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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HASSAN HUSSEIN ALQAHTANI,

Defendant - Appellant.

No. 22-2007

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:20-CR-00082-WJ-1)

Joel R. Meyers, Law Office of Joel R. Meyers LLC, Santa Fe, New Mexico, appearing for Defendant-Appellant.

Paul J. Mysliwiec, Assistant U.S. Attorney (Alexander M.M. Uballez, United States Attorney, with him on the brief), United States Attorney's Office, Albuquerque, New Mexico, appearing for Plaintiff-Appellee.

Before **CARSON**, **EBEL**, and **ROSSMAN**, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant Hassan Alqahtani was convicted for illegally possessing a firearm and sentenced to 30 months in prison. The gun was discovered after Special Agent Jonathan Labuhn received a tip that Mr. Alqahtani was unlawfully in

possession of a firearm, prompting Labuhn to begin an investigation. Labuhn ultimately received a search warrant and discovered the firearm at Mr. Alqahtani's home.

Mr. Alqahtani now appeals his conviction and sentence for multiple reasons. First, Mr. Alqahtani argues that the warrant application failed to establish probable cause to search his residence, and that the affidavit supporting the application contained material misstatements and omissions. Second, Mr. Alqahtani argues that the district court improperly granted the Government's peremptory challenge to the only Black member of the jury venire. Third, Mr. Alqahtani argues that the district court impermissibly admitted hearsay testimony concerning statements made by Mr. Alqahtani's wife to a Task Force Officer. Fourth, Mr. Alqahtani argues that the district court improperly applied a four-level sentencing enhancement on the theory that Mr. Alqahtani had previously used the gun at issue here in connection with another felony.

Exercising jurisdiction under 28 U.S.C § 1291 and 18 U.S.C § 3742(a), we reject each of Mr. Alqahtani's arguments and AFFIRM his conviction and sentence.

I. BACKGROUND

In 2012, Mr. Alqahtani was admitted to the United States from Saudi Arabia on a temporary student visa. This visa permitted Mr. Alqahtani to remain in the United States for as long as he was a student. While in the United States, Mr. Alqahtani pursued studies in mechanical engineering at the University of New Mexico and married a United States citizen.

In 2019, Special Agent Jonathan Labuhn received an anonymous tip from one of Mr. Alqahtani's classmates, informing Labuhn that Mr. Alqahtani was in possession of a gun. Labuhn then interviewed the tipster—a man named Randolph Vasquez, or "R.V." in written reports—who told Labuhn that Mr. Alqahtani had shown him a colored firearm that Mr. Alqahtani owned. According to R.V., Mr. Alqahtani was "aware that he should not have a firearm" and he said that, if he were ever to get in trouble with the firearm, his girlfriend "would take possession of it and hide it for him." S. ROA vol. 1, at 58. R.V. also stated that Mr. Alqahtani had created a list of people he wanted to kill before leaving the U.S., which included R.V. R.V. additionally claimed that he and Mr. Alqahtani went shooting together on numerous occasions, and that Mr. Alqahtani had asked R.V. if he would be willing to hold his gun during transport. Despite this request, R.V. never actually saw Mr. Alqahtani bring this firearm on one of the shooting trips.

In addition to interviewing R.V. after the tip, Labuhn investigated the residence where Mr. Alqahtani appeared to be living (referred to as the "Target Residence"). During this investigation, Labuhn spotted a car registered to Mr. Alqahtani parked in the driveway of the Target Residence, and then saw an individual who bore a resemblance to Mr. Alqahtani's driver's license photo exit the Target Residence and lock the door. Labuhn also spoke to the property management company responsible for the Target Residence and received a lease for the Target Residence, which confirmed that Mr. Alqahtani lived there with a woman later learned to be his wife, S.S.

During his investigation, Labuhn also interviewed Mr. Alqahtani's former teaching assistant, Anthony Menicucci (who went by the initials "A.M." in the reports). A.M. stated that he met Mr. Alqahtani at the Target Residence in July 2019, and while he was there, Mr. Alqahtani brought out a firearm with a colored coating. A.M. unloaded the firearm and saw that it had 9mm rounds. According to A.M., Mr. Alqahtani said that if he was ever caught with the firearm, he would claim it belonged to his wife. Finally, A.M. later told Labuhn that Mr. Alqahtani had approached him in November 2019 and expressed interest in buying an AK-47. By the time of this last incident, A.M. had received confidential human source status, and was therefore referred to as "CHS" in reference to the AK-47 discussion (rather than A.M.).

Labuhn then submitted a search warrant application to a federal magistrate judge, which included an affidavit detailing these various interviews and describing his investigation of the Target Residence. This affidavit specified that Labuhn had spoken to R.V., A.M., and CHS—but did not specify that CHS was the same person as A.M. The magistrate judge issued the warrant, and the subsequent search of the Target Residence by the FBI yielded a blue and white .380 caliber pistol. Mr. Alqahtani was arrested and charged with a violation of 18 U.S.C. § 922(g)(5)(B), which prohibits the possession of firearms by noncitizens admitted to the country on a nonimmigrant visa.

