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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AMANDA LYN WALKER,

Defendant - Appellant.

No. 22-5005

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CRAIG ALAN MORRISON, a/k/a Craig Allen Morrison,

Defendant - Appellant.

No. 22-5014

Appeals from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:20-CR-00196-JFH-2)
(D.C. No. 4:20-CR-00196-JFH-1)

Katayoun A. Donnelly, Azizpour Donnelly LLC, Denver, Colorado, for Defendant – Appellant Amanda Lyn Walker.

John C. Arceci, Assistant Federal Public Defender, Office of the Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant – Appellant Craig Alan Morrison.

Chantelle Dial, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, with her on the briefs), Tulsa, Oklahoma, for Plaintiff – Appellee.

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

McHUGH, Circuit Judge.

Craig Alan Morrison and Amanda Lyn Walker brought Ms. Walker's three-year-old son, R.T., to the emergency room and told doctors that R.T. had jumped off his bed and hit his head on his scooter. After examining R.T., doctors discovered bruising across most of R.T.'s body, internal bleeding, and severe injuries to R.T.'s internal organs—injuries the doctors determined did not line up with Mr. Morrison's and Ms. Walker's story. The doctors contacted the police, who initiated a child abuse investigation, ultimately leading to a grand jury indictment of Mr. Morrison for two counts of child abuse, under the Assimilated Crimes Act, 18 U.S.C. § 13, and Okla. Stat. tit. 21, § 843.5(A) (2019), and of Ms. Walker for two counts of enabling child abuse, under the Assimilated Crimes Act, 18 U.S.C. § 13, and Okla. Stat. tit. 21, § 843.5(B) (2019). Mr. Morrison and Ms. Walker were indicted under the Assimilated Crimes Act because R.T. is an Indian and the offense conduct took place within the boundaries of the Muscogee (Creek) Reservation. They were tried in a joint trial and the jury returned guilty verdicts on all four counts. In separate sentencing proceedings, the district court granted the Government's motions for upward variances from United States Sentencing Guidelines sentences for both Mr. Morrison and Ms. Walker. The district court sentenced Mr. Morrison to a

300-month term of imprisonment, 195 months greater than the high end of his Guidelines range, and Ms. Walker to 120 months in prison, 63 months over the high end of her Guidelines range.

Mr. Morrison and Ms. Walker filed separate appeals, collectively raising ten challenges to their convictions and sentences. Because Mr. Morrison and Ms. Walker were tried in one trial, and each joins several of the other's arguments on appeal, we address their appeals together. Determining none of their arguments are meritorious, we affirm Mr. Morrison's and Ms. Walker's convictions and sentences.

I. BACKGROUND

A. Factual Background[1]

In July 2019, Mr. Morrison and Ms. Walker began a romantic relationship. Within a week, Mr. Morrison moved into Ms. Walker's home where Ms. Walker's adult daughter, Katana Partain; Ms. Partain's boyfriend, John Webb; Ms. Partain's minor daughter; Ms. Walker's minor daughter, M.L.; and Ms. Walker's two-year-old son, R.T., were also living. Not long after moving in, Mr. Morrison became involved with raising R.T.—potty training R.T., helping R.T. to transition to sleep in his own bed, and transitioning R.T. from bottles to sippy cups.

[1] All facts are drawn from evidence presented at Mr. Morrison's and Ms. Walker's joint trial. Where there was conflicting testimony, we recite the facts based on the evidence most favorable to the jury's verdict. *See United States v. Espinoza*, 338 F.3d 1140, 1146–47 (10th Cir. 2003).

On one occasion, in August 2019, Mr. Morrison wanted R.T. to eat pizza, but R.T. was resisting. Mr. Morrison shoved the pizza into R.T.'s mouth, causing R.T. to choke and cry. Ms. Partain yelled at Mr. Morrison to stop. Ms. Walker saw Mr. Morrison shoving the pizza into R.T.'s mouth while R.T. was choking and crying, but she went to her room and closed the door. When Ms. Partain checked on Ms. Walker, Ms. Walker explained that she did not want to hear R.T. crying. Ms. Partain, Mr. Webb, and Ms. Partain's minor child moved out of Ms. Walker's home in late September 2019.

Mr. Morrison lost his job in December 2019 and became more involved in R.T.'s care while Ms. Walker was working. Around this time, R.T. came to Ms. Partain's house and she noticed a dark handprint-shaped bruise on R.T.'s face and small bruises on R.T.'s buttocks. Ms. Partain took pictures of the bruises and sent them to Ms. Walker, asking Ms. Walker about R.T.'s injuries. Ms. Walker told Ms. Partain the handprint-shaped bruise on R.T.'s face was the result of Mr. Morrison unintentionally slapping R.T. while Mr. Morrison was having a night terror and the bruising on R.T.'s buttocks was caused by him falling off his bed.

During this same period, Mr. Morrison's cousin, Misty Dawn Hill, regularly spoke with Mr. Morrison. On one occasion, Mr. Morrison told Ms. Hill that he "made [R.T.] a man-sized peanut butter and jelly sandwich, and that [R.T.] wasn't eating it so he sent him to lay down. And he heard the child choking and he immediately ran and got him up." Morrison ROA Vol. III at 210. Mr. Morrison told Ms. Hill that he

was frustrated by R.T.'s frequent crying and "that he would give the child something to cry about." *Id.* at 211.

In February 2020, Mr. Morrison and Ms. Walker brought R.T. to the emergency room, informing the doctors R.T. had hurt himself jumping from his bed and falling onto his scooter. Upon examination, the hospital discovered R.T. had many severe external and internal injuries that could not be explained by R.T. jumping off his bed. The hospital took photographs of R.T.'s injuries and contacted the Tulsa police. Officers came to the hospital, took statements from Mr. Morrison and Ms. Walker, and photographed R.T.'s injuries. Mr. Morrison and Ms. Walker denied having harmed R.T. or having knowledge of any other person harming him. The responding officers referred the case to a child crisis detective, William Hays, to investigate.

