

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 22, 2019

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHARLEY JOE, JR.,

Defendant - Appellant.

No. 18-2072
(D.C. No. 1:16-CR-04007-JB-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **MATHESON, MURPHY, and CARSON**, Circuit Judges.

I. Introduction

Defendant-appellant Charley Joe, Jr. (“Joe”) challenges the procedural reasonableness of the seventy-eight month sentence imposed by the district court after his conviction for voluntary manslaughter. At sentencing, the district court determined the victim was a “vulnerable victim” under the United States Sentencing Guidelines. It, accordingly, calculated Joe’s advisory guidelines range by applying the two-level vulnerable victim enhancement. *See* U.S. Sentencing Guidelines

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Manual § 3A1.1(b). Joe argues the district court procedurally erred by applying the sentencing enhancement.

Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we **affirm** Joe's sentence.

II. Background

On October 12, 2016, a federal grand jury in the District of New Mexico charged Joe with voluntary manslaughter in violation of 18 U.S.C. §§ 1153 and 1112. The victim was Joe's brother, Jonathan, who suffered from cerebral palsy and was paralyzed on the left side of his body. The cause of death was determined to be "chop wounds" that were inflicted by Joe with an axe. The wounds were mainly on the left side of the victim's body, including his face, neck, chest, abdomen, and left arm.

Joe pleaded guilty to the charge and a Presentence Investigation Report ("PSR") was prepared. The PSR calculated Joe's offense level under the Sentencing Guidelines to include a two-level "vulnerable victim" enhancement under USSG § 3A1.1(b)(1). Joe objected to application of the enhancement, arguing the evidence proffered by the government did not show the victim was unusually vulnerable. The PSR responded by noting that many of the victim's injuries were sustained on the left side of his body, the side which the victim could not use to defend himself.

The district court considered Joe's arguments at a sentencing hearing held on October 3, 2017, but overruled his objection to application of the two-level vulnerable victim enhancement in a written order. The district court sentenced Joe to

seventy-eight months' incarceration, based on a total offense level of twenty-eight, a criminal history category of 1, and an advisory guidelines range of seventy-eight to ninety-seven months.

III. Discussion

A. Standard of Review

Joe argues the district court erred in applying the two-level vulnerable victim enhancement to calculate his advisory guidelines range, an argument that concerns the procedural reasonableness of Joe's sentence. *See United States v. Cook*, 550 F.3d 1292, 1295 (10th Cir. 2008). "When evaluating the district court's interpretation and application of the Sentencing Guidelines, we review legal questions *de novo* and factual findings for clear error, giving due deference to the district court's application of the guidelines to the facts." *United States v. Munoz-Tello*, 531 F.3d 1174, 1181 (10th Cir. 2008) (quotation omitted). Joe does not challenge any of the district court's factual findings, limiting his argument to the assertion those facts do not support the enhancement. Thus, our review is *de novo*. *United States v. Checora*, 175 F.3d 782, 788-89 (10th Cir. 1999) ("[T]o the extent the defendant[] ask[s] us to interpret the Guidelines or hold the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a *de novo* review.>").

B. Vulnerable Victim Enhancement

The Sentencing Guidelines provide for a two-level enhancement "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S. Sentencing Guidelines Manual § 3A1.1(b)(1). The application notes

define a vulnerable victim as “a person (A) who is a victim of the offense of conviction . . . and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” *Id.* at § 3A1.1 cmt. n.2. “The theory behind the vulnerable victim enhancement is that conduct against the particular victim . . . is more blameworthy than the conduct of other offenders and thus deserves greater punishment.” *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008) (quotation omitted). To support the enhancement, the government must prove by a preponderance of the evidence that the victim was “‘particularly susceptible’ to the criminal conduct.” *United States v. Shumway*, 112 F.3d 1413, 1422-23 (10th Cir. 1997). “In assessing vulnerability, the sentencing court must make an individualized determination; it is not enough that a victim belongs to a class generally considered vulnerable.” *Scott*, 529 F.3d at 1300-01.

