No. 08-2525

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

KYLE MILBOURN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
CASE NO. 07-CR-159
THE HONORABLE JOHN DANIEL TINDER

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant was indicted in the Southern District of Indiana under 18 U.S.C. 241, 42 U.S.C. 3631(b), 18 U.S.C. 844(h)(1), and 18 U.S.C. 1512(b)(3). Def. App. 6-9.[1] The district court had jurisdiction under 18 U.S.C. 3231 and entered

[1] "Br. _" refers to defendant's opening brief. "Def. App. _" refers to defendant's appendix contained in his opening brief. "Tr. _" refers to the transcripts of the trial and sentencing. "R. _" refers to documents filed with the district court by docket number.

judgment on June 12, 2008. Def. App. 4. Milbourn filed a timely notice of appeal on June 18, 2008. Def. App. 4, 16. This Court has jurisdiction under 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether sufficient evidence supports the jury's finding that Milbourn, by helping to burn a cross on the Thrash family's lawn, intimidated and interfered with their exercise of housing rights because of race in violation of 42 U.S.C. 3631(b) and conspired to oppress, threaten, and intimidate them in the exercise of those rights in violation of 18 U.S.C. 241.

2. Whether the prosecutor plainly erred during closing arguments in describing the defendant's attitude towards the Ku Klux Klan and trial witnesses' reactions to learning about the cross burning.

3. Whether a district court has discretion to disregard the minimum sentence required under 18 U.S.C. 844(h)(1) in favor of the general sentencing factors outlined in 18 U.S.C. 3553(a)(2).

STATEMENT OF THE CASE

Kyle Milbourn was indicted for his role in burning a cross in front of Paula Thrash's home, where she lived with her then boyfriend and three biracial

children.[2] He was charged with conspiring to intimidate and interfere with the Thrashes, on account of race, in the exercise of their right to occupy their home, in violation of 18 U.S.C. 241 (count one); intimidating the family for these reasons, in violation of 42 U.S.C. 3631(b) (count two); using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1) (count three); and tampering with a witness, in violation of 18 U.S.C. 1512(b)(3) (count four). Def. App. 6-9.

The jury convicted Milbourn on all four counts. R. 38 at 1. The court pronounced a below-guidelines sentence of 121 months. Def. App. 11.[3]

STATEMENT OF THE FACTS

1. The Cross-Burning And Milbourn's Views On Racial Issues

On March 12, 2006, Kyle Shroyer and Kyle Milbourn were drinking in Shroyer's trailer, where he lived with his then girlfriend, Paula Thrash's half-sister, Hope Pierce Shroyer.[4] Tr. Vol. 1 at 16-17, 19-20, 33; Tr. Vol. 2 at 155.

[2] After the cross burning but before trial, Paula Tracy married Phillip Thrash. Tr. Vol. 1 at 5. Also during that interval, Hope Pierce married Kyle Shroyer. In this brief, I will refer to both women by the married names they used at trial.

[3] Kyle Shroyer pled guilty and received a 15-month prison sentence. Sentencing Tr. 94-95, 111.

[4] Defendant incorrectly asserts, Br. 11, 22, that Milbourn was a "teenage[r]" at the time of the crime. Milbourn's counsel told the jury that he was "20-years-old or so." Closing Argument Tr. 10; see also Sentencing Tr. 89 (Milbourn stated he was 20 years old at the time of the crime).

After consuming a case or two of beer and some vodka, Shroyer and Milbourn put on hard hats and work overalls and "danc[ed] around the living room." Tr. Vol. 1 at 47-48; Tr. Vol. 2 at 138. The two men started talking about burning a cross in Shroyer's father's field, about a twenty-minute drive away. Tr. Vol. 1 at 20-21. Hope Shroyer tried to dissuade them, but the two left the trailer, went into a nearby shed, and built a cross out of some wooden molding. Tr. Vol. 1 at 21-22, 56. Then they loaded the cross, a gas can, some nails, and a shovel into Milbourn's truck and drove away with Milbourn at the wheel. Tr. Vol. 2 at 139.

After driving around looking for a spot, they parked near the Thrash home at 2234 West Memorial Drive. Tr. Vol. 2 at 135, 139-140. Both men carried the cross to Paula Thrash's front yard. Tr. Vol. 1 at 7; Tr. Vol. 2 at 140. Shroyer dug a hole and the two lifted the cross into it. Tr. Vol. 2 at 140. Milbourn poured gasoline on the structure. Tr. Vol. 2 at 140. They lit the cross and stood watching it for 10 or 15 seconds, laughing. Tr. Vol. 2 at 140.

The Thrashes' rented house is in a predominantly white neighborhood, just off a main road in Muncie, Indiana. Tr. Vol. 1 at 6, 19, 44; Tr. Vol. 2 at 175. Paula and Phillip Thrash are white. Paula's three children are biracial. The children's grandfather, Paul Jones, who is black, also lived there in a separate upstairs unit. Tr. Vol. 2 at 161, 176.

Paula and Phillip Thrash noticed an orange glow outside and saw the burning cross in their yard, some five feet away from the room in which two children, six and ten years old at the time, were in bed. Tr. Vol. 1 at 7; Tr. Vol. 2 at 157, 159. Phillip Thrash went outside and saw two men in hard hats "kind of standing around." Tr. Vol. 1 at 7. He yelled at the men and they ran away. Tr. Vol. 1 at 8. Phillip Thrash chased them for a short distance and then returned, got in his truck, and drove around the block looking for the men. Tr. Vol. 1 at 8. He wanted to "grab a hold of them and * * * send them to jail." Tr. Vol. 1 at 8. Paula Thrash called 911. An officer responding to the call observed that Paula Thrash was "visibly upset, frantic," and "crying." Tr. Vol. 1 at 65. Phillip Thrash was also "visibly upset" and "angered." Tr. Vol. 1 at 66. An hour or two after they had left Shroyer's trailer, Milbourn and Shroyer returned. Tr. Vol. 1 at 22. One of the two – Hope Shroyer could not remember which one – told her they had just burned a cross in her sister's yard. Tr. Vol. 1 at 22-23.