The following morning, Dr. Christine Beeson, a pediatric physician completing a child abuse fellowship, examined R.T. Dr. Beeson's examination revealed extensive injuries including blunt force trauma injuries to R.T.'s liver and pancreas, muscle damage, injury to R.T.'s kidneys, severe bruising on R.T.'s buttocks and going down his leg, bruises on the inside and outside of both of his ears, his right and left cheeks and jawlines, his right forearm, his right shoulder, his shoulder blade and upper back, and the back of his ribcage. CT scans revealed that R.T. had a frontal hematoma, a hematoma around his right adrenal gland, and extensive internal bleeding. Dr. Beeson took additional photographs of R.T. when she

completed the examination. Based on her examination of R.T., Dr. Beeson concluded R.T. suffered "[c]hild physical abuse." *Id.* at 341.

While examining R.T., Dr. Beeson spoke with Ms. Walker about R.T.'s history. Ms. Walker informed Dr. Beeson that R.T. had "a two or three month history of easy bruising that she had noticed, and she was worried about leukemia." *Id.* at 318. Reviewing R.T.'s blood work and labs, Dr. Beeson determined R.T. did not have a bleeding disorder or condition that would cause easy bruising. That same day, Detective Hays interviewed Ms. Walker and Mr. Morrison. Ms. Walker told Detective Hays that prior to taking R.T. to the hospital, she had been at work until the afternoon and R.T. had been with Mr. Morrison. Ms. Walker further stated that when she got home from work in the afternoon, she saw R.T. running around naked and did not see any injuries or bruises on him. Ms. Walker explained she took R.T. to the hospital after hearing a crash from R.T.'s bedroom and noticing an injury to his head. Mr. Morrison told Detective Hays the same story. When Detective Hays asked about R.T.'s extensive bruising that did not seem consistent with their story, both Mr. Morrison and Ms. Walker stated they had not seen it. Ms. Walker minimized R.T.'s injuries when speaking to Detective Hays, stating they were not the result of abuse but "were just normal injuries and that [R.T.] gets these all the time." *Id.* at 231.

R.T. remained hospitalized for a total of four days. The week after R.T. was hospitalized, Ms. Walker asked Ms. Partain not to tell the police about the incident

where Mr. Morrison force-fed R.T. pizza or where Mr. Morrison hit R.T. during a night terror.

B. Procedural Background

1. Indictment and Trial

The state of Oklahoma arrested Mr. Morrison and Ms. Walker and charged them with child abuse offenses in March 2020. Following the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Oklahoma dismissed the charges for lack of jurisdiction because the victim in the case, R.T., is an Indian and the offense conduct occurred in Tulsa, within the boundaries of the Muscogee (Creek) Reservation.[2] *See McGirt*, 140 S. Ct. at 2468 (holding Congress never disestablished the Muscogee (Creek) Reservation). A federal grand jury indicted Mr. Morrison and Ms. Walker under the Assimilated Crimes Act, 18 U.S.C. § 13, charging Mr. Morrison with one count of child abuse, in violation of Okla. Stat. tit. 21, § 843.5(A), and Ms. Walker with one count of enabling child abuse, in violation of Okla. Stat. tit. 21, § 843.5(B), based on R.T.'s February 2020 injuries. In a superseding indictment, the grand jury charged Mr. Morrison with two counts of

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[2] Prior to the Supreme Court's decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), there was a general belief that Oklahoma lacked jurisdiction over crimes committed by Indians or against Indians in Indian country. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020) ("States are . . . free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country."). However, in *Castro-Huerta*, the Supreme Court recognized Oklahoma has concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. *See Castro-Huerta*, 142 S. Ct. at 2491.

child abuse and Ms. Walker with two counts of enabling child abuse, adding separate counts based on the handprint-shaped bruise documented by Ms. Partain on R.T.'s face in December 2019. The criminal information sheets filed with the superseding indictment listed all four counts as felonies and stated the maximum penalty for each count was life imprisonment.

Prior to trial, the Government offered plea deals to Ms. Walker and Mr. Morrison. Specifically, the Government offered Mr. Morrison a deal under which he would plead guilty to one count of child abuse, the February 2020 incident, and receive a sentence of ten years. The Government offered Ms. Walker a deal under which she would plead guilty to one count of enabling child abuse, based on the February 2020 incident, and receive a three-year sentence. Both Ms. Walker and Mr. Morrison rejected the offers. Also, before the trial, Ms. Walker and Mr. Morrison jointly proposed jury instructions asking the jury to determine whether their conduct for each count constituted a misdemeanor or felony.

Over the course of a three-day trial, the Government elicited testimony from Michael Scott Dean, a Tulsa police officer who photographed R.T. and took statements from Mr. Morrison and Ms. Walker the night they took R.T. to the hospital; a hospital employee who confirmed that pictures of R.T. the Government submitted as evidence were from R.T.'s medical record; Kelsey Hess, a forensic interviewer who attempted to interview R.T; R.T.'s biological father, Dennis Tooamhimpah; Mr. Webb, Ms. Partain's boyfriend; Ms. Partain, Ms. Walker's adult daughter; Ms. Hill, Mr. Morrison's cousin; Detective Hays, the detective who

investigated the case; and Dr. Beeson, the child abuse specialist who evaluated R.T. As part of its case-in-chief, the Government also presented photos taken by Ms. Partain of R.T.'s December 2019 injuries, the written statements Ms. Walker and Mr. Morrison gave to Officer Dean the night they brought R.T. to the hospital, a video of the forensic interview Ms. Hess conducted with R.T., videos of interviews Detective Hays conducted with Mr. Morrison and Ms. Walker, photos of R.T.'s February 2020 injuries taken by the hospital, photos of R.T.'s February 2020 injuries taken by Officer Dean, and photos of R.T.'s February 2020 injuries taken by Dr. Beeson. Following the completion of the Government's case-in-chief, both Mr. Morrison and Ms. Walker moved for judgments of acquittal under Federal Rule of Criminal Procedure 29; the district court denied their motions. Mr. Morrison then rested his case. Ms. Walker called her minor daughter, M.L., as a witness, and also testified in her own defense.