Recognizing it was required to assess the victim’s vulnerabilities rather than rely on the fact the victim belonged to a class generally considered vulnerable (i.e., people with cerebral palsy or paralysis), the district court stated as follows:

Here, Joe killed the victim with an axe. The victim had cerebral palsy, was partially paralyzed, and only had use of the right side of his body. . . . Even though Joe lived in the hogan next to the main house, he and the victim would share use of the house, kitchen, and restroom. On these facts, the Court concludes that Joe knew or should have known that a victim of the offense was a vulnerable victim. That the victim could only use one side of his body because of his cerebral palsy made him unusually vulnerable due to . . . physical or mental condition, and particularly susceptible to the criminal conduct. Further, that the victim was partially paralyzed and could use only part of his body made him unable to protect himself . . . from criminal conduct and . . . in need of greater societal protection than the average citizen.

Joe does not dispute that the victim was born with cerebral palsy and was paralyzed on his left side. He argues, however, that the victim had adapted to his disability and was able to live alone and perform daily tasks. Joe further asserts that he and the victim had an acrimonious relationship and the victim physically assaulted him on several occasions. According to Joe, these facts show the victim was not unusually vulnerable to a physical attack. Joe's argument is unavailing. The district court specifically found that the victim was only able to use one side of his body because of his paralysis. Evidence that the victim engaged in both physical activity and physical aggression does not compel the conclusion the victim was able to protect himself from multiple blows from an axe when those blows were delivered to the paralyzed side of the victim's body.

Having considered Joe's arguments, we conclude the evidence was sufficient to support the enhancement. The record amply supports the conclusion that the victim's paralysis made him vulnerable to physical attacks and Joe knew of the vulnerability and exploited it by striking the victim multiple times on his paralyzed side. Thus, the victim's paralysis made him "particularly susceptible" to the specific criminal conduct in which Joe engaged. *See Schumway*, 112 F.3d at 1423. Even assuming, as Joe asserts, that the victim instigated the confrontation that led to his death, these facts show that Joe acted with the "extra measure of . . . depravity" necessary to apply the vulnerable victim enhancement. *See United States v. Creech*, 913 F.2d 780, 782 (10th Cir. 1990).

Relying on this court's opinion in *Checora*, Joe also argues his physical limitations were part of the totality of the circumstances and should have been considered by the district court in its analysis of the vulnerable victim enhancement. 175 F.3d at 789. Specifically, he asserts that at the time of the attack he was older than the victim, walked with a limp, and had been drinking alcohol. According to Joe, these physical limitations made him less able than the victim and offset the victim's vulnerability. In *Checora*, this court upheld the application of the vulnerable victim enhancement because the victim "was intoxicated, outnumbered, and much smaller in stature than his assailants." *Id.* at 790. In arriving at this conclusion, we assessed whether the size differential between the victim and his attackers *supported* application of the vulnerable victim enhancement. *Id.* at 789-90 (noting the district court properly "considered relative size as one of several factors that rendered [the victim] an unusually vulnerable victim under the totality of the circumstances"). Joe, on the other hand, asks us to consider whether his physical characteristics *proscribe* application of the vulnerable victim enhancement. *Checora* did not so hold and Joe has not directed this court to any authority for this proposition. Even assuming, however, that Joe's alleged physical disadvantages should be considered when determining whether the enhancement was properly applied, Joe's argument fails. The characteristics he identifies do not negate or even minimize the victim's vulnerability to the use of an axe on the paralyzed side of his body.

IV. Conclusion

Because the district court properly applied the vulnerable victim enhancement, Joe has not shown his seventy-eight month sentence was procedurally unreasonable. Accordingly, we **affirm** the sentence.

Entered for the Court

Michael R. Murphy
Circuit Judge