No. 19-2418

In the United States Court of Appeals
for the Sixth Circuit

United States of America,

Plaintiff-Appellee,

v.

Michael Lee Johnson,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 18-cr-20794 (Hon. Thomas L. Ludington)

Brief for the United States

Saima S. Mohsin
Acting United States Attorney

Erin S. Shaw
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9182
erin.shaw@usdoj.gov

Table of Contents

Table of Authorities

Cases

Cases

Cases

Statutes

Rules

Guidelines

Other Authorities

Request for Oral Argument

The United States agrees with the defendant that this Court's decisional process is likely to be aided by oral argument. Accordingly, the United States concurs in the defendant's request for oral argument.

Introduction

Defendant Michael Lee Johnson is prone to angry and explosive outbursts that often turn violent.

In October 2018, he exploded on his girlfriend, imprisoning her in her bedroom, assaulting her, strangling her, choking her and suffocating her. Six months later, he exploded on his appointed counsel during a legal visit in lockup. Three county deputies had to intervene from the control booth to protect the attorney from physical assault. He exploded twice during his criminal trial, requiring the United States Marshals Service to remove him from the courtroom. He then continued his explosive behavior from outside the courtroom, yelling and rattling the jail bars so loudly that it disrupted the trial proceedings. He exploded during sentencing, and the marshals removed him from the courtroom once more.

Johnson takes no ownership for any of his conduct. Instead, he has claimed throughout this case that his victim was a federal informant and a "whore" (R.104: Sentencing Tr., 1272), his attorneys were trying to sabotage him, and the district court railroaded and wronged him. Any headwinds that Johnson encountered at trial were of

his own making, and his unending cries of foul warrant appropriate scrutiny.

It was Johnson who waived his right to counsel with his irrational and aggressive conduct towards his appointed attorneys. It was Johnson who failed to subpoena any of his family-member witnesses, and declined to call anyone at all when the district court expressly invited him to do so. It was Johnson who opened the door to rebuttal impeachment testimony, ignoring his attorney's advice and claiming on direct examination that he had never restrained, choked or strangled any woman, nor held any woman against her will. It was Johnson who confessed to his crimes in multiple writings. His convictions should be affirmed.

So should his sentence. Johnson agreed at sentencing that his guidelines were scored properly, and his sentence within them is significant. But so was his offense conduct. He is a career offender with a lifelong history of chronic violence. He has repeatedly demonstrated his exceptional dangerousness, and as the district court aptly observed, lack of any moral guardrails to govern his behavior.

Issues Presented

I. *Sixth Amendment – Waiver by Misconduct.* Johnson had irrational and violent outbursts during meetings with his court-appointed lawyers, accusing them of conspiring with the prosecutor. Did the district court commit plain error when it ordered Johnson to represent himself with the assistance of standby counsel, Johnson affirmed that this arrangement was also his preference, and standby counsel took over as trial counsel anyway during cross-examination of the government's first witness?

II. *Sixth Amendment – Waiver of Defense Witnesses.* Was Johnson's right to present a defense and call witnesses violated when the district court asked if he had "any additional witnesses," and Johnson declined to call anyone?

III. *Rebuttal Testimony*. The defense conceded that Johnson "open[ed] the door" to rebuttal testimony after he gratuitously testified on direct examination that he had never restrained, choked or strangled any woman, nor held any woman against her will. Did Johnson waive his contrary argument on appeal, and, in any event, did the district court appropriately allow two rebuttal

witnesses to testify that Johnson had committed those acts against them, while also instructing the jury that this evidence could only be considered for assessing Johnson's credibility?

IV. *Cumulative Error*. Does the "accumulation of non-errors" amount to reversible cumulative error?

V. *Sentencing*. Did the district court commit plain error in calculating Johnson's guidelines and explaining the reasons for his within-guidelines sentence?

Statement of the Case

A. Johnson strangles, chokes and holds C.J. against her will, then intimidates her so she will not cooperate with police.

Victim C.J. is a Native American woman who resides on a reservation in Mount Pleasant, Michigan. On October 23, 2018, after being in a relationship for about seven months, C.J. and Johnson were arguing in C.J.'s second-story bedroom. (R.101: Trial Tr., 762–63, 765). C.J.'s daughters, who were then ages six and nine, were also in the house. (*Id.*, 768). C.J. tried to leave the bedroom four or five times, but Johnson would not let her. He blocked the door with his body, pushed her down on the bed three or four times, and said, "Sit down, bitch." (*Id.*, 766–67). He threatened to throw her out the window if she tried contacting the police. (*Id.*, 768). This went on for 25-30 minutes. (*Id.*, 769; R.102, Trial Tr., 1042).

The next day, C.J. came home from work around lunchtime. Johnson was there. He was agitated, twice slamming the door and throwing children's furniture across the garage. (R.101: Trial Tr., 771). After C.J. went back to work, she received "nonstop" messages from Johnson, through the end of her work day. (*Id.*). C.J. told Johnson that

the relationship was over, and he needed to leave. (*Id.*, 772). He berated her, calling her a "SELFISH DISRESPECTFUL ASS BITCH," a "dirty, dirty bitch," and a "dirty scandolous [sic] bitch." (R.109-1: Govt. Ex. 1A, 1379, 1388). At the time, Johnson was on parole with the Michigan Department of Corrections. (R.102: Trial Tr., 1001). Johnson's parole officer instructed him to be gone from the house before 5 o'clock. (*Id.*, 1003).

But when C.J. arrived home that evening, Johnson was standing in the kitchen. (*Id.*, 808). He asked her to come talk to him. (*Id.*). When C.J. noticed a knife on the kitchen counter near where he was standing, she refused and tried to walk past him. (*Id.*). He came up behind her, slammed her into the wall and jabbed her in the face with his finger. (*Id.*, 809). C.J. tried to yell so her neighbors would hear. Johnson covered her nose and mouth with his hand, wrapped his fingers around her windpipe, and squeezed her neck. (*Id.*). She had trouble breathing. (*Id.*). He slammed her down on the stairs, causing her to hit her head on the stairs and her arm on the marble banister. (*Id.*, 810–11). She thought her arm was broken. (*Id.*, 811).

C.J. believed that her "only option" to get Johnson out of her life was to accede to his demand to drive him to Saginaw. (*Id.*, 817). Her daughters were in the backseat. (*Id.*, 818). As C.J. drove, Johnson yelled at her, saying "yeah, bitch, I know you're scared, aren't you? I can see it." (*Id.*, 818). He also told her that he was a "shooter," and would "take care of" her. (*Id.*). He grabbed C.J.'s head, pushed it down towards the console, and slapped her across the face, while the girls were screaming and crying. (*Id.*, 819).

Johnson knew that C.J. needed to go to the hospital for her injuries, and he demanded to go with her. (*Id.*, 820). He instructed C.J. to lie and tell hospital staff that she hurt her arm moving a curio cabinet. (*Id.*, 821). But C.J. left Johnson in Saginaw and went to the hospital without him. She had scrapes on her neck and bruises all over her body. (*Id.*, 811). Medical staff took photos of C.J.'s injuries, and so did she, as her bruises progressed. (*Id.*, 813–16; R.109-3: Govt. Ex. 7A–J, 1452–61).

Johnson was arrested the next day. (R.101: Trial Tr., 828). He made a recorded call from the jail, directing that C.J. be told that he

"doesn't deserve any more time," and she should "leave the law out of this shit." (PSR, ¶15).

Johnson likewise wrote numerous letters directly to C.J., pressuring her to get the charges dismissed and not to testify against him. (*Id.*, ¶17). He said things like:

- "These people are talking about a serious felony," "This charge the grand jury is looking at will put me away – why?" (R.109-2: Govt. Ex. 2: 1418).
- "What are you going to accomplish by putting me in federal prison?" (*Id.*, 1420).
- "I asked specifically no law," "don't prosecute me," "don't push the issue, just let me do a few months and start over for my baby and I," and "Don't do this with the courts." (*Id.*, 1425).
- "Why can't you tell them you don't want to pursue charges?" "you will just tell them I DON'T WANT TO PURSUE THIS." (*Id.*, 1427, 1429).
- "my heart hopes you don't show up" to the Grand Jury proceedings (*Id.*, 1449).
- "I wonder if you are going to testify against me?" "Tell me – what would you do if you lost your life, you sat rotting in here from me talking to police? WHAT WOULD YOU DO ABOUT YOUR DAUGHTERS?" (*Id.*, 1436).

Johnson confessed his crimes to numerous friends and family in several different Facebook messages. (R.109-1: Govt. Ex. 1B, 1394–

1409; R.109-4: Govt. Ex. 8, 1462–68). He made similar admissions of guilt in letters to C.J. and written statements provided to the FBI. (R.109-2: Govt. Ex. 2, 1414, 1416, 1418, 1422, 1430, 1431, 1442); R.109-5: Govt. Ex. 9, 1469–70; R.109-6: Govt. Ex. 10, 1471).