On April 10, 2020, Mr. Alqahtani moved to suppress the firearm recovered from the Target Residence. Mr. Alqahtani argued that the affidavit failed to establish

probable cause because it failed to establish (a) that Mr. Alqahtani lived at the Target Residence that he shared with his wife, who could have owned the gun, (b) that the witnesses were reliable, and (c) that the information in the warrant application about the firearm was not stale. In the alternative, he requested a Franks hearing on the basis that Labuhn had misrepresented facts to the judge in the affidavit. See Franks v. Delaware, 438 U.S. 154, 155–56 (1978). Specifically, Mr. Alqahtani argued that Labuhn misleadingly represented that A.M. and CHS were different people, that Mr. Alqahtani had made a "list of people who he wants to kill," and that Mr. Alqahtani had approached A.M. about a gun (when Mr. Alqahtani asserts that it was A.M. who approached him). S. ROA vol. 1, at 58. Mr. Alqahtani also asserted that the search warrant affidavit omitted key information—specifically about Mr. Alqahtani no longer being interested in purchasing an AK-47, about the potential biases of the sources, and about whether Mr. Alqahtani ever actually planned to leave the country. The district court concluded that the warrant established probable cause and did not recklessly misrepresent or omit any information, and therefore denied both motions.

The case then proceeded to trial. During jury selection, the Government used a peremptory strike on the only Black member of the venire panel. In response, Mr. Alqahtani filed a Batson challenge, alleging that this peremptory strike was racially discriminatory. See Batson v. Kentucky, 476 U.S. 79 (1986). In response to this challenge, the district court asked the Government to provide a race-neutral explanation for the strike to flesh out the record. In response, the Government

asserted that the potential juror had appeared to be lying about her history, since she had tattoos that seemed inconsistent with her claim of military service and she had displayed a hostility to police. The district court rejected the Government's tattoo justification but concluded that the potential juror's expressed hostility towards police was race-neutral and thus it denied the Batson challenge after rejecting Mr. Alqahtani's argument that this was a pretextual justification.

Leading up to trial, the district court excluded the testimony of a task force officer detailing a discussion the officer had with S.S. (later determined to be Mr. Alqahtani's wife) during the execution of the search warrant, reasoning that this testimony contained inadmissible hearsay. This testimony would have established that, during the execution of the warrant, S.S. said that she did not own a gun; she did not think there was a gun in the house; nor had she ever seen a gun in the house. After the trial commenced, however, Mr. Alqahtani's counsel attacked the integrity of the investigation for failing to consider that the gun may have belonged to S.S. In response, the district court reconsidered its prior exclusion and allowed the testimony, not for the truth of what S.S. said out of court, but to show that the FBI conducted a thorough investigation by considering whether S.S. could be the owner of the gun. The district court additionally provided the jury with limiting instructions to make clear that S.S.'s statements could not be considered for the truth of the matter asserted.

Mr. Alqahtani was ultimately convicted of unlawfully possessing a firearm. At sentencing, the district court applied a four-level sentencing enhancement under

U.S.S.G. § 2K2.1(b)(6)(B), which applies when a defendant "used or possessed any firearm or ammunition in connection with another felony offense." The other alleged felony committed by Mr. Alqahtani was aggravated assault under N.M. Stat. § 30-3-2, based on the allegation that Mr. Alqahtani held a gun to the head of a woman named Miranda and told her to kill herself. Although Mr. Alqahtani was never convicted for this offense, the district court relied on interview statements with Miranda and her mother, as well as the testimony of R.V., to determine that Mr. Alqahtani committed this aggravated assault with the firearm at issue here and that Miranda was subjectively scared while this occurred (as is required by N.M. Stat. § 30-3-2). The court therefore concluded that a four-step enhancement under § 2K2.1(b)(6)(B) was appropriate and sentenced Mr. Alqahtani to 30 months' imprisonment.

Mr. Alqahtani now appeals on multiple grounds. He first argues that the firearm should have been suppressed because the warrant application failed to establish probable cause, or at the very least that a Franks hearing was required. He next argues that the district court erred in denying his Batson challenge to the peremptory strike of the one Black member of the venire. He then argues that the district court erred in admitting the testimony concerning the out-of-court statements of S.S. Finally, he argues that the district court erred in enhancing his sentence under § 2K2.1(b)(6)(B). We consider each argument in turn.

