No. 04-4060

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL RAY NICHOLS,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

Defendant Michael Ray Nichols appeals his conviction on one count of violating 42 U.S.C. 3631 and 18 U.S.C. 2, as well as his sentence. The district court had jurisdiction under 18 U.S.C. 3231. The district court pronounced sentence on November 20, 2002, and entered final judgment on December 2, 2002. J.A. 6-7.[1] Nichols filed his notice of appeal on November 21, 2002. J.A. 6. This Court has jurisdiction under 28 U.S.C. 1291.

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[1] Citations to the Joint Appendix are designated "J.A." Citations to the Supplemental Joint Appendix are designated "Supp. J.A." Citations to Appellant's Brief are designated "Br." Citations to Appellant's Supplemental Brief are designated "Supp. Br." Citations to the Presentence Investigation Report are designated "PSR."

STATEMENT OF THE ISSUES

1. Whether Nichols' conviction for interfering by force or threat of force with the occupation of a dwelling because of race resulting in bodily injury was supported by substantial evidence.

2. Whether the district court abused its discretion in denying Nichols' request for an instruction on the lesser-included offense of violating 42 U.S.C. 3631 not resulting in bodily injury.

3. Whether the Supreme Court's decision in *Blakely* v. *Washington* prohibits a district court from applying the career offender enhancement to a defendant's offense level when that finding is based solely on the defendant's prior convictions.

STATEMENT OF THE CASE

On November 8, 2001, a federal grand jury returned a four-count indictment against Nichols. The first count charged a conspiracy by Nichols and an unnamed co-conspirator to violate civil rights in violation of 18 U.S.C. 241 by interfering with the rights of African-American and Hispanic residents living on or near East Louisiana Avenue in Bessemer City, North Carolina. J.A. 8. Nichols' co-conspirator, Shane Greene, lived on East Louisiana Avenue. Greene died of a drug overdose before trial. J.A. 167.

The three remaining counts charged Nichols and his co-conspirator with three racially motivated incidents in violation of 42 U.S.C. 3631, interfering by force or threat of force with the occupation of a dwelling because of race, and 18

U.S.C. 2. Those incidents were also listed as overt acts of the conspiracy charged in Count One. J.A. 9-12.

Count Two involved the physical assault of an African-American male, Milton Taylor, outside his home on May 31, resulting in bodily injury. J.A. 10-11. Count Three charged that on June 1, Nichols and his co-conspirator threw cinder blocks through the windows of the home of the Byers, an African-American family living at the opposite end of East Louisiana Avenue, while the family was home. J.A. 11. The final count charged that on July 29, Nichols and his co-conspirator punched Efren Barrios Juarez, a Hispanic male, in the face, and used metal bats or pipes to break the windows of Juarez's home and of two trucks parked outside while Juarez and a friend hid inside the house. Juarez lived with a group of Hispanic men in a house in the middle of the block. J.A. 12. Both Counts Three and Four charged Nichols with using a deadly weapon. J.A. 11-12.

Nichols was tried before a jury on January 28 and 29, 2002. J.A. 5. Nichols was convicted of conspiracy, and of the attacks on Taylor and Juarez. He was acquitted on Count Three, throwing cinder blocks through the windows of the Byers home. J.A. 260. The district court denied Nichols' request for a new trial on March 7, 2002. J.A. 279. On November 20, 2002, the district court sentenced Nichols to a term of 110 months imprisonment with three years of supervised release, and ordered him to make restitution of $11,647. J.A. 281-284.

Nichols filed a notice of appeal on November 21, 2002. J.A. 287. His opening brief challenged only his conviction on Count Two, attacking Milton

Taylor. Br. 2. Following the Supreme Court's ruling in *Blakely* v. *Washington*, 124 S. Ct. 2631 (2004), Nichols filed a supplemental brief challenging his sentence. On August 2, 2004, this Court held that *Blakely* does not operate to invalidate the federal Sentencing Guidelines. *United States* v. *Hammoud*, No. 03-4253, 2004 WL 17030309 (4th Cir. Aug. 2, 2004) (en banc).

STATEMENT OF THE FACTS

At the time in question, Greene lived at 202 East Louisiana Avenue on the corner of East Louisiana Avenue and Eleventh Street. J.A. 67, 91-92. Greene's grandmother lived at the opposite end of the block on the corner of East Louisiana and Tenth Street. J.A. 90. Greene's uncle, Doyle Marlow, and Marlow's fiancee, Lois Wilson, lived in the middle of the same block. J.A. 90.

