**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**June 20, 2023**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL HERNANDEZ,

Defendant - Appellant.

No. 22-2083
(D.C. No. 2:19-CR-04184-KG-1)
(D.N.M.)

---

**ORDER AND JUDGMENT***

---

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

---

In this appeal, Daniel Hernandez challenges the sufficiency of the evidence to support his convictions of carjacking, in violation of 18 U.S.C. § 2119(1), and brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Mr. Hernandez also challenges the substantive reasonableness of his sentence of 240 months' imprisonment. Upon review of the parties' arguments and the record in this matter, we conclude the evidence was sufficient to support

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Mr. Hernandez's convictions and his sentence was substantively reasonable considering the circumstances of the case along with the other factors set forth in 18 U.S.C. § 3553(a). Accordingly, we affirm Mr. Hernandez's convictions and sentence.

## I. BACKGROUND

Over the course of a two-day jury trial, the jury heard testimony from law enforcement officers; Mr. Hernandez's ex-girlfriend; Mr. Hernandez's co-conspirator, Savannah Padilla; and Mr. Hernandez's victims, Monteque Montaño and Kasey Jackson. The following factual history is drawn from the evidence presented at trial, viewed in the light most favorable to the Government. *See United States v. Gregory*, 54 F.4th 1183, 1192 (10th Cir. 2022), *cert. denied*, No. 22-905, 2023 WL 2959422 (U.S. Apr. 17, 2023) ("In determining whether the government presented sufficient evidence to support the jury's verdict, this court must review the record de novo and ask only whether, taking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find Defendant guilty beyond a reasonable doubt." (quotation marks omitted)).

### *A. Factual History*[1]

On the night of September 6, 2018, Mr. Hernandez came across a stranger, Mr. Montaño, sitting in a truck parked near his home. Mr. Montaño testified that he had driven his mother to a friend's house and had parked to wait for her. Mr. Hernandez

[1] Although Mr. Hernandez challenges only his convictions under Counts 8 and 9, we relate the facts relevant to the other counts because they are relevant to the reasonableness of his sentence.

approached Mr. Montaño's truck and asked who he was and what he was doing there. Their verbal exchange escalated until Mr. Hernandez pointed a handgun at Mr. Montaño's face, through the truck's open window. At that point, Mr. Montaño's mother returned and got in the truck. They quickly left.

The next day, Mr. Hernandez, together with his friend Ms. Padilla, arranged to sell drugs to Mr. Jackson. Mr. Jackson met Mr. Hernandez and Ms. Padilla outside Mr. Hernandez's home at about 11:30 a.m., and Ms. Padilla and Mr. Hernandez got into Mr. Jackson's car. Mr. Jackson testified that he intended to buy approximately one-half ounce of methamphetamine from Mr. Hernandez for $200, but Mr. Hernandez decided to get "an extra little bit" for him. ROA Vol. 3 at 212. According to Mr. Jackson's and Ms. Padilla's testimony, Mr. Hernandez gave Mr. Jackson directions to drive to three other locations in an attempt to purchase more methamphetamine, but none of the attempts were successful. Mr. Jackson then dropped Ms. Padilla at Mr. Hernandez's house, and he and Mr. Hernandez left in the car.

At trial, Mr. Jackson described what happened when he and Mr. Hernandez were alone in the car. Mr. Hernandez instructed Mr. Jackson to drive to a secluded area. As Mr. Jackson was driving, Mr. Hernandez asked if he had ever been robbed. Mr. Jackson responded that he had not, and revealed he carried a gun. Mr. Hernandez said he did too and pulled a black and silver handgun from his waistband to show Mr. Jackson. Mr. Jackson looked at Mr. Hernandez's gun and then passed it back to him. In turn, Mr. Jackson pulled out his own gun, a black .380 Glock, to show Mr. Hernandez. He unloaded it completely, locked the slide back, and passed the gun to Mr. Hernandez.

Mr. Hernandez took the Glock, looked it over, and kept it in his lap. Mr. Hernandez also showed Mr. Jackson a small two-shot Derringer pistol he kept in his backpack. Eventually, Mr. Jackson stopped and the two sat in the parked car, chatted, and smoked methamphetamine together. After they had done two or three hits each, Mr. Hernandez began to put on a pair of black gloves. Concerned, Mr. Jackson started the car and began driving back in the direction they had come from.