B. Johnson churns through his appointed attorneys, accusing them of colluding with the prosecutor and nearly assaulting one of them.

A grand jury indicted Johnson for unlawful imprisonment, in violation of 18 U.S.C. § 13 and Mich. Comp. Laws § 750.349b (count one); assault by strangulation (count two), in violation of 18 U.S.C. § 113(a)(8); assault by suffocation, in violation of 18 U.S.C. § 113(a)(8) (count three); interstate domestic violence, in violation of 18 U.S.C. § 2261(a) (count four); assault by striking, beating, or wounding, in violation of 18 U.S.C. § 113(a)(4) (count eight); and eight counts of witness tampering, in violation of 18 U.S.C. § 1512(b) (counts five through seven and nine through thirteen). (R.9: First Superseding Indictment, 30–37).

Johnson's first appointed attorney was David Koelzer. The district court described Mr. Koelzer as "one of the most senior [federal public defenders] in the Eastern District of Michigan, one of the most

accomplished defense lawyers that most defendants would seek out." (R.108: 3/12/19 Tr., 1294–95). But after about two months of working together, Johnson demanded that Mr. Koelzer withdraw as counsel. (R.19: Mot. to Withdraw, 67). Johnson believed that Mr. Koezler and the prosecutor were "in collusion." (R.108: 3/12/19 Tr., 1286). Mr. Koelzer explained that Johnson had expressed "anger" and "vitriol" in their interactions, and that the situation was "extreme" because Johnson appeared to believe that Mr. Koelzer was trying to "sabotage" him. (*Id.*, 1291, 1293). The district court agreed to give Johnson new counsel. This was in mid-March.

Johnson's next attorney was Barry A. Wolf. By the end of April, he too moved to withdraw at Johnson's insistence. (R.33: Mot. to Withdraw, 105; R.46: 5/23/19 Tr., 165). Mr. Wolf met with Johnson three times. During the first meeting, which lasted about three hours, they discussed a proposed plea bargain, and Johnson wanted a negotiated sentencing cap. (R.46: 5/23/19 Tr., 166–67). When Mr. Wolf returned to advise Johnson that the government had rejected his proposal, Johnson "was just irate." (*Id.*, 167). He "refused to engage in a rational discussion regarding claimed evidentiary issues," "became

enraged," "commenced screaming and moving about in a highly agitated state," and accused Mr. Wolf, like Mr. Koelzer, of colluding with the prosecutor. (R.33: Mot. to Withdraw, 105). After Johnson "got angry" and "stormed out of the meeting," he filed a motion to have Mr. Wolf removed as counsel. (R.46: 5/23/19 Tr., 168).

Mr. Wolf kept trying. He went to visit Johnson a third time, to discuss trial strategy and provide Johnson with a copy of the response he had filed on Johnson's behalf opposing the government's pending evidentiary motion. (R.46: 5/23/19 Tr., 169). But Johnson refused to assist in preparing for trial or to discuss evidentiary issues in any rational manner. (R.33: Mot. to Withdraw, 106). Instead, he accused Mr. Wolf of trying to force him to plead guilty. (*Id.*, 105–06). Johnson became "so enraged" in his "physical demeanor, so loud in the volume of his voice and irate in his tone towards" Mr. Wolf that three county deputies had to intervene from the control booth to make sure that Mr. Wolf "was not under physical assault." (R.46: 5/23/19 Tr., 165–66). Johnson made clear that he was not willing to work with Mr. Wolf, and Mr. Wolf believed that "given [Johnson's] conduct," "there's also a personal safety aspect to it." (*Id.*, 166).

The district court ordered Johnson to explain why Johnson might "have any higher level of success" were the court to appoint him a third attorney. (R.46: 5/23/19 Hrg. Tr., 184). Johnson did not signal that he would, nor did he indicate that he was willing to continue working with Mr. Wolf. (*Id.*, 184–85). Instead, Johnson suggested a third option: to proceed pro se. (*Id.*, 185). The district court cautioned Johnson that "without a legal education," the idea that he was better suited to handle the case than his appointed attorneys was "a little bit out there," and that self-representation was "not advisable." (*Id.*, 185, 187). The district court heard Johnson's explanations concerning his knowledge of the facts of his case, the applicable state and federal laws and rules of evidence, and the amount of time he had spent studying while in custody. (*Id.*, 185–86). The district court also confirmed with Johnson that he was aware of the charges, the potential sentencing consequences, and that he was potentially engaging in an area where he did not have the expertise to evaluate all of the potential implications. (*Id.*, 191). The district court issued a written order, expressly determining that Johnson's waiver of counsel "was knowing, intelligent,

and voluntary," and ordering Johnson to proceed pro se, with standby counsel. (R.39: 5/23/19 Order, 136).

Attorney Alan Crawford entered his appearance as standby counsel a few days later.

C. Johnson is convicted at trial.

Johnson began the trial pro se, with Mr. Crawford serving as his standby counsel.

During Johnson's cross examination of C.J., Johnson had to be admonished nine times for attempting to testify rather than just question the witness. (R.101: Trial Tr., 848, 850, 866, 873, 898, 904, 923, 924, 932). Even though Johnson had no exhibit list or pre-marked defense exhibits, the court and prosecutors tried to work with him on the fly. (*Id.*, 870–71, 877). Johnson was unable to lay a proper foundation or establish relevance for the exhibits that he sought to admit. (*Id.*, 872–78, 882). But he blamed the court for his shortcomings, often decrying that he was being "railroaded." (R.102: Trial Tr., 1137). The trial judge explained to Johnson that his evidence was "either irrelevant or otherwise inadmissible," and that it had been "reviewed by three of the finest defense lawyers that I have had an opportunity to

work with in their effort to assist you in defense of the case." (R.103: Trial Tr., 1219).

Johnson stopped representing himself during C.J.'s cross-examination. At Johnson's request, Mr. Crawford took over as defense counsel for the remainder of the trial (R.101: Trial Tr., 938–39).

After the government rested, Johnson testified. The district court had previously granted in part Johnson's motion in limine, and barred the government from introducing testimony from Johnson's former intimate partners, R.T. and S.R., whom Johnson had abused. (R.52: 7/19/19 Order, 254). But during questioning by Mr. Crawford, Johnson volunteered: "I've never felt — restrained a woman, kept them against their will. I've never choked a woman." (R.102: Trial Tr., 1064). He continued: "I never strangled her or another woman in my life." (*Id.*, 1074). The court determined that Johnson's testimony opened the door to R.T. and S.R. as rebuttal witnesses. (*Id.*, 1086). Defense counsel later agreed that Johnson "did open the door to that," despite counsel's extensive warnings. (R.103: Trial Tr., 1242–43). Johnson became so enraged that he had to be removed from the courtroom and watch the trial via closed circuit television. (R.102: Trial Tr., 1140–43).

Johnson then opted not call any further witnesses. Johnson had previously identified the victim and case agent as potential trial witnesses, along with several family members whom he had not subpoenaed. (R.100: Trial Tr., 664). Although Johnson blamed the lack of subpoenas on Mr. Crawford, Mr. Crawford explained that it was his "first time hearing of witnesses" besides Johnson's mother. (R.100: Trial Tr., 752). Fortunately, her appearance had already been secured because she was also on the government's witness list. The defense questioned the victim and case agent at length. But at the conclusion of Johnson's testimony, when the court invited the defense to call "any additional witnesses," the defense declined to call Johnson's mother or anyone else. (R.102: Trial Tr., 1143).

R.T. and S.R. both testified on rebuttal for the government. During their testimony, Johnson was "noticeably yelling in lockup," which had "an impact clearly on the witnesses that were testifying." (*Id.*, 1155).

During the government's closing argument the next day, Johnson was permitted back in the courtroom. But he interrupted four times, pointed at the victim seated in the back of the courtroom 11 times, and

stared down the jury, showing them different items and pointing fingers at them. (R.103: Trial Tr., 1218). Following another outburst during the government's rebuttal argument, Johnson was again removed. (*Id.*, 1228–29). The district court instructed the jury to "disregard the gentleman's outburst and focus just on the evidence, please." (*Id.*). The court also instructed the jury that testimony of the government's two rebuttal witnesses could only be considered for evaluating Johnson's credibility, and that the jury "must not consider it for any other purpose, including as a substitute for proof of the charged criminal offenses." (R.103: Trial Tr., 1167–68).

The jury convicted Johnson on all counts. (R.69: Jury Verdict, 426–28).

D. Johnson continues to harass his victim and her family following his conviction, including sending his victim a letter written in his blood, and receives a within-guidelines sentence.