Nichols lived in the town of Statesville, but was dating a close friend of Greene's girlfriend and regularly stayed at Greene's home on the weekends. J.A. 36, 89, 168-169. Nichols usually rode to Bessemer City with two friends from Statesville, Rodney and Adam Blansett. J.A. 169.

The charges in this case arose from the three incidents charged as overt acts in Nichols' conspiracy conviction.

1. The Attack On Milton Taylor

In April 1999, Milton Taylor, his fiancee, Annie Taylor, and Annie's teenage daughter moved into a house at 407 South Eleventh Street. The Taylor home was on the corner of East Louisiana Avenue, directly across the street from Greene's house. J.A. 116-117, 128-129. The Taylors are African-American.

On the night of May 31, 1999, as Milton Taylor returned home from visiting a friend, he was attacked by at least three men. The attack began on the Louisiana Avenue side of his house, directly across the street from Greene's house. J.A. 119-120. Just before the attack, Taylor testified, he saw a group of men in Greene's yard and on Greene's porch. As Taylor turned towards the front of his home, he saw two men running towards him from across Louisiana Avenue. He tried to get to his front door, but two more men came at him around the other side of his house, from his backyard. The men tackled Taylor, forcing him to the ground and knocking off his glasses. As Taylor lay curled on the ground in a fetal position, the men punched his face repeatedly and kicked him for approximately two minutes. J.A. 119-121.

When the beating stopped, one white man helped him to his feet and walked him to his front door. The man told him "to go on inside and keep your mouth shut 'cause we'll get you again." J.A. 120. That man mentioned his name was "Rodney or something to that effect." *Ibid.* Taylor testified that because his glasses fell off, he could not identify his attackers or the man who helped him afterwards. J.A. 120-121.

Annie Taylor testified that on the night in question, she was awakened by muffled sounds. J.A. 130. She walked to her front door and turned on the porch light, where she saw a single white man helping her injured husband to the door. J.A. 130. She did not learn the man's name that night. The next day, however, the man came by to ask how her husband was doing and said he was sorry about what

had happened. Annie Taylor testified that "He said his name was Roger or Rodney or something." J.A. 130.

Following the attack, Taylor and his wife sent their daughter to live with her sister in another town. J.A. 124. Three weeks later, in August 1999, they moved out of their home "because it was just too much. It was like living in a nightmare." J.A. 124.

Wilson was engaged to Greene's uncle. She testified that on several occasions before May 31, while she was in Greene's home, Nichols and Greene remarked on "the fact that [the Taylors] were black, and that they didn't like niggers. They didn't like them living there." J.A. 92. Both Nichols and Greene said that "no niggers, no spics" should live in Bessemer City. J.A. 92. Wilson testified that Nichols referred to black people in general as "G.D. niggers" and "monkeys", and that he and Greene said they "were going to teach [the Taylors] a lesson for moving in there" and were "going to kick their ass." J.A. 93.

Wilson also testified that on one occasion after Taylor was beaten, Greene and Nichols were sitting on Greene's porch, pointing across the street at Taylor's home. Both men "were just laughing about how they kicked his ass" and said "they taught them a lesson, and they knew they were scared to come out of the house." J.A. 94.

Nichols admitted he was outside Greene's house at the time of the attack on Taylor. He testified that on the night of May 31, he, Greene, the Blansett brothers and others were drinking on Greene's porch. J.A. 169-170. Nichols claimed that

Taylor was drinking on his porch, and that "there was a few statements made." J.A. 170. Shortly thereafter, Nichols testified, Greene, Adam Blansett, and an unnamed "young boy" crossed the street and attacked Taylor on the side of Taylor's house. J.A. 170. Nichols denied taking part in the beating. J.A. 170. Contradicting the Taylors, Nichols claimed that he, together with Rodney Blansett, stopped the attack and that he was with Blansett when Blansett helped Taylor to the door. J.A. 170.

2. The Attack On Efren Barrios Juarez

Efran Barrios Juarez and Julio Sanchez, Juarez's friend and coworker, testified that on the night of July 30, 1999, they were sitting on Juarez's porch after work. Two white men approached them from Greene's house. One asked if they spoke English. That man came up on the porch and punched Juarez in the face. The other tried to hit Sanchez, but missed. J.A. 55-56.

Juarez and Sanchez went inside to call the police. They returned outside with two other friends, and the two white men retreated towards Greene's home. Five or ten minutes later, the two men returned to the house, each with a long object resembling a bat in his hand. J.A. 58, 76. Sanchez and Juarez went back in the house, locked the doors, and made a second call to the police. J.A. 58.