II. DISCUSSION

A. The warrant application established probable cause and a Franks hearing was unnecessary.

1. The warrant was based on probable cause.

We first consider whether the warrant application established probable cause. "A search warrant can issue only upon a showing of probable cause," meaning that "[t]he supporting affidavit must provide a substantial basis to conclude that there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Long, 774 F.3d 653, 658 (10th Cir. 2014) (internal quotation marks omitted) (quoting United States v. Nolan, 199 F.3d 1180, 1182 (10th Cir. 1999)). To make this determination, the judge issuing the warrant must consider the "'veracity' and 'basis of knowledge' of persons supplying hearsay information" supporting the warrant. Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, the warrant application must establish "a nexus between [the contraband to be seized or] suspected criminal activity and the place to be searched." United States v. Rowland, 145 F.3d 1194, 1203 (10th Cir. 1998) (quoting United States v. Corral-Corral, 899 F.2d 927, 937 (10th Cir. 1990)). "A magistrate judge's decision to issue a warrant is entitled to great deference from the reviewing court." United States v. Tuter, 240 F.3d 1292, 1295 (10th Cir. 2001) (internal quotation marks omitted) (quoting United States v. Le, 173 F.3d 1258, 1265 (10th Cir. 1999)).

Mr. Alqahtani argues that the warrant application was insufficient because it neither established the credibility or reliability of the unnamed sources, nor

established a nexus between the firearm and the Target Residence. We reject these arguments and conclude that the warrant application established probable cause that a firearm possessed by Mr. Alqahtani would be found at the Target Residence.

a) Credibility and reliability of the witnesses.

First, the supporting affidavit established the credibility and reliability of the unnamed sources—R.V., A.M., and CHS. We have previously held that a witness is made more credible when he or she has "personally witnessed" the event. See United States v. Jenkins, 313 F.3d 549, 554 (10th Cir. 2002). A witness's credibility is also bolstered when his or her "information is corroborated by other information." United States v. Sturmoski, 971 F.2d 452, 457 (10th Cir. 1992). And a witness is made more credible when he or she has face-to-face meetings with the police, such that the witness places his or her anonymity at risk. See Jenkins, 313 F.3d at 554.

Starting with R.V., the affidavit detailed two interviews in which R.V. described (1) what Mr. Alqahtani's handgun looked like, (2) a time when Mr. Alqahtani showed R.V. the gun and described how he got it, and (3) times when Mr. Alqahtani and R.V. would go shooting together, during which times Mr. Alqahtani asked R.V. if he would hold Mr. Alqahtani's gun during transport (although R.V. did not see the gun on any of these occasions). As for A.M., the affidavit described an interview in which A.M. provided a description of a firearm that Mr. Alqahtani showed him at the Target Residence matching the description of the firearm that R.V. identified with Mr. Alqahtani. These two witnesses therefore provided information that they had "personally witnessed," Jenkins, 313 F.3d at 554.

They also corroborated each other's allegations, Sturmoski, 971 F.2d at 457, since both men provided similar testimony consistent with the gun being a handgun[1] and it being "colored." S. ROA vol. 1, at 58. Their anonymity was also placed at risk both because R.V. and A.M were both interviewed by Labuhn and provided him with at least their initials. And the record confirms that A.M. repeatedly met with Labuhn in person. Together, these details are enough to conclude that R.V.'s and A.M.'s allegations "bore sufficient indicia of reliability." Jenkins, 313 F.3d at 554.

b) Nexus between the firearm and the Target Residence.

Second, as to the nexus requirement, the affidavit concretely established a nexus between Mr. Alqahtani's firearm and the Target Residence. The affidavit first sufficiently established that Mr. Alqahtani resided at the Target Residence by stating that Labuhn (1) saw a car out front that was registered to Mr. Alqahtani, (2) saw a man who resembled Mr. Alqahtani's driver's license photo exit the house and lock the door behind him, (3) received a copy of the Target Residence's lease which confirmed that Mr. Alqahtani lived there, and (4) spoke to employees of the property management company who confirmed that he lived there. This credibly linked Mr. Alqahtani to the Target Residence. There was also evidence linking the firearm to the Target Residence, since A.M. alleged that Mr. Alqahtani retrieved a firearm from a room in the Target Residence during July 2019. Together, these facts connect

[1] Although A.M. did not specifically say it was a handgun, he mentioned that the firearm had "9mm rounds in the magazine," which is commonly used with handguns. S. ROA vol. 1, at 59.

the firearm to both Mr. Alqahtani and the Target Residence as of July 2019. See United States v. Stiffler, 400 F. App'x 340, 344 (10th Cir. 2010) (unpublished) (concluding that warrant application established a nexus between defendant and his apartment when defendant exited his apartment with contraband to sell to cooperating individual).[2]

The only issue, then, is whether the passage of time between July 2019 (the date when the firearm was last seen at the Target Residence) and December 2019 (when the search was conducted pursuant to the warrant) undercut the nexus between the Target Residence and the firearm. Probable cause cannot be established if information has grown stale, i.e., if too much time has passed between the receipt of information and the issuance of the warrant. See United States v. Schauble, 647 F.2d 113, 116 (10th Cir. 1981). To determine whether information is stale, "the nature of the alleged criminal activity and the property to be seized must be considered." Id. Probable cause is weakened "if the property to be seized can be easily transported or consumed," but this is not an issue if "the affidavit properly recites facts indicating activity of a protracted and continuous nature." Id. (quoting United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972)).