Prior to instructing the jury, the district court asked the Government, Mr. Morrison, and Ms. Walker if any party had any objections to the proposed instructions. They did not. The jury returned a guilty verdict against Mr. Morrison on both counts of child abuse and against Ms. Walker on both counts of enabling child abuse.

2. Ms. Walker's Sentencing Proceedings

Following Ms. Walker's conviction, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). The PSR determined there was no directly applicable Guideline for Ms. Walker's enabling child abuse conviction,

but that the most analogous Guideline was §2A2.2, which set a base offense level of 14 for aggravated assault offenses. The PSR applied three offense level enhancements: (1) a seven-level enhancement under §2A2.2(b)(3)(C) due to R.T. sustaining permanent or life-threatening bodily injury, (2) a two-level enhancement based on R.T. being a vulnerable victim under §3A1.1(b)(1), and (3) a two-level enhancement under §3A1.3 based on R.T. having been physically restrained in the course of the offense. The PSR also applied a two-level deduction under §3B1.2 due to Ms. Walker being a minor participant in the underlying offense, resulting in a total offense level of twenty-three. Based on Ms. Walker's total offense level of twenty-three and criminal history category of I, her Guidelines range was 46 to 57 months. The PSR stated the Probation Office had identified no factor warranting a departure or variance from a Guidelines sentence.

Ms. Walker objected to both the seven-level enhancement based on R.T. having sustained a permanent or life-threatening bodily injury and the two-level enhancement based on R.T. having been physically restrained, arguing neither of these enhancements were supported by sufficient evidence. The Probation Office overruled Ms. Walker's objections. The Government submitted a motion for an upward variance to a term of 120 months, contending the Guidelines range did not sufficiently account for the harm done to R.T. The Government analogized to 18 U.S.C. § 3559(f), a federal sentencing statute that was not charged in Ms. Walker's case, noting the statute required a ten-year minimum sentence for any crime of violence resulting in serious bodily harm to a child. Ms. Walker submitted a motion

for a downward variance from a Guidelines sentence, requesting that she receive a term of probation rather than imprisonment. Ms. Walker argued a downward variance was appropriate based on the § 3553(a) factors because she had accepted responsibility for her role in R.T.'s injuries, played a minor role in the offense, had attended parenting classes, and was a productive member of society with gainful employment. Prior to sentencing, the district court informed Ms. Walker and the Government that it was considering an upward variance from the Guidelines range set out in the PSR based on the § 3553(a) factors.

At Ms. Walker's sentencing hearing, the court heard a victim impact statement from R.T.'s father, Mr. Tooahimpah, and R.T.'s assigned guardian ad litem. Mr. Tooahimpah requested that Ms. Walker receive the maximum sentence possible based on the suffering she caused R.T. Mr. Tooahimpah told the court that when R.T. came to live with him, he "was broke[n] emotionally and physically." Walker ROA Vol. III at 570. R.T.'s guardian ad litem informed the court that R.T. was going to "need significant and ongoing counseling for many, many years" explaining that although R.T.'s bruises had healed, he would have to cope with the trauma he suffered for a long time. *Id.* at 574.

Ms. Walker argued the seven-point enhancement in the PSR was not warranted as no testimony at trial demonstrated R.T. suffered permanent or life-threatening injuries. Ms. Walker also argued against the two-level enhancement based on R.T. having been physically restrained, stating that only Ms. Partain testified at trial that Ms. Walker was present when Mr. Morrison forced R.T. to eat pizza, while other

witnesses stated Ms. Walker was not present during the incident. The court overruled Ms. Walker's objections to both enhancements, determining Dr. Beeson's testimony demonstrated R.T. suffered life-threatening injuries and Ms. Partain's testimony was sufficient to show Ms. Walker was present when Mr. Morrison force fed R.T.

The court then turned to the § 3553(a) factors. The Government argued an upward variance was warranted because Ms. Walker was an experienced mother, suffered no abuse or threats from Mr. Morrison, Ms. Walker enabled the abuse of R.T. over several months, and Ms. Walker never cooperated with the Government's investigation, choosing to defend Mr. Morrison rather than R.T. Following the Government's argument, Ms. Walker informed the court she was no longer seeking a downward variance and instead, asked the court to impose a Guidelines sentence. The court agreed with the PSR's finding that the Guideline addressing aggravated assault was the most analogous Guideline, but determined the Guideline failed to fully account for the severity of Ms. Walker's crime. The court concluded that evidence adduced at trial and the victim impact statements at the sentencing hearing demonstrated Ms. Walker allowed Mr. Morrison to move into her home with R.T. just a few days after they started dating, witnessed Mr. Morrison act aggressively with R.T. shortly after he moved in and left the room, continued to leave R.T. in Mr. Morrison's care, explained away suspicious bruises and marks on R.T., and continued to cover for Mr. Morrison during the investigation. The court also noted that the multitude of injuries identified by Dr. Beeson at the trial demonstrated R.T.'s abuse had been ongoing, as opposed to a single incident. The court agreed with the

Government that 18 U.S.C. § 3559(f), a federal statute setting a minimum mandatory sentence of ten years for crimes of violence against children causing serious bodily injuries, was analogous to the criminal conduct here. The court then stated, "An upward variance in this matter will adequately reflect the seriousness of the offense, provide just punishment, afford deterrence to further criminal conduct, and protect the public from further crimes by this defendant. Therefore the motion—the government's motion [for an upward variance] is granted." *Id.* at 593.