Three other neighbors on East Louisiana Avenue testified that on the night of July 30 they heard loud voices and other sounds coming from near Juarez's home. Martha Sellars testified that she went out to the edge of her yard and saw Greene and Nichols walking towards Juarez's home, shouting racial insults and cursing.

J.A. 30-31, 36. Nichols had a long metal pipe in his hand, which he used to break all the windows in two vehicles parked next to the house. J.A. 31-32, 34-35. He and Greene also broke all of the windows in the house. J.A. 35.

Wilson also identified Greene and Nichols. J.A. 101. She testified that the scene "was bedlam. It was crazy. I mean they were just like two savages out there destroying those guys' vehicles, destroying the windows and doors in their house, petrifying them, screaming and hollering and cussing, 'Go back to Mexico. You done got all our damn jobs.'" J.A. 104.

Todd Cloninger, who lived in the house next door to Juarez, heard Nichols and Greene yelling racial slurs as they smashed the windows of the house and trucks. J.A. 150-153. Cloninger went inside to get his rifle, and returned to his porch. J.A. 152. Cloninger shouted at Nichols and Greene to stop, and they did. J.A. 153-154. Cloninger testified that as they walked away, Nichols told Cloninger "we're just white supremacists." J.A. 154.

At trial, Nichols admitted that he broke all of the windows on the trucks. But he claimed that he was just drunk, and was not motivated by the men's race or national origin. J.A. 106, 174. Nichols also denied being one of the two men who initially punched Juarez and Sanchez, claiming that Greene was accompanied by a young neighbor. J.A. 173. He testified that after Juarez and Juarez's friends chased Greene and the young neighbor up the street, he returned to the Juarez home with Greene and destroyed all of the windows because Juarez and his friends "were talking trash and asking to fight." J.A. 181.

3. The Byers Incident

Althea Byers testified that in the summer of 1999, she lived above East Louisiana Avenue on South Hill Street with her elderly parents. On the night of June 1, she returned home and found four broken windows and concrete cinder blocks inside the house. Her parents were in their bed, sleeping. Byers checked to make sure her parents were all right, called the police, and then took her parents to stay at a cousin's house in case the attackers came back. J.A. 82-83.

Wilson testified that on the night of the attack on the Byers' home, she was on Greene's porch with Greene and Nichols. Both men made racially derogatory comments about the Byers family, calling them monkeys and niggers, and said that they were going to teach them a lesson. She testified that both men left the porch and walked in the direction of the Byers' home. She could not see them, but a few minutes later she heard the crashing sound of glass breaking. Then Greene and Nichols returned, sneaking around between houses. Both men "were just killing [them]selves laughing of how they had scared the hell out of those niggers." J.A. 96.

Nichols testified that he was not at the Byers' home on the night their windows were broken. He testified that he went to Greene's grandmother's house to use her phone to check on his father, who was in the hospital. J.A. 171. Nichols claimed that another neighbor who lived directly across the street from the Byers told Greene that Mr. Byers had called the police about the neighbor's marijuana use. This neighbor, Nichols testified, asked Greene to "take care of them for him."

J.A. 172. Nichols testified that this neighbor picked up cinder blocks from Greene's grandmother's yard, and that the neighbor and Greene went up the hill towards the Byers' home. Shortly thereafter Nichols, Greene's grandmother and Greene's uncle heard glass breaking. J.A. 172. Nichols testified that when the neighbor and Greene returned, Greene's grandmother, uncle and Nichols all scolded them for harassing older black people. J.A. 172-173. After Nichols' mother returned his phone call, the group went back up to Greene's home.

4. Lesser-Included Offense Instruction

Following closing statements, counsel for Nichols requested that the verdict form for Count Two, the attack on Taylor, direct the jury to specifically find that the violation of Section 3631 either did or did not result in bodily injury, and that the violations in Counts Three and Four, the attacks on the Byers and Juarez, include specific findings on the use of a dangerous weapon. J.A. 219. The United States objected, arguing that the indictment itself alleged that the defendant caused bodily injury or used or attempted to use a dangerous weapon. J.A. 219-220. Accordingly, if the jury found Nichols guilty of the count, they necessarily found that he either used a dangerous weapon or that the attack resulted in bodily injury. J.A. 220. Counsel for Nichols responded that the "lesser-included offense should be included" and asked that the verdict form read "not guilty or guilty without bodily injury or a dangerous weapon or guilty with bodily injury or a dangerous weapon, so the jury specifically has that." J.A. 220-221. The United States objected. The district court sustained the objection, and the verdict form did not

include the lesser offenses. J.A. 221.