In the sentencing memorandum that Mr. Crawford wrote and Johnson endorsed (R.91: Sent. Mem., 546–52; R.104: Sent. Tr., 1258), the defense agreed that the guidelines were scored correctly, and that there were no objections to the PSR. (R.91: Sent. Mem., 546). Johnson

refused to be interviewed for the PSR and did not submit any objections. (PSR ¶¶ 105, 135).

At the sentencing hearing, Mr. Crawford re-confirmed that the PSR was accurate. (R.104: Sent. Tr., 1254). He asked for "mercy" and a 30-year sentence. (*Id.*, 1257). Johnson rehashed his criticisms of the trial and struggled to focus on sentencing, instead accusing C.J. of being a federal informant. (*Id.*, 1259). The court heard a victim-impact statement from C.J., and the government explained that Johnson attempted to contact C.J. 192 times since the trial ended, and left 39 voicemails for her. (*Id.*, 1265–66). The majority of these messages were threatening. (PSR ¶ 18). Additionally, Johnson made over 53 attempted calls to C.J.'s mother, and left her 15 voicemail messages. Representative messages were played for the court, and Johnson expressed no remorse for them: "I stand by them words." (R.104: Sent. Tr., 1265–66). One letter from Johnson to C.J. was written in defendant's blood. (PSR ¶ 18).

Johnson's guideline range was 360 months to life imprisonment, capped at the statutory maximum of 2,412 months. (PSR ¶ 117). The district court sentenced him to 864 months. (R.92: Judgment, 556). As

the court pronounced sentence and Johnson was removed from the courtroom, Johnson proclaimed, "You all burn in hell," and called C.J. a "whore." (R.104: Sent. Tr., 1272).

Johnson timely appealed. (R.93: Notice of Appeal, 563).

Summary of the Argument

The district judge did not commit plain error in ordering Johnson to proceed pro se, with the assistance of standby counsel. Johnson refused to work with his two appointed defenders because he believed they were colluding with the prosecutor. Given Johnson's explosive conduct, one even expressed concerns for his personal safety. Johnson was not permitted a heckler's veto over the trial proceedings just by rejecting one attorney after another. The Sixth Amendment is not a license for gamesmanship or misconduct, and there was no violation of Johnson's right to counsel on these facts.

Nor was there a violation of Johnson's right to present a defense. The district court did not issue a blanket exclusion of defense witnesses, as Johnson claims. Johnson questioned two of his identified witnesses, then declined the court's invitation to call "any additional witnesses," and instead opted to rest his case. Even so, any error would be harmless given his many confessions to the charged offenses.

On direct examination, Johnson ignored counsel's advice, and gratuitously testified that he had never strangled, choked or held any woman against her will. As defense counsel conceded, this testimony

opened the door to rebuttal testimony that would otherwise have been inadmissible. Defense counsel's concession means that Johnson's contrary argument here is waived. But even if the Court were to treat Johnson's argument as preserved, the district court appropriately allowed the government to call R.T. and S.R. for impeachment purposes on rebuttal, and provided the jury with a limiting instruction to which Johnson did not object. Any error would also be harmless. Given Johnson's multiple confessions, the jury would not have credited Johnson's implausible denials during trial, regardless of the rebuttal witnesses.

Johnson's sentence should also stand. Johnson did not object to the scoring of the guidelines, and cannot show plain error. Application of USSG § 2A4.1 to Johnson's unlawful imprisonment conviction was warranted because it was the most analogous offense guideline. Each of the two-level increases for obstruction of justice in Johnson's three guideline range groups reflected distinct predicate events that did not double-count any other part of the guideline calculation. The remaining five witness tampering counts were, correctly, not grouped. The fact that the guideline range is determined by reference to grouped offense

conduct does not bar the district court from imposing individual sentences on each count of conviction, and the district court did not plainly err in stacking the counts of conviction to reach the aggregate within-guideline sentence. The district judge also adequately explained the reasons for that sentence, and it was substantively reasonable.

Argument

I. Johnson's Sixth Amendment right to counsel was not violated.

A. Johnson effectively waived his right to counsel with his conduct toward his appointed attorneys.

Johnson argues for the first time on appeal that the district court violated his Sixth Amendment right to counsel by allowing him to proceed pro se, with the assistance of standby counsel.

Plain error is the appropriate standard of review because Johnson failed to object below. *See United States v. Herrera–Martinez,* 985 F.2d 298, 301 (6th Cir. 1993) (holding that because no specific objection was made at trial to the defendant's proceeding pro se, the plain error standard applied). Under that standard, the Court may grant relief only if a defendant establishes (1) an error; (2) that was obvious or clear; (3) that affected his substantial rights; and (4) that affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997). Plain error is found only in exceptional circumstances "where the error is so plain that the trial judge . . . [was] derelict in countenancing it." *United States v. Vonner,* 516 F.3d 382, 386 (6th Cir. 2008).

Johnson has not satisfied that standard, nor established any error at all. Instead, he wholly ignores his irascible, irrational, impossible—and violent—behavior toward his attorneys.

This Court has consistently held that a defendant can waive his right to counsel through misconduct. In *United States v. Green*, 388 F.3d 918, 921 (6th Cir. 2004), the defendant wanted to represent himself, and also wanted the court to appoint an attorney to act as his co-counsel. The district judge, who had already allowed the defendant's three previous attorneys to withdraw, refused to appoint co-counsel. This Court held that this decision did not violate the Sixth Amendment even though it effectively required the defendant to proceed pro se. *Id.* at 921–22 ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel … is the functional equivalent of a valid waiver of counsel."). The Court reached a similar conclusion in *United States v. Coles*, 695 F.3d 559, 560–62 (6th Cir. 2012), holding that a defendant did not have a constitutional right to demand that the court appoint new counsel for him when he had previously fired four attorneys. Likewise, in *United States v. Pittman*, 816 F.3d 419, 425–26 (6th Cir. 2016), the defendant rejected a series of court-appointed

lawyers. When Pittman dismissed the last attorney, the district court ruled that he had given up his right to counsel, leaving Pittman to represent himself with standby counsel.

Johnson's conduct here was similarly intractable. At the hearing on Mr. Wolf's motion to withdraw, the district court judge advised Johnson that he had "dismissed two of the very best defense lawyers in the Eastern District of Michigan," and "if I were to choose two people that I thought could be the very best advocates on your behalf," Johnson had "already had them and canned them." (R.46: 5/23/19 Tr., 180). Like the defendant in *Green*, Johnson's first words in the district court were triumphant interruptions, boldly announcing that Johnson had fired his free, appointed attorneys. *Green*, 388 F.3d at 921. Also like the defendant in *Green*, Johnson accused his attorneys "of conspiring against him with the government," and "refused to allow himself to be represented by [Mr. Wolf], instead insisting that the court appoint a lawyer to act as his cocounsel." *Green*, 388 F.3d at 922.

Johnson's comments and conduct demonstrated that he was unwilling to work with his appointed attorneys. Johnson accused them of trying to force him to plead when they simply presented him with the

government's proposed plea offers. (R.33: Mot. to Withdraw, 105–06). Johnson does not dispute Mr. Koelzer's account that Johnson had expressed "anger" and "vitriol" in their interactions, that Johnson stormed out of his second meeting with Mr. Wolf, or that Johnson became so enraged with Mr. Wolf during their third and final meeting that three county deputies had to intervene from the control booth to make sure that Mr. Wolf was not under physical assault. (R.108: 3/12/19 Tr., 1291; R.46: 5/23/19 Tr., 165–66). Indeed, Mr. Wolf feared for his own personal safety. (R.46: 5/23/19 Tr., 166). Johnson's injection of violence into the attorney-client relationship only reinforces that his conduct amounts to waiver of the right to counsel.

The district court had also previously warned Johnson that he could not continue firing or refusing to work with his attorneys. At the hearing on Mr. Koelzer's motion to withdraw, the district court pointedly warned Johnson of "the limits that are appropriately placed" on its ability to keep appointing new counsel, explaining that it was not "like a cafeteria plan where you get to keep selecting different attorneys until you find one you like." (R.108: 3/12/19 Tr., 1290, 1307).

The district court reiterated the point in its discussion with Johnson a few months later, at the hearing on Mr. Wolf's motion to withdraw. It noted: "I've asked the United States taxpayers to pay for two of the finest lawyers in the district to represent you," and there are "limitations on my ability to appoint a third under circumstances where it appears that their representation, based on their understanding of their communications with you, was fully appropriate and correct." (R.46: 5/23/19 Hrg. Tr., 183–84). Given Johnson's abysmal track record, the district court reasonably asked Johnson: "Why should we ask the United States taxpayers to appoint a third person? Do you think we'll have any higher level of success?" (*Id.*). Johnson did not answer the question.