The court then asked Ms. Walker if she wanted to make a statement, and Ms. Walker took the opportunity to allocute. Ms. Walker asked the court to give her a Guidelines sentence, explaining that she now recognized the mistake she had made letting Mr. Morrison into her life, that she had never previously been in trouble with the law, that she had been taking parenting classes, and that she wanted to be present in her children's lives. The court proceeded to sentence Ms. Walker to two sentences of 120 months' imprisonment that would run concurrently.

3. Mr. Morrison's Sentencing

Like Ms. Walker's PSR, Mr. Morrison's PSR determined the most analogous Guideline to child abuse was USSG §2A2.2, the Guideline for aggravated assault offenses. The PSR also added the same offense level enhancements as were added for Ms. Walker—a seven-level enhancement based on USSG §2A2.2(b)(3)(C) because R.T. "sustained permanent or life-threatening bodily injury," Morrison ROA Vol. V at 6; a two-level enhancement pursuant to USSG §3A1.1(b)(1) because R.T. was a vulnerable victim; and a two-level enhancement based on USSG §3A1.3 because

R.T. "was physically restrained in the course of the offense," *id.* at 7. In support of the two-level enhancement under §3A1.3, the PSR noted "[Mr.] Morrison restrained R.T. while he choked him with pizza, hotdogs, or sandwiches on various occasions." *Id.* at 7. With a base offense level of 14, and the three enhancements, the PSR calculated an adjusted offense level of 25. The PSR calculated a total criminal history score of 7, establishing a criminal history category of IV, based on Mr. Morrison's prior convictions for domestic assault and battery by strangulation, violation of protective order, conspiracy to manufacture controlled drugs, unlawful possession of methamphetamine, and possession or selling paraphernalia. Based on his total offense level of 25 and criminal history category of IV, the PSR stated the Guidelines range was 84 to 105 months. The PSR noted the Probation Office had identified no basis for a departure or variance from a Guidelines sentence.

As with Ms. Walker, the Government submitted a motion for an upward variance from a Guidelines sentence pursuant to the § 3553(a) factors. The Government argued that, although USSG §2A2.2 was the most analogous Guideline, a variance was necessary because §2A2.2 applied to aggravated assault generally and did not adequately "address the harms of child abuse." Morrison ROA Vol. II at 35. The Government posited 18 U.S.C. § 3559(f), which sets a twenty-five-year mandatory minimum sentence if a defendant is convicted of kidnapping or maiming a child and a ten-year mandatory minimum sentence where a defendant is convicted for a crime of violence resulting in serious bodily injury to a child, demonstrates how the aggravated assault Guideline does not align with the accountability Congress has

imposed in child abuse cases. The Government also noted other federal statutes that impose high mandatory minimums for crimes against children. Applying the § 3553(a) factors, the Government argued the nature and circumstances of the offense; Mr. Morrison's history and characteristics; and the need for the sentence imposed to reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense, justified an upward variance to a 300-month term.

Mr. Morrison objected to the seven-level special offense characteristic and two-level victim related adjustment enhancements in the PSR. Regarding the seven-level enhancement pursuant to §2A2.2(b)(3)(C), Mr. Morrison argued there was insufficient evidence presented at trial for the court to determine that R.T. had sustained permanent or life-threatening injuries. Challenging the two-level enhancement under §3A1.3, Mr. Morrison argued there was insufficient evidence to establish that Mr. Morrison had physically restrained R.T. in the course of the offense. Mr. Morrison also objected to the proposed upward variance, arguing the Government was attempting to impose a trial penalty based on Mr. Morrison's choice not to accept its plea offer. In support of his argument, Mr. Morrison noted that the Government had agreed to lower sentences, ranging from two years to twenty years' imprisonment, in similar cases also involving heinous child abuse offenses where the Government had reached plea agreements with the defendants. Prior to

Mr. Morrison's sentencing hearing, the district court informed both parties that the court was considering an upward variance from a Guidelines sentence.

At the sentencing hearing, the court again heard testimony from Mr. Tooahimpah and R.T.'s guardian ad litem. Mr. Tooahimpah testified that R.T. "was broken emotionally and physically" when he came to live with him, hid from others, and struggled to communicate, make eye contact, or show emotion. Morrison ROA Vol. III at 16. Mr. Tooahimpah stated he "would like to see [Mr. Morrison] get the max sentencing" as "[t]here [was] no amount of time or punishment that could justify the abuse [R.T.] endured." *Id.* at 20. R.T.'s guardian ad litem testified that R.T. would potentially need life-long counseling to cope with the trauma he endured.

Addressing Mr. Morrison's objections to the PSR, the court overruled his objection to the seven-level enhancement under §2A2.2(b)(3)(C), determining Dr. Beeson's testimony at the trial provided sufficient evidence that R.T.'s injuries were life-threatening. Next, after reviewing the definition of "physically restrained" under §1B1.1, comment note 1(L), and Tenth Circuit caselaw interpreting that definition, the court determined Mr. Morrison's act of holding R.T. while force feeding him pizza satisfied the definition, and it overruled Mr. Morrison's objection to the application of §3A1.3. Ultimately, the court adopted the PSR in full. Addressing the § 3553(a) factors, Mr. Morrison argued there was no need to depart from a Guidelines sentence as his case was not abnormal and that in cases involving similar conduct the Government had agreed in plea agreements to significantly lower sentences than it requested for Mr. Morrison. The district court judge noted he had

reviewed the cases Mr. Morrison had cited where similar offenses resulted in lower prison terms through plea agreements but that he could speak to only one of the cases, where he was the sentencing judge. The district court judge explained that, in that case, he had agreed to a twenty-year sentence only because there was an acceptance of responsibility and a request from the victim's family for the court to accept the plea agreement. The court then noted that although the aggravated assault Guideline was the most analogous to Mr. Morrison's crimes, Mr. Morrison's "case show[ed] how inappropriate a strict application of the aggravated assault guideline would be to address the harms of child abuse." *Id.* at 36.

