term "coon" used by others to refer to African-Americans. JA Vol. I at 139.

Defendant Hobbs, defendant Kratzer, Hancock, Chance, and Foy had multiple conversations about burning a cross in the Edwards's yard. JA Vol. I at 203, 294-295, 378-379, 405. Again, these conversations usually took place outside Rocky's or the Game Room. JA Vol. I at 203, 294, 378-379; JA Vol. II at 483-484. Defendant Hobbs was the "leader" of these conversations, meaning he was one of the most vocal and was the one "who kept on * * * about it, and wanted to do it and get [the Edwards family] out of the community." JA Vol. I at 203. Defendant Hobbs and Chance explained at one point during a conversation that the cross should be built using creosote timbers that had been soaked in diesel fuel because it would be hard to extinguish. JA Vol. I at 379, 423. Defendant Hobbs and Chance had another conversation in their home about burning a cross. JA Vol. I at 379. Defendant Hobbs also met with Hancock at Carlton's convenience store and told Hancock that the best way to get the Edwards family to leave Nine Mile was to burn a cross. JA Vol. I at 327-328, 353.

Defendant Kratzer, Foy, and Smith also discussed burning a cross in the

Edwards's yard. JA Vol. II at 482. On Easter Sunday, defendant Kratzer, Foy, Smith, Bob Kratzer (defendant Kratzer's father), and Ed Davis (defendant Kratzer's uncle) were at Gertie Davis's house remodeling her bathroom. JA Vol. I at 295-296; JA Vol. II at 481-482, 546. They were using new two-by-fours that were in a pile outside the bathroom. JA Vol. I at 296-297. Defendant Kratzer, Foy, and Smith also spent some of their time on the bathroom's roof replacing shingles. JA Vol. I at 295-296; JA Vol. II at 481. While on the roof, they saw the Edwards family outside, across the street, JA Vol. I at 298; JA Vol. II at 482, and began talking about how they did not belong in the neighborhood and that they needed to move, JA Vol. II at 482. They also said that "someone should burn a cross in the yard to get them out." JA Vol. II at 482.

Later that evening, Ms. Edwards was putting up curtains on her back windows. JA Vol. I at 132. She saw a glare through the window and peeked outside to see what it was. JA Vol. I at 132. There in her backyard was a large burning cross. JA Vol. I at 132-133. At first she could not believe what she was seeing, then fear "hit" her. JA Vol. I at 132. Afraid, she called her fiancé, the police, and Jason Davis – the man who had built her house. JA Vol. I at 133, 135. Her children also saw the burning cross and were afraid and upset. JA Vol. I at 134, 135. By the time the police arrived, some neighbors had come to her home

and put the fire out. JA Vol. I at 135. When the police asked Ms. Edwards if anything suspicious had happened beforehand, she realized that the rope found on her doorstep the week before was a noose. JA Vol. I at 135-136. She then felt "a lot of fear" because she associated a noose with "hanging black people." JA Vol. I at 136. She also thought she had a made a "big mistake" by moving to Nine Mile. JA Vol. I at 136.

Because of these incidents, Ms. Edwards never felt safe while living in Nine Mile. JA Vol. I at 142. She and her children were in constant fear and were "constantly looking over [their] shoulders to see what was going on" around them. JA Vol. I at 139. They wanted to leave Nine Mile, but could not do so immediately. JA Vol. I at 140-141. Ms. Edwards took extra precautions to keep her family safe. JA Vol. I at 142. She made sure the doors were closed and locked, even when she was home. JA Vol. I at 142. Her children would not go outside, especially at night. JA Vol. I at 141. If they had to do so, Ms. Edwards stood at the door and watched them. JA Vol. I at 142. The kids were even afraid to walk their dog outside. JA Vol. I at 141-142. Ms. Edwards decided to marry her fiancé earlier than planned so that she and her children would not be alone in the house. JA Vol. I at 138. Once married, she asked her husband either to spend less time working in Raleigh or to take a local job so that he would not be away

from her and her children. JA Vol. I at 140. This decision affected them financially, and they were eventually forced to give up their home. JA Vol. I at 140.

SUMMARY OF ARGUMENT

Defendants challenge their convictions on numerous grounds; none of their arguments warrants reversal.

1. The evidence was more than sufficient to support defendants' convictions. A reasonable jury could easily conclude that a conspiracy existed among certain members of the Nine Mile neighborhood to try to intimidate the Edwards family into leaving Nine Mile, and that the defendants knew about, and participated in, that conspiracy. Defendants discussed with their co-conspirators the Edwards family's presence in Nine Mile; they reached an understanding that something should be done to drive them from the neighborhood; and, they both actively participated in the actions designed to drive them from the neighborhood.

2. The district court correctly denied defendant Kratzer's motion for a new trial based on the prosecutor's alleged improper comment during closing argument. The prosecutor's closing argument did not refer to defendant Kratzer's failure to testify on his behalf; rather, it was an entirely appropriate comment on the failure of the defense to contradict certain of the prosecution's witnesses. Moreover, the

prosecutor's comment was consistent with comments this Court has previously held to be proper. Even if the comment was improper, the district court's repeated instructions on the government's burden of proof were sufficient to contain any prejudice associated with the prosecutor's remark.

3. The district court properly ruled that the prosecutor's unintentional mischaracterization of the defense's closing argument during the government's rebuttal argument did not warrant a new trial. The prosecutor immediately sought to correct the mischaracterization, the comment was isolated and unintentional, and the evidence establishing the defendants' guilt was overwhelming. Under circumstances similar to those present in this case, this Court has held that a new trial is not warranted.

4. The district court did not abuse its discretion in permitting a co-conspirator to testify about whether he had reached an understanding with the defendants to intimidate the Edwards family. The co-conspirator did not offer an opinion; rather, he testified that he, personally, reached an understanding with both defendants. Even if the co-conspirator's testimony is correctly considered "lay opinion testimony," it was properly admitted because (1) lay witnesses are permitted to testify to an ultimate factual issue in a case, (2) the testimony was rationally based on the witness's own perceptions and was helpful to the jury, (3)

the testimony did not present a legal conclusion, and (4) even if erroneously admitted, any resulting prejudice was harmless.