By firing Mr. Koelzer, physically threatening and rejecting Mr. Wolf, and failing to explain why the district court should appoint a third attorney, Johnson essentially ended up pro se by default. *See Pittman*, 816 F.3d at 426. Johnson himself recognized this point: "if Your Honor feels that these are two of the best appointed federal defenders we have … I'll represent myself." (R.46: 5/23/19 Hrg. Tr., 185). During trial, Johnson even told the jury that he was representing himself because he

"couldn't get representation nowhere else" and he was "in a pit." (R.100: Trial Tr., 749). This amounts to waiver by conduct.

B. The district court was not required to engage in an extended colloquy under these circumstances.

Johnson's argument that the district court failed to engage in the complete *Bench Book* colloquy wholly ignores Johnson's cyclical rejection of court-appointed defenders and his erratic and violent behavior. The *Bench Book* has little relevance in a situation like ours, where Johnson simply wanted the same thing that his misconduct had already required.

This Court has agreed, explaining that "different requirements come into play" when the defendant gives up his right to counsel by rejecting his appointed attorneys. *Pittman*, 816 F.3d at 426. Under these circumstances, "the Constitution does not require a court to engage in an extended discussion about the repercussion of the waiver." *Id.* (citing *United States v. Ross,* 703 F.3d 856, 868 (6th Cir. 2012) (quotation omitted)). Rather, this Court has "declined to exercise our supervisory powers to instruct district court judges how to proceed when a defendant has, by his conduct, waived his right to counsel."

Coles, 695 F.3d at 563. In such cases, this Court has decided to "leave it to district court judges" within the bounds of reason "to determine how best to deal with [the] defendant." *Pittman*, 816 F.3d at 426–27 ("we decline to impose specific requirements on judges faced with intransigent defendants"). In *Green*, 388 F.3d at 921, there does not appear to have been any *Faretta* inquiry at all.

"Literal adherence to the model inquiry" is not required in any case, much less under our circumstances. *United States v. Bankston*, 820 F.3d 215, 226 (6th Cir. 2016) (no plain error where four questions were not asked). Moreover, the "inquiry is not rendered deficient due to the absence of a particular question," and "a precise accounting of the questions asked" is not required. *Id.* at 225.

Here, the record reflects that while perhaps not perfect, the district court's inquiry was adequate. It cautioned Johnson that self-representation was "constitutionally protected — but it's not advisable, and it's for that reason that it's important that I be sure that you understand that." (R.46: 5/23/19 Hrg. Tr., 187). The district court was aware that Johnson did not have a legal education, and expressly questioned Johnson about why he believed that he would do a better

job, without one, than his two appointed attorneys. (*Id.*, 185). Johnson assured the court: "I know my case, the ins and outs and legalities." (*Id.*). Johnson informed that he was versed in the relevant Michigan and federal statutes and the Federal Rules of Evidence, that he had studied the law during his periods of incarceration, and that he was college educated. (*Id.*). The district court was advised that Johnson had recently represented himself in a county court proceeding. (*Id.*, 194). The district court then confirmed with Johnson that he was aware of the charges, the potential sentencing consequences, and that he was potentially engaging in an area where he did not have the expertise to evaluate all of the potential implications. (*Id.*, 191).

Johnson is correct that the district court provided him with misinformation concerning penalties. (R.46: 5/20/19 Tr., 181). But even in the face of this mistake, there has never been an indication that Johnson failed to appreciate his sentencing exposure. He was specifically apprised of the penalties during his arraignments on the original indictment and the superseding indictment, and he signed written acknowledgments of those penalties. (R.5: Acknowledgment of Indictment, 10–11; R.15: Acknowledgment of First Superseding

Indictment, 55–56). Johnson even admitted during his opening statement that he was "looking at a life sentence." (R.100: Trial Tr., 745). Moreover, it is unclear what Johnson would have done differently had the court been more accurate. He cannot now seriously contend that a different description of the penalties would have caused him to continue on with Mr. Wolf, whom he describes as "treacherous." (R.99: 8/1/19 Hrg. Tr., 615).

Finally, the district court issued a timely written order, the same day as the hearing, expressly determining that Johnson's waiver of counsel "was knowing, intelligent, and voluntary." (R.39: 5/23/19 Order, 136). Although Johnson argues on appeal that the district court must make this finding orally, none of his authorities say so.

The district court's appointment of standby counsel further protected Johnson's rights. Johnson's self-representation was short-lived. He abdicated during the very first cross-examination. (R.101: Trial Tr., 938–39). Johnson confirmed that he understood that Mr. Crawford would be taking over "for the balance of the case." (*Id.*). From that point on, Mr. Crawford was no longer on standby. He was trial

counsel—which proved important given Johnson's continued outbursts and removal from the courtroom.

II. The district court did not issue a blanket exclusion of defense witnesses or violate Johnson's right to present a defense.

A. Johnson declined calling additional witnesses when given the opportunity.

Johnson's entire argument is based on the false premise that the district court issued a "blanket exclusion" of defense witnesses. Defense Brief, 19. It did not.

"There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment—its availability is dependent entirely on the defendant's initiative." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Here, Johnson did not subpoena any witnesses to testify in his defense. (R.100: Trial Tr., 664). After Johnson told the jury that his witnesses would be a handful of his family members, plus the victim and the case agent, Mr. Crawford came forward to explain that it was his "first time hearing of witnesses" besides Johnson's mother. (R.100: Trial Tr., 752). Johnson claimed—and Mr. Crawford disputed—that Johnson previously provided him with these names. But even Johnson conceded that he had

not been diligent in following up with Mr. Crawford, admitting, "I'm unaware if they were subpoenaed or not." (*Id.*, 664).

The district court aptly observed that if "those witnesses are not under subpoena, you are at risk of them not appearing." (*Id.*, 754). Hearing this, Johnson went on a rant, proclaiming "I get no witnesses" and "I'm going to be denied witnesses." (*Id.*, 755). But these were his words, not the district court's. The district court never issued a ruling or order forbidding Johnson from calling witnesses. It simply explained to Johnson, as a practical matter, that Johnson's potential witnesses had not been compelled to be present in court for testimony, because Johnson had not sufficiently procured their presence. The explanation began: "You are not going to have witnesses because you have not furnished the attorneys –" but Johnson interrupted. The district court did not complete its sentence. This can hardly be construed as a blanket exclusion of defense witnesses.

Nor was it. As noted above, Mr. Crawford assumed the duties of trial counsel. After Johnson's testimony was complete, the district court asked Mr. Crawford this critical question: "Any additional witnesses,

sir?" (R.102: Trial Tr., 1143). Mr. Crawford responded: "No, defense has no additional witnesses. We will be resting at this time." (*Id.*).

This exchange establishes that there was no ban on defense witnesses. Tellingly, Mr. Crawford did not convey surprise at hearing that he was being invited to call additional defense witnesses, or otherwise indicate that he was unaware that the defense would be afforded that opportunity. This is because the defense was never forbidden from calling witnesses in the first place.

And even without subpoenas, Johnson would have had little difficulty securing his witnesses if he had actually wanted to call them. Johnson identified the following potential witnesses during voir dire: his cousin, Ashley Mazur (*see* R.101: Trial Tr., 826); another cousin, Billie Jo Mazur (*see id.*); FBI agent Steven Larson; the case victim, C.J.; his mother, Robin Johnson; his aunt, Kelly Mazur (*see* PSR ¶107); and his daughter's mother, Brandy Kenyon. (R.100: Trial Tr., 664). When the district court invited Mr. Crawford to call "any additional witnesses," (R.102: Trial Tr., 1143), the defense had already questioned two: C.J. and the case agent. And Johnson has never seriously argued that he needed subpoenas to secure the presence of his family members.

The record suggests that he didn't. He was in regular contact with these cousins on Facebook (R.101; Trial Tr., 826; R.109-4: Govt. Ex. 8, 1465–67), and was "close" with Aunt Kelly. (PSR, ¶107). His mother had even voluntarily come to court before, too. (R.108: 3/12/19 Tr., 1300).

Perhaps more importantly, his mother was situated differently than his other proposed witnesses, because she was on the government's witness list. As Mr. Crawford observed, she "will be here," and "if needed," he could "call her back for direct examination." (R.100: Trial Tr., 752). Mr. Crawford and Johnson had specifically discussed calling her. (*Id.*). During his opening statement, Johnson asserted that she "knew the truth," and was even arrested for fighting for his innocence. (*Id.*, 743). But when given the chance, he opted not to call her. He cannot now blame that decision on an alleged lack of compulsory process.