As he was driving, Mr. Jackson reached to retrieve his .380 Glock from Mr. Hernandez's lap. Mr. Hernandez put his hand on top of the Glock and would not let Mr. Jackson take it. Mr. Hernandez told Mr. Jackson to make a sharp left turn down another street. Mr. Jackson complied. As Mr. Jackson continued driving, Mr. Hernandez pointed his black and silver handgun at Mr. Jackson's chest. Mr. Hernandez asked Mr. Jackson who he hung around with and revealed he heard Mr. Jackson had snitched on one of his friends. Knowing the street they were on led to a secluded, wooded area, Mr. Jackson turned and parked the car at a park. Still pointing the gun at Mr. Jackson, Mr. Hernandez told him to empty his pockets. Mr. Jackson emptied his pockets and gave Mr. Hernandez $98 and the loose bullet and magazine from his Glock. When Mr. Jackson mentioned he had to be at work in thirty minutes, Mr. Hernandez told Mr. Jackson to drive him home. They returned to Mr. Hernandez's home around 1:00 p.m., and Mr. Hernandez left the car taking with him Mr. Jackson's money, gun, and ammunition.

According to Mr. Jackson, at around 6:00 p.m., while at work, he received a call from Mr. Hernandez. Mr. Hernandez told Mr. Jackson he was "sorry for about earlier," he was "just tripping," and "it was all good now." *Id.* at 233. Mr. Hernandez asked

whether Mr. Jackson could bring a little more money after he got off work. Mr. Jackson told him no; his bank was closed. Mr. Hernandez instructed Mr. Jackson to call him back after work and Mr. Jackson agreed.

Mr. Jackson testified that, after his shift, he got in touch with Mr. Hernandez and returned to Mr. Hernandez's home around 10:30 p.m. Mr. Jackson, Mr. Hernandez, and Ms. Padilla went to Mr. Hernandez's bedroom where they drank some beer and smoked methamphetamine. Mr. Jackson and Ms. Padilla testified that the three later left Mr. Hernandez's house and drove to nearby apartments where they had tried to buy methamphetamine earlier in the day. Mr. Jackson drove and Mr. Hernandez and Ms. Padilla sat in the back seat. Mr. Jackson parked near the apartments and Mr. Hernandez told Ms. Padilla to move to the front passenger seat. Mr. Hernandez asked Mr. Jackson for more money. According to Ms. Padilla's testimony, when Mr. Jackson told him no, Mr. Hernandez started threatening him: "What? Didn't you know what's going to happen when [] you didn't come back with money?" *Id.* at 326. Because Mr. Jackson did not have any money on him, Mr. Hernandez and Ms. Padilla told him to get money out of his bank account. Mr. Jackson testified that he did not have any way to access his account, so he tried to setup online access for his account. After about twenty minutes, Mr. Jackson was unsuccessful in accessing his account. Mr. Hernandez told Mr. Jackson to drive him home.

According to Mr. Jackson, as he drove, Mr. Hernandez and Ms. Padilla continued demanding things and told him not to do anything stupid. Ms. Padilla testified that, from her position in the front passenger seat, she saw Mr. Hernandez put on his gloves and

point his handgun at Mr. Jackson's lower back from the back seat. When Mr. Jackson got to Mr. Hernandez's home, he parked in the driveway. Mr. Hernandez and Ms. Padilla traded seats, so Mr. Hernandez was sitting in the front passenger seat with his black and silver handgun visible in his lap. Mr. Jackson further testified that Mr. Hernandez and Ms. Padilla continued to demand that he get money from his bank account. Mr. Jackson and Ms. Padilla explained that Mr. Hernandez next took a stack of papers from Mr. Jackson's glove compartment and passed them to Ms. Padilla in the back seat, who started going through them looking for anything of value.