5. The district court did not clearly err in sustaining the government's *Batson* challenge. Defendants argue that the government failed to make the requisite *prima facie* showing of discrimination in the defendants' selection of jurors because the record does not reflect the race of the jurors who were struck. The premise of that argument is incorrect. The court and counsel focused their *Batson* discussion on the four jurors in the jury pool who they perceived to be African-American, all of whom were struck by defense counsel. Even if the district court's ruling was incorrect, this Court has noted that no prejudice results from an improper *Batson* ruling concerning an alternate juror where, as here, no alternate juror participates in deliberations.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANTS' CONVICTIONS

A. Standard Of Review

This Court reviews the district court's decision to deny a motion for judgment of acquittal *de novo*. *United States* v. *Romer*, 148 F.3d 359, 364 (4th Cir.

1998), cert. denied, 525 U.S. 1141 (1999). Where, as here, the motion is based upon insufficient evidence, this Court must sustain the conviction if "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In evaluating the evidence, this Court may not weigh the evidence or assess the credibility of the witnesses but, rather, must assume that the jury resolved all contradictions in the testimony in favor of the government. *Romer*, 148 F.3d at 364. "[I]f the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe." *United States* v. *Murphy*, 35 F.3d 143, 148 (4th Cir. 1994), cert. denied, 513 U.S. 1135 (1995). A "reversal on grounds of insufficient evidence * * * will be confined to cases where the prosecution's failure is clear." *Burks* v. *United States*, 437 U.S. 1, 17 (1978). When evaluating the sufficiency of the evidence, "[t]he focus of appellate review * * * is on the complete picture, viewed in context and in the light most favorable to the Government, that all of the evidence portrayed." *United States* v. *Burgos*, 94 F.3d 849, 863 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997).

B. Sufficient Evidence Supports Defendants' 18 U.S.C. 241 Convictions

Section 241 is violated "[i]f two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any

right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241. Accordingly, the elements that must be shown to establish a violation of 18 U.S.C. 241 are (1) the existence of a conspiracy, and (2) that the purpose of the conspiracy was to injure, oppress, threaten, or intimidate a United States citizen in the free exercise or enjoyment of a constitutional or federal right. *United States* v. *Kozminski*, 487 U.S. 931, 936 (1988). In this case, the federally protected right is the right to own and occupy a dwelling without injury, intimidation, and interference because of one's race.[4] See 42 U.S.C. 1982. Defendant Kratzer asserts (Def. Br. 19-20) that to prove the existence of a conspiracy, the government must establish an overt act in furtherance of the conspiracy. Although 11 overt acts are included in the indictment, 18 U.S.C. 241 does not require the commission of an overt act. See *United States* v. *Crochiere*, 129 F.3d 233, 237-238 (1st Cir. 1997) (stating that *United States* v. *Shabani*, 513 U.S. 10 (1994) "requires a holding that § 241 contains no overt act requirement"), cert. denied, 523 U.S. 1048 (1998); see also *United States* v. *Colvin*, 353 F.3d 569, 576 (7th Cir. 2003), cert. denied, 543 U.S. 925 (2004); *United States* v. *Skillman*, 922 F.2d 1370, 1375 (9th Cir. 1990); *United States* v. *Whitney*, 229 F.3d 1296,

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[4] Neither defendant argues that threats and intimidation designed to force a family from its home because of the family's race do not violate that right.

1301 (10th Cir. 2000).

This Court has stated that "the gist or gravamen of the crime of conspiracy is an *agreement* to effectuate a criminal act." *United States* v. *Laughman*, 618 F.2d 1067, 1074 (4th Cir.) (emphasis added), cert. denied, 447 U.S. 925 (1980); see also *United States* v. *Mills*, 995 F.2d 480, 484 (4th Cir.) ("[T]he focus of a conspiracy charge is the agreement to violate the law, not whether the conspirators have worked out the details of their confederated criminal undertakings."), cert. denied, 510 U.S. 904 (1993); cf. *United States* v. *Redwine*, 715 F.2d 315, 320 (7th Cir.) ("The government need not establish that there existed a formal agreement to conspire; circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct may serve as proof."), cert. denied, 467 U.S. 1216 (1984). Once the government demonstrates that a conspiracy exists, "the evidence need only establish a slight connection between the defendant and the conspiracy to support conviction." *United States* v. *Brooks*, 957 F.2d 1138, 1147 (4th Cir.), cert. denied, 505 U.S. 1228 (1992). The government must show that the defendant "knew of the existence of, and voluntarily participated in, the conspiracy." *United States* v. *Morsley*, 64 F.3d 907, 919 (4th Cir. 1995), cert. denied, 516 U.S. 1065 (1996). This Court will uphold the conviction even if the defendant "played only a minor

role in the conspiracy." *Ibid.* A defendant's knowledge of and participation in a conspiracy, like the conspiratorial agreement itself, "may be inferred from circumstantial evidence." *Burgos*, 94 F.3d at 858.

Viewing the evidence presented in the light most favorable to the government, there was ample evidence that defendants were guilty beyond a reasonable doubt. The evidence presented was sufficient to show that a conspiracy existed to engage in racially motivated acts of intimidation to get the Edwards family to move from their home, and that defendants knew of, and willfully participated in, this conspiracy.[5]

1. Sufficient Evidence Supports The Jury's Finding That A Conspiracy Existed To Violate The Edwards Family's Civil Rights

The government presented ample evidence from which a reasonable jury could have concluded beyond a reasonable doubt that a conspiracy existed to threaten and intimidate the Edwards family into leaving their home in Nine Mile. The evidence established that the defendants and their co-conspirators Hancock, Chance, and Foy, met at several locations over the course of a two-week period to

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[5] Defendant Kratzer does not appear to argue that a conspiracy to drive the Edwards family from Nine Mile did not exist. Rather, defendant Kratzer argues (Def. Br. 21-24) that there was insufficient evidence to tie him to the conspiracy. This argument will be addressed in Part I.B.2. Defendant Hobbs, on the other hand, appears to challenge (Def. Br. 42-43) both the existence of a conspiracy and his participation in it.

discuss, plan, and execute various acts designed to threaten and intimidate the Edwards family so that they would leave Nine Mile. JA Vol. I at 159-161, 196-196, 200, 284, 287-288, 316, 319-320, 370-373; JA Vol. II at 473-476, 479. Members of this conspiracy initially discussed hanging a noose on the Edwards's door. JA Vol. I at 160-161, 195, 197, 203, 287, 371, 416, 420; JA Vol. II at 475. While doing so, they passed around a noose, JA Vol. I at 163, 197-198, 287, 417; JA Vol. II at 476, and agreed that "the niggers should see [the noose]," JA Vol. I at 323. Later that same evening, after "fixing to do something to frighten the family," all but one of the conspirators went to the Edwards's home with the intention of hanging the noose on the family's doorknob. JA Vol. I at 377. Once there, they did just that. JA Vol. I at 377-378.