Johnson's reliance on *Bennett v. Scroggy*, 793 F.2d 772, 776 (6th Cir. 1986), is misplaced. The issue in *Bennett* was whether the district court improperly denied the defense a requested continuance to secure the attendance of someone whom the defendant had subpoenaed, but failed to appear. That is not this case. Johnson's mother wasn't a no-

show. The prosecution ultimately elected not to call her in the government's case, but, as Mr. Crawford acknowledged, she was available to the defense. (R.100: Trial Tr., 752). Johnson has never suggested that she had somehow refused his attempts to secure her appearance. Bennett may have been effectively prohibited from calling his only defense witness, but Johnson wasn't. He didn't even try. *See*, *e.g.*, *United States v. Wise*, 4 F. App'x 306, 310 (6th Cir. 2001) (distinguishing *Bennett* where the defendant "was apparently not diligent in interviewing witnesses and procuring their presence").

The reality is that as a trial witness, Johnson's mother had significant baggage. Johnson had previously held her against her will, and she had personally observed him do the same to his ex-girlfriend, R.T. (R.52: 7/19/19 Order, 245). Cousin Ashley had similar problems. Johnson sent her messages stating: "Hey. Domestic. Assault. [M]an i need to go. Something bad happened. Serious. Ash .. Ash I fucked up." (R.101: Trial Tr., 826; R.109-4: Govt. Ex. 8, 1467). Under these circumstances, the decision not to call Johnson's mother, or pursue testimony from his cousin, could only have been strategic, and in no way due to a court prohibition or lack of access. And a defense attorney

is entitled to a presumption that his decision on calling witnesses at trial is sound trial strategy. *Hutchinson v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002).

B. Any error was harmless.

Even though review is *de novo*, this Court is "obligated to consider the trial record as a whole and to ignore errors that are harmless." *United States v. Lloyd*, 10 F.3d 1197, 1216 (6th Cir. 1993).

Generally, "testimony must establish a reasonable doubt about guilt in light of the record in the case" for its exclusion to constitute reversible error. *United States v. Reifsteck*, 841 F.2d 701, 705 (6th Cir. 1988). Given Johnson's numerous confessions, admission of the testimony of Johnson's family members about C.J.'s reputation for truthfulness would have done little to "establish a reasonable doubt about guilt." *Id.*

Johnson confessed in letters to C.J. He confirmed: "I shoved you down," "I smacked you," and "I don't want to go off to prison for some years for strangulation." (R.109-2: Govt. Ex. 2, 1422–23). In another: "As to that instance when I slammed you, I forcibly pushed you down, when I covered your mouth, hurt your arm, grabbed you by the throat,

the jabs with the finger to the face, those were scars you put in my heart." (*Id.*,1430). He also admitted: "I hurt your arm, slapped you, put my hands over your mouth," and "[t]hat shit was two seconds choking you against the wall." (*Id.*, 1447–48).

Johnson confessed in written statements to law enforcement. Johnson wrote: "10/23/18, Casey and I in bedroom approximately 25 minutes, I ranted, raised my voice somewhat. She didn't want to hear me anymore, was done with discussion, got up and came towards door. I stood in front of door and said, I'm not done talking." (R.109-5: Govt. Ex. 9, 1469). He also identified passages from the tribal police report that he considered "true," to include statements that he grabbed C.J. by both of her arms and held her against the wall, and that she hit her arm on the hand rail while being thrown down. (R.109-6: Govt. Ex. 10, 1471: R.102: Trial Tr., 1047).

Johnson confessed in messages to his family and friends. As discussed above, he admitted domestic assault to his cousin, Ashley. To "Sam," he said: "Im pretty sure I broke her arm" and talks about slapping C.J., jabbing her with his finger, and choking her. (R.109-4: Govt. Ex. 8, 1462). To "Matthew," he said: "Im pretty sure im going to

jail, brother," "I fucked up. i put hands on," "I choked her, slapped her. I jabbed her in the face, mouth. I think her arm is broke." (*Id*., 1463–64). To "Stacey Marie," he admitted that he "jabbed her in the face," "slapped her… grabbed her by the throat," "pushed her and she hit the stairs" and that he thinks "she broke her arm." (R.109-1: Govt. Ex. 1B, 1402–03). Moreover, Johnson did not tell any of his friends and family that C.J. was the aggressor, and that he was merely acting in self-defense. Instead, he said things like "I guess i am a bad guy," "i lost it," "I lost control," and "I feel different … Like im a monster," while also explaining "I wanted to fuck her up" and questioning "why did i do that?" and "what made me feel like that?" (R.109-1: Govt. Ex. 1B, 1398, 1400, 1401, 1402, 1408).

In sum, admission of reputation evidence against C.J. would have done little to help the defense in the face of Johnson's admissions. As Johnson said, he "wanted to fuck her up." (R.109-1: Govt. Ex. 1B, 1401). Questioning "why did i do that?" and "what made me feel like that?" strongly negated his claim of self-defense. (*Id*., 1398, 1401). Any error was harmless.

III. The district court properly allowed rebuttal testimony after Johnson "open[ed] the door."

A. Johnson's argument on appeal is waived.

Johnson's challenge to the government's rebuttal witnesses should begin and end with waiver. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Unlike forfeited claims, which are reviewed for plain error, waived claims are generally "not reviewable." *United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002). An attorney "cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990).

Johnson initially said "I have nothing to hide. Federal Rule of Evidence 404(b)'s filed by the Government, no objections," in response to the prospect that R.T. and S.R. might testify. (R.46: 5/23/19 Tr., 192). And although Johnson stated that he "totally object[s] to this" when the district court informed him that he had opened the door to their rebuttal testimony, he was no longer representing himself. (R.102: Trial

Tr., 1086). By that point, he had already turned the case over to Mr. Crawford. Mr. Crawford did not object when the government's rebuttal witnesses were called to the stand. (*Id.*, 1144). Later, Mr. Crawford expressly confirmed that Johnson "did open the door" to R.T. and S.R. as rebuttal witnesses. (R.103: Trial Tr., 1242–43).

The defense cannot agree in open court that Johnson's testimony "open[ed] the door" to rebuttal witnesses, and then turn around on appeal and claim otherwise. *Sloman*, 909 F.2d at 182. This was waiver, and Johnson's argument now is "not reviewable." *Aparco-Centeno*, 280 F.3d at 1088.

B. The testimony went solely to Johnson's credibility, and the district court so instructed the jury with a proper limiting instruction.

Even if the Court were to review Johnson's argument, the district court did not abuse its discretion in allowing the government to call R.T. and S.R. in rebuttal after Johnson opened the door with his own gratuitous testimony on direct examination.

This Court has long held that a party can open the door to otherwise-inadmissible evidence by testifying in a way that would mislead the jury. In *United States v. Acuff*, 410 F.2d 463, 466 (6th Cir.

1969), the defendant stated on direct examination that he had never been in the counterfeiting business, or connected to it. The district court admitted rebuttal testimony from witnesses who had seen him in possession of counterfeit notes, and instructed the jury that the rebuttal testimony was introduced solely for the purpose of attacking defendant's credibility. *Id*. This Court affirmed, explaining that with defendant's "sweeping denial on direct examination," "he opened the door for examination on this subject." Similarly, in *Walder v. United States*, 347 U.S. 62, 65 (1954), the Supreme Court held that where, "of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *See also United States v. Townes*, 512 F.2d 1057, 1058–59 (6th Cir. 1975) (evidence obtained from an illegal search and seizure of narcotics on defendant's premises was properly admitted to rebut defendant's statements on direct examination that he had "never had anything to do with drugs"); *United States v. Bender*, 265 F.3d 464, 471

(6th Cir. 2001) (defendant's "statements on direct examination that she had never sold drugs . . . opened the door to bringing into evidence" the nature of her prior drug conviction).

As in those cases, Johnson made sweeping statements on direct examination, denying any history of domestic violence. He testified: "I've never felt — restrained a woman, kept them against their will. I've never choked a woman." (R.102: Trial Tr., 1064). He continued: "I never strangled her or another woman in my life." (*Id.*, 1074). In making these statements, he "invited precisely the sort of impeachment that the district court allowed in this case." *United States v. Markarian*, 967 F.2d 1098, 1103 (6th Cir. 1992).

Moreover, the court correctly gave a limiting jury instruction to minimize any potential unfair prejudice. *See Acuff*, 410 F.2d at 466; *Bender*, 265 F.3d at 471 (the district court had "minimized any prejudicial effect by providing limiting instructions to the jury" when it instructed the jury to consider the evidence only for evaluating defendant's credibility); *United States v. Gaitan–Acevedo,* 148 F.3d 577, 591–92 (6th Cir. 1998) (finding no abuse of discretion where the district court allowed evidence of defendant's prior drug conviction and gave

limiting instruction). The court's limiting instruction informed the jury that the purpose of the testimony was the assessment of Johnson's credibility. (R.70: Jury Instructions, 434). The limiting instruction was immediately preceded by one discussing the evaluation of the "credibility" or the "believability" of the defendant's testimony. (*Id.*). The court next stated that the testimony by R.T. and S.R. that Johnson "committed acts of strangulation, suffocation, and/or false imprisonment other than the ones charged in the indictment" could be considered "only as it relates to the government's claim to rebut the defendant's testimony that the defendant had not engaged in any such acts before." (*Id.*). The court further instructed that the jury "must not consider it for any other purpose, including as a substitute for proof of the charged criminal offenses." (*Id.*). The court also reminded the jury that "the defendant is on trial here only for the charges contained in the indictment, not for the other acts." (*Id.*).