5. Sentencing

Nichols' Presentence Investigation Report (PSR) calculated his base offense level as 12. Supp. J.A. 19. Nichols qualified for an additional three levels under U.S.S.G. § 3A1.1 because the victims of his offenses were specifically targeted as a result of their race and ethnicity. Supp. J.A. 19. He received an additional two levels under the multiple count rule of U.S.S.G. § 3D1.4, resulting in an adjusted offense level of 17. Supp. J.A. 20.

The PSR found that Nichols' conviction qualified as a crime of violence. Nichols had numerous prior convictions, including two prior convictions for crimes of violence. In 1990, Nichols was convicted in the North Carolina Superior Court of assault with a deadly weapon inflicting serious injury and sentenced to two years imprisonment. PSR ¶ 51. In 1991, Nichols was convicted in the North Carolina District Court of assault on a law officer and sentenced to 12 months imprisonment. PSR ¶ 52. Accordingly, the PSR applied the career offender enhancement in U.S.S.G. § 4B1.1, raising Nichols' total offense level to 24. PSR ¶¶ 36, 38.

Nichols was in Criminal History Category VI as a result of his classification as a career offender. Even without that status, his prior convictions gave him 31 criminal history points, which qualified him for Category of VI. PSR ¶¶ 64-65.

While Nichols did not contest the fact of his convictions as set forth in the PSR, he objected to the finding that the 1990 and 1991 convictions constituted crimes of violence under U.S.S.G. § 4B1.1. Supp. J.A. 3-5, 40. The district court

overruled his objection and adopted the findings and conclusions of the PSR, Supp. J.A. 4-5, sentencing Nichols to a term of 110 months imprisonment with three years of supervised release. The district court also ordered him to make restitution of $11,647. J.A. 281.

SUMMARY OF THE ARGUMENT

Nichols' conviction for the assault on Milton Taylor was supported by sufficient evidence. Nichols admitted that he was at the scene of the crime with his friends when Taylor was assaulted. Wilson testified that she heard Nichols complain about the Taylors living in the neighborhood and threaten to teach them a lesson for moving there by "kicking their ass." Wilson also testified that after the beating, she heard Nichols brag about beating Milton Taylor and so thoroughly intimidating the Taylor family that they would not come out of their home.

Nichols attempts to mischaracterize Wilson's testimony as uncertain and vague, but it was clear to Wilson that Nichols' boasts referred to the beating of Milton Taylor on May 31. As she testified, Nichols was pointing directly at Taylor's house as he bragged about the beating. That conclusion was further bolstered by evidence showing that Nichols lied when he said that he broke up the attack. Taken in the light most favorable to the verdict, this evidence is sufficient to allow a rational jury to conclude beyond a reasonable doubt that Nichols took part in beating Taylor.

Nichols' challenge to the denial of his request for a lesser-included offense

instruction on a mere threat of force not resulting in bodily injury fails on three grounds. First, the distinguishing element of the lesser-included offense, whether Mr. Taylor suffered bodily injury, was not disputed. Second, based on the evidence presented at trial, Nichols rationally could not be found guilty of the lesser offense. There is no evidence to support Nichols' claim that he incited – but did not participate in – the racially-motivated assault of Mr. Taylor. Even Nichols' self-serving testimony did not establish that he said anything prior to the assault, much less that what he said amounted to threat of force under Section 3631. Third, even under Nichols' threat of force theory, he would be guilty of aiding and abetting a violation of Section 3631 resulting in bodily injury. As a result, he still would be punishable as a principal under Section 3631 resulting in bodily injury. Therefore, for all of these reasons, the district court properly declined to give the lesser-included offense instruction.

Finally, since the submission of Nichols' supplemental brief, this Court has ruled that *Blakely* does not apply to the federal Sentencing Guidelines. *United States* v. *Hammoud*, No. 03-4253 (en banc) (Aug. 2, 2004). Accordingly, there is no ground for remanding Nichols' sentence.

ARGUMENT

I

NICHOLS' CONVICTION IS SUPPORTED BY EVIDENCE SUFFICIENT FOR THE JURY TO CONCLUDE THAT HE PARTICIPATED IN THE ATTACK

A. Standard Of Review

In reviewing a conviction for sufficiency of the evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Wills*, 346 F.3d 476, 495 (4th Cir. 2003), cert. denied, No. 03-9215, 2004 WL 4056577 (Jun. 28, 2004). "[T]he appellate function is not to determine whether the reviewing court is convinced of guilt beyond reasonable doubt, but, to determine, viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government,' whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt.'" *United States* v. *Burgos*, 94 F.3d 849, 863 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1151 (1997). Moreover, this Court "must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States* v. *Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982).