The court proceeded to assess the § 3553(a) factors in relation to Mr. Morrison's case. First, the court determined "[t]he nature and circumstances of the offenses" were "grave" considering the pattern of abuse adduced by testimony at the trial and the severity of R.T.'s injuries. *Id.* at 36–37. The court further determined Mr. Morrison's "history and characteristics" supported an upward variance because of Mr. Morrison's "prior conviction for a domestic assault and battery by strangulation." *Id.* at 37. The court noted Mr. Morrison's prior domestic violence conviction, which resulted in him being incarcerated, had not deterred him from continuing to act with escalating violence towards a more vulnerable victim. Finally, addressing the possibility of disparities between sentences, the court noted "that strict application of the guideline provisions to assimilated crimes would cause, rather than mitigate, disparity between [Mr. Morrison] and other defendants with similar records." *Id.* at 38. The court determined the Government's analogy to the minimum

sentences under 18 U.S.C. § 3559(f) was persuasive and showed "that Congress gives great weight to consequences for committing a violent crime against a child." *Id.* at 38. Determining a Guidelines sentence would be "woefully inadequate," the court "f[ound] that an upward variance [was] warranted in [Mr. Morrisons'] case" and stated "the [G]overnment's motion will be granted in terms of a request for an upward variance." *Id.* at 39. After stating it was granting the Government's motion for an upward variance, the district court gave Mr. Morrison the opportunity to allocute. Mr. Morrison declined to address the court. The court then sentenced Mr. Morrison to 300 months' imprisonment.

4. Appeals

Mr. Morrison and Ms. Walker timely filed notices of appeal. On appeal, Ms. Walker raises five challenges to her conviction, two of which are joined by Mr. Morrison. She also raises one challenge to her sentence. Mr. Morrison raises four challenges to his sentence, all of which Ms. Walker joins.

First, Ms. Walker, joined by Mr. Morrison, argues under plain error review that Okla. Stat. tit. 21, § 843.5(B) is unconstitutionally vague, stating the statute does not set any standard or element to distinguish between misdemeanor and felony offenses. In his notice of joinder, Mr. Morrison contends the same argument applies equally to his statute of conviction, Okla. Stat. tit. 21, § 843.5(A). Second and relatedly, Ms. Walker, joined by Mr. Morrison, argues the district court plainly erred by not adopting their proposed instructions asking the jury to determine whether Ms. Walker's and Mr. Morrison's conduct constituted misdemeanor or felony

offenses. Third, Ms. Walker asserts the district court plainly erred by failing to instruct the jury about two exceptions to child abuse listed under Okla. Stat. tit. 10A, § 1-1-105(2) (2019), accidental harm and the ordinary use of force as a means of discipline. Fourth, Ms. Walker contends the district court erred in denying her motion for acquittal because the Government presented insufficient evidence to satisfy the knowledge element necessary for conviction under § 843.5(B). Fifth, Ms. Walker argues the district court's cumulative errors warrant reversal of her conviction.

Turning to sentencing, Ms. Walker first argues the district court plainly erred based on the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by not submitting to the jury the question of whether Ms. Walker enabled Mr. Morrison to cause R.T. serious injuries. Second, Mr. Morrison, joined by Ms. Walker,[3] argues the district court erred by applying a two-level enhancement under USSG §3A1.3, which applies when a defendant physically restrains a victim in the course of the offense, because the district court's factual findings were insufficient as a matter of law to support application of the Guideline. Third, Mr. Morrison, joined by Ms. Walker, argues the district court plainly erred by stating

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[3] In Ms. Walker's notice of joinder, she asserts she is joining each of Mr. Morrison's challenges to his sentence. Notably, although Ms. Walker and Mr. Morrison were tried in a joint trial, Ms. Walker was sentenced separately from Mr. Morrison. Accordingly, we address below whether Ms. Walker has provided sufficient information for us to assess how each of Mr. Morrison's challenges to his sentence applies to her separate sentencing. *See United States v. Renteria*, 720 F.3d 1245, 1251 (10th Cir. 2013) ("We will allow Defendants to adopt one another's arguments but only to the extent we can discern a clear and straightforward application to the facts that is fairly presented.").

it would grant the Government's motion for an upward variance prior to giving him the opportunity to allocute. Fourth, Mr. Morrison, joined by Ms. Walker, argues the district court's cumulative errors warrant resentencing. Fifth, Mr. Morrison, joined by Ms. Walker, contends the district court imposed a substantively unreasonable sentence by sentencing him to a 300-month term of imprisonment, a major upward variance from a Guidelines sentence.

II. DISCUSSION

Ms. Walker and Mr. Morrison raise ten arguments on appeal, challenging both their convictions and sentences. We address the arguments in two parts, first considering Ms. Walker's and Mr. Morrison's arguments directed at their convictions and then turning to their arguments challenging their sentences.