On a previous occasion, Hope had spoken to Milbourn about Paula Thrash's biracial children. Milbourn was looking for someone to date and went through her scrapbook looking at pictures, including Thrash's. When Hope told Milbourn about Thrash's children, "[h]e just didn't want to meet her." Tr. Vol. 1 at 18-19. Hope Shroyer said that she had shown Kyle Shroyer Paula Thrash's house while

the two were driving nearby, Tr. Vol. 1 at 32-33, and was "sure [she] probably pointed out" the house to Milbourn as well, Tr. Vol. 1 at 44. Thrash's house was three or four minutes from Shroyer's trailer. Tr. Vol. 1 at 19, 44-45.

Sometime after the incident, Milbourn came over to the Shroyers' to show them pictures he and Shroyer had taken of the cross burning. He gave Kyle Shroyer a set to keep. Milbourn's roommate, Casey Burke, also saw them. Tr. Vol. 1 at 112. When Burke came across the pictures and asked Milbourn about them, Milbourn told him "it was a crazy night" and the pictures were "something he had to get rid of." Tr. Vol. 1 at 113. Milbourn kept the photos in his truck and showed them to a friend, Gerald Davis, while at a party in May or June of 2006. Tr. Vol. 1 at 75. He told Davis that "he had burned a cross on a nigger's yard." Tr. Vol. 1 at 76.[5]

After the cross burning, Paula Thrash was "visibly upset, frantic," and "crying." Tr. Vol. 1 at 65. Later, she felt "[a]ngry" and "disrespected." Tr. Vol. 2 at 159. The incident made her realize there were "precautions that we needed to take for our kids" and "there were things that we didn't realize that we needed to be teaching them." Tr. Vol. 2 at 167. Paula Thrash and her husband became concerned for the children's safety and their "entire lives had to change." Tr. Vol.

[5] Although Davis and Milbourn had once been "best friend[s]," they got into a fight in November 2006 and Davis broke Milbourn's jaw. Tr. Vol. 1 at 108.

2 at 167. After Paula Thrash learned that her oldest child had been awake during the cross burning, she sought counseling for him. Tr. Vol. 2 at 167. The children previously had a good relationship with their African American father, but they did not continue to see him on a regular basis after the incident. Tr. Vol. 2 at 168-170. The Thrashes "didn't feel that it was appropriate for our children to remain" in the house after the cross burning, and decided they "needed to move on" to another home. Tr. Vol. 2 at 164.

Although Hope Shroyer and her sister do not have a good relationship, Shroyer was "pretty upset" to learn of the cross burning. Tr. Vol. 1 at 23. There are "issues" in their family regarding Paula Thrash's biracial children; Hope Shroyer's parents once disowned Thrash. Tr. Vol. 1 at 54-55. At some point, Hope Shroyer tried to apologize for what Kyle Shroyer had done. She said her apology did not go well and her sister threatened her. Tr. Vol. 1 at 49.

At trial, several witnesses recalled that they had heard Milbourn make derogatory comments about African Americans. Davis said Milbourn "frequently" used the term "nigger," Tr. Vol. 1 at 80, and Burke confirmed he used the term, Tr. Vol. 1 at 114. Milbourn also used the term "niglet" to refer to a black child. Tr. Vol. 1 at 30-31; see also Tr. Vol. 1 at 117.

Davis recalled that he and Milbourn took a high school history class together that covered the history of the Klan and cross burning. Vol. 1 Tr. 81-82. They both "thought it would be cool" to join the Ku Klux Klan, Tr. Vol. 1 at 82. Milbourn and Shroyer discussed a book, "Modern Hatred," which warned that the white race is becoming extinct. Tr. Vol. 1 at 31.

Milbourn expressed feelings against interracial dating, and would ask potential dates whether they had ever gone out with a black man. Tr. Vol. 1 at 80-81, 119. If they had, Milbourn "wouldn't talk to them." Tr. Vol. 1 at 81. Upon learning Davis's girlfriend had previously dated a black man, Milbourn called him a "nigger lover." Tr. Vol. 1 at 81.

Hope Shroyer reported that "about a year" before defendant's March 2008 trial she had gone to a "hillbilly" or "redneck" bar where Milbourn had spotted a black patron. Tr. Vol. 1 at 29-30. He stated the man was "out of place" and should leave. Tr. Vol. 1 at 29-30.

2. The Investigation

In early 2007, the Shroyers broke up temporarily and Hope Shroyer moved in with her mother. Tr. Vol. 1 at 27-28. Some time afterwards, she showed her sister, Rebecca Wright, the photographs of the cross burning. Tr. Vol. 1 at 28.

Wright gave the pictures to Paula Thrash, Tr. Vol. 1 at 29; Tr. Vol. 2 at 163, who gave them to the police in February 2007, Tr. Vol. 1 at 67; Tr. Vol. 2 at 163.

FBI Agents Charlie Rownd and Neil Freeman went to Milbourn's house on March 6, 2007. Tr. Vol. 2 at 136-137. Milbourn spoke alone with his father – a police officer – for a few minutes, and then agreed to be interviewed. Tr. Vol. 2 at 137. Rownd showed Milbourn the photographs, and Milbourn identified himself and Shroyer. Tr. Vol. 2 at 141. He told the agent he burned the cross "for something to do, kind of for fun," that he had no "racial motive" or "criminal intent," and that he did not know who lived at the house. Tr. Vol. 2 at 142-143, 147-148. Rownd asked him what he would think if he heard someone had burned a cross in an African American's yard. Milbourn replied "[t]hat would have been a racial thing," but insisted that his actions were not a "racial thing." Tr. Vol. 2 at 143.