B. Argument

Count Two of the indictment charged Nichols with violating 42 U.S.C. 3631 resulting in bodily injury. To prove a violation of Section 3631 resulting in bodily

injury, the government had to prove beyond a reasonable doubt: (1) that Nichols used or attempted to use force or threatened to use force; (2) that Nichols injured, intimidated or interfered with Mr. Taylor; (3) that Nichols acted because of Mr. Taylor's race and because Mr. Taylor was occupying a dwelling; (4) that Nichols acted willfully; and (5) that Nichols' actions caused bodily injury to Mr. Taylor. J.A. 192-193. Viewed in the light most favorable to the government, see *Burgos*, 94 F.3d at 863, the evidence presented at trial was sufficient for a jury to find beyond a reasonable doubt that Nichols was guilty of violating Section 3631 resulting in bodily injury.

It is undisputed that at least three men attacked Mr. Taylor outside of his home on the night of May 31, 1999. Nichols himself testified that he was outside Greene's home drinking with Greene and Adam Blansett when the attack took place, and that Greene, Adam Blansett, and a young neighbor left Greene's yard and attacked Taylor. J.A. 169-170.

It is also undisputed that Mr. Taylor suffered bodily injury as a result of this attack. Mr. Taylor testified that after the attack he went inside his house and looked in the mirror. He testified that when he looked in the mirror he saw "bruises all over [his] face" and that "it was beginning to swell." J.A. 121. He also stated that he had a sore shoulder and side. *Ibid*. Similarly, Mrs. Taylor testified that on the night of the attack Mr. Taylor's "face was all bruised up and that he had a great big knot in the back of his head." J.A. 131.

Wilson, who was engaged to Shane Greene's uncle and lived on Louisiana

Avenue, testified that, before the assault on Taylor, Nichols and Greene commented on more than one occasion that they didn't like having a black family live across the street and that "no niggers, no spics" should live in Bessemer City. J.A. 92-93. Specifically referring to the Taylors, Nichols and Greene stated that they were going to "teach them a lesson for moving in there" and that they were "going to kick their ass." J.A. 93.

Wilson further testified that, some time after the beating, she was on Greene's porch with Greene and Nichols. Both men pointed to the Taylors' house across the street and laughed, saying that they had beaten Taylor up and that now the family was scared to come out of the house. J.A. 94.

Appellant attempts to minimize Wilson's testimony, claiming that "[w]ithout some further information, it is impossible to determine *when [Nichols' statements] were made* and *to whom they referred*." Br. 27 (emphasis added). This is patently incorrect. First, Wilson clearly testified that Nichols made his statements *after* the May 31 incident.

> Q: Did you ever hear the Defendant talking about any interaction with the black family across the street?
> A. Just saying "going to kick their ass."
> Q: And did you ever hear them talking about the interaction *after it happened*?
> A: Yes.
> Q: What did he say?
> A: They taught them a lesson, and they knew they were scared to come out of the house.
> Q: Did he say what he had done?
> A: They were just laughing *about how they kicked his ass.*
> Q: And *who was laughing about how they kicked his ass*?
> A: *Shane and Mike.*

Q: And where was this conversation?
A: On the front porch of Shane's home.
Q: How did you know who they were referring to?
A: Well, I mean they were pointing directly across the street.

J.A. 93-94 (emphasis added).

Second, as can be seen from the testimony above, Wilson also clearly testified that Nichols was talking about his attack *on Milton Taylor*. J.A. 94. Specifically, Wilson testified that Nichols pointed at the Taylors' house when he boasted about the attack on Taylor. Moreover, nothing in the record suggests that Nichols' boasts referred to some other, unrelated altercation.[2]

"Confessions and eyewitness or ear-witness testimony, of course, are forms of direct evidence." *United States* v. *Russell*, 971 F.2d 1098, 1110 n.24 (4th Cir. 1992), cert. denied, 506 U.S. 1066 (1993). Nichols' admission to Wilson that he participated in the Taylor assault is direct evidence of his guilt. See *United States* v. *Elie*, 111 F.3d 1135, 1140 (4th Cir. 1997) (noting that an admission is an example of direct evidence). Wilson's testimony establishes that after Taylor was attacked, Nichols boasted about beating Taylor and teaching the Taylor family a lesson. That lesson, based on Wilson's testimony about Nichols' statements before the beating, was that blacks and Hispanics had no business living in Bessemer City. J.A. 92.