A. Challenges to Convictions

1. Unconstitutional Vagueness

Ms. Walker, joined by Mr. Morrison, argues the statute under which she was convicted, Okla. Stat. tit. 21, § 843.5(B) (2019), is unconstitutionally vague because the statute provides no direction as to how to distinguish between felony and misdemeanor offenses of enabling child abuse and the associated punishments. Mr. Morrison contends Ms. Walker's unconstitutional vagueness argument applies equally to the subsection of § 843.5 under which he was convicted, § 843.5(A). We reject both defendants' claims.

a. *Standard of review*

Ms. Walker and Mr. Morrison concede they did not raise this issue before the district court, so it is subject to plain error review. *See* Walker's Br. at 13; Morrison's Notice of Joinder at 2; *United States v. Gonzalez-Jaquez*, 566 F.3d 1250, 1251 (10th Cir. 2009); *see also* Fed. R. Crim. P. § 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). Establishing the district court plainly erred is a heavy lift, and "the burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). To assess if Ms. Walker and Mr. Morrison have established entitlement to relief for plain error, we apply a four-prong test: (1) "there must be an error or defect . . . that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant," *Puckett v. United States*, 556 U.S. 129, 135 (2009); (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute," *id.*; (3) "the error must have affected the appellant's substantial rights," *id.*; and (4) the error must "'seriously affect the fairness, integrity or public reputation of judicial proceedings,'" *id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). "We will not reverse a conviction for plain error unless all four prongs of the plain-error test are satisfied." *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quotation marks omitted). However, "we apply the plain error rule less rigidly when reviewing a potential constitutional error." *United States v. Salas*, 889 F.3d 681, 687 (10th Cir. 2018) (internal quotation marks omitted).

b. Analysis

Ms. Walker and Mr. Morrison have not satisfied their burden on the first prong of plain error review to demonstrate an error by the district court. Based on the text of the statute and Oklahoma law defining misdemeanor and felony offenses, we conclude neither § 843.5(A) nor § 843.5(B) are unconstitutionally vague. Ms. Walker's and Mr. Morrison's arguments rest on an erroneous interpretation of the punishment clauses in § 843.5(A) and (B). When read in context, § 843.5(A) and (B) plainly describe *only* felony offenses and are not rendered unconstitutionally vague by giving district courts wide discretion in sentencing.

The Fifth Amendment to the United States Constitution protects individuals' right to due process, stating that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Davis*, 139 S. Ct. 2319, 2323 (2019) ("In our constitutional order, a vague law is no law at all."). A criminal statute is unconstitutionally vague when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Grayned*, 408 U.S. at 108 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). "Applying this standard, the [Supreme] Court has invalidated two kinds of criminal laws as 'void for vagueness': laws that *define*

criminal offenses and laws that *fix the permissible sentences* for criminal offenses." *Beckles v. United States*, 580 U.S. 256, 262 (2017). First, statutes defining criminal offenses are unconstitutionally vague if they do not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* Second, laws setting the sentencing range for criminal offenses are unconstitutionally vague if they do not "specify the range of available sentences with 'sufficient clarity.'" *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). The Supreme Court has rejected vagueness claims that do not fall within this "limited scope of the void-for-vagueness doctrine." *Id.* at 263.

"A law can be unconstitutionally vague on its face or in application." *United States v. Rodebaugh*, 798 F.3d 1281, 1294 (10th Cir. 2015). We have held that "a court will consider a law's facial vagueness only if it threatens First Amendment interests or if the challenge is made before enforcement." *Id.* at 1294–95. Where a statute does not threaten First Amendment interests and the challenge is not brought prior to enforcement, "vagueness challenges . . . 'must be examined in the light of the facts of the case at hand.'" *United States v. Wells*, 38 F.4th 1246, 1258 (10th Cir. 2022) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). Ms. Walker and Mr. Morrison do not argue § 843.5(A) and (B) threaten their First Amendment interests and did not bring a challenge prior to enforcement. Accordingly, we address their arguments "in the light of the facts" of their cases. *Id.* (quoting *Mazurie*, 419 U.S. at 550).

Ms. Walker and Mr. Morrison argue that § 843.5(A) and (B) are unconstitutionally vague because they do not give ordinary people fair notice of whether the conduct of conviction is proscribed as a misdemeanor, subject to one year's imprisonment, or as a felony, subject to life imprisonment. They further contend that § 843.5(A) and (B) give the prosecution unfettered discretion to charge individuals with misdemeanors or felonies, subject to drastically different punishments, based on identical elements. In making this argument, Ms. Walker and Mr. Morrison assume that § 843.5(A) and (B) describe both misdemeanor and felony offenses. The Government does not dispute this characterization of the statute in its responsive brief. However, the Supreme Court and this court have recognized appellate courts are not bound by the government's concessions or stipulations on questions of law when reviewing alleged errors by the district court on appeal. *See Young v. United States*, 315 U.S. 257, 258–59 (1942) (noting that despite concession by the government, "our judicial obligations compel us to examine independently the errors confessed"); *United States v. Hurlich*, 293 F.3d 1223, 1227 (10th Cir. 2002) ("A party's concession, however, cannot compel us to reverse a district court's decision."); *United States v. Furman*, 112 F.3d 435, 438 n.2 (10th Cir. 1997) (determining this court "[wa]s not constrained by the government's ill-considered concession"). Based on the plain language of the statute and Oklahoma law, we conclude that § 843.5(A) and (B) describe only felony offenses.

Section 843.5(A), the subsection under which Mr. Morrison was convicted, states:

> Any parent or other person who shall willfully or maliciously engage in child abuse shall, upon conviction, *be guilty of a felony* punishable by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment.

(Emphasis added). Section 843.5(B), the subsection under which Ms. Walker was convicted, states:

> Any parent or other person who shall willfully or maliciously engage in enabling child abuse shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00) or both such fine and imprisonment.

All parties seem to assume that a charge under § 843.5(A) or (B) could be brought as a felony or a misdemeanor because the statute states child abuse shall be "punishable by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year," Okla. Stat. tit. 21, § 843.5(A), and enabling child abuse shall "be punished by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year," Okla. Stat. tit. 21, § 843.5(B). This assumption is not warranted by the text of the statute or by Oklahoma precedent.