Eventually, Ms. Padilla and Mr. Hernandez got out of the car. Mr. Jackson testified that he could hear Mr. Hernandez clicking the gun safety. Mr. Hernandez ordered Mr. Jackson to open the trunk of the car and began going through its contents. Ms. Padilla stood by the back passenger side holding Mr. Hernandez's handgun clicking the safety. After going through the trunk, Mr. Hernandez told Mr. Jackson to get into the back seat. Mr. Jackson testified that he moved to the back, Mr. Hernandez sat in the driver's seat, and Ms. Padilla got into the front passenger seat. At that point, Mr. Jackson left the car and took off running, in fear for his life and safety. Ms. Padilla testified that she yelled at Mr. Jackson to get back in the car, but he ran off.

According to Mr. Jackson, he ran for about half a block and hid behind a car in someone's driveway. Ms. Padilla testified that Mr. Hernandez drove the car up the street with her, looking for Mr. Jackson. Mr. Jackson, hiding, watched the car pull up, slow down near where he was hiding, then speed away up the street. After about thirty seconds, Mr. Jackson called 911 and walked to meet police at a nearby CVS. According

to Ms. Padilla, Mr. Hernandez drove the car up the street, then pulled over. Seeing police lights, Mr. Hernandez and Ms. Padilla ran into the woods.

On September 9, police apprehended and arrested Mr. Hernandez as he attempted to flee from his girlfriend's apartment. Upon searching the apartment, they found two guns: a silver and black handgun and Mr. Jackson's .380 Glock.

### *B. Procedural History*

A grand jury charged Mr. Hernandez with ten counts related to the events of September 6 through 9. As relevant here, based on interactions with Mr. Jackson on the night of September 7, Mr. Hernandez was charged with Counts (7) conspiracy, (8) carjacking, and (9) brandishing a firearm during and in relation to a crime of violence.

Mr. Hernandez pleaded guilty to Count 1 (felon in possession of a firearm); the remaining counts proceeded to trial. Over a two-day trial, the jury heard testimony from law enforcement agents, Ms. Padilla, and Mr. Jackson among others. At the conclusion of trial, the jury found Mr. Hernandez guilty of Counts 2, 3, 4, 7, 8, 9, and 10. The jury found him not guilty of Counts 5 and 6.[2]

Following Mr. Hernandez's conviction, The United States Probation Office filed a presentence investigation report that calculated Mr. Hernandez's total offense level as 33,

[2] Counts 5 (carjacking) and 6 (brandishing a firearm during and in relation to a crime of violence—carjacking), for which Mr. Hernandez was acquitted, related to the events of Mr. Hernandez's and Mr. Jackson's first encounter the morning of September 7, after they dropped Ms. Padilla off at Mr. Hernandez's home. Counts 8 (carjacking) and 9 (brandishing a firearm during and in relation to a crime of violence—carjacking), for which Mr. Hernandez was convicted and which are at issue in this appeal, related to the events of Mr. Hernandez's and Mr. Jackson's second encounter the night of September 7.

his criminal history as category VI, and the recommended Sentencing Guidelines range as 235–293 months. Mr. Hernandez requested a downward variance to a total sentence of 108 months. The Government responded, requesting a sentence of no less than 264 months. Ultimately, the court sentenced Mr. Hernandez to a total term of 240 months—comprising concurrent terms of 120 months as to Counts 1–4, 60 months as to Count 7, and 156 months as to Count 8, and a mandatory consecutive term of 84 months as to Count 9—followed by five years of supervised release. Following the court's entry of judgment, Mr. Hernandez appealed his convictions and sentence.

## II. DISCUSSION

On appeal, Mr. Hernandez argues the evidence presented to the jury was legally insufficient to support his conviction on Counts 8 (carjacking) and 9 (brandishing a firearm during and in relation to a crime of violence), related to the events on the night of September 7. Mr. Hernandez also argues that the sentence imposed by the district court was substantively unreasonable in light of the factors set forth in 18 U.S.C. § 3553(a). Considering each argument in turn, we affirm.