[2] To support his position, Mr. Alqahtani cites United States v. Gonzales, 399 F.3d 1225, 1230 (10th Cir. 2005), but that case is far afield from this one. In Gonzales, "there were no facts explaining how the address was linked" to the defendant. Id. Rather, "the only facts before the magistrate were that Gonzales was a convicted felon and a Glock 10mm magazine was found in a vehicle in which he was the only occupant." Id. In contrast, Labuhn explained the evidence establishing that Mr. Alqahtani lived at the Target Residence and that he had a firearm at the residence.

Unlike drugs or drug proceeds which are commonly moved, see United States v. Roach, 582 F.3d 1192, 1201–02 (10th Cir. 2009), a personal firearm is "the type[] of evidence likely to be kept in a suspect's residence," United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993), and is likely to remain there for an extended period of time, cf. United States v. Lester, 285 F. App'x 542, 546 (10th Cir. 2008) (unpublished) (noting that firearm silencers are not fluid commodities and that "owners typically keep silencers for an extended period of time"). For this reason, the passage of five months does not undercut the connection between the likely current location of the personal firearm and the residence where it was last seen, at least where the putative owner of the handgun was currently linked with the address searched. Cf. United States v. Myers, 106 F.3d 936, 939 (10th Cir. 1997) (information was not stale when last indication of criminal activity was five months prior). The information provided by A.M. connecting the firearm to the Target Residence was therefore not stale at the time of the warrant application.

In sum, the warrant application both established the credibility and reliability of the unnamed witnesses, and further established a nexus between the firearm seen by A.M. and the Target Residence. It therefore set forth probable cause that a firearm would be found at the Target Residence.

2. The warrant application did not contain material misstatements or omissions requiring a Franks hearing.

Mr. Alqahtani next argues that the district court erred in denying his request for a Franks hearing due to the warrant application's alleged misstatements or

omissions. A defendant is entitled to a Franks hearing once the defendant has made a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause[.]" Franks, 438 U.S. at 155–56. We conclude that the warrant at issue contained no material misstatements or omissions.[3]

a) The affidavit did not contain material misstatements.

Mr. Alqahtani argues that the warrant affidavit contained material misstatements in three ways: (1) by misleading the magistrate judge into thinking CHS was a third person, (2) by misrepresenting facts about a "kill list," and (3) by falsely stating that Mr. Alqahtani approached CHS to buy an AK-47. We reject each of these points.

First, Mr. Alqahtani argues that the affidavit was materially misleading because it potentially misled the magistrate judge into thinking CHS was a third person. But even if there was potential confusion as to whether CHS and A.M. were one or two individuals, there is no evidence in the record that Labuhn's failure to explain that CHS was A.M. was reckless or intentional, rather than negligent. Cf. Kapinski v. City of Albuquerque, 964 F.3d 900, 909 (10th Cir. 2020) (concluding that it was "mere negligence" for the affiant to omit helpful video footage from the

[3] We have "yet to adopt a standard of review for the denial of a Franks hearing," United States v. Velarde-Pavia, 2022 WL 108331, at *4 (10th Cir. Jan. 12, 2022) (unpublished), and we need not resolve this issue today because we would uphold the district court's denial of a Franks hearing even under de novo review.

affidavit). Indeed, Labuhn provides a plausible explanation that he switched the designation from A.M. to CHS once A.M. received confidential human source status. Although Labuhn should have explained to the magistrate judge that CHS was the same person as A.M., his explanation belies any finding of recklessness or intentionality, and therefore a Franks hearing was unwarranted. See Franks, 438 U.S. at 155–56.

Mr. Alqahtani cites multiple cases in an attempt to demonstrate that this was recklessly misleading, but none prove the point. The first is Franks itself, where the officer made two blatant misrepresentations. There, the officer falsely stated that he had interviewed two witnesses that he had in fact never spoken to, and second, the police officer included information in his affidavit that deviated from what a witness had told him. 438 U.S. at 158. These facts are inapposite, as Labuhn neither lied about speaking to witnesses he never spoke to, nor misrepresented what the witnesses told him. The next precedent relied upon by Alqahtani is United States v. McCain, where the affidavit falsely attributed information received from a wiretap to a confidential source. 271 F. Supp. 2d 1187, 1194-95 (N.D. Cal. 2003). This is also quite distinct, because Labuhn never falsely represented the source of information; he simply used two different (but accurate) acronyms to refer to the same person who received confidential human source status during the investigation. Last is United States v. Smith, where the affidavit repeatedly stated that the defendants were involved with "drugs" or "cocaine" based on the defendants' conversations, despite the defendants having used coded language and never actually referring to drugs by

name—a fact which the affidavit failed to note. 118 F. Supp. 2d 1125, 1135 (D. Colo. 2000). Like the other cases relied upon by Mr. Alqahtani, Smith involved an actual misrepresentation about the substance of what was overheard, which is not what happened here. Thus, none of these cases establish that there was an intentional or reckless misrepresentation.