Defendants and others also discussed throwing a dead racoon into the Edwards's yard to send the message that they were not welcome in Nine Mile. JA Vol. I at 201, 240-241; JA Vol. II at 485, 488, 518-519. Defendant Hobbs held up a dead racoon while he and some of his co-conspirators discussed this plan. JA Vol. I at 425-426; JA Vol. II at 485-486. Shortly after this discussion, defendant Hobbs, two of his co-conspirators, and a few others went to the Edwards's home with the intention of throwing the racoon in their yard. JA Vol. II 486-487. Once there, they did just that. JA Vol. II 487.

And during the weeks before Easter, defendants and their co-conspirators often discussed burning a cross in the Edwards's yard. JA Vol. I. at 160-161, 195, 197, 203, 294-295, 371, 378-379, 405, 416, 420; JA Vol. II at 475. As with the noose and the racoon, the purpose of burning the cross was to get the Edwards family to leave Nine Mile. See, *e.g.*, JA Vol. I at 327-328, 353. Various members of the conspiracy even debated the best ways of building and burning the cross to maximize its effect. JA Vol. I at 198-199, 257, 379, 423. There is, of course, some question as to who specifically built and burned the cross found in the Edwards's yard. There is no question, however, that (1) shortly after the conspirators talked about hanging a noose at the Edwards's house, members of the conspiracy hung a noose at the Edwards's house; (2) shortly after the conspirators talked about throwing a racoon in the Edwards's yard, members of the conspiracy threw a dead racoon in the Edwards's yard; and, (3) shortly after the conspirators talked about burning a cross in the Edwards's yard, a cross was found burning in the Edwards's yard.

Finally, two co-conspirators testified that they had an understanding with defendants Hobbs and Kratzer that they should do things to try and get the Edwards family to leave Nine Mile. JA Vol. I at 331-335; JA Vol. II at 495-496; see *United States* v. *Gressler*, 935 F.2d 96, 101 (6th Cir. 1991) ("A tacit

understanding is enough to show a conspiratorial agreement."), cert. denied, 502 U.S. 885 (1991); *Whitney*, 229 F.3d at 1302 (holding that conspiracy existed without a verbal agreement because there was a "mutual understanding" between conspirators of what they were going to do). From all of this evidence, a jury could reasonably conclude that a conspiracy existed to violate the Edwards family's civil rights.

2. Sufficient Evidence Supports The Jury's Finding That Defendant Hobbs Knew Of, And Participated In, The Conspiracy

The government presented abundant evidence from which a reasonable jury could conclude that defendant Hobbs knew of, and participated in, the conspiracy to threaten and intimidate the Edwards family so that they would leave Nine Mile. Witnesses testified that defendant Hobbs was present at and participated in most of the conversations during which the conspiracy's illegal plans were discussed. JA Vol. I at 194, 196, 197-198, 203, 319-320, 327-328, 378-379, 414, 420, 423, 424-425; JA Vol. II at 483-485. Indeed, some witnesses testified that defendant Hobbs was the leader of these conversations, in that he was "just louder," and more "pumped up" than anyone else. JA Vol. I at 416; see also JA Vol. I at 196. Moreover, defendant Hobbs specifically told his co-conspirators that he wanted to run the Edwards family out of Nine Mile, JA Vol. I at 195-196, 201, 416, and he

discussed with them various ways to do so. And, again, two of Hobbs's co-conspirators testified that they had an understanding with defendant Hobbs that things should be done to drive the Edwards family from Nine Mile. JA Vol. I at 163-167; JA Vol. II at 495-496. The evidence was more than sufficient to establish defendant Hobbs's knowledge of the conspiracy.

The evidence supporting a finding that defendant Hobbs participated in the conspiracy was equally strong. Defendant Hobbs committed himself to the conspiracy's objective early on: During one of the first conversations about the Edwards family, defendant Hobbs declared that if hanging a noose did not succeed in scaring the Edwards family into leaving Nine Mile, then they should throw a dead racoon or burn a cross in their yard. JA Vol. I at 201. Following the noose hanging incident, defendant Hobbs held up a dead racoon and encouraged those present to throw it in the Edwards's yard. JA Vol. I at 425-426; JA Vol. II at 485-486. He then drove with Foy to the Edwards's home where the racoon was thrown into their yard. JA Vol. II at 486-487. Even if defendant Hobbs was not the one who actually threw the racoon, he initiated the idea and participated in the venture. See, *e.g.*, *United States* v. *Whitney*, 229 F.3d 1296, 1302 (10th Cir. 2000) (upholding 18 U.S.C. 241 conviction arising from racially motivated act of intimidation where evidence did not show that defendant participated in the act, but

did show that he "[knew] about, discuss[ed], and encourage[d] the action," and also "initiated it").

Additional evidence supports the jury's verdict. At one point defendant Hobbs opined that the best way to get the Edwards family to leave was to burn a cross in their yard, JA Vol. I at 327-328, 353, and he went so far as to discuss with his co-conspirators – on multiple occasions – the mechanics of building and burning a cross in the Edwards's yard, JA Vol. I at 198-199, 257. Shortly after these discussions, a cross was found burning in the Edwards's yard. That the government did not produce evidence establishing defendant Hobbs's presence at the cross-burning is of little consequence. Other courts have upheld conspiracy convictions under 18 U.S.C. 241 when the defendant did not participate directly in the intimidating act. See, *e.g.*, *Whitney*, 229 F.3d at 1303; *United States* v. *Montgomery*, 23 F.3d 1130, 1132-1133 (7th Cir. 1994) (concluding evidence was sufficient to support conviction under 18 U.S.C. 241 arising from cross burning where defendant discussed building a cross to scare African-American residents out of the neighborhood and vandalized a car while his co-defendants prepared the cross for burning); *United States* v. *White*, 788 F.2d 390, 393 (6th Cir. 1986) (concluding evidence supported conviction of 18 U.S.C. 241 where, although defendant did not participate in the arson of a home owned by an African-

American, he had made statements such as, "if that black son of a bitch [re]built * * * across the street from me * * * I'd burn it down"). Indeed, the government is not required to prove an overt act to establish a 241 conspiracy.