### *A. Sufficiency of the Evidence*

#### 1. Standard of Review

"We review the sufficiency of the evidence to support a conviction de novo." *United States v. Medina-Copete*, 757 F.3d 1092, 1107 (10th Cir. 2014). "[T]aking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government," we ask whether "a reasonable jury could find [the] [d]efendant guilty beyond a reasonable doubt." *Gregory*,

54 F.4th at 1192 (quotation marks omitted). In doing so, "[w]e accept at face value the jury's credibility determinations and its balancing of conflicting evidence." *Medina-Copete*, 757 F.3d at 1107 (quotation marks omitted)). Thus, our review is limited and deferential; "we will not overturn a jury's finding unless no reasonable juror could have reached the disputed verdict." *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998).

**2. Count 8: Carjacking**

Mr. Hernandez was convicted of carjacking, related to the events the night of September 7, in violation of 18 U.S.C. § 2119(1). To convict Mr. Hernandez of carjacking, the Government had to prove the following elements beyond a reasonable doubt:

> (1) that [Mr. Hernandez] took a motor vehicle from the person or presence of another; (2) that he did so by force, violence or intimidation; (3) that [Mr. Hernandez] intended to cause death or serious bodily harm; and (4) that the motor vehicle had been transported, shipped, or received in interstate or foreign commerce.

*United States v. Gurule*, 461 F.3d 1238, 1243 (10th Cir. 2006); *see also* 18 U.S.C. § 2119(1) ("Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, . . . shall" be guilty of a crime). Mr. Hernandez contests the sufficiency of the evidence to prove the first and third elements.

*a. Taking a motor vehicle*

The first element of carjacking, in violation of 18 U.S.C. § 2119(1), is "the taking of a motor vehicle from the person or presence of another." *Gurule*, 461 F.3d at 1243. To establish this element, the government must show that the defendant "acquir[ed] possession or control of the victim's vehicle in the presence of another[.]" *Id.*

Mr. Hernandez argues the evidence presented to the jury was insufficient to prove this element because "Mr. Hernandez never intended to take Mr. Jackson's car but merely steal the things inside." Appellant's Br. at 15. Mr. Hernandez argues that he wanted Mr. Jackson's money and personal items of value, not the car.

But a defendant's "subjective motivation in acquiring possession or control of the victim's vehicle is irrelevant to whether the government established the 'taking' element of 18 U.S.C. § 2119." *Gurule*, 461 F.3d at 1243; *see also United States v. Payne*, 83 F.3d 346, 347 (10th Cir. 1996) ("Carjacking is a general intent crime analogous to robbery. An intent to permanently deprive a victim of a motor vehicle is not required by the 'taking' element."). It does not matter whether Mr. Hernandez intended to keep the car, to possess or control it temporarily while he it searched for valuables, or to use it as an instrumentality of another crime. *See Payne*, 83 F.3d at 347 (concluding that a carjacker's motive for taking the car, "be it for profit, convenience or as an instrumentality of another crime, is irrelevant.").

Furthermore, the evidence was sufficient for the jury to find beyond a reasonable doubt that Mr. Hernandez had taken control of Mr. Jackson's car by the time he ordered Mr. Jackson out of the driver's seat and into the backseat of the car. Mr. Hernandez

contends the evidence was insufficient to find he exercised control or possession of Mr. Jackson's car because he did not demand the car, try to take the keys from Mr. Jackson, start the engine while Mr. Jackson was in the car, or make any attempt to separate Mr. Jackson from the car. In fact, Mr. Hernandez argues he and Ms. Padilla drove the car up the street looking for Mr. Jackson, to return the car to him. But acquiring control of Mr. Jackson's car does not require that Mr. Hernandez separated Mr. Jackson from the car. *See Gurule*, 461 F.3d at 1241–42. The uncontroverted evidence presented to the jury showed that Mr. Hernandez visibly and audibly displayed his handgun, told Mr. Jackson to open the trunk of the car, ordered him out and into the back seat, and took Mr. Jackson's place in the driver's seat. At that point, fearing for his safety, Mr. Jackson fled, leaving the car and his keys behind. Mr. Hernandez started the car and drove it up the street before abandoning it at the sight of police lights. Such evidence is sufficient for a reasonable jury to find beyond a reasonable doubt that Mr. Hernandez acquired control of Mr. Jackson's car by the time Mr. Jackson fled. That Mr. Hernandez did not demand the car, attempt to take the keys from Mr. Jackson, or start the car while Mr. Jackson was sitting in the back seat, does not controvert a finding that Mr. Hernandez acquired control of Mr. Jackson's car while in his presence. *See, e.g., Gurule*, 461 F.3d at 1234–44 (concluding evidence was sufficient to support taking element of carjacking because defendant was in control of the situation despite not forcing victim to leave the car but rather forcing her to give him a ride); *United States v. Nelson*, 801 F. App'x 652, 663–64 (10th Cir. 2020) (unpublished) (concluding evidence was sufficient to support taking element of carjacking because defendant "made sure [victim] got in the car and directed