The defendant did not object to this instruction. Rather, the record reflects that the parties and court collaborated on the jury instructions throughout the course of the trial. (R.101: Trial Tr., 759, 987–95; R.102: Trial Tr., 1155–56; R.103: Trial Tr., 1159). In addition, each juror was

provided with a "read along" copy of the printed instructions. (R.103: Trial Tr., 1160). Although Johnson now claims for the first time on appeal that the instructions were "confusing" (Defense Brief, 44), his counsel did not think so at the time, and the members of the jury had no questions.

The rebuttal testimony was also not propensity evidence. The government "was attempting to show only that appellant had lied about a fact he gratuitously interjected in his direct testimony so that he would appear in a better light before the jury." *United States v. Ambrose*, 483 F.2d 742, 749 (6th Cir. 1973). Under these circumstances, "there is no reason why the Government should be unable to prevent a defendant from profiting by such a misstatement." *Id.*; *Bender*, 265 F.3d at 471 ("[W]hen a party opens up a subject ... [the party] cannot complain on appeal if the opposing party introduces evidence on the same subject."); *United States v. Petway*, 932 F.2d 970 (6th Cir. 1991) (unpublished table opinion) ("Having purposefully constructed this defense, [the defendant] cannot now be heard to complain if the government attempts to expose its falsity.").

Nor was the rebuttal testimony introduced as Rule 404(b) evidence. Although the trial record contains a handful of references to Rule 404(b), the testimony's substance and context demonstrate that it was used only for *impeachment*—to show that Johnson was lying when he said on direct examination that he had never strangled or choked any woman, and that he had never held any woman against her will. This is not 404(b) evidence. *See United States v. Foster*, 376 F.3d 577, 591 (6th Cir. 2004) (finding that "Rule 404(b) is not triggered" when the purpose of the evidence was to impeach a witness, and not to demonstrate that the defendant "was acting in conformity with his prior bad acts or character").

This court has "consistently recognized the broad scope of allowable impeachment evidence and, more importantly perhaps, the significant discretion left to the trial court in this area." *United States v. Causey*, 834 F.2d 1277, 1282 (6th Cir. 1987). Johnson opened the door with his sweeping denials, the district court allowed rebuttal testimony only for purposes of impeaching him, and so instructed the jury. This is what happened in *Acuff*, and it was similarly proper here.

C. Any error was harmless.

Last, even if there was any error in allowing the testimony, its admission was harmless. The government's questions to R.T. and S.R. were tightly focused. (R.102: Trial Tr., 1144–54). The government did not suggest propensity, or use the testimony for some other prohibited purpose, either in its questioning or closing argument. In fact, the government did not mention R.T. or S.R. in its closing argument at all. (R.103: Tr., 1184–1217). Rather, the defense injected "the two ex-girlfriends" into the discussion at closing. (*Id.*, 1223).

In rebuttal argument, the government likewise emphasized that the rebuttal evidence was not offered for propensity. (*Id.*, 1231–32). The prosecutor thoughtfully reminded the jury, consistent with the court's limiting instruction, that the testimony of R.T. and S.R. "goes to his credibility." (*Id.* at 1232). Again, the point was that Johnson was not telling the truth when he said he had "never" strangled or choked any woman, or held any woman against her will. Indeed, counsel concluded his remarks immediately following this discussion by noting that Johnson "can't be believed." (*Id.*).

Finally, the evidence against Johnson was substantial. As discussed above, C.J.'s testimony about Johnson's horrific actions was corroborated by Johnson's own graphic and damning admissions on Facebook, in his letters to C.J., and in his written statements provided to the FBI. In the face of his multiple confessions, the jury would not have credited Johnson's implausible denials during trial, whether or not they heard from R.T. and S.R. Any error was harmless.

IV. Johnson's claim of cumulative error fails for want of error.

Johnson argues cursorily that the cumulative effect of the alleged trial errors rendered his trial fundamentally unfair, even if each error alone would have been harmless. But he has not shown an error, and the "accumulation of non-errors" does not amount to reversible cumulative error. *See United States v. Underwood*, 859 F.3d 386, 394 (6th Cir. 2017); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) ("the accumulation of non-errors cannot collectively amount to a violation of due process"). Thus, his claim of cumulative error fails for want of error. *United States v. Ledbetter*, 929 F.3d 338, 365 (6th Cir. 2019). This is particularly true where, as here, the defendant's admissions were among the strongest evidence in the case.

V. Johnson's sentence was procedurally and substantively reasonable.

Johnson challenges his sentence as procedurally and substantively unreasonable. "District courts have wide latitude in each respect." *United States v. Mullet*, 822 F.3d 842, 849 (6th Cir. 2016).

A. The district court did not commit plain error in calculating Johnson's guideline range.

1. USSG § 2A4.1 applies to the unlawful imprisonment count.

Johnson argues for the first time on appeal that the district court erred in applying USSG § 2A4.1. Johnson did not raise this argument below, even after the district court asked the *Bostic* question: "Mr. Crawford, any questions concerning the terms of the sentence or objections that we've not given earlier attention to?" (R.104: Sent. Tr., 1273–74).

Johnson claims that he preserved his objection, presumably when he called the PSR "pure garbage," complained that it was "inaccurate" and "misinformation," and stated, "I disapprove of it totally." (*Id.*, 1255). But Johnson did not file or otherwise present any specific objections to the guidelines scoring, and Mr. Crawford twice confirmed that the PSR was accurate. (*Id.*, 1254; R.91: Sent. Mem., 546). Under these

circumstances, this court reviews for plain error. *See Vonner,* 516 F.3d at 385; *United States v. Battaglia*, 624 F.3d 348, 350 (6th Cir. 2010).

The district court did not plainly err in calculating the guidelines for count one using § 2A4.1. Johnson was convicted of unlawful imprisonment, in violation of 18 U.S.C. §§ 13, 1151, and 1152 and M.C.L. § 750.349b. This felony is punishable by up to 15 years' imprisonment. Mich. Comp. Law § 750.349b.

Johnson agrees that the applicable guideline for this offense is USSG § 2X5.1. Defense Brief, 43, 45. Under § 2X5.1, if the offense is a felony for which no guideline expressly has been promulgated, the district court should "apply the most analogous offense guideline." USSG § 2X5.1; *see also United States v. Gray,* 982 F.2d 1020, 1021 (6th Cir. 1993).

Johnson objects, however, to the district court's choice of § 2A4.1 as the best analogy. The "district court's choice of an analogy should be upheld if it is reasonable." *United States v. Gibson*, 409 F.3d 325, 339 (6th Cir. 2005). Here, the probation officer, defense counsel, government counsel, and the court all reasonably agreed that the most analogous offense guideline for the "unlawful imprisonment" conviction was

§ 2A4.1, which applies in situations involving, among other things "unlawful restraint."

In *United States v. Anderson*, 608 F. App'x 369, 372–73 (6th Cir. 2015), this Court affirmed the application of an enhanced base offense level under § 2A4.1 in a felon-in-possession case, where the government provided sufficient evidence that the defendant possessed his firearm in connection with the offense of unlawful imprisonment of his victims under M.C.L. § 750.349b. This finding was proper even without any express charges of unlawful imprisonment under M.C.L. § 750.349b. Application of § 2A4.1 in our case is even more reasonable, given that the jury expressly found Johnson guilty of violating M.C.L. § 750.349b.

United States v. Epley, 52 F.3d 571 (6th Cir. 1995), does not help Johnson. It held that § 2A4.1 was inapplicable in a prosecution of police officers for planting drugs to stage an arrest. But "the only state law that the officers' conduct possibly violated was a misdemeanor that involved restraint with no threat of force or risk of injury." *Mullet*, 822 F.3d at 851 (distinguishing *Epley* and affirming application of § 2A4.1 in hate crime case where state analogue was a "felony of the first or second degree and subject to a lengthy prison term"). Although § 2A4.1

might not apply where the state law analogues are punished "far less" severely than the federal crimes sentenced under § 2A4.1, Johnson's state crime carries a lengthy prison term of 15 years.

The district court's choice of an analogy was reasonable, and should be upheld. *Gibson*, 409 F.3d at 339; *Mullet*, 822 F.3d at 851.