Mr. Alqahtani has separately failed to establish that this potentially false impression was material, i.e., "necessary to the finding of probable cause." Franks, 438 U.S. at 155–56. Specifically, Mr. Alqahtani does not explain how the finding of probable cause depended on the magistrate judge's potential belief that CHS was a third person. Nor could he, because R.V. and A.M. reliably provided enough information on their own to establish probable cause that a firearm would be found at the Target Residence, as we note above. Thus, any potential misimpression concerning CHS's identity did not require a Franks hearing because it was not necessary to the probable cause finding.

Second, Mr. Alqahtani contends that the affidavit was materially misleading in referring to a "kill list." Aplt. Br. 31. Mr. Alqahtani's argument here is hard to follow, but his main contention is that the phrase "kill list" was created by R.V., not Mr. Alqahtani. But the affidavit never ascribed the phrase "kill list" to Mr. Alqahtani; it instead simply stated that R.V. informed Labuhn that Mr. Alqahtani was making a "list of people who he wants to kill." S. ROA vol. 1, at 58. This representation is supported by the record. In particular, in one text message exchange, R.V. told Mr. Alqahtani to "put me back on your kill list," to which Mr.

Alqahtani replied "[o]n it." S. ROA vol. 1, at 70. Thus, there is no indication here that the affidavit was materially misleading in this regard.

Third, Mr. Alqahtani argues that the affidavit contains false information because it claims that Mr. Alqahtani approached CHS (i.e., A.M.) to buy a firearm, when it was in fact A.M. who approached Mr. Alqahtani. But the record establishes that Mr. Alqahtani had approached A.M. about purchasing a gun before A.M. approached Mr. Alqahtani to confirm that he was "still interested in purchasing a weapon." ROA vol. 3, at 499 (emphasis added); see also id. at 502 (" . . . this is the second solicitation that Mr. Alqahtani made to buy a weapon of mine."). So, there is no evidence that the affidavit is mistaken on this point. To the contrary, the testimony in the record supports the affidavit's characterization.

b) The affidavit did not omit any material facts.

Mr. Alqahtani next asserts that the affidavit omitted several material facts: (1) the fact that Mr. Alqahtani was no longer interested in purchasing an AK-47, (2) the date on which Mr. Alqahtani was set to leave the country, (3) the history between R.V. and Mr. Alqahtani, and (4) R.V. and A.M.'s respective criminal histories. Like above, none of these points are persuasive.

First, Mr. Alqahtani points out that he later told A.M. that he was no longer interested in purchasing an AK-47, which is omitted from the affidavit. This fact is immaterial, though, because Mr. Alqahtani made clear that he was still interested in "a smaller sized firearm for protection"—notwithstanding the fact that he was no longer interested in an AK-47. S. ROA vol. 1, at 33. Given that any firearm

possession was illegal for Mr. Alqahtani in all respects, it is immaterial whether Mr. Alqahtani wanted an AK-47 or a different firearm. More importantly, though, Mr. Alqahtani's desire to purchase another gun did not change the fact that he currently illegally possessed a gun, a fact that was clear even without A.M.'s allegations here. Thus, even if this omission was deliberate (and there is no evidence that it was), it would be immaterial to probable cause.

Second, given that the affidavit suggests Mr. Alqahtani's kill list would be triggered upon him leaving the country, Mr. Alqahtani takes issue with the omission of any date at which Mr. Alqahtani was set to leave the country. But it is unclear why the date Mr. Alqahtani planned to leave the country (if such a date did exist) would add any relevant information to the affidavit, since it does not bear on whether the FBI could find a firearm at Mr. Alqahtani's house. Nor does this appear to be an omission at all, since there is no indication that R.V. provided Labuhn with a date (if any) that Mr. Alqahtani planned to leave the country. So, this is not a material omission in the affidavit.

Third, we reject Mr. Alqahtani's contention that the affidavit omitted material information about an altercation between Mr. Alqahtani and R.V. that occurred before the tip to the FBI. The affidavit states that R.V. was on Mr. Alqahtani's "list of people who he want[ed] to kill," indicating that the two men were not on good terms. S. ROA vol. 1, at 58. If this fact about the altercation is meant to bear on R.V.'s credibility (i.e., by demonstrating bias given his strained relationship with Mr.

Alqahtani), this was sufficiently demonstrated by the reference to R.V. being on the kill list.

Finally, we do not see any material omission regarding whether or not R.V. or A.M. had a criminal history. There is no evidence in the record regarding whether R.V. or A.M. did or did not have a criminal history, and a warrant affidavit is not ordinarily required to disclose a source's lack of criminal history. There could only be a material omission here if there was evidence that one of the sources had a material criminal history that was not disclosed. Without any such evidence in the record, Mr. Alqahtani has failed to establish that there was any omission here which would require a Franks hearing.