Agent Rownd also spoke to Gerald Davis in late October or early November, 2007. Tr. Vol. 1 at 84; Tr. Vol. 2 at 143-145. The two scheduled a follow-up interview for mid-November, but Davis did not appear. Tr. Vol. 1 at 85; Tr. Vol. 2 at 145. Davis was reluctant to speak with the FBI because of a recent confrontation with Milbourn. Tr. Vol. 1 at 87-89. He explained that Milbourn had stopped him in the street to ask "why [Davis] was trying to screw

him over." Tr. Vol. 1 at 86. Apparently, Milbourn suspected Davis had turned him in to the FBI. Tr. Vol. 1 at 77. He told Davis that he did not have to talk to the FBI and threatened "he could screw [Davis] if [Davis] was trying to screw him." Tr. Vol. 1 at 88; see also Tr. Vol. 2 at 148-149. Referring to the friends' November 2006 fight, Milbourn said he would have his insurance company "come after" Davis for the full cost of Milbourn's medical bills. Tr. Vol. 1 at 87. Davis had been criminally charged for the incident and expected to pay $2500 in restitution under a plea agreement. Tr. Vol. 1 at 88. If he were liable for the full cost of Milbourn's medical care, Davis believed he would have to pay some $26,000. Tr. Vol. 1 at 101. After Davis failed to keep the appointment, Agent Rownd served him with a grand jury subpoena. Tr. Vol. 1 at 89; Tr. Vol. 2 at 145-146.

Davis testified that Milbourn's "attitude" about the cross burning "change[d]" after the investigation began. Tr. Vol. 1 at 79. Milbourn told Davis "he didn't know where they had done [the cross burning] at" but that "it was probably a black person's house because it was on a bad side of town." Tr. Vol. 1 at 79; see also Tr. Vol. 1 at 90, 97. He also said that "a cross burning was a religious act." Tr. Vol. 1 at 90.

3. Milbourn's Trial And Sentencing

After the government presented its case, Milbourn moved for acquittal on counts one, two, and three, arguing that there was insufficient evidence of racial motivation. Tr. Vol. 2 at 176-179; see also Def. App. at 6-8. The court denied the motion. Tr. Vol. 2 at 183. Milbourn presented no evidence, and the court stated that there was therefore no need to renew his motion before sending the case to the jury. Tr. Vol. 2 at 185. The jury convicted Milbourn on all four counts. R. 38 at 1.

At sentencing, the court calculated a guidelines range sentence of between 30 and 37 months for counts one, two, and four. Sentencing Tr. 5. Count three carried a ten-year mandatory minimum sentence under 18 U.S.C. 844(h)(1), in addition to the sentences for the other offences, producing a total guidelines sentence of 150 to 157 months. Milbourn requested a departure from the guidelines sentence. Sentencing Tr. 83-87, 90-95. The court sentenced Milbourn to a below-guidelines sentence of 121 months. Def. App. 11.

SUMMARY OF ARGUMENT

Milbourn argues that the government presented insufficient evidence that he acted because of race or that he intended to threaten or interfere with the Thrash family's occupancy of their home. Sufficient evidence supports the jury's finding

of intent. Milbourn acknowledged that he knew the racial significance of a burning cross. Tr. Vol. 2 at 143. After the incident, Milbourn reported to a friend that "he had burned a cross on a nigger's yard." Tr. Vol. 1 at 76. He frequently made racial statements including "nigger," "nigger lover," and "niglet." Tr. Vol. 1 at 30-31, 80-81. He "thought it would be cool" to join the Ku Klux Klan, and expressed opposition to interracial dating and socializing suggesting he did not wish African Americans and whites to mix in his community. Tr. Vol. 1 at 29-30, 80-82, 119. A burning cross is widely recognized as a racial threat, see *Virginia* v. *Black*, 538 U.S. 343, 352-357, 363 (2003). The cross on the Thrash family's lawn sent a message that they were not welcome and, indeed, the family moved away from their home. See *United States* v. *Pospisil*, 186 F.3d 1023, 1028-1029 (8th Cir. 1999), cert. denied, 529 U.S. 1089 (2000).

Contrary to defendant's argument, sufficient evidence also supports Milbourn's conspiracy conviction. Milbourn and Shroyer talked about burning a cross, together gathered and prepared the materials, and helped each other carry, erect, and light the cross. Tr. Vol. 1 at 20-23; Tr. Vol. 2 at 139-140. The two agreed on the burn site as Shroyer chose it and Milbourn drove there. Tr. Vol. 2 at 139.

The prosecutor did not engage in misconduct in stating that Milbourn may have aspired to be a member of the Ku Klux Klan. The statement responded to the inference defense counsel suggested in closing argument and was based on evidence that Milbourn thought it would be "cool" to join the Klan. Tr. Vol. 1 at 82-83, 115. Nor did the prosecutor mislead the jury in referring to Hope Shroyer and Casey Burke as "witnesses." Closing Argument Tr. 5. Contrary to defendant's argument, it was clear that they were not eyewitnesses.

Defendant argues for the first time on appeal that, in consideration of the general sentencing factors elaborated in 18 U.S.C. 3553(a)(2), the district court should not have pronounced the full ten-year statutory minimum sentence. That argument is waived. In any case, this Court has previously held that 18 U.S.C. 3553(a)(2) does not abrogate statutory minimum requirements.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTS MILBOURN'S CONVICTIONS FOR INTIMIDATION AND CONSPIRACY

A. Standard Of Review

In reviewing a conviction for substantial evidence, this Court must consider evidence in the light most favorable to the government, drawing all reasonable

inferences in the government's favor. *United States* v. *Masten*, 170 F.3d 790, 794 (7th Cir. 1999). It may not make determinations on the credibility of witnesses. *United States* v. *Orozco-Vasquez*, 469 F.3d 1101, 1106 (7th Cir. 2006), cert. denied, 550 U.S. 937 (2007). "Challenging the sufficiency of the evidence is an uphill battle and the defendant bears a heavy burden." *United States* v. *Wallace*, 212 F.3d 1000, 1003 (7th Cir. 2000). Reversal is "appropriate only when the record contains no evidence, however weighed, from which the jury could have found guilt beyond a reasonable doubt." *United States* v. *Craft*, 484 F.3d 922, 925 (7th Cir.), cert. denied, 128 S. Ct. 257 (2007).