2. The guidelines for the eight counts of witness tampering were scored correctly.

Johnson also challenges the guidelines scoring for his eight witness-tampering convictions. On the one hand, he claims that the district court engaged in impermissible double-counting as to counts five, six and seven when it placed them in groups one, two and three, respectively. Defense Brief, 47. On the other, he claims that counts nine through thirteen should have been grouped into count one, but weren't. *Id.*, 50. Johnson cannot show plain error on either front.

First, there was no double-counting in the groups. The first group included counts one, five and eight, and stemmed from the events of October 23. (PSR ¶25). It included a two-level increase for obstruction of justice, predicated on Johnson's threat to throw C.J. out the window if she considered calling the police. (PSR ¶¶ 11, 34). The second group

included counts two, three and six, and stemmed from the events of October 24, prior to the drive to Saginaw. (PSR ¶26). It included a two-level increase for obstruction of justice based on Johnson's instructions to C.J. to lie about the cause of her injuries at the hospital, so the police and his parole officer would not find out. (PSR ¶¶ 13, 41). Group three's two-level increase for obstruction of justice was based on yet a third factual predicate: Johnson's jail call following his arrest, when he tried to persuade C.J. not to cooperate with law enforcement. (PSR ¶¶ 15, 47). In each instance, the two-level enhancement was supported by a distinct factual basis. None of Johnson's obstruction of justice was counted more than once.

The remaining five witness-tampering counts, predicated on his separate attempts to influence C.J.'s testimony on each of November 7, 8, 9, 13, and 25, should not have been included in group one. Johnson had already been assessed a two-level enhancement in group one for threatening to throw C.J. out the window. (PSR ¶¶ 11, 34). This Court addressed a similar issue in *United States v. Beckner*, 983 F.2d 1380, 1385 (6th Cir. 1993), where the defendant was convicted of multiple counts of mail theft and two counts of resisting arrest. This Court held

that one resisting arrest count was to be grouped with the mail counts, but the other was not. *Beckner*, 983 F.2d at 1383–85. The resisting-arrest counts were parsed out because Application Note 5 to USSG § 3D1.2(c) states that when there are multiple counts, "each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor[,] ... only the count representing the most serious of those factors is to be grouped with the other count." Any remaining convictions are treated separately. Where, as here, the more serious count provides an adjustment for only one occurrence of that factor, the remaining counts stand alone, and should be counted separately, for guideline purposes.

Johnson's authority, *United States v. Baggett*, 342 F.3d 536, 539 (6th Cir. 2003), does noy say otherwise. Unlike Johnson, the defendant in *Baggett* wasn't even indicted for witness tampering, much less convicted by a jury of committing the federal crime eight separate times. *Baggett* merely considered application of USSG § 3C1.1's two-level enhancement in a one-count case. It does not discuss grouping and is hardly "on all fours" with our case. Defense Brief, 50.

As this Court has explained, "no double counting occurs if the defendant is punished for distinct aspects of his conduct." *Battaglia*, 624 F.3d at 351. That is exactly what Johnson's guideline calculation accomplished here: it increased his range to reflect what he did, each time he did it. That's not double-counting; it's proportionate punishment.

3. The district court did not plainly err by imposing consecutive sentences for counts that had been grouped.

Johnson also complains that the district court erred in imposing separate, consecutive sentences for counts five through seven because they had been grouped. Defense Brief, 46. Given Johnson's failure to object, this argument is also reviewed for plain error. *Vonner,* 516 F.3d at 385–86.

There was no error here. The "mere fact that the Guidelines range is determined by reference to grouped offense conduct obviously does not bar the district court from imposing sentences on each count of conviction." *United States v. Pego*, 567 F. App'x 323, 329 (6th Cir. 2014). In *Jenkins v. United States,* 394 F.3d 407, 411 (6th Cir. 2005), the defendant similarly complained that after grouping the offenses, the

district court imposed consecutive sentences on the counts of conviction. This Court explained that this argument was "based on a misunderstanding" between the grouping guidelines and the stacking guideline. *Id*.

In doing so, this Court approvingly cited decisions from the Fourth and First Circuits, *United States v. Chase,* 296 F.3d 247, 251 (4th Cir. 2002) and *United States v. Garcia-Torres,* 341 F.3d 61, 75 (1st Cir. 2003). In *Chase,* the Fourth Circuit held that "grouping and stacking are separate concepts relevant in different stages of the sentencing process" that "are not mutually exclusive," and, "as a purely logical matter, there is no obstacle to stacking a defendant's sentences for grouped offenses." 296 F.3d at 251. Likewise, in *Garcia-Torres*, the First Circuit held that "grouping of [defendant's] two counts pursuant to § 3D1.2 does not preclude the imposition of consecutive sentences on each of them." *See also United States v. Mukherjee*, 289 F. App'x 107, 114 (6th Cir. 2008) (the district court's imposition of separate and stacked sentences did not violate the guidelines "grouping" standard); USSG § 5G1.2(d) (noting that where the adjusted offense level applicable to grouped counts exceeds the highest applicable statutory

maximum on one of them, the sentencing court may apportion the rest of its chosen sentence as a consecutive sentence on the additional counts of conviction).

B. The district court did not plainly err in explaining the justification for Johnson's within-guideline sentence.

The district court adequately explained the justification for Johnson's within-guidelines sentence. Because Johnson failed to make this objection at the sentencing hearing when the district court asked whether he had any objections to the sentence just imposed (R.104: Sent. Tr., 1273–74), this Court reviews for plain error. *Vonner,* 516 F.3d at 385–86.

There was none. "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." *Rita v. United States*, 551 U.S. 338, 356–57 (2007); *see also United States v. Duane,* 533 F.3d 441, 451 (6th Cir. 2008) ("A lengthy explanation may be particularly unnecessary where a defendant's arguments are 'straightforward [and] conceptually simple' and where a sentencing court imposes a within-Guidelines sentence." (citing *Rita*)). This is particularly true where the defendant does not

contest the guidelines sentence generally under 18 U.S.C. § 3553(a), or argue for a departure. *Rita*, 551 U.S. at 356–57.

By the time of sentencing, the district court was already very familiar with Johnson and his case. The district court was aware that three county deputies had to intervene from the control booth to make sure that Johnson was not physically assaulting Mr. Wolf, and that Mr. Wolf had expressed concern about his own "personal safety." (R.46: 5/23/19 Tr., 165–66). During the trial, the district court not only heard all of the testimony and considered all of the exhibits, but also saw first-hand Johnson's absolute lack of self-control. Johnson had to be removed from the courtroom twice. He had to be admonished for making a gesture to the FBI case agent with his finger, mimicking a gun to the head with the trigger being pulled. (R.101: Trial Tr., 977–78; R.102: Trial Tr., 1011). He expressed aggression toward Mr. Crawford. (R.103: Trial Tr., 1242–43). He yelled and shook the jail bars after removal from the courtroom. (*Id.*, 1243–44).

At sentencing, despite a cursory statement that the guidelines were excessive, Johnson repeatedly advocated for a within-guideline sentence of 30 years. (R.91: Sent. Mem., 551–52; R.104: Sent. Tr., 1257).

Johnson's amenability to a guideline sentence distinguishes his chief case on this point, *United States v. Thomas*, 498 F.3d 336, 339 (6th Cir. 2007). In *Thomas*, the defendant not only consistently sought a below-guideline sentence, but also raised specific arguments concerning the nonviolent nature of his crime, his age and his rehabilitative efforts. Johnson did none of these things. Moreover, Johnson faces a less favorable standard of review of plain error; *Thomas* applied a reasonableness standard due to a deficient *Bostic* inquiry.

Faced with an agreed guideline range, no defense objections beyond Johnson's general characterization of the PSR as "pure garbage," and no motion for a downward departure or variance, the issues facing the district court at sentencing hearing were relatively straightforward. There was next to no mitigation evidence, perhaps in part because Johnson refused to be interviewed for his PSR. (PSR, ¶¶105, 135). Johnson also refused the district court's entreaties for "input." (R.104: Trial Tr., 1259). The most Johnson offered was that he had a "baby girl," a mother with "bad lungs," and a never-before-mentioned son. (*Id.*, 1260). The district court "appreciate[d]" but was unmoved by those remarks, explaining instead that it had "observed"

something "important" about Johnson over the course of the case: "I do not discern any sense of moral guardrails concerning your own behavior, none." (*Id.*, 1260, 1268).