Section 843.5(A), the subsection of the statute under which Mr. Morrison was convicted, dispels this theory expressly by stating that "[a]ny person who shall willfully or maliciously engage in child abuse, as defined in this section, shall, upon

conviction, *be guilty of a felony*." (Emphasis added). The statute makes no mention of a misdemeanor. *See id.* Accordingly, there is no merit in Mr. Morrison's attempt to adopt Ms. Walker's argument to show that his statute of conviction is unconstitutionally vague. The offense of engaging in child abuse is expressly categorized as a felony. We therefore reject Mr. Morrison's vagueness argument.

Section 843.5(B), in contrast, does not expressly refer to the offense of enabling child abuse as a felony. Nevertheless, the offense in § 843.5(B) fits Oklahoma's statutory definition of a felony and not its definition of a misdemeanor. Oklahoma's Criminal Code defines "felony" as "a crime which is, *or may be*, punishable with death, or by imprisonment in the penitentiary." Okla. Stat. tit. 21, § 5 (emphasis added). The Oklahoma Supreme Court has interpreted "imprisonment in the penitentiary," *id.*, to refer to "imprisonment in the state prison," *Braly v. Wingard*, 326 P.2d 775, 776 (Okla. 1958). And Oklahoma's Criminal Code states that "[e]very *other* crime is a misdemeanor." Okla. Stat. tit. 21, § 6 (emphasis added). Accordingly, crimes that are punishable by imprisonment in the state prison are felonies; crimes that are not punishable by imprisonment in the state prison are misdemeanors. Oklahoma's statutory definitions further provide that, if a crime is a felony, it cannot also be a misdemeanor. Because a conviction under § 843.5(B) may

be punished by imprisonment in the state prison, it is categorically a felony under Oklahoma law. Okla. Stat. tit. 21, § 843.5(B).[4]

We previously considered whether an Oklahoma statute with a similar punishment clause defined a felony in an unpublished order and judgment, *United States v. Maxwell*, 492 F. App'x 860 (10th Cir. 2012) (unpublished).[5] In *Maxwell*, the appellant argued he did not have three predicate violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), because his previous Oklahoma conviction for "assault with a dangerous weapon" was not a felony. *Maxwell*, 492 F. App'x at 867–68. Specifically, Mr. Maxwell contended he had not been convicted of a felony because his statute of conviction, Okla. Stat. tit. 21, § 645 (1981), was "punishable by imprisonment in the penitentiary not exceeding five (5) years, or by imprisonment in a county jail not exceeding one (1) year." *Maxwell*, 492 F. App'x at 868 (quoting Okla. Stat. tit. 21, § 645 (1981)). Relying on Oklahoma's own interpretation of its felony definition, we determined Mr. Maxwell's conviction was for a felony because "Oklahoma law holds that it is the potential punishment—not the actual punishment—that is used to determine whether a conviction is a

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[4] The same analysis applies to § 843.5(A) which, in addition to expressly stating the offense is a felony, allows for punishment by imprisonment in the state prison. *See* Okla. Stat. tit. 21, § 843.5(A).

[5] Although not precedential, we find the reasoning of this court's unpublished opinions instructive. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

felony." *Id.* (citing *Braly*, 326 P.2d at 776). Although Mr. Maxwell was sentenced to only 6 months in the county jail, the panel concluded he had been convicted of a felony because the potential punishment included up to five years in prison. *See id.* We interpreted the statute's punishment clause as outlining the potential punishments available, not distinguishing between a misdemeanor and felony offense. *See id.*

Just like the statute at issue in *Maxwell*, § 843.5(B) sets out a felony offense because the *potential* punishment is up to life imprisonment. *See Braly*, 326 P.2d at 776 ("It is not the actual punishment imposed but the extent to which punishment may be imposed which controls . . . whether the crime is a felony."). Accordingly, it describes a felony offense. *See id.* Indeed, § 843.5(B) is not an anomaly—sentencing ranges where an individual may be sentenced to a term under a year in county jail or over a year in state prison are common in Oklahoma statutes defining *felonies*, as terms of incarceration over a year are not served in county jails. *See, e.g.*, Okla. Stat. tit. 21, § 644(D) (stating assault and battery upon an intimate partner or a family or household member "with any sharp or dangerous weapon" is "a felony and punishable by imprisonment in the custody of the Department of Corrections not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year"); Okla. Stat. tit. 21, § 722 ("Any person guilty of manslaughter in the second degree shall be guilty of a felony punishable by imprisonment in the State Penitentiary not more than four (4) years and not less than two (2) years, or by imprisonment in a county jail not exceeding one (1) year."); Okla. Stat. tit. 21, § 1163 (stating individual who unlawfully interferes with a place of burial "shall be

guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding two (2) years, or in a county jail not exceeding six (6) months."); Okla. Stat. tit. 21, § 647 ("Aggravated assault and battery shall be punished by imprisonment in the State Penitentiary not exceeding five (5) years, or by imprisonment in a county jail not exceeding one (1) year.").

Our review of the Oklahoma statutes and case law, as well as our prior decision in *Maxwell,* allows us to confidently conclude that § 843.5(A) and (B) do not describe both misdemeanor and felony offenses subject to different punishments. Rather, both subsections of the statute describe felony offenses subject to wide sentencing ranges. This wide discretion in sentencing, ranging from a $500 fine to life imprisonment, does not render the statute void for vagueness. The Supreme Court has stated that it "has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Beckles*, 580 U.S. at 263 (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005)). A statute is unconstitutionally vague based on its sentence fixing provision only if it fails to "specify the range of available sentences with 'sufficient clarity.'" *Id.* at 262 (quoting *Batchelder*, 442 U.S. at 123). Sections 843.5(A) and (B) both specify with sufficient clarity that the sentencing ranges for the felony offenses of child abuse and enabling child abuse are from a fine of $500 to life imprisonment. *See* Okla. Stat. tit. 21, § 843.5(A); Okla. Stat. tit. 21, § 843.5(B). Accordingly, the sentence fixing provisions in § 843.5(A) and (B) are not unconstitutionally vague.