B. Substantial Evidence Supports Milbourn's Convictions For Intimidation And Interference With Housing Rights Under 42 U.S.C. 3631

For conviction under 42 U.S.C. 3631, the government must show that defendant "willfully injure[d], intimidate[d] or interfere[d] with, or attempt[ed] to injure, intimidate or interfere with" the Thrash family because of their race and because they were occupying their home. 42 U.S.C. 3631; Def. App. 8; see also *United States* v. *Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001). Milbourn claims that he did not know who lived at 2234 West Memorial Drive. He argues that the government presented insufficient evidence that he acted on account of race, that

he intended to threaten the Thrashes, or that he intended to interfere with their housing rights. Br. 14-19.

The evidence is more than sufficient to show that Milbourn was "motivated by racial animus toward his victims." *Craft*, 484 F.3d at 926. In a cross-burning case, the jury is permitted to "draw inferences of subjective intent from a defendant's objective acts," and may base its findings on "circumstantial evidence and surrounding circumstances." *Magleby*, 241 F.3d at 1314 (citation and quotation marks omitted). Cross-burning is widely understood as an act of racial hatred. "[T]he burning of a cross is a symbol of hate." *Virginia* v. *Black*, 538 U.S. 343, 357 (2003) (citation and quotation marks omitted). Milbourn's use of the "age old symbol of racism" belies his argument that he had no racial motive. *United States* v. *Gresser*, 935 F.2d 96, 101 (6th Cir.) (holding defendant's use of a burning cross suggested he was motivated by racism rather than anger over a specific fight with a black neighbor), cert. denied, 502 U.S. 885 (1991). Indeed, Milbourn admitted in his statement to the FBI that he understood cross-burning was "a racial thing," Tr. Vol. 2 at 143, and a classmate testified that Milbourn's high school history class included treatment of cross-burning, Tr. Vol. 1 at 81-82. See *Magleby*, 241 F.3d at 1313 (noting the jury "heard evidence that Mr. Magleby knew that burning crosses were symbols of racial hatred" and defendant "admitted

that he knew that the general public saw a burning cross as a symbol of racial hatred").

Indeed, the government presented evidence that Milbourn knew or believed that the residents of 2234 West Memorial Drive were African-American. See *United States* v. *Pospisil*, 186 F.3d 1023, 1027 n.3 (8th Cir. 1999) (upholding defendant's conviction where he burned a cross on a family's lawn, mistakenly believing they were African-American), cert. denied, 529 U.S. 1089 (2000). Hope Shroyer had spoken to Milbourn about Paula Thrash's biracial children, Tr. Vol. 1 at 18-19, shown their house to Milbourn's codefendant, and thought she had pointed out the house to Milbourn as well, Tr. Vol. 1 at 44. She reported that one or both defendants told her immediately after the incident that they had burned a cross on her sister's lawn. Tr. Vol. 1 at 23. Milbourn bragged to Davis that "he had burned a cross on a nigger's yard." Tr. Vol. 1 at 76; see *Magleby*, 241 F.3d at 1313 (finding sufficient evidence of racial intent where defendant told friends, after the cross-burning, that a victim was black).

The defendant in *Magleby*, like Milbourn, claimed that his codefendant selected the site of the cross-burning and that he did not know the victims' race until afterwards.[6] Based on defendant's racist statements and boasting after the

[6] Although Milbourn reported burning a cross "on a nigger's yard" two or (continued...)

crime, the Tenth Circuit found it "highly unlikely that Mr. Magleby burned a cross at a home occupied by an African-American merely by coincidence." *Magleby*, 241 F.3d at 1313.

The government presented additional evidence of Milbourn's racial attitudes suggesting his actions were racially motivated. He disapproved of interracial relationships, did not want to date women who had previously dated black men, and called a friend who did so a "nigger lover." Tr. Vol. 1 at 80-81. He used the terms "nigger" and "niglet" and "thought it would be cool" to join the Klan. Tr. Vol. 1 at 80, 82, 117. See *Magleby*, 241 F.3d at 1313 (noting that a "background of racial slurs, racist jokes, racist music, and racist internet sites" supported a finding of race-based action). He stated to friends that a black patron was "out of place" at a local bar and should leave. Tr. Vol. 1 at 29-30.

Defendant is mistaken in asserting that his statements about the cross-burning and his attitudes towards race are irrelevant because they did not

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[6](...continued)
three months after the cross burning, Tr. Vol. 1 at 75-76, the statement nevertheless supports an inference that he knew or believed, at the time of the crime, that his victim or victims were black. Indeed, *Magleby* upheld convictions under 42 U.S.C. 3631 and 18 U.S.C. 241 where statements made after the crime were the only admissible evidence the defendant knew the race of his victims. 241 F.3d at 1313 & n.4.

necessarily occur "immediately prior" or "on the very night" of the crime.[7] Br. 15. Defendant cites cases where such contemporaneous statements were made, see *United States* v. *J.H.H.*, 22 F.3d 821, 826-827 (8th Cir. 1994) and *Magleby*, 241 F.3d at 1309, but they are by no means required. In *United States* v. *Hartbarger*, this Court considered defendants' history of racial comments made at unspecified times and descriptions of the crime made "months after the incident." *United States* v. *Hartbarger*, 148 F.3d 777, 780, 782 (7th Cir. 1998), overruled in part on other grounds by *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc).