In sum, we reject Mr. Alqahtani's arguments that the warrant affidavit failed to establish probable cause, or in the alternative, that a Franks hearing was required.

B. The district court did not err in denying Mr. Alqahtani's Batson challenge.

Mr. Alqahtani next argues that the district court erroneously permitted the Government to strike the only Black juror from the venire, despite Mr. Alqahtani's Batson challenge. Once a party raises a Batson challenge, the trial court must apply a three-step analysis. First, the court "must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race." Rice v. Collins, 546 U.S. 333, 338 (2006). If this is met, then "the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question." Id. Once this explanation has been made, "the court must then

determine whether the defendant has carried his burden of proving purposeful discrimination." Id.

In reviewing a Batson challenge, the proffered race-neutral explanation is reviewed de novo, while the ultimate finding concerning discriminatory intent is reviewed for clear error. Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 854 (10th Cir. 2000). The district court's finding of no discriminatory intent is also "accorded great deference on appeal," since this "largely turn[s] on an evaluation of the prosecutor's credibility." United States v. Sneed, 34 F.3d 1570, 1579 (10th Cir. 1994) (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).

Below, the district court "assume[d]" there was a prima facie showing at step one of the Batson inquiry. ROA vol. 3, at 250. The Government now argues that the district court never actually found that this step of the inquiry had been satisfied and that Mr. Alqahtani cannot satisfy it, but the Government never objected to the district court's assumption below, and does not argue plain error on appeal. The Government has therefore waived this argument. Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1131 (10th Cir. 2011) (" . . . the failure to argue for plain error and its application on appeal [] surely marks the end of the road for an argument for reversal not first presented to the district court.").

Proceeding to step two, the district court concluded that the Government had satisfied this step (i.e., proffering a race-neutral explanation) by noting that the potential juror had exhibited hostility towards police. Courts have generally concluded that a hostile attitude towards police officers is a race-neutral basis to

strike a juror from the venire. See, e.g., Pirtle v. DeWitt, 31 F. App'x 191, 193 (6th Cir. 2002) (unpublished); Caldwell v. Maloney, 159 F.3d 639, 652 (1st Cir. 1998); United States v. Carter, 111 F.3d 509, 512 (7th Cir. 1997); United States v. Moreno, 878 F.2d 817, 820 (5th Cir. 1989). The juror at issue here stated that she was "sure there are many" dishonest police officers, or at least a "handful" of them. ROA vol. 3, at 125. This belief that many, or at least a handful of, police officers are dishonest constituted sufficient hostility to satisfy the second step of the Batson inquiry. See Purkett v. Elem, 514 U.S. 765, 767–68 (1995) ("The second step of this process does not demand an explanation that is persuasive, or even plausible."); see also Caldwell, 159 F.3d at 652 (assuming the second step had been met when juror expressed doubts about honesty of police).[4]

Finally, the district court turned back to Mr. Alqahtani to explain why the Government's explanation was pretextual. Mr. Alqahtani argued that pretext was demonstrated because this person was the sole Black member of the venire, and because she stated that she believed her bad experience with a police officer was an aberration, which was clear to her based on the law enforcement connection within her family. The district court rejected this argument for pretext and concluded that the potential juror's hostility towards police provided the Government with a sufficient basis for the peremptory strike. Because we give "great deference" to the

[4] We need not decide at this time whether hostility towards police is a race-neutral justification when the hostility is explicitly predicated on race, since the juror's hostility here was predicated on the dishonesty of police without any connection between this dishonesty and race.

district court's evaluation of the prosecutor's credibility on appeal, Sneed, 34 F.3d at 1579 (quoting Hernandez, 500 U.S. at 364), we cannot say that the district court's finding here was clearly erroneous, see Caldwell, 159 F.3d at 652 (affirming denial of Batson challenge at step three when juror expressed belief that police are not truthful enough). We therefore reject Mr. Alqahtani's claim of error premised on his Batson challenge.[5]

C. The district court did not err in permitting an agent to testify that Mr. Alqahtani's wife disclaimed ownership of the gun.

Mr. Alqahtani next argues that the district court erred in permitting a federal agent to testify about the out-of-court and unsworn statements made by Mr. Alqahtani's wife (S.S.) during the warrant execution. We review a district court's evidentiary rulings for abuse of discretion. United States v. Williams, 934 F.3d 1122, 1131 (10th Cir. 2019). On hearsay issues, the district court is accorded "greater deference." United States v. Rosario Fuentez, 231 F.3d 700, 708 (10th Cir. 2000). Applying this standard, we conclude that the district court did not abuse its discretion in determining that the testimony was permissible.