3. Sufficient Evidence Supports The Jury's Finding That Defendant Kratzer Knew Of, And Participated In, The Conspiracy

The government presented abundant evidence from which a reasonable jury could conclude that defendant Kratzer knew of, and participated in, the conspiracy to threaten and intimidate the Edwards family into leaving Nine Mile. Witnesses testified that defendant Kratzer was present at, and participated in, most of the conversations during which the conspiracy's illegal plans were discussed. JA Vol. I at 159, 194-196, 197-199, 200-201, 203, 320-323, 370-372, 378-379, 414-416, 420-421, 424-426; JA Vol. II at 482-484. The government also produced evidence that defendant Kratzer, like defendant Hobbs, was one of the more vocal of the conspiracy. JA Vol. I at 416; see also JA Vol. I at 196. And the government produced two co-conspirators who testified that they had an understanding with defendant Kratzer that things should be done to drive the Edwards family from Nine Mile. JA Vol. I at 331-335; JA Vol. II at 495-496. The evidence was thus more than sufficient to establish defendant Kratzer's knowledge of the conspiracy.

The evidence supporting a finding that defendant Kratzer participated in the

conspiracy was equally strong. For example, when defendant Hobbs declared that he wanted to run the Edwards family out of Nine Mile, defendant Kratzer offered to help. JA Vol. I at 195-196, 199, 416. Defendant Kratzer also discussed with defendant Hobbs and Foy how to build and burn a cross in the Edwards's backyard, JA Vol. I at 198-199, 257, and defendant Kratzer told defendant Hobbs and Foy that if they needed anyone to help them, he would, JA Vol. I at 256, 258. And on Easter Sunday, the day of the cross burning, defendant Kratzer, Foy, and Smith talked about how the Edwards family did not belong in Nine Mile, and they agreed that "someone should burn a cross in the yard to get them out." JA Vol. II at 482.

Defendant Kratzer also participated directly in the noose hanging incident. The government produced evidence that defendant Kratzer was present at the Game Room and participated in the discussion of ways to threaten and intimidate the Edwards family on the night the noose was hung on the Edwards's door. JA Vol. I at 200, 319-320, 420; JA Vol. II at 479. After the discussion, and after Hancock, Chance, and Foy arrived at Gertie Davis's house, defendant Kratzer ran toward the Edwards's house with Chance and Hancock when one of them hung the noose on the door. JA Vol. I at 325; JA Vol. II at 480. Thus, the evidence fully supports the jury's finding that defendant Kratzer participated in the conspiracy.

See, *e.g.*, *Montgomery*, 23 F.3d at 1132-1133 (upholding 18 U.S.C. 241 conviction against sufficiency challenge where evidence supported finding that, although not "the ringleader, [the defendant] went along with and participated in the [racially motivated act of intimidation]," and evidence showed that defendant had discussed with others taking some action to scare residents from his neighborhood); see also *Whitney*, 229 F.3d at 1302; cf. *Skillman*, 922 F.2d at 1373 (noting that "[w]hile mere proximity to the scene of the [racially motivated act of intimidation] is not sufficient alone to establish involvement in the conspiracy, [the defendant's] presence does provide additional support for the finding of his involvement").

II

THE DISTRICT COURT CORRECTLY DENIED DEFENDANT KRATZER'S MOTION FOR A NEW TRIAL BECAUSE THE PROSECUTOR'S CLOSING ARGUMENT DID NOT IMPLICATE DEFENDANT KRATZER'S FIFTH AMENDMENT RIGHT NOT TO TESTIFY

A. Standard Of Review

This Court reviews a district court's denial of a motion for a new trial for abuse of discretion. *United States* v. *Perry*, 335 F.3d 316, 320 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004). The ultimate question here, however, is whether the prosecutor's comment implicated defendant Kratzer's constitutional

right not to testify at trial. Because this issue presents a question of law, the appropriate standard of review is *de novo*. *United States* v. *Cheek*, 94 F.3d 136, 140 (4th Cir. 1996).

B. Analysis

The district court correctly denied defendant Kratzer's motion for a new trial based on the prosecutor's alleged improper comment during closing argument. Defendants contend (Def. Br. 27-28, 44) that the prosecutor improperly commented on defendants' failure to testify. The prosecutor did not, and defendants' argument fails.

During the government's closing argument, the prosecutor reviewed the testimony provided by several witnesses regarding *Chase Hobbs's* presence at, participation in, and agreement with, discussions about hanging a noose, burning a cross, and throwing a dead raccoon at the Edwards's home. JA Vol. II at 582-583. The prosecutor then stated: "The defense hasn't called a single witness to refute the government witnesses' testimony about these conversations." JA Vol. II at 583. Defendant *Kratzer* immediately objected and the district court sustained the objection.[6] JA Vol. II at 583-584.

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[6] In the district court's order denying defendant Kratzer's motion for a new trial on this ground, the court explained that it had "now conclude[d] that the

(continued...)

In determining whether a prosecutor improperly commented on a defendant's failure to testify, this Court asks: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States* v. *Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). As defendant Kratzer acknowledges in his brief (Def. Br. at 26-27), this Court does not consider a prosecutor's comment to be improper where the prosecutor does not directly refer to the defendant's failure to testify on his behalf. See, *e.g.*, *United States* v. *Francis*, 82 F.3d 77, 78 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); *United States* v. *Percy*, 765 F.2d 1199, 1204 (4th Cir. 1985). In *United States* v. *Johnson*, 337 F.2d 180, 203 (4th Cir.), cert. denied, 379 U.S. 988 (1965), this Court held that a prosecutor's comment during closing argument that the defendant "produced no evidence to deny the testimony of numerous witnesses of his various activities" did not improperly draw attention to the defendant's refusal to testify. This Court explained that the defendant was not the only person who could have refuted the government's witnesses. *Ibid.* The comment, therefore, "merely pointed out that the defense did not introduce evidence to contradict certain of the prosecution's

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[6](...continued)
Government's statement *was not* improper" because it did not implicate either defendant's right not to take the stand. JA Vol. II at 674-675 (emphasis added).

witnesses." *Ibid.* Similarly, defendants could have called other witnesses to the discussions to refute the testimony provided by the government's witnesses.[7]