There is also ample evidence to support the jury's finding that Milbourn acted to threaten or intimidate the Thrashes. "[T]he act of cross burning * * * promotes fear, intimidation, and psychological injury." *United States* v. *Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993), overruled in part on other grounds by *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc). The practice has a "long and pernicious history as a signal of impending violence." *Black*, 538 U.S. at 363. "In light of the history of violence associated with the Ku Klux Klan," the Eighth Circuit has noted, "a jury could reasonably conclude" that a defendant's

[7] In most instances, witnesses did not specify when Milbourn made specific racist statements. They may very well have occurred near the time of the crime. Milbourn called black children "niglet[s]" "a little bit before" or "right around" the time of the crime. Tr. Vol. 1 at 43-44. He reported burning a cross in "a nigger's" yard two or three months afterwards. Tr. Vol. 1 at 75-76.

"intent in burning [a] cross was to threaten violence." *United States* v. *Lee*, 6 F.3d 1297, 1304 (8th Cir. 1993).

In a cross-burning case, the jury may consider the victims' reaction as an indication of threatening intent, as "[e]vidence showing the reaction of the victim of a threat is admissible as proof that a threat was made." *J.H.H.*, 22 F.3d at 827 (citing *Watts* v. *United States*, 394 U.S. 705, 708 (1969)); see also *Magleby*, 241 F.3d at 1311, 1314. The government presented testimony of the Thrash family's feelings of fear and anger because of the cross burning. Tr. Vol. 2 at 159. They sought counseling for the oldest child (who was awake and saw the cross), and they moved out of their home after the incident. Tr. Vol. 2 at 164, 167.

The same evidence supports the jury's conclusion that Milbourn acted because the Thrash family occupied their residence at 2234 West Memorial Drive. In *Magleby*, as in this case, the defendant argued that there was insufficient evidence to show he acted "because [the victims] occupied their home." *Magleby*, 241 F.3d at 1314. The Tenth Circuit concluded that defendant's "own testimony regarding his understanding of the meaning of a burning cross, combined with his testimony that he intentionally burned the cross in the [victims'] yard, provides sufficient evidence from which a jury could reasonably find beyond a reasonable doubt that [he] also targeted the [victims] because they occupied their home."

Ibid. In this case, too, the defendant admitted that he burned the cross and knew its meaning. Indeed, the Thrash family moved from their home after Milbourn burned the cross in their yard. Tr. Vol. 2 at 164; see *Pospisil*, 186 F.3d at 1028-1029 (noting evidence of intent can be based on statements that the victim "understood that a burning cross meant that white people were trying to get rid of the blacks" and that the victim took the cross to mean she "'should get out of town'") (citation and quotation marks omitted). In addition, evidence that Milbourn disapproved of black people dating whites or using a bar whites frequented further supports the inference that Milbourn did not wish black people and white people to mix in his community.

Furthermore, because he tried to conceal his motives by changing his descriptions of the crime, a jury could have reasonably disbelieved Milbourn's claim that he lacked the requisite criminal intent to threaten the Thrashes on account of their race and because they occupied their home. As in *Craft*, 484 F.3d at 926, "the jury was free to reject [defendant's] stated reason * * * in favor of other testimony that indicated that he set the fire because of racial animus." Before the FBI investigation, Milbourn bragged to Davis that he "burned a cross on a nigger's yard." Tr. Vol. 1 at 76. After the investigation began, Milbourn told Davis "he didn't know whose house it was, and that it was probably a black

person's house because it was on a bad side of town." Tr. Vol. 1 at 79. He also stated that a cross burning was "a religious act." Tr. Vol. 1 at 90. In his interview with the FBI, Milbourn suggested still another motive, saying he burned the cross "for something to do, kind of for fun." Tr. Vol. 2 at 142.

Milbourn argues the record does not support a finding of racial or threatening motivation because Hope Shroyer testified he and Kyle Shroyer were "just acting silly." Br. 15 (citing Tr. Vol. 1 at 48). Even if we assume the jury credited this testimony – or any other alleged reason – this does not negate any racial intent. "The presence of other motives * * * does not make the[] conduct any less a violation of 42 U.S.C. § 3631." *United States* v. *Johns*, 615 F.2d 672, 675 (5th Cir.), cert. denied, 449 U.S. 829 (1980). In *Craft*, this Court sustained a Section 3631 conviction where the defendant told a witness that he burned victims' houses because "'it was fun'" and because "the neighborhood 'was full of wetbacks and niggers anyway.'" 484 F.3d at 926. The government need only prove race was one motivating factor, not that it was Milbourn's only motivation. *Ibid.*

Aside from his changing descriptions of his motive, Milbourn took steps to cover up the crime. He told Casey Burke that the photographs of the incident were "something he had to get rid of," Tr. Vol. 1 at 113, and later told Agent Rownd his

set had been destroyed, Tr. Vol. 2 at 142. He tried to convince Davis not to talk to the FBI. Tr. Vol. 1 at 87. The jury could reasonably view these statements as an indication that Milbourn was lying when he said he did not know the race of residents at 2234 West Memorial Drive. They further suggest that he did not view the cross burning as a prank or as a "religious" act but instead knew it was offensive and threatening. See *Lee*, 6 F.3d at 1303 (noting that defendant's "attempt to conceal his role in the cross burning" showed he was not engaged in constitutionally protected expression but in the "unprotected activity of threatening or intimidating the residents"). Accordingly, there was sufficient evidence to show that Milbourn threatened or interfered with the Thrashes because of their race and because they occupied their home.

C. Substantial Evidence Supports Milbourn's Conviction For Conspiracy To Violate Civil Rights Under 18 U.S.C. 241

Ample evidence supports the jury's findings that Milbourn "conspire[d] to injure, oppress, threaten, or intimidate" the Thrash family "in the free exercise or enjoyment of [a] right or privilege secured to [them] by the Constitution or laws of the United States." 18 U.S.C. 241; see also *United States* v. *Guest*, 383 U.S. 745, 759-760 (1966). To establish a conspiracy, the government need not offer direct evidence of express agreement; it may be inferred from conduct. *United States* v.