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[2] Appellant flatly asserts that a jury could connect Nichols' gloating statements about beating and intimidating Milton Taylor to the attack on Taylor "if and only if [Nichols' statements] were made on the evening of May 31, 1999." Br. 25; see also Br. 26. But there is simply no such requirement, and, unsurprisingly, appellant cites no authority for this claim.

Nichols testified that he went across the street with his friend Rodney to break up the attack and to help Taylor to his door. J.A. 170. Clearly, the jury believed Wilson and rejected Nichols' version of events. As this Court has stated, "[a] defendant's credibility is a material consideration in establishing guilt, and if a defendant 'takes the stand * * * and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence.'" *Burgos*, 94 F.3d at 868 (quoting *United States* v. *Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), aff'd 506 U.S. 534 (1993)).

Nichols' testimony was further contradicted by both Milton and Annie Taylor, who testified that a single man helped Milton Taylor to his feet and accompanied him to the door. Milton Taylor testified that the man told him that his name was Rodney or something to that effect, while Annie Taylor testified that he told her his name was Roger or Rodney. J.A. 120, 130. Neither mentioned two men, or thought that the man's name was Michael or Mike. Thus, this testimony further damaged Nichols' credibility in the eyes of the jury and likely aided in establishing Nichols' guilt. See *Burgos*, 94 F.3d at 868.

A reviewing court "may not substitute [its] judgment for that of the jury or make credibility determinations." *Price* v. *City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996), cert. denied, 520 U.S. 1116 (1997); see also *Burgos*, 94 F.3d at 868 ("Determining credibility of witnesses and resolving conflicting testimony falls within the province of the fact finder, not the reviewing court."). Wilson testified that Nichols said he was going to teach the Taylors a lesson for moving into

Bessemer City. J.A. 93. Nichols admitted he was at the scene of the attack while his friends assaulted Taylor. J.A. 169-170. The Taylors testified that, as a result of the attack, Mr. Taylor's face was filled with bruises. J.A. 121, 131. Wilson testified that, after the attack, Nichols boasted about beating Taylor up and teaching him a lesson. J.A. 94. In addition, Nichols' explanation for being at the attack was contradicted by the Taylors' testimony. Accordingly, accepting the jury's determination that Wilson and the Taylors were credible witnesses and that Nichols was not, the evidence presented at trial is sufficient to allow a rational jury to conclude beyond a reasonable doubt that Nichols was guilty of violating Section 3631 resulting in bodily injury.

II

THE DISTRICT COURT'S CORRECTLY REFUSED TO GIVE A LESSER-INCLUDED OFFENSE INSTRUCTION

A. Standard of Review

"[T]he decision to give (or not to give) a jury instruction * * * [is] reviewed for abuse of discretion." *United States* v. *Russell*, 971 F.2d 1098, 1107 (4th Cir. 1992), cert. denied, 506 U.S. 1066 (1993).

B. Argument

Nichols argues that the district court abused its discretion when it denied Nichols' request for an instruction on the lesser-included offense of violating Section 3631 not resulting in bodily injury.

"A defendant is not entitled to a lesser-included offense instruction as a

matter of course." *United States* v. *Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997), cert. denied, 524 U.S. 921 (1998). To receive such an instruction, "'the proof of the element that differentiates the two offenses must be sufficiently in dispute that the jury could rationally find the defendant guilty of the lesser offense but not guilty of the greater offense.' For an element to be placed 'sufficiently in dispute' so as to warrant a lesser-included offense instruction, one of two conditions must be satisfied. Either 'the testimony on the distinguishing element must be sharply conflicting, or the conclusion as to the lesser offense must be fairly inferable from the evidence presented.'" *Ibid*. (quoting *United States* v. *Walker*, 75 F.3d 178, 180 (4th Cir.), cert. denied, 517 U.S. 1250 (1996)). Neither of these conditions is satisfied here.