Defendant Kratzer's contention (Def. Br. at 27-28) that everyone who was

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[7] Defendant Kratzer also contends (Def. Br. 27) that the government mischaracterized the defense's evidence because he did, in fact, present evidence (*i.e.*, testimony from defendant Kratzer's father and uncle and alibi testimony from Carol Davis). This argument misinterprets the prosecutor's comment. The prosecutor did not state that the defendants failed to produce any evidence; the prosecutor pointed out that the defendants did not produce evidence to refute the government's witnesses regarding discussions in which defendant *Hobbs* participated. The testimony from defendant Kratzer's father and uncle focused on conversations between *defendant Kratzer*, Foy, and Smith. Moreover, the testimony from defendant Kratzer's father and uncle did not refute any of the government's witnesses who testified that both defendants discussed hanging a noose, burning a cross, and throwing a dead racoon in the Edwards family's yard. Defendant Kratzer's uncle testified that he did not know if defendant Kratzer and Foy had conversations outside his presence, and that he could not hear their conversations when he was not close to them. JA Vol. II at 562-563. He also testified that defendant Kratzer and Foy remained on the roof after he left. JA Vol. II at 561. Although defendant Kratzer's father testified that he did not hear defendant Kratzer and his friends discuss the Edwards family while working on the roof, he also testified that he did not hear all of their conversations. JA Vol. II at 553-554. The testimony from Carol Davis concerned defendant Kratzer's whereabouts on the night of the cross-burning, JA Vol. II at 539-542, not whether either defendant participated in discussions about hanging a noose, throwing a racoon, or burning a cross. Moreover, her testimony that defendant Kratzer fell asleep on the couch the night of the cross burning directly contradicted defendant Kratzer's grand jury testimony that he slept in his bed that evening. Compare JA Vol. II at 541-542, with JA Vol. I. at 300. Finally, Jessica Green, Hobbs's alibi witness for the night of the cross-burning, could not recall specifically what time he left her house that evening. JA Vol. II at 572. She provided no information to contradict other witnesses' testimony that defendant Hobbs was present at, and participated in, the discussions and plans to intimidate the Edwards family.

involved in the discussions testified except the defendants, and therefore the prosecutor's argument "can only be interpreted as a comment on Kratzer's silence at trial," is simply incorrect. The prosecutor referred to the conversations during which the defendants, their co-conspirators, and others discussed plans to threaten and intimidate the Edwards family so that they would leave Nine Mile. JA Vol. II at 583-592. The government called as witnesses many – but certainly not all – of the persons who were present during those conversations. The government did not call, for example, Alex Smith, JA Vol. I at 159, 370, 414-415; JA Vol. II at 473, Kelly Willaford, JA Vol. I at 159, 414, Kim Bachellor, JA Vol. I at 159, Jason Watkins, JA Vol. I at 397, 414, or, Anthony Marshburn, JA Vol. I at 370, 414. *And neither did the defense*. Thus, the prosecutor "merely pointed out that the defense did not introduce evidence to contradict certain of the prosecution's witnesses." *Johnson*, 337 F.2d at 203. This comment was not an improper reference to defendant Kratzer's right not to testify. See *United States* v. *Wall*, 389 F.3d 457 (5th Cir. 2004) ("Commenting on a failure to call a witnesses generally is not an error, unless the comment implicates the defendant's right not to testify."), cert. denied, 125 S. Ct. 1874 (2005); cf. *United States* v. *Cabrera*, 201 F.3d 1243, 1244-1245 (9th Cir. 2000) ("A prosecutor's comment on a defendant's failure to call a witness does not shift the burden of proof, and is therefore permissible, so

long as the prosecutor does not violate the defendant's Fifth Amendment rights by commenting on the defendant's failure to testify.").

Nor was the prosecutor's comment "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Anderson*, 481 F.2d at 701. This Court has previously rejected Fifth Amendment challenges to prosecutorial comments similar to the one at issue here. See *Percy*, 765 F.2d at 1204-1205 (holding that a prosecutor's reference to the "unrefuted and unrebutted" testimony did not run afoul of the *Anderson* test); see also *Francis*, 82 F.3d at 79 (holding that a prosecutor's reference to the "uncontradicted" evidence did not infringe upon defendant's Fifth Amendment right against self-incrimination); cf. *United States* v. *Williams*, 479 F.2d 1138, 1140-1141 (4th Cir.) (distinguishing claim that the government's evidence is "undenied," which "skirt[s] the precipice of reversible error," from permissible claim that it is "unrefuted" or "uncontroverted"), cert. denied, 414 U.S. 1025 (1973).

Even if the prosecutor's statement was improper (and the government in no way concedes that it was), the statement did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *United States* v. *Loayza*, 107 F.3d 257, 262 (4th Cir. 1997). The district court "repeatedly

instructed the jury that [the] burden of proof was on the Government, and that the Defendants had no burden or obligation to produce witnesses or evidence." JA Vol. II at 675. This Court has previously held that curative instructions offered to the jury contain any prejudice which may have resulted from an improper remark. See *United States* v. *Harrison*, 716 F.2d 1050, 1053 (4th Cir. 1983), cert. denied, 466 U.S. 972 (1984); see also *United States* v. *Mares*, 940 F.2d 455, 461 (9th Cir. 1991) ("We have held that such instructions are sufficient to cure prejudice resulting from improper prosecutorial argument."). Thus, the prosecutor's statement does not warrant a new trial.

III

THE DISTRICT COURT CORRECTLY RULED THAT THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT DID NOT WARRANT A NEW TRIAL

A. Standard Of Review

This court reviews a district court's denial of a motion for a new trial for abuse of discretion. *United States* v. *Perry*, 335 F.3d 316, 320 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004). When reviewing a district court's decision for abuse of discretion, "this Court may not substitute its judgment for that of the district court; rather, [it] must determine whether the court's exercise of discretion, considering the law and the facts, was arbitrary or capricious." *United States* v. *Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995).

Moreover, "[a] prosecutor's remarks where an objection has been raised are reviewed for harmless error." *United States* v. *Loayza*, 107 F.3d 257, 262 (4th Cir. 1997); Fed. R. Crim. P. 52(a). If the error does not affect substantial rights, it "must be disregarded." Fed. R. Crim. P. 52(a).

B. Analysis

Defendants argue (Def. Br. 28-31, 43-44) that the prosecutor's rebuttal argument improperly characterized their defense. Specifically, defendants contend that the prosecutor suggested that one of the defendant's counsel acknowledged

defendants' guilt. This comment, defendants contend, deprived them of a fair trial. This argument lacks merit.