Olson, 978 F.2d 1472, 1478 (7th Cir. 1992). An agreement "may be informal and may be inferred entirely from circumstantial evidence." *United States* v. *Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). A jury may "rely[] on common sense" in drawing such inferences. *United States* v. *Zambrana*, 841 F.2d 1320, 1331 (7th Cir. 1988). "[B]y its nature conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available." *United States* v. *Mayo*, 721 F.2d 1084, 1088 (7th Cir. 1983) (citation and quotation marks omitted).

Here, Milbourn's participation in building, transporting, and igniting the cross is sufficient to show he and Shroyer agreed to burn it in Paula Thrash's yard. Milbourn and Kyle Shroyer discussed burning a cross, built it, and together gathered a shovel, nails, and fuel. Tr. Vol. 1 at 20-22; Tr. Vol. 2 at 139. Milbourn drove Shroyer and the cross to the burn site and followed Shroyer's direction to stop outside Thrash's residence. Tr. Vol. 2 at 139-140. Indeed, because Milbourn was driving, Shroyer could not have reached the Thrash house without Milbourn ultimately agreeing, either by words or action, to stop there. After their arrival, Milbourn helped carry the cross, poured gas on it, and took pictures of Shroyer with it. Tr. Vol. 1 at 24-25; Tr. Vol. 2 at 140, 181-182. There was thus ample evidence to support the jury's conclusion that Milbourn conspired to burn a cross at 2234 West Memorial Drive.

II

THE PROSECUTOR DID NOT PLAINLY ERR IN CLOSING ARGUMENT

A. Standard Of Review

Even where objections are properly preserved, a defendant must do more than show that the arguments were improper. He must show they "deprived [him] of a fair trial." *United States* v. *Mietus*, 237 F.3d 866, 870 (7th Cir. 2001). This requires that "the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Ibid*. (quoting *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986)).

Because defendant failed to object to the prosecutor's arguments at trial, this Court reviews them for plain error. *United States* v. *Sandoval*, 347 F.3d 627, 631 (7th Cir. 2003). To meet that standard an error must be "clear or obvious, rather than subject to reasonable dispute." *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009); see also *United States* v. *Harris*, 271 F.3d 690, 700 (7th Cir. 2001) (requiring "that the prosecutor's comments were '*obviously*' or '*clearly*' improper") (citation omitted). The defendant must establish "not only that the remarks denied him a fair trial, but also that the outcome of the proceedings would have been different absent the remarks." *Sandoval*, 347 F.3d at 631 (citation and quotation marks omitted); see also *Puckett*, 129 S. Ct. at 1433 (requiring a specific

showing of prejudice). Ultimately, a court may reverse only upon a showing that the prejudicial error "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Puckett*, 129 S. Ct. at 1429 (citation, quotation marks, and brackets omitted), or where "a miscarriage of justice would otherwise result." *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (citation and quotation marks omitted).

B. The Prosecutor's Arguments About Milbourn's Attitude Towards Hate Groups Were Proper And Do Not Require Reversal Under A Plain Error Standard

In his closing arguments, Milbourn's attorney told the jury that the government sought to "inflame" them with "the vile history of the Ku Klux Klan and the Aryan Nation." Closing Argument Tr. 9, 10. "If you're going to contend that this young man is a member of a white racist Supremacist group," he argued, "prove it." Closing Argument Tr. 10.

In rebuttal argument, the prosecutor recounted the evidence of Milbourn's views on racial issues and explained "[w]e've never claimed during this trial he's a member of any organization of any kind. He may aspire to be. Based on the evidence you've heard, I think that's something that could be concluded. He aspires to be part of one of these organizations, but he's not." Closing Argument Tr. 27.

Davis testified that he and Milbourn learned about the Klan in history class. Asked if he ever heard Milbourn discuss "potentially becoming a member," Davis said "Yes." Tr. Vol. 1 at 82. He testified that Milbourn said "[y]eah, maybe," about joining, but acknowledged it was "mostly just talk." Tr. Vol. 1 at 82. "We had talked about it and thought it would be cool, and we was talking about joining the Klan, and mostly just blowing off steam." Tr. Vol. 1 at 82-83. He also said the two had talked about the Aryan Nation. Tr. Vol. 1 at 83. Another witness, Burke, stated that when he and Milbourn talked about the Klan, Milbourn had expressed neither opposition nor a desire to join. Tr. Vol. 1 at 117.

Counsel may ask the jury to infer facts from the evidence. The prosecutor may argue all reasonable inferences from evidence in the record. *United States* v. *Young*, 470 U.S. 1, 8 & n.5 (1985). The prosecutor's argument that Milbourn "may aspire to be" part of a hate group was not improper, as it was a reasonable inference based on the record. Closing Argument Tr. 26; see *United States* v. *Graham*, 315 F.3d 777, 782 (7th Cir. 2003). Although there was conflicting testimony about whether Milbourn aspired to join the Klan, the prosecutor did not commit misconduct in urging the jury draw an inference. Tr. Vol. 1 at 82-83; see also *United States* v. *Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (where there was no evidence defendant was a skinhead, his interest in the group nevertheless

"tended to establish [his] racial animus and that he might act on his beliefs"), cert. denied, 502 U.S. 922 (1991). There was no legal error here, much less the "obvious" error required under the plain error standard. *Puckett*, 129 S. Ct. at 1429.

Were this Court to hold that the prosecutor's argument was obvious error, it still does not warrant reversal in light of the record as a whole and under the strict plain error standard. Milbourn has not shown the error "denied him a fair trial" and affected the outcome of the proceedings. *Sandoval*, 347 F.3d at 631 (citation and quotation marks omitted). There are several factors this Court will consider in evaluating potential negative effects of improper argument, including: "(1) the nature and seriousness of the misconduct; (2) the extent to which the comments were invited by the defense; (3) the extent to which any prejudice was ameliorated by the court's instruction to the jury; (4) the defense's opportunity to counter any prejudice; and (5) the weight of the evidence supporting the conviction." *Graham*, 315 F.3d at 781-782.