her to drive while pointing [a] gun at her"). Furthermore, because even a temporary taking is sufficient to satisfy the first element of carjacking, it is immaterial whether Mr. Hernandez and Ms. Padilla later sought to return the car to Mr. Jackson. *See id.* at 1241–44. Based on the evidence presented, a reasonably jury could find beyond a reasonable doubt that Mr. Hernandez acquired control of the car, while in his presence, even if temporarily for the purpose of searching the car for personal items to steal. This is sufficient to satisfy the first element of the federal carjacking statute.

*b. Intent to cause death or serious bodily harm*

The third element of carjacking, in violation of 18 U.S.C. § 2119(1), is the "inten[t] to cause death or serious bodily harm." *Gurule*, 461 F.3d at 1243. Where, as here, the defendant acquired possession or control of the victim's car without inflicting, or attempting to inflict, serious bodily harm, the intent element "requires the Government to prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car." *Holloway v. United States*, 526 U.S. 1, 11–12 (1999). Put differently, the intent element is conditional; the defendant "does not have to display a desire to injure the victim so long as the jury could infer that, had the victim refused to give up his car, the carjacker would have injured him." *United States v. Vallejos*, 421 F.3d 1119, 1123 (10th Cir. 2005).

This element is satisfied if the defendant had the proscribed state of mind "at the precise moment he demanded or took control over the car 'by force and violence or by intimidation.'" *Holloway*, 526 U.S. at 8 (quoting 18 U.S.C. § 2119). But, in discerning

the defendant's state of mind at that moment, "it is necessary to look at the totality of the circumstances to determine whether the words and actions of the defendant[] sufficiently demonstrate a conditional intent to cause serious bodily harm." *United States v. Malone*, 222 F.3d 1286, 1291 (10th Cir. 2000) (holding a jury could reasonably infer defendants' conditional intent to seriously harm the victim based on the facts that they tied up her family, held a gun to her head, and pushed her to the ground several times). The totality of the circumstances includes "any relevant episode that is sufficiently contemporaneous" to the moment the defendant took possession of the car to be probative of his intent in that moment. *United States v. Folse*, 854 F. App'x 276, 288 (10th Cir. 2021) (unpublished). This may include the entire episode leading up to the defendant taking the victim's car. *See id.* at 287–88 ("[T]he factfinder may determine that an entire episode is sufficiently contemporaneous with the moment the defendant took control of the vehicle to be probative regarding the nature of the defendant's intent." (internal quotation marks omitted)); *United States v. Pena*, 550 F. App'x 563, 565–66 (10th Cir. 2013) (unpublished) (holding the factfinder could reasonably "view[] the entire episode as sufficiently contemporaneous" with the defendant taking the car to be probative of his intent at that moment).

Mr. Hernandez argues the evidence was insufficient for the jury to find he possessed the requisite intent to cause death or serious bodily harm at the time he told Mr. Jackson to get out of the driver's seat. Mr. Hernandez notes that he never threatened Mr. Jackson regarding the car. Although he did point a gun at Mr. Jackson earlier in the day, and there was evidence he pointed a gun at Mr. Jackson's lower back while the latter

was driving that night, Mr. Hernandez argues these actions are too temporally removed from the moment Mr. Hernandez took Mr. Jackson's car to be probative of his intent at that moment. The Government responds that, in evaluating the totality of the circumstances, the entirety of Mr. Hernandez's conduct during the day and into the night of September 7 is probative of his intent to inflict serious bodily harm. Furthermore, the Government argues that Mr. Hernandez brandishing a gun at various points throughout his interactions with Mr. Jackson reasonably supports an inference that he was willing to use that gun if Mr. Jackson refused to give up control of the car.