In his rebuttal closing argument, the prosecutor said:

> You heard another contention from counsel, something along the lines of other people might be just as guilty as my client. Other people may have done these things. And you've heard our explanation for why some of these people have not been charged. It's kind of an unusual argument from a defense counsel. You should hold other people responsible, too. But it's irrelevant –

JA Vol. II at 603-604. At this point, defense counsel objected and the district court held a sidebar conference. JA Vol. II at 604. During this conference, defense counsel stated his objection to the rebuttal argument – that the prosecutor mischaracterized his closing because he (defense counsel) "didn't say that [defendants] were guilty of anything." JA Vol. II at 604. Defense counsel explained that defendant Kratzer's argument was that he was in the same position as Kyle Gwynn, and that he (defense counsel) "[did not] say that they were guilty of anything." JA Vol. II at 604. The prosecutor stated he would "be happy to correct that," JA Vol. II at 604, and, resuming his argument to the jury, offered the following:

> And if I - - let me correct the misimpression, if I left you with one. I'm not suggesting that counsel has argued that their clients aren't guilty. I think that's obvious. They've made very forceful arguments in favor of their client. I don't mean to suggest that. But what they are saying is

> other people may have done some things, particularly other members of this group may have done things for which they should be held responsible.

JA Vol. II at 605. Neither defense counsel objected to the prosecutor's attempt to correct any misimpression left with the jury.

Comments made by a prosecutor during closing arguments do not warrant a new trial unless they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States* v. *Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993). This Court applies a two-pronged test to determine whether a prosecutor's comments warrant reversal. First, this Court must determine whether the comments were, in fact, improper. *United States* v. *Morsley*, 64 F.3d 907, 913 (4th Cir. 1995). Second, this Court must determine whether the improper comments "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." *Ibid.* To evaluate whether a defendant was prejudiced by a prosecutor's comments, this Court considers "(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *United States* v. *Harrison*, 716 F.2d 1050,

1052 (4th Cir. 1983), cert. denied, 466 U.S. 972 (1984). Whether a reversal is warranted "must be gauged from the facts of each trial." *Ibid.*

Here, the government concedes that the prosecutor misspoke when characterizing the defendants' argument. But the prosecutor's comments did not "so prejudice[] the [defendants'] substantial rights that [they were] denied a fair trial." *Morsley*, 64 F.3d at 913. First, it is unlikely, considering the overall context in which the statement was made, that the prosecutor's comment misled the jury. *Harrison*, 716 F.2d at 1052. The prosecutor immediately offered to correct the mischaracterization when it was called to his attention. JA Vol. II at 604-605. Whether the prosecutor effectively corrected the misstatement is, however, debatable. The prosecutor's use of the double negative ("I'm *not* suggesting that counsel has argued that their clients *aren't* guilty," JA Vol. II at 605 (emphasis added)) suggests that the misstatement was unintentionally left uncorrected.[8] If the correction was ineffective, however, it was not immediately apparent to defense counsel – neither renewed the objection. And if it went unnoticed by the defense, it was likely unnoticed by the jury. What the jury heard was the prosecutor's

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[8] In denying defendant Kratzer's motion for a new trial on this issue, the district court assumed the prosecutor made an improper comment, but "suspect[ed] that [the prosecutor] misspoke" in his attempt to correct the improper comment. JA Vol. II at 677.

immediate attempt to "correct the misimpression, if [he] left [them] with one," by stating that it was "obvious" that defense counsel had "made very forceful arguments in favor of their client." JA Vol. II at 605.

Second, even assuming the jury could have been misled, the prosecutor's comment was isolated. *Harrison*, 716 F.2d at 1052. There is no evidence to support a finding that the government's closing arguments were infected with prejudicial comments, and neither defendant suggests that they were. See *Morsley*, 64 F.3d at 913 (prosecutor's improper comment was isolated when, after "comb[ing] the record," the court found no other similar comments in the prosecutor's principal or rebuttal closing arguments). Rather, any improper comment by the prosecutor was limited to one misstatement in the government's rebuttal argument.[9] See *Mitchell*, 1 F.3d at 241 (concluding that prosecutor's improper statements were "extensive" where prosecutor "repeatedly" referred to improper evidence in opening statement, during witness cross-examination, during closing argument, and on rebuttal).

Third, as set forth above, see Part I.B., and as recognized by the district

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[9] Although defendant Kratzer contends that the government also improperly implicated his right not to testify, that argument lacks any merit. See Part II.B; see also JA Vol. II at 678 (In denying defendant Kratzer's motion for a new trial, the district court reasoned that the prosecutor's "comments were indeed isolated, even when considered with the other comments Defendant Kratzer challenges.").

court, "there was more than sufficient evidence" from which the jury could convict defendants. JA Vol. II at 668, 678; see *Harrison*, 716 F.2d at 1052. The district court explained that "given the substantial evidence, the jury deliberated just one hour." JA Vol. II at 678. As is clear, the government's case against the defendants was based upon the testimony of witnesses who had personal knowledge of the defendants' conversations, intentions, and actions. The government's case against defendants was not based upon – and certainly did not depend upon – the prosecutor's mistaken characterization of the defense's closing argument. See *Harrison*, 716 F.2d at 1052 (finding that the government's case remained strong where it did not revolve around the subject of the improper comment).

Finally, nothing suggests that the prosecutor's misstatement was "deliberately placed before the jury to divert attention to extraneous matters." *Harrison*, 716 F.2d at 1052. The record shows that it was an isolated occurrence and that the prosecutor immediately offered to correct the misstatement when it was brought to his attention. See *Loayza*, 107 F.3d at 263 (finding that the prosecutor's comment was "clearly not intentional" because he was not aware of his improper comment and, when so advised, immediately apologized).

This Court should not overturn the decision of the district court, which was in the best position to evaluate the prosecutor's isolated statement and its impact in

light of all of the relevant circumstances. The district court's careful weighing of the four factors enunciated in *Harrison* demonstrates that its denial of the new trial motion was not an abuse of discretion, and certainly not arbitrary and capricious. See *Morsley*, 64 F.3d at 913 (holding that prosecutor's comment during closing argument that defendant had "confessed" did not warrant a new trial where comments were isolated and did not appear to be deliberate attempt to divert the jury's attention, evidence against the defendant was "abundant," and court issued a curative instruction); see also *United States* v. *Collins*, 415 F.3d 304, 309-310 (4th Cir. 2005) (holding that prosecutor's impermissible vouching for government witnesses did not require reversal even where government's case relied on credibility of witnesses, where comment was unlikely to have misled jury, was isolated, and was not deliberately made to divert the jury's attention).