The testimony at issue here pertained to S.S.'s assertions during the execution of the warrant that she did not own a firearm, did not think there was a firearm in the

[5] Judge Rossman joins the disposition rejecting Mr. Alqahtani's Batson claim in Part II.B, but concludes on this record, the district court denied the Batson challenge based not on the potential juror's views about police but on the government's assessment of the potential juror's credibility. See ROA vol. 3 at 250-51 (the government contended the potential juror's responses in voir dire were "absolutely implausible," "obviously untrue," and that she was "concealing her true feelings that she has about police in America generally").

house, and had never seen a firearm in the house.[6] Although the district court had previously excluded this testimony, the court concluded that Mr. Alqahtani had opened the door to the testimony by criticizing the integrity of the FBI investigation in his opening statement. The district court thus admitted the testimony not for the truth of S.S.'s statements, but instead to show that the FBI investigated whether S.S. was the true owner of the firearm.

It was well within the discretion of the district court to permit this testimony. When defense counsel "opens the door" to an otherwise inadmissible topic, this "operates as a limited waiver allowing the government to introduce further evidence on that same topic." United States v. Lopez-Medina, 596 F.3d 716, 731 (10th Cir. 2010). In Mr. Alqahtani's opening statement, he asserted that the FBI's "so-called thorough investigation" failed to account for the fact that Mr. Alqahtani had an American citizen wife who was "fully within her rights to possess a weapon," and that the gun was found in a bedroom clearly occupied by S.S. ROA vol. 3, at 288–90. Once Mr. Alqahtani's opening statement impugned the thoroughness of the FBI's investigation for allegedly failing to consider that S.S. could have owned the gun, Mr. Alqahtani opened the door to the Government presenting evidence defending the thoroughness of the FBI's investigation. See United States v. Chavez, 229 F.3d 946, 952 (10th Cir. 2000) ("It is widely recognized that a party who raises a

[6] This statement by S.S. does not outweigh the credible statements provided by A.M. and R.V. supporting a fair probability that Mr. Alqahtani's gun would be found at the Target Residence.

subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party."). And Mr. Alqahtani further opened the door to this testimony by cross-examining the federal agent about her knowledge of S.S.'s citizenship and right to possess a firearm. ROA vol. 2, at 383–88. The testimony that Mr. Alqahtani now challenges showed that the FBI had considered that S.S. could be the owner of the gun by questioning her about the firearm, thereby bolstering the integrity of the investigation.[7]

Moreover, S.S.'s testimony was not hearsay. To constitute hearsay, a statement must be offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(2). The hearsay rule therefore does not prohibit an out-of-court statement from being offered as evidence if it is "not being used to prove the truth of the matter asserted[.]" United States v. Lewis, 594 F.3d 1270, 1284 (10th Cir. 2010). As explained above, S.S.'s testimony was offered to show that the FBI had considered whether she was the owner of the gun, not to prove that S.S. knew of a firearm in the house. To this end, the district court specifically provided the jury with instructions that this testimony was not being offered for the truth of the matter asserted. "Juries are presumed to follow limiting instructions." United States v.

[7] The wife's ownership of the gun is also not dispositive because § 922(g) pertains to possession of a firearm, not ownership, and thus Mr. Alqahtani would violate § 922(g) by merely possessing the gun—even if his wife owned it. See Henderson v. United States, 575 U.S. 622, 626 (2015) (noting that § 922(g) does not prohibit the defendant from owning a gun, but instead simply possessing the gun).

Acosta, 475 F.3d 677, 683 (5th Cir. 2007). This evidence was therefore admissible non-hearsay.

In sum, the agent's testimony about S.S. was permissible both because Mr. Alqahtani opened the door to it by impugning the investigation in his opening statement and because S.S.'s out-of-court statements were offered for a non-hearsay purpose. See Acosta, 475 F.3d at 683 (testimony was permissible "because it was not admitted to establish the truth of the matter asserted and because [the defendant] opened the door to its admission").[8]

D. The district court did not err by sentencing Mr. Alqahtani under U.S.S.G. § 2K2.1(b)(6)(B).

Mr. Alqahtani's final argument is that the district court erred in applying a four-level sentencing increase under U.S.S.G. § 2K2.1(b)(6)(B),[9] which applies to a defendant who "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in

[8] Mr. Alqahtani argues that this testimony could not bolster the integrity of the investigation because the FBI took no action in reaction to S.S.'s statements, meaning that the statements could only show that Mr. Alqahtani was the owner of the gun. This logic does not follow. Since S.S. said that she had never seen a firearm, her statements were consistent with the investigation to-date—i.e., that Mr. Alqahtani was the owner of the firearm. Given that this information was consistent with the investigation, there are no new steps that the FBI would have been expected to take in response to what S.S. said. So, the fact that the FBI did not change course is not proof that the questions were not investigatory in nature.