The district court also conveyed that it had "reviewed the Sentencing Reform Act"—of which the § 3553(a) factors are a part—and "sought to briefly highlight" the "factors important to the Court in assessing the circumstance." (R.104: Sent. Tr., 1268). This included the court's review of the PSR, which described Johnson's incredibly violent conduct towards C.J. during commission of the crimes of conviction and continuous harassment following the verdict, including writing one letter to her in his own blood. (PSR ¶¶ 10–19, 21). The PSR also outlined Johnson's extensive criminal history. (PSR ¶¶ 86–104). The record makes clear that the district court received and read Johnson's sentencing memorandum (R.104: Sent. Tr., 1255), which conceded that "there [was] no way to minimize" Johnson's actions, that the victim was "physically assaulted and then tormented" by Johnson, and that Johnson had acted "in a manner that is unforgiving and reprehensible." (R.91: Sent. Mem., 550).

The details of Johnson's sentence also confirmed that the district court took Johnson's sentencing memorandum seriously. Johnson's memo addressed the need for the sentence to provide the defendant with needed medical care or other correctional treatment in the most effective manner (§ 3553(a)(2)(D)), and conceded the need to protect the public (§ 3553(a)(2)(C)), by suggesting that with "decades of consistent mental health treatment" Johnson "would no longer be a danger to the community." (R.91: Sent. Mem., 548). The district court responded by including significant mental health components as conditions of any supervised release. (R.104: Sent. Tr., 1273).

A district court is not required to give "the specific reason" for a within-guidelines sentence, *Vonner*, 516 F.3d at 387, or engage in a ritualistic incantation of the § 3553(a) factors. *United States v. Johnson*, 403 F.3d 813, 816 (6th Cir. 2005). The explanation of sentence is brief in this case. But the "appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Rita*, 551 U.S. at 356. "The law leaves much, in this respect, to the judge's own professional judgment." *Id*. Here, in light of Johnson's overwhelming criminal history; the horrendous nature of his offense

conduct; his demonstrated lack of self-control, as exhibited through his aggression toward his counsel and repeated explosive behavior in the courtroom; his complete lack of remorse; and the paucity of any significant mitigating factors, nothing more needed to be said to justify Johnson's within-guideline sentence.

Johnson's remaining argument is that the district plainly court erred in stacking his counts of conviction. Defense Brief, 51. The district court did not err at all on this point, because the consecutive sentences on the counts of conviction were the only way to produce the within-guideline sentence that the court imposed after considering the § 3553(a) factors. When a defendant is convicted of multiple counts, a district court is typically required to calculate only one guideline range. USSG §§ 1B1.1(a), 3D1.1–3D1.5, 5G1.2(b). The court must then consider that guideline range and the other § 3553(a) factors in selecting the defendant's aggregate sentence of imprisonment. If that aggregate sentence is higher than the maximum sentence "on the count carrying the highest statutory maximum," the court must impose consecutive sentences on the remaining counts "to the extent necessary to produce a combined sentence equal to the total punishment." USSG

§ 5G1.2(d). That is what happened here: the 864-month within-guideline sentence was higher than the statutory maximum on any single count of conviction, so the court had to use "consecutive sentences on the remaining counts" to impose that sentence. *Id.*

The case upon which Johnson relies, *United States v. Cochrane,* 702 F.3d 334 (6th Cir. 2012), applies a different standard of review (abuse of discretion) and deals with an entirely different issue: consecutive sentences imposed in separate prosecutions. That defendant was convicted for being a being a felon in possession of a firearm. *Cochrane,* 702 F.3d at 339. He was also serving a term of supervised release from a previous bank fraud conviction at the time. His firearm conviction constituted an automatic violation of the terms of his supervised release for his bank fraud conviction. The question in *Cochrane* was whether the separate sentences for his firearm conviction and supervised-release violation should run consecutively or concurrently under USSG § 7B1.3. By contrast, in our case, the district court sentenced Johnson to consecutive sentences for individual counts of conviction, to reach an aggregate within-guideline sentence in one prosecution. That is not the same thing.

In addition, unlike in *Cochrane,* neither Johnson nor his counsel requested concurrent sentences. Even Johnson implicitly agreed that consecutive sentences were necessary here. He argued for a 30-year sentence. The highest sentence for any of his counts of conviction was 15 years. The only way the district court could have possibly given Johnson a sentence within the guidelines—or the 30-year sentence that he invited, for that matter—was to run some of the sentences on some of the counts of conviction consecutive to each other. There was no plain error at sentencing.

C. Johnson's within-guideline sentence was substantively reasonable.

Finally, Johnson challenges the substantive reasonableness of his sentence. The Court reviews the substantive reasonableness of a sentence under an abuse-of-discretion standard, and affords a within-guideline sentence a presumption of reasonableness. *See Vonner*, 516 F.3d at 389; *Mullet*, 822 F.3d at 854.

Johnson offers no compelling argument to overcome that presumption here. Although Johnson argued below that the comparable sentences for his crimes in state court likely would have been lower, he

defeated his own argument by rightly conceding that his status as a career offender reasonably justified his higher sentencing guidelines in federal court. (R.91: Sent. Mem., 550). On appeal, he merely offers a comparison to the median sentences in this Circuit for murder and assault, while ignoring his career offender status. Defense Brief, 55. These inapt comparisons do not render the district court's assessment unreasonable. In light of Johnson's criminal history, the within-guideline sentence is substantively reasonable, and should be affirmed.

VI. Reassignment is an extraordinary power that should not be invoked here.

Even if this Court were to disagree with the district court in some fashion, reassignment of the case would be unwarranted here. Reassignment is an extraordinary power that should be rarely invoked. *See U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 533 (6th Cir. 2012). To determine whether reassignment is necessary, this Court considers whether (1) the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) reassignment is advisable to preserve the appearance of justice; and (3) reassignment would entail waste and

duplication out of proportion to any gain in preserving the appearance of fairness. *Id*.

The district court treated Johnson fairly, and reassignment is not needed to preserve the appearance of justice. It granted in part his motion in limine, barring testimony by his former intimate partners. (R.52: 7/19/19 Order, 255). They testified only because Johnson opened the door. The district court tried to accommodate Johnson's presentation of evidence, even when he had no exhibit list or pre-marked defense exhibits. (R.101: Trial Tr., 870–71, 877). Johnson simply was unable to lay a proper foundation or establish relevance for the exhibits that he sought to admit. (*Id*., 872–78, 882). The district court sought to ensure that Johnson received "independent consideration of the evidence" by a jury that lacked knowledge of "any of the additional information" that had come to light in "the pretrial proceedings," which included Johnson's prior acts of assault and his irrational disparagements of the prosecutor and each of the defense lawyers—including Mr. Crawford. (R.99: 8/1/19 Hrg Tr., 612–15, 617). Finally, at sentencing, the district judge expressly sought Johnson's "input." (R.104: Trial Tr., 1259).

The efficiencies also favor the district judge's continued assignment. Johnson's suggestion that the original proceedings were "perfunctory" is without merit: the judge considered and ruled upon eight pretrial motions and sat through four days of trial. He spent numerous hours with this defendant over the course of the case. This first-hand experience puts him in an optimal position to evaluate and apply Johnson's relevant sentencing factors. He has gotten to know Johnson far better than any transcript or presentence report could convey.

Conclusion

The defendant's convictions and sentences should be affirmed.

Respectfully submitted,

Saima S. Mohsin
Acting United States Attorney

/s/ Erin S. Shaw
Erin S. Shaw
Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9182
erin.shaw@usdoj.gov

Dated: April 9, 2021

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 12,085 words. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Erin S. Shaw
Assistant United States Attorney

Dated: April 9, 2021

Certificate of Service

I certify that on April 9, 2021, I electronically filed this brief for the United States with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of the filing to the following attorney of record:

Melissa M. Salinas
salinasm@umich.edu

/s/ Erin S. Shaw
Assistant United States Attorney

Relevant District Court Documents

The United States of America designates as relevant these documents in the district court's electronic record, Eastern District of Michigan case number 18-cr-20794:

Record No.	Document Description	Page ID Range
5	Acknowledgment of Indictment	10–11
9	First Superseding Indictment	30–37
15	Acknowledgment of First Superseding Indictment	55–56
19	Motion to Withdraw (by David Koelzer)	67–71
33	Motion to Withdraw (by Barry A. Wolf)	104–07
39	Order Granting Motion to Withdraw	135–37
46	Hearing Tr. 5/23/19	162–97
52	Order on Motions in Limine	244–55
69	Jury Verdict Form	426–28
70	Jury Instructions	429–53
91	Defendant's Sentencing Memorandum	546–53
92	Judgment	554–62
93	Notice of Appeal	563
99	Motion Tr. 8/1/19	602–18
100	Trial Tr. 8/20/19 (sealed)	619–756

Record No.	Document Description	Page ID Range
101	Trial Tr. 8/21/19	757–995
102	Trial Tr. 8/22/19	996–1156
103	Trial Tr. 8/23/19	1157–250
104	Sentencing Tr. 12/3/19	1251–75
108	Motion Tr. 3/12/19	1284–309
109	Notice of Filing Exhibits	1310–471
n/a	Presentence Investigation Report	n/a