The prosecutor's statements were very close to Davis's testimony. Importantly, the statements responded to defense counsel's erroneous inference that the government had falsely accused Milbourn of actual *membership* in a hate group. See Closing Argument Tr. 9-10, 26.

Furthermore, the court properly instructed the jury before trial that "final arguments are made to discuss the evidence with you and try to convince you why certain inferences should be drawn and what the evidence proved, but it is not made under oath, and it's not testimony that's subject to cross-examination. And those arguments are not evidence in this case." Preliminary Instructions and Opening Arguments Tr. 13. The court further explained the reasons for the rule. "[T]he lawyers in the case are not witnesses to the facts. They weren't there when things happened. They don't have personal, firsthand knowledge about those things." Preliminary Instructions and Opening Arguments Tr. 15. In addition, the court reiterated, attorneys "don't take the oath that witnesses take when the witnesses subject themselves to examination." Preliminary Instructions and Opening Arguments Tr. 15.

After closing arguments, the court again instructed the jury that "the lawyers' statements to you are not evidence. * * * If the evidence as you remember it differs from what the lawyers said, your memory is what counts." Final Jury Instructions Tr. 10. The statements do "not constitute any evidence whatsoever in this case, and should not be considered by you as proof of any facts." Final Jury Instructions Tr. 11.

Although defendant did not respond to the comments, he could have done so by objecting and seeking an additional clarifying instruction. Indeed, defense counsel thoroughly addressed the issue in cross-examining witnesses about Milbourn's attitude towards hate groups. Davis acknowledged Milbourn was not a member of the Klan. Tr. Vol. 1 at 93. Agent Rownd reported that he had asked Milbourn if he was a member of the Klan and Milbourn said he was not. Tr. Vol. 2 at 150.

Finally, the evidence against Milbourn was very strong. The government presented pictures of him committing the crime, evidence that Milbourn used racial slurs and believed black people should not date or socialize with whites, and testimony that he bragged about burning a cross "on a nigger's yard." Tr. Vol. 1 at 76. Milbourn's attitudes towards the Klan were not a central issue in the case. To the extent his attitude towards the Klan indicated that he might act out of racial animus, there was other, more salient evidence of Milbourn's racial attitudes to support the jury's findings that he acted with racial intent. See Tr. Vol. 1 at 80-81, 117, 119. Accordingly it is not likely, under the plain error standard, that the argument in question denied Milbourn a fair trial or affected the outcome of the proceedings. *Puckett*, 129 S. Ct. at 1433; *Sandoval*, 347 F.3d at 631. It hardly amounted to "a miscarriage of justice." *Olano*, 507 U.S. at 736.

C. The Prosecutor's Arguments About Hope Shroyer And Casey Burke Were Proper And Do Not Require Reversal Under A Plain Error Standard

During closing argument, the prosecutor read portions of the court's instructions, which stated that the jury could "consider the reaction of the victims and other witnesses to the cross burning in determining the defendant's intent." Closing Argument Tr. 4; Final Jury Instructions Tr. 30. The prosecutor then described Paula Thrash's reaction to the cross burning. Afterwards she noted Hope Shroyer's and Casey Burke's reactions:

> Reaction of witnesses; you heard Hope was very upset about this. It caused some temporary problems in her relationship with Kyle Shroyer. Casey Burke, who's been friends with the defendant since kindergarten, said they're not friends anymore, and he didn't ask because he didn't want to talk about it.

Closing Argument Tr. 5.

Defendant claims that discussion of their reactions to the incident "improperly implied that these individuals were witnesses to the cross-burning, even though they of course were not present at that scene." Br. 25; see also Closing Argument Tr. 4. In the context of the trial as a whole, the arguments were not intended to mislead the jury and they did not do so. There was no error – much less "obvious" error. *Puckett*, 129 S. Ct. at 1429. Furthermore, even assuming error, the statements likely had little effect, much less the specific

prejudice and determinative effect on the outcome required under plain error review. *Sandoval*, 347 F.3d at 631. The jury would have understood, having heard extensive testimony from both witnesses, that the two were not eyewitnesses but rather were witnesses to events surrounding the cross burning.

Hope Shroyer explained that she was at home in her trailer during the crime, that she tried to talk both defendants into staying home to play cards, and that she was still awake when they returned two hours later. Tr. Vol. 1 at 21-22. She was "pretty upset" when they told her they had burned a cross on her sister's lawn. Tr. Vol. 1 at 23. She also said she saw pictures of the event sometime afterwards. Tr. Vol. 1 at 24-25. Her testimony made it clear that she did not see the cross burning in person.

When asked how he knew about the March 12 cross burning, Burke explained that he "found out about it afterwards," during the summer. Tr. Vol. 1 at 111. He was living with Milbourn and came across photographs of the event. Tr. Vol. 1 at 112-113.

Other evidence also made it clear neither witness was at the scene. Phillip Thrash testified that he saw two men at the scene "standing around" the cross. Tr. Vol. 1 at 7. Furthermore, the jury saw photographs of the crime showing Milbourn and Shroyer as the two participants. Given the clear, uncontested

evidence that Hope Shroyer and Burke were not at the scene, the jury would not have been misled into thinking that either person saw the cross burning in person.

Nor did the prosecutor go beyond the record in describing changes in Burke's and Milbourn's relationship. See Br. 25. The prosecutor may argue all reasonable inferences from evidence in the record. *Young*, 470 U.S. at 8 & n.5. The record supports the statements that Burke "said they're not friends anymore, and he didn't ask [about the cross burning] because he didn't want to talk about it." Closing Argument Tr. 5. Burke described how he found Milbourn's pictures of the cross burning and explained that he "didn't ask any questions" at the time because it was "a big deal" and "something that didn't need to be discussed." Tr. Vol. 1 at 114. When asked if he and Milbourn were still friends, Burke said, "No, I wouldn't say that." Tr. Vol. at 119. He acknowledged that he and Milbourn had not remained friends "in part because of th[e] investigation" into the cross burning. Tr. Vol. 1 at 119.