[9] In his brief, Mr. Alqahtani refers to subsection (a)(6)(B), rather than subsection (b)(6)(B), but it clear from the record that the trial court applied subsection (b)(6)(B). See ROA vol. 4, at 326.

connection with another felony offense." In applying § 2K2.1(b)(6)(B), the district court concluded that Mr. Alqahtani committed the New Mexico offense of aggravated assault (N.M. Stat. § 30-3-2) against a victim (Miranda) with the firearm in question. A defendant violates N.M. Stat. § 30-3-2 by "threaten[ing] or engag[ing] in menacing conduct with a deadly weapon toward a victim, causing the victim to believe he or she was about to be in danger of receiving an immediate battery." State v. Bachicha, 111 N.M. 601, 607 (Ct. App. 1991). "Findings of fact that are related to the Sentencing Guidelines are reviewed for clear error." United States v. Robinson, 978 F.2d 1554, 1568 (10th Cir. 1992).

Mr. Alqhatani contends that the Government failed to prove that the same gun was used in connection with Miranda's assault as was found here, and also that the Government failed to prove that Miranda subjectively felt fear (which is a requirement of N.M. Stat. § 30-3-2). At sentencing, the other offense need only be proven by a preponderance of the evidence. United States v. Clonts, 966 F.2d 1366, 1371 (10th Cir. 1992). Moreover, "hearsay statements may be considered at sentencing if they bear some minimal indicia of reliability." United States v. Damato, 672 F.3d 832, 847 (10th Cir. 2012) (quoting United States v. Cook, 550 F.3d 1292, 1296 (10th Cir. 2008)). We conclude that the district court did not err in finding that the same gun was used in both instances and that Miranda subjectively felt fear.

In making these two findings, the district court relied on two summaries of FBI interviews with Miranda and her mother, as well as R.V.'s testimony. The

summary of Miranda's interview stated that Miranda was very nervous about sharing any details regarding Mr. Alqahtani, and when asked about the incident, she responded that she did not "want to speak about that." ROA. vol. 4, at 325; see also S. ROA. vol. 3, at 2. The summary of the interview with Miranda's mother states that she began to cry when she was asked why the two of them wanted to relocate, and that she and Miranda were afraid of Mr. Alqahtani because he held a gun to Miranda's head and threatened her life. And these accounts were corroborated under oath by R.V., who testified that Mr. Alqahtani had told him that he held a gun to a woman named Miranda's head and told her that she should kill herself. R.V. additionally testified that he had seen Mr. Alqahtani's pistol multiple times over the course of a few years and had never seen him with a different one.

Miranda and her mother's hearsay statements were reliable enough to allow the district court to find that Miranda had subjectively felt fear when assaulted. In arguing otherwise, Mr. Alqahtani only cites United States v. Fennell, 65 F.3d 812, 813-14 (10th Cir. 1995). There, we concluded that the hearsay evidence was insufficient for a different sentencing enhancement because it was "based solely upon unsworn allegations made by the [defendant's] girlfriend during the telephone interview." Id. at 813. But we have explained in many later cases how limited Fennell is. For example, in United States v. Pulham, we concluded that Fennell was limited to situations where the statement at issue was uncorroborated, where the witness had a reason to lie, and when the district court was "bereft of evidence bearing on the demeanor of the witness." 735 F. App'x 937, 956 (10th Cir. 2018)

(unpublished). In United States v. Martinez, we distinguished Fennell on the grounds that the hearsay statement implicating the defendant was sufficiently reliable when it accurately connected the defendant to one of the burglarized homes. 824 F.3d 1256, 1262 (10th Cir. 2016). And in United States v. Ruby, we pointed out that the witness in Fennell had an incentive to lie, in contrast to the corroborating statements of "three relatively neutral witnesses" at issue there. 706 F.3d 1221, 1230 (10th Cir. 2013).

This case is far more like these later cases than Fennell. Miranda's statement was corroborated both by her mother's unsworn testimony and R.V.'s sworn testimony. Both the mother and R.V. described an incident in which Mr. Alqahtani held a gun to Miranda's head.[10] This corroboration was sufficient to demonstrate reliability, since there is no other explanation as to how R.V. and Miranda's mother could both describe roughly the same event. Cf. Martinez, 824 F.3d at 1262 (hearsay statement sufficiently reliable when the individual knew a fact that otherwise could not be known without knowledge of the incident). And, once it was reliably established that the incident occurred, it was not erroneous to determine that the mother was reliable in saying that she and Miranda were afraid of Mr. Alqahtani.

As for use of the same gun in both incidents, the district court relied on R.V.'s sworn testimony that he had only ever seen Mr. Alqahtani with the same distinctive gun. Although R.V.'s testimony certainly did not prove beyond a reasonable doubt that the same gun was used, R.V.'s testimony was sufficient to conclude by a

[10] R.V. heard about the story from Mr. Alqahtani, and thus this testimony was non-hearsay as an admission of a party opponent. See Fed. R. Evid. 801(d)(2)(A).

preponderance of the evidence that the guns were the same. As such, the district court did not clearly err in applying § 2K2.1(b)(6)(B).

III. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in refusing to suppress the firearm, denying a Franks hearing, denying Mr. Alqahtani's Batson challenge, admitting the challenged testimony, or applying a sentencing enhancement under § 2K2.1(b)(6)(B). We therefore AFFIRM Mr. Alqahtani's conviction and sentence.