1. The Testimony On The Distinguishing Element Was Not Sharply Conflicting

First, the distinguishing element of the lesser-included offense, whether Mr. Taylor suffered bodily injury, was not disputed. As discussed *supra* pages 15-16, both Mr. and Mrs. Taylor testified that after the attack Mr. Taylor had bruises all over his face. J.A. 121, 131. Mr. Taylor also testified that he had a sore shoulder and side, and Mrs. Taylor stated that he had a big knot at the back of his head. *Ibid*. Nichols did not dispute this testimony. Rather, his defense was one of

identity; he claimed that he was not one of the men who crossed the street to attack. Thus, the testimony on the distinguishing element was not sharply conflicting, and the district court did not abuse its discretion by denying the lesser-included offense instruction on this ground.

2. The Conclusion As To The Lesser Offense Is Not Fairly Inferable From The Evidence Presented

Second, a lesser-included offense instruction was not warranted as the jury could not reasonably infer from the evidence presented that Nichols was guilty of violating Section 3631 not resulting in bodily injury.

As detailed *supra*, pages 15-18, the evidence clearly established that Nichols participated in the attack on Mr. Taylor. Wilson testified that, before the assault on Taylor, Nichols and Greene stated that they didn't like having a black family live across the street, that "no niggers, no spics" should live in Bessemer City, that they were going to "teach [the Taylors] a lesson for moving in there," and that they were "going to kick their ass." J.A. 92-93. In addition, Wilson testified that, after the beating, Nichols and Greene boasted about beating up Taylor, that they stated that they had "taught him a lesson" and that they had "laugh[ed] about how they had kicked his ass." J.A. 94. And Nichols himself admitted he was at the scene of the attack while his friends assaulted Taylor. J.A. 169-170.

Nichols argues that he could have been convicted of a lesser-included offense if the jury believed that he threatened Taylor with force, because of his race and because he was occupying his home, but did not participate in the physical attack. To support his contention, Nichols argues that such an inference could be made from a few sentences of his trial testimony.

At trial, Nichols testified that he and his friends were on Greene's porch drinking, and that Taylor was on his porch drinking too. J.A. 169-170. Nichols then testified that

> [Taylor] had come around to the side of the house. *And there was a few statements made*. And he was dancing, you know, around in his – in the front of his yard. Well, [Greene and Greene's girlfriend] started dancing, like, in their yard. *And at that time, there was a few comments made.*

J.A. 170 (emphasis added). After these comments were made, Nichols testified, Greene, Greene's young neighbor, and Adam Blansett crossed the street and jumped on Taylor. J.A. 170.

It is from this bare suggestion of "comments" that Nichols contends a rational jury could reasonably infer that Nichols threatened Taylor with force, and that these threats did not result in bodily injury. This contention is meritless.

First, Nichols did not testify that he himself made any of these alleged statements. In fact, his testimony in the passive voice ("there was a few statements

made") implies that someone else in Greene's yard, or perhaps even Mr. Taylor, made the comments.

In addition, there is simply not enough evidence in the record to fairly infer that the comments mentioned by Nichols amounted to a threat to use force against Taylor. As the district court instructed the jury, "While 'force' requires some physical manifestation of violence, 'threat of force' falls short of actual violence and ordinarily signifies the expression of one person's intent to act against another or to do some harm." J.A. 239-240. Nichols gave absolutely no details about the content of the statements that were allegedly made. The word "threat" was never used. A jury that believed Nichols' version of events could rationally infer from his testimony that, regardless of who made the comments, the statements were derogatory or inflammatory. But there is simply not enough information, either from direct evidence or by inference from the context, for a jury to rationally conclude that the comments amounted to a threat to use force against Taylor.

Moreover, Nichols' version of events is contradicted by Taylor. Contrary to Nichols' testimony, Taylor testified that he was not drinking on his porch and that no exchange of "comments" took place. J.A. 126. Rather, Taylor testified that the assault began after he returned home from a friend's house without his key and went to the side window of his home to awaken his wife.

Accordingly, there was no evidence from which the jury could fairly infer that Nichols was guilty of threatening force before the attack. Because he did not present evidence from which a reasonable jury could fairly infer that he was guilty only of threatening force against Milton Taylor and that these threats did not result in bodily injury, the district court appropriately rejected his request for a lesser-included offense instruction.

3. Even Under Nichols' Theory, He Would Be Guilty Of Aiding And Abetting A Use Of Force Resulting In Bodily Injury

Further, even if there had been a factual basis for the jury to conclude that Nichols, rather than someone else, made these "comments" or "statements" and that the statements constituted a "threat of force", the rational inference of this "evidence" would be that Nichols' statements encouraged or inspired the attack which immediately followed. Indeed, even under his version of events, Nichols does not deny that his companions attacked Taylor, causing him bodily injury. Nichols merely denies joining in that attack. J.A. 169-170.