Even limiting our consideration to Mr. Hernandez's conduct on the night of September 7, the evidence is sufficient for a reasonable jury to find beyond a reasonable doubt that Mr. Hernandez intended to inflict serious bodily harm if doing so proved necessary to take Mr. Jackson's car. Ms. Padilla testified that, while Mr. Jackson was driving back to Mr. Hernandez's home, she saw Mr. Hernandez point a handgun at Mr. Jackson's lower back. Additionally, Mr. Jackson testified that when they arrived at Mr. Hernandez's home, Mr. Hernandez sat in the passenger seat, with a gun visibly in his lap, as he searched through Mr. Jackson's glove compartment. Mr. Jackson also testified that he heard Mr. Hernandez clicking the gun's safety. These actions were all part of the same episode in which Mr. Hernandez searched through the car, commanded him to open the trunk, and told him to get out of the driver's seat and into the back seat. The open presence of Mr. Hernandez's gun throughout this episode, and the evidence that Mr. Hernandez pointed the gun at Mr. Jackson's back while he drove, is sufficient for a reasonable jury to conclude that Mr. Hernandez had the requisite intent to seriously harm

Mr. Jackson if necessary to obtain control of the car. *See Vallejos*, 421 F.3d at 1124 ("[W]hen a carjacker brandishes a firearm and orders a driver out of his car, it is reasonable for the driver, and for the jury, to infer that the carjacker is willing to use that firearm if the driver refuses to give up the car."); *see also Nelson*, 801 F. App'x at 664 (inferring intent based on defendant holding a firearm when he ordered the victim into the car and later pointing it at her thigh).

* * *

In reviewing the sufficiency of the evidence, our question is "not whether *every* reasonable factfinder—when presented with the same evidence—would have rendered a verdict of guilty; rather, it is whether *any* reasonable factfinder would have done so." *Folse*, 854 F. App'x at 287 (emphasis added); *see also United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir. 2012) ("In reviewing the sufficiency of the evidence . . . , this court reviews the record de novo to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt."). We will not reverse the jury's decision to convict the defendant unless it was "outside the range of a rational factfinder's reasonable choices." *United States v. Ramos-Arenas*, 596 F.3d 783, 787 (10th Cir. 2010). Based on the testimony of Mr. Jackson and Ms. Padilla, a reasonable jury could have found beyond a reasonable doubt that Mr. Hernandez took control of Mr. Jackson's car, even if temporarily to search it for personal property to steal, and that he intended to inflict serious bodily harm if it became necessary to do so. Thus, the evidence was

sufficient to support the jury's conviction on Count 8, for carjacking in relation to the events the night of September 7, and we affirm the jury's conviction.

**3. Count 9: Brandishing a firearm in relation to a crime of violence**

Based on the events the night of September 7, Mr. Hernandez was also convicted of brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). To convict Mr. Hernandez of brandishing a firearm, the Government had to prove the following elements beyond a reasonable doubt: (1) Mr. Hernandez committed the underlying crime of violence, (2) he brandished a firearm, and (3) such brandishing was "during and in relation to" the crime of violence. 18 U.S.C. § 924(c)(1)(A); *see also United States v. Shuler*, 181 F.3d 1188, 1189–90 (10th Cir. 1999). Mr. Hernandez only contests the sufficiency of the evidence to prove the first element. Mr. Hernandez argues that, because the evidence was insufficient to support his conviction of carjacking, as charged in Count 8, the Government failed to prove that he committed the underlying crime of violence.

But, as discussed above, the evidence was sufficient to support the jury's conviction on Count 8. Because the Government presented sufficient evidence to prove that Mr. Hernandez committed the underlying crime of violence, carjacking, we affirm the jury's conviction on Count 9.