The prosecutor's statements went no further than Burke's testimony. She did not explicitly offer any reasons for the relationship's deterioration. To the extent that the prosecutor suggested that the jury draw an inference that Burke gave up his friendship on account of the cross burning, that inference is a

reasonable one. The argument may "contradict [defendant's] view of the evidence," but it was "nonetheless proper." *Sandoval*, 347 F.3d at 631.

Even if this Court were to find one of the prosecutor's statements unclear or misleading, there is no chance, "in light of the entire record," that they "deprived [defendant] of a fair trial," *Mietus*, 237 F.3d at 870, or that they changed the outcome, *Sandoval*, 347 F.3d at 631. Neither Milbourn and Burke's friendship nor Hope Shroyer's reaction to the crime was central to the case.

In addition, as noted previously, the court admonished the jury that counsels' arguments were not evidence, should not be considered as proof of facts, and "if counsel inadvertently misstate the law or misstate the evidence," jurors should rely on evidence of witnesses, not statements of counsel. Final Jury Instructions Tr. 10-11; see also Preliminary Instructions and Opening Arguments Tr. 15; p. 28, *supra*. This Court "presume[s] that jurors follow instructions given." *United States* v. *James*, 487 F.3d 518, 524 (7th Cir. 2007) (citation and quotation marks omitted). Accordingly, it is unlikely that the jury disregarded the evidence and relied instead on the prosecutor's isolated statements to conclude that Burke and Hope Shroyer were eyewitnesses. The evidence against Milbourn was strong, and the arguments about Hope Shroyer and Burke did not affect the outcome of Milbourn's trial or bring about "a miscarriage of justice." *Olano*, 507 U.S. at 736.

III

THE DISTRICT COURT PROPERLY APPLIED THE STATUTORY MINIMUM IN IMPOSING DEFENDANT'S BELOW-GUIDELINES SENTENCE

A. Milbourn's Sentencing Argument Is Waived

Milbourn appeals his below-guidelines sentence, arguing that the "parsimony provision" of 18 U.S.C. 3553(a)(2) required that the district court disregard the statutorily-required mandatory minimum sentence of ten years for use of fire in commission of a felony. See 18 U.S.C. 844(h)(1). Milbourn did not present this argument to the district court and it is, accordingly, waived. *United States* v. *Gimbel*, 782 F.2d 89, 91 (7th Cir. 1986). In fact, Milbourn's counsel acknowledged he was "not aware of a basis by which the Court c[ould] get around" the statutory minimum. Sentencing Tr. 94.

B. Even If This Court Chooses To Consider The Issue, The District Court Was Not Free To Disregard The Statutory Minimum Required By 18 U.S.C. 844(h)(1)

Milbourn's argument is without merit as it ignores the plain language of the statute, and, as defendant acknowledges, Br. 27, "is in conflict with existing Circuit precedent."

The general provisions of the federal criminal code's sentencing chapter state that 18 U.S.C. 3553(a)(2) applies "[e]xcept as otherwise *specifically*

provided." 18 U.S.C. 3551(a) (emphasis added). The statutory minimum sentence for violations of 18 U.S.C. 844(h)(1) is such a "specific[] provi[sion]" explicitly exempt from 3553(a). See *United States* v. *Huskey*, 502 F.3d 1196, 1200 (10th Cir. 2007); see also 18 U.S.C. 844(h) (noting the statute applies "[n]otwithstanding any other provision of law").

Section 3553(a)(2) only provides guidance for formulating guidelines sentences subject to the trial court's discretion; it does not abrogate statutory minimums. In *United States* v. *Roberson*, 474 F.3d 432, 436 (7th Cir. 2007), this Court "acknowledge[d] the tension" between statutory minimums and section 3553(a), but noted that "that very general statute cannot be understood to authorize courts to sentence below minimums specifically prescribed by Congress."

Other circuits have also held that Section 3553(a) does not provide a basis for ignoring statutory minimums. *Huskey*, 502 F.3d at 1200; *United States* v. *Franklin*, 499 F.3d 578, 585 (6th Cir. 2007); *United States* v. *Gregg*, 451 F.3d 930, 937 (8th Cir. 2006); *United States* v. *Samas*, 561 F.3d 108, 111 (2d Cir.), cert. denied, 2009 WL 1807582 (Oct. 5, 2009).

Recent changes in sentencing, including *United States* v. *Booker*, 543 U.S. 220 (2005), do not alter this principle. "[I]n making the sentencing guidelines advisory, the Court did not authorize courts to sentence below the minimums

prescribed not by the guidelines but by constitutional federal statutes." *Roberson*, 474 F.3d at 436; see also *United States* v. *Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005); *United States* v. *Cannon*, 429 F.3d 1158, 1160 (7th Cir. 2005).

Nor does the doctrine of lenity pertain. The principle applies "[w]hen there are two rational readings of a criminal statute." *Scheidler* v. *NOW, Inc*., 537 U.S. 393, 409 (2003) (quoting *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987)). In this case, the statutory language is clear. Section 3553(a) does not apply where Congress has explicitly provided otherwise. 18 U.S.C. 3551(a).

This Court has previously noted that, under statutory minimums, "[t]he remedy for any dissatisfaction with the results * * * lies with Congress and not with this Court." *United States* v. *Colvin*, 353 F.3d 569, 578 (7th Cir. 2003) (citation and quotation marks omitted). It is "not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Ibid*.; see also *Roberson*, 474 F.3d 436-437.

CONCLUSION

This court should affirm the decision of the district court.

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 X4 and contains no more than 8500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

APRIL J. ANDERSON
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Date: October 19, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, as well as an electronic copy in compact disc format, were served by first class mail, postage prepaid, upon the following:

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