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING JOSHUA HANCOCK'S TESTIMONY

A. Standard Of Review

This Court reviews a district court's decision to admit or exclude evidence for abuse of discretion. See *United States* v. *Forrest*, 429 F.3d 73, 79 (4th Cir. 2005).

B. Analysis

The district court did not abuse its discretion in permitting Joshua Hancock to testify that he reached an understanding with defendants to intimidate the Edwards family. Defendant Hobbs argues (Def. Br. 34-39) that the district court should not have admitted Hancock's testimony because, as a lay opinion, it impermissibly addressed an ultimate issue in the case. This argument is without merit.

First, Hancock's testimony was not "opinion testimony." Hancock initially testified that he tried to intimidate the Edwards family into leaving Nine Mile and that he agreed with others to do so. JA Vol. I at 331-332. When the prosecutor then asked him whether *defendants* agreed *with him* to intimidate the Edwards family, defense counsel objected and the district court sustained the objection. JA Vol. I at 332. The court ruled that the prosecutor could ask Joshua Hancock "whether or not *he* reached an understanding, and by each defendant. Whether *he* reached an understanding in his mind as to what they were going to do." JA Vol. I at 333 (emphasis added). The prosecutor asked Joshua Hancock exactly that.

> Q. Did you have an understanding with defendant Hobbs that things should be done to try and scare the Edwards family?
>
> A. Yes.

JA Vol. I at 334. The prosecutor then asked Joshua Hancock the same question with respect to defendant Kratzer. JA Vol. I at 335.

Hancock did not offer an opinion on anything; rather, he testified that he, as a participant in the conversations and actions involving the Edwards family, had reached an understanding with the defendants. He was *not* testifying in the form of an opinion about either defendant's state of mind; he was testifying about his own. Cf. *United States* v. *Anderskow*, 88 F.3d 245, 249 (3d Cir.) (holding that witness's testimony did not actually contain a "lay opinion" because witness did not explicitly opine on defendant's guilty knowledge), cert. denied, 519 U.S. 1042 (1996). Hancock, then, did not provide an opinion on the ultimate issue in this case; that is, whether the defendants entered into a conspiracy to intimidate the Edwards family.

Even if Hancock's testimony is considered lay opinion testimony, and even if it addressed the ultimate issue in this case, it was properly admitted. The Federal Rules of Evidence permit a lay witness, in certain circumstances, to testify in the form of an opinion even if that opinion pertains to an ultimate issue in the case. See Fed. R. Evid. 704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); see also *United States* v. *Barile*, 286 F.3d 749,

759 (4th Cir. 2002). Hancock's testimony was "rationally based" on his own perceptions and "helpful to * * * the determination of a fact in issue." Fed. R. Evid. 701. It did not provide a legal conclusion. See *Barile*, 286 F.3d at 760 ("The role of the district court * * * is to distinguish opinion testimony that embraces an ultimate issue of fact from opinion testimony that states a legal conclusion."). Hancock's testimony was limited to whether he, himself, had an understanding with defendants that things should be done to threaten and intimidate the Edwards family so that they would leave Nine Mile. Defendants' characterization of Hancock's testimony as embracing the "very question the jury was impaneled to decide" – that is, whether "Kratzer and Hobbs agree[d] to participate in the intimidation of the Edwards family" – is inaccurate.

Finally, even if it was error to admit Hancock's testimony (and the government does not concede that it was), it was harmless. An erroneous ruling on the admissibility of evidence is harmless if a reviewing court can fairly conclude that the admitted evidence did not substantially influence the jury. See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). Here, there was ample evidence apart from Hancock's testimony that defendants Hobbs and Kratzer agreed with others to intimidate the Edwards family so that they would leave Nine Mile. See, generally, Part I.B. Indeed, Hancock was not the only witness who testified that he

(personally) had an understanding with the defendants to intimidate the Edwards family. Foy testified (without objection) that he had an understanding with defendant Hobbs, defendant Kratzer, and Joshua Hancock to "get the [Edwards] family out of the neighborhood." JA Vol. II at 495-496; see *Anderskow*, 88 F.3d at 251 (admission of testimony that gave opinion of knowledge was harmless error because other circumstantial evidence of defendant's knowledge was overwhelming); see also *United States* v. *Polishan*, 336 F.3d 234, 244 (3d Cir. 2003) (any error in admission of lay opinion testimony was harmless where weight of evidence supported lay witness's conclusions), cert. denied, 540 U.S. 1220 (2004).

V

THE DISTRICT COURT'S REFUSAL TO STRIKE AN ALTERNATE JUROR WAS NOT CLEARLY ERRONEOUS

A. Standard Of Review

This Court gives "great deference" to a district court's finding that a peremptory challenge was exercised for a racially discriminatory reason, and reviews that finding for clear error. *Jones* v. *Plaster*, 57 F.3d 417, 421 (4th Cir. 1995).

B. Analysis

Defendants contend (Def. Br. at 32-34, 45) that "because the record does not

indicate the race of any of the prospective jurors," "the government failed to make a *prima facie* showing that any challenges were exercised on the basis of race." Defendants conclude (Def. Br. 33) that "[w]ithout establishing [a *prima facie* case of discrimination], the district court could not sustain the challenge." Defendants' argument fails.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the prosecution's use of race-based peremptory strikes was unconstitutional. That principle was extended to peremptory strikes by criminal defendants in *Georgia* v. *McCollum*, 505 U.S. 42 (1992). Evaluating whether a party has exercised a peremptory challenge in a discriminatory manner entails a three-step process. *Hernandez* v. *New York*, 500 U.S. 352, 358 (1991). First, the party challenging an opponent's use of peremptory strikes bears the burden of establishing a *prima facie* case of discrimination in the selection of the jury. *Ibid.* In deciding whether the defendant has made the requisite showing of *prima facie* discrimination, "the trial court should consider all relevant circumstances." *Batson*, 476 U.S. at 96. If that showing is sufficient, the burden shifts to the party seeking to strike the juror to articulate a race-neutral reason for the strike. *Hernandez*, 500 U.S. at 358-359. If a race-neutral reason is offered, the district court must then determine whether the challenging party carried his burden of proving that purposeful discrimination was

a substantial or motivating factor in the decision to use the strike. *Id.* at 359. If, however, the party seeking the strike "has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [challenging party] had made a prima facie showing becomes moot." *Ibid.*; see also *United States* v. *Lane*, 866 F.2d 103, 105 (4th Cir. 1989) (holding that this Court "will not address the question of whether the [challenging party] established a prima facie showing to satisfy *Batson* where the [party exercising the strike] articulated reasons for his strikes"); see also *United States* v. *Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987) (declining to address question of whether challenging party had established requisite *prima facie* showing of discrimination where party exercising the strike had provided reasons for seeking the strike). This Court explained in *Lane*, 866 F.2d at 105, that proceeding with an analysis of the reasons provided for the strike was "reasonable since appellate review should not become bogged down on the question of whether the defendant made a *prima facie* showing in cases where the district court has required an explanation."