If Nichols' comments encouraged or inspired the attack, he would be guilty of aiding and abetting a violation of Section 3631. See *United States* v. *Horton*, 921 F.2d 540, 543 (4th Cir. 1990) (citations omitted) ("[I]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate

himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"), cert. denied, 501 U.S. 1234 (1991); see also *United States* v. *Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000) (concluding evidence sufficient to support a conviction for aiding and abetting a violation of Section 3631 where defendant encouraged his companions who built and burned a cross in the victim's yard by using racial epithets to describe victims and discussing cross-burning as a symbol of racial hatred). Thus, even if Nichols had not joined in the attack on Mr. Taylor, but only inspired his companions to do so, he would still be punishable as if he had joined in. See 18 U.S.C. 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); see also *Horton*, 921 F.2d at 543.

A jury therefore could not "rationally find the defendant guilty of the lesser offense [force or threat of force not resulting in bodily injury] but not guilty of the greater offense [force or threat of force resulting in bodily injury]." *Walker*, 75 F.3d at 180. Accordingly, the district court did not err by denying Nichols' request for the lesser-included offense instruction on violating Section 3631 without resulting bodily injury.

III

BLAKELY PROVIDES NO GROUNDS FOR REDUCING OR REMANDING NICHOLS' SENTENCE

A. Standard Of Review

Whether *Blakely* applies to the Federal Sentencing Guidelines is a question of law reviewed *de novo*. See *United States* v. *Kinter*, 235 F.3d 192, 195 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001). Because Nichols did not challenge the constitutionality of the district court, rather than a jury, making the finding that two of his prior convictions qualify as crimes of violence, his claim that the PSR's offense level calculation violates *Blakely* is reviewed for plain error. *United States* v. *Mackins*, 315 F.3d 399, 408 (4th Cir. 2003), cert. denied, 538 U.S. 1045 (2003).

B. Argument

After Nichols filed his supplemental brief appealing his sentence, this Court ruled en banc that *Blakely* does not apply to the federal Sentencing Guidelines. *United States* v. *Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug. 2, 2004) (en banc). Accordingly, *Blakely* does not provide a basis for remanding Nichols' sentence. However, in the interest of judicial economy, and pending a definitive decision by the Supreme Court, we want to make clear that this Court can reject Nichols' sentencing challenge regardless of whether *Blakely* applies to the federal Sentencing Guidelines.

The Supreme Court has expressly held that adjustments based on prior convictions are not subject to *Apprendi* or *Blakely*. *Blakely*, 124 S. Ct. at 2536 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (quoting *Apprendi*, 530 U.S. at 490) (emphasis added). The career offender enhancement to Nichols' sentence was based solely on his prior convictions. As the Eleventh Circuit recently held, *Blakely* simply does not apply to such a case. *United States* v. *Marseille*, No. 03-12961, 2004 WL 1627026, *7 n. 14 (11th Cir. Jul. 21, 2004) (*Blakely* does not remove fact-finding on prior convictions for career offender enhancement from the courts); cf. *United States* v. *Cooper*, No. 03-4019, 2004 WL 1598798, *11 (10th Cir. Jul. 9, 2004) (noting in context of three strikes provision of 18 U.S.C. 3665 that *Blakely* reaffirmed *Apprendi* exception for findings of prior convictions).

Marseille is consistent with decisions in the three courts of appeals that, prior to *Blakely*, rejected the argument that *Apprendi* should apply to findings on whether prior convictions qualify as crimes of violence. *United States* v. *Alvarez*, 320 F.3d 765, 767 (8th Cir. 2002) (noting fact of prior conviction is expressly excluded from *Apprendi*); *United States* v. *Sanchez*, 251 F.3d 598, 603 (7th Cir.), cert. denied, 534 U.S. 933 (2001); *United States* v. *Weaver*, 267 F.3d 231, 250 (3d

Cir. 2001) (in *Apprendi* the Supreme Court "singl[ed] out the fact of a prior conviction as the exception to the rule") (emphasis and citation omitted), cert. denied, 534 U.S. 1152 (2002). Indeed, no court of appeals has held that *Apprendi* applies to the determination that a prior conviction qualifies as a crime of violence.

CONCLUSION

This Court should affirm the district court's judgment finding Nichols guilty of Count Two and affirm Nichols' sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief for the United States as Appellee complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains no more than 6763 words, as calculated by the WordPerfect 9 word-count system.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2004, two copies of the Brief For The United States As Appellee were served by first-class mail to the following counsel of record:

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