***B. Substantive Reasonableness of the Sentence***

**1. Standard of Review**

This court reviews the substantive reasonableness of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Our review "focuses on whether

the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States v. Garcia*, 946 F.3d 1191, 1211 (10th Cir. 2020) (quotation marks omitted). We will find a sentence substantively unreasonable only if it "exceeds the bounds of permissible choice, given the facts and the applicable law," *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013) (quotation marks and brackets omitted), or is otherwise "arbitrary, capricious, whimsical, or manifestly unreasonable," *Garcia*, 946 F.3d at 1211. A sentence that falls within the properly calculated Guidelines range is presumed substantively reasonable, and the defendant bears the burden of rebutting this presumption in light of the § 3553(a) factors. *Chavez*, 723 F.3d at 1233.

"Sentencing judges should aim to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of criminal punishment." *United States v. Lucero*, 747 F.3d 1242, 1250 (10th Cir. 2014) (internal quotation marks omitted). Pursuant to 18 U.S.C. § 3553(a), in determining the sentence to impose, the district court shall consider certain factors, including:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. § 3553(a). In reviewing the court's sentencing and consideration of the § 3553(a) factors, we give substantial deference "not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings." *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir. 2020) (quotation marks omitted). We will "not reweigh the sentencing factors but instead ask whether the sentence fell within the range of rationally available choices that [the] facts and the law at issue can fairly support." *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019) (internal quotation marks omitted); *see also Gall*, 552 U.S. at 51 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

**2. Mr. Hernandez's Sentence**

Mr. Hernandez argues the district court's 240-month sentence is substantively unreasonable because, although it is within the Guidelines range,[3] it "still exceeds the bounds of permissible choice given the facts of this case [and] the applicable law and [] is greater than necessary to comply with the purposes of criminal punishment." Appellant's Br. at 23. Mr. Hernandez argues the district court did not appropriately account for his

[3] There is some uncertainty regarding whether the court calculated Mr. Hernandez's Guidelines range as 235–264 months or 235–293 months. The court calculated Mr. Hernandez's Guidelines range as 235–293 months based on his offense level and criminal history. However, there was discussion of whether the statutory maximum for Count 8, 180 months, followed by the mandatory consecutive minimum of 84 months for Count 9, imposed a new, 264-month, upper limit to Mr. Hernandez's Guidelines range. But Mr. Hernandez does not challenge the court's calculation of the Guidelines range and his sentence is within, and at the lower end, of either range discussed by the court.

personal history, including childhood experiences of domestic violence, mental health instability, and substance abuse. Mr. Hernandez contends a 240-month sentence "is essentially a life sentence," and he could "be rehabilitated to a useful place in society with a much shorter sentence." *Id.* at 24.

At sentencing, the district court considered Mr. Hernandez's mitigating circumstances, including his personal history and struggles with his mental health and substance abuse, and commended his sobriety while in jail and his efforts to change his life. But the court also considered his lengthy criminal history, including multiple felony convictions, firearms offenses, and involvement in another offense while in pretrial detention. Weighing these considerations, the court concluded that a 240-month sentence was sufficient, but not greater than necessary, to promote respect for the law, deter further criminal conduct, and protect the public from further criminal conduct by Mr. Hernandez.

Because the court's sentence is within the range recommended by the Sentencing Guidelines, we presume it to be reasonable. *See Chavez*, 723 F.3d at 1233. Mr. Hernandez's argument that the court should have given greater weight to his personal history and efforts to change his life does not rebut the presumed reasonableness of the court's within-Guidelines sentence. We will not reweigh the § 3553(a) factors considered by the district court. *See Lawless*, 979 F.3d at 855; *Blair*, 933 F.3d at 1274. Here, the court's imposition of a within-Guidelines sentence is supported by Mr. Hernandez's lengthy criminal history, repeated recidivism, and persistent firearm violations. Further, the court credited Mr. Hernandez's personal circumstances and efforts to reform his life

by imposing a sentence at the lower end of the recommended Guidelines range. Given the facts and circumstances of Mr. Hernandez's case, as part of the § 3553(a) analysis, the district court's 240-month sentence was reasonable, within the bounds of permissible choice, and therefore not an abuse of discretion. *See Chavez*, 723 F.3d at 1233. We affirm the district court's sentence.

## III. CONCLUSION

Because we conclude there was sufficient evidence to support Mr. Hernandez's convictions and the district court's sentence was substantively reasonable, we AFFIRM.

ENTERED FOR THE COURT

Carolyn B. McHugh
Circuit Judge