Here, the district court conducted voir dire with an initial set of 12 potential jurors. JA Vol. I at 58-59. The defense moved to strike one juror, John Herring, for cause based on his answers to the jury questionnaire. Under questioning from

the district court, Mr. Herring stated that he felt a prior injury he received was racially motivated. JA Vol. I. at 77-78. The district court excused Mr. Herring. JA Vol. I at 78. The government exercised one peremptory strike, JA Vol. I at 76, and the defense exercised four, JA Vol. I at 78. Six persons were then added to the pool of potential jurors. JA Vol. I at 78-79. The government exercised two peremptory strikes, JA Vol. I at 84; the defense exercised one – against a Ms. Wilders, JA Vol. I at 84. Thereafter three persons were added to the pool of potential jurors. JA Vol. I at 85. Upon the defense's request, the district court asked one of these potential jurors, Ms. Bacon, if her response on the questionnaire indicating that the government should do more "in these type of cases" would affect her ability to be impartial. JA Vol. I at 89. She answered it would not. JA Vol. 89. The government then exercised one peremptory strike; the defense struck Ms. Bacon. JA Vol. I at 90.

At this point in voir dire, the prosecutor stated that "the defense has struck all three black members of the jury pool." JA Vol. I at 90. While "not raising a *Batson* challenge at this time," the prosecutor brought to the court's attention that "[e]very single black member of the pool has been struck." JA Vol. I at 90. The district court responded: "I'm aware of that." JA Vol. I at 90. At that point, defense counsel explained that "Mr. Herring was struck for a cause" and not via a

peremptory challenge. JA Vol. I at 91. The court nonetheless stated that the government's "concerns are not without foundation." JA Vol. I at 91.

During selection of alternate jurors, defense counsel requested that the court ask Mr. Hall, one of the potential alternates, about his questionnaire response indicating he had been the victim of racial discrimination in his job. JA Vol. I at 100. The court did so, and Mr. Hall explained that it would not affect his ability to serve as a juror in this case. JA Vol. I at 100. After the defense asked to strike Mr. Hall based on his being a victim of racial discrimination, the prosecutor made a formal *Batson* challenge, explaining that the defendants had "struck every single black member of the [jury] pool." JA Vol. I at 101. The court responded: "Well, I know that." JA Vol. I at 101. In support of the *Batson* challenge, the prosecutor inquired as to the defendants' reasons for striking the only other African-American members of the petit jury pool (*i.e.*, Mr. Herring, Ms. Wilders, and Ms. Bacon). JA Vol. I at 102-103; see also *Batson*, 476 U.S. at 96. After considering the defense's explanations for striking those jurors along with Mr. Hall, the district court sustained the government's objection. JA Vol. I at 105. Mr. Hall was seated as an alternate juror. JA Vol. I at 105-106.

The government satisfied its burden of establishing a *prima facie* showing of racial discrimination in the defendants' use of peremptory strikes. The prosecutor

twice brought to the district court's attention the fact that the defendants struck "[e]very single black member of the pool." JA Vol. I at 90; see also JA Vol. I at 101. The court twice acknowledged that fact. JA Vol. I at 90; JA Vol. I at 101. As explained by the Supreme Court in *Batson*, "a pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97.

Defendants' contention (Def. Br. 33) that the race of Mr. Hall and the three jurors previously stricken from the petit jury (*i.e.*, Mr. Herring, Ms. Wilder, Ms. Bacon) was unknown is incorrect. Defense counsel acknowledged before the district court that the jury pool included "only * * * four what we perceive to be African-Americans," JA Vol. I at 104, and the prosecutor, district court, and defense counsel conducted the *Batson* discussion under the assumption that the three stricken jurors and Mr. Hall were African-American, JA Vol. I at 104. Moreover, this Court has recognized that "the district court is especially well-suited to resolve challenges to peremptory strikes of jurors because *it has observed with its own eyes* the very act in dispute." *Jones* v. *Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (emphasis added).

Even assuming the government failed to show a *prima facie* case of discrimination in the defense's use of peremptory challenges, the defendants'

argument fails. After defendants indicated their intention to strike Mr. Hall, the district court proceeded with an analysis of defendants' race-neutral reasons for striking Mr. Hall and the other three jurors. The district court thereafter sustained the government's objection. As such, "the preliminary issue of whether the [government] made a *prima facie* showing [is] moot." *Hernandez*, 500 U.S. at 359; *Lane*, 866 F.2d at 105; *Woods*, 812 F.2d at 1487.

Finally, even assuming the district court erred in sustaining the government's *Batson* challenge, the defendants' argument still fails because Mr. Hall did not participate in jury deliberations. Cf. *Lane*, 866 F.2d at 106 n.3 (stating that a defendant would not suffer prejudice if an alternate juror, who was seated in place of a juror who was the subject of a failed *Batson* challenge by the defense, was not called upon to serve as a member of the petit jury); see also *Nevius* v. *Sumner*, 852 F.2d 463, 468 (9th Cir. 1988) (holding that because no alternate juror was called upon to serve at defendant's trial, the fact that another potential alternate juror may have been improperly struck was harmless error), cert. denied, 490 U.S. 1059 (1989); *United States* v. *Canoy*, 38 F.3d 893, 899 n.6 (7th Cir. 1994) (noting some authority for holding *Batson* error regarding alternate juror harmless when no alternate juror deliberates); but see, *e.g.*, *United States* v. *Harris*, 192 F.3d 580, 588 (6th Cir. 1999) (holding *Batson* error involving alternate juror is

not subject to harmless error review).

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 12,005 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: April 11, 2006

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2006, two copies of the foregoing BRIEF OF THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on the following counsels of record:

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