2. Proposed Jury Instruction on Misdemeanor or Felony Offenses

Based on their theory that § 843.5(A) and (B) allow for misdemeanor or felony convictions, Ms. Walker and Mr. Morrison also argue the district court erred by not submitting an instruction to the jury asking it to determine whether their conduct constituted misdemeanors or felonies.

Ms. Walker and Mr. Morrison argue they preserved this issue for review when they jointly proposed jury instructions prior to trial which included questions asking the jury whether Ms. Walker and Mr. Morrison were guilty of misdemeanors or felonies. The Government counters that, despite submitting the proposed jury instructions prior to trial, Ms. Walker and Mr. Morrison waived the ability to seek appellate review of this issue by stating they had no objections when the district court asked if there were any objections to its proposed jury instructions, reviewing the instructions line by line. "Merely tendering jury instructions, without any further objection, is insufficient to preserve issues related to those jury instructions." *United States v. Lawrence*, 405 F.3d 888, 897 (10th Cir. 2005). Because Ms. Walker and Mr. Morrison did not object to the district court's proposed jury instructions at trial, the alleged error is at most subject to plain error review. Where Ms. Walker's and Mr. Morrison's argument "fails even applying plain error review," we need not decide whether the argument is waived entirely. *United States v. Eddy*, 523 F.3d 1268, 1270 (10th Cir. 2008).

Ms. Walker and Mr. Morrison have not met their burden on prong one of plain error review because, as discussed above, § 843.5(A) and (B) describe only felony

offenses. Thus, the district court did not err by not asking the jury to determine whether Ms. Walker and Mr. Morrison committed misdemeanors or felonies.

3. Jury Instruction on "Accidental" Injury and "Ordinary Force as a Means of Discipline" Exceptions to Child Abuse

Next, Ms. Walker argues that based on the definitions of "abuse" and "harm or threatened harm to the health or safety of a child" under the Oklahoma Children's Code, Okla. Stat. tit. 10A, § 1-1-105(2) (2019), she was entitled to a jury instruction stating that "ordinary force as a means of discipline," and "[]accidental physical or mental injury," Okla Stat. Ann. tit. 10A, § 1-1-105(2), are not considered child abuse under her statute of conviction, Okla. Stat. tit. 21, § 843.5(B). Ms. Walker concedes she did not raise this issue before the district court, so it is subject to plain error review. Walker's Br. at 17. Ms. Walker has not met her prong one burden of demonstrating the district court erred because § 843.5(B), the statute under which Ms. Walker was convicted, contains its own definition of child abuse and does not adopt the definition, or exceptions, from § 1-1-105(2).

Section 843.5(B), under which Ms. Walker was convicted, defines "enabling of child abuse" as:

> the causing, procuring or permitting of a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare of a child under eighteen (18) years of age by another. As used in this subsection, "permit" means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse as proscribed by this subsection.

This definition implicitly defines child abuse as "a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare of a child under eighteen (18) years of age." *Id.*

Oklahoma Stat. tit. 10A, § 1-1-105, the statute upon which Ms. Walker relies for this argument, sets out definitions for the Oklahoma Children's Code, which governs the removal of children from their parents' custody, the termination of parental rights, the responsibilities of the Oklahoma Department of Human Services, and related issues. Section 1-1-105(2) defines "abuse" as

> harm or threatened harm to the health, safety, or welfare of a child by a person responsible for the child's health, safety, or welfare, including but not limited to nonaccidental physical or mental injury, sexual abuse, or sexual exploitation. Provided, however, that nothing contained in the Oklahoma Children's Code shall prohibit any parent from using ordinary force as a means of discipline including, but not limited to, spanking, switching, or paddling.

Section 1-1-105(2)(a) also defines "[h]arm or threatened harm to the health or safety of a child" as "any real or threatened physical, mental, or emotional injury or damage to the body or mind that is not accidental including but not limited to sexual abuse, sexual exploitation, neglect, or dependency."

The instructions submitted to the jury for Ms. Walker's two counts of enabling child abuse in Indian country stated:

> To find [Ms.] Walker guilty of this crime you must be convinced that the Government has proven each of the following beyond a reasonable doubt:
> First: [Ms.] Walker was responsible for R.T.'s health, safety or welfare;
> Second: [Ms.] Walker willfully or maliciously permitted;
> Third: a willful or malicious act of harm by another person;

> Fourth: to the health, safety or welfare of R.T., a child under the age of eighteen; . . .
> Permit means: to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse.

Walker ROA Vol. I at 215.

Ms. Walker argues these jury instructions were missing two elements of conviction under § 843.5(B): (1) that the act of harm had to be "nonaccidental" and (2) that the act of harm was not "ordinary force as a means of discipline." Walker's Reply at 7 (quoting Okla. Stat. tit. 10A § 1-1-105(2)). Ms. Walker and the Government both assume in their arguments on appeal that the definitions of "abuse" and "[h]arm or threatened harm to the health or safety of a child" under § 1-1-105(2) are applicable to Ms. Walker's conviction for enabling child abuse under § 843.5(B). *See* Walker's Br. at 17–18; Appellee's Br. at 30–33 (Walker). This assumption is not warranted.[6]

Section 843.5(B), the statute under which Ms. Walker was convicted, includes its own definition of child abuse and does not cross-reference the definitions of "abuse" or "[h]arm or threatened harm to the health or safety of a child" under § 1-1-105(2). *See* Okla. Stat. tit. 21, § 843.5(B). This is notable considering other

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[6] Although the Government appears to concede that the definitions of "abuse" and "[h]arm or threatened harm to the health or safety of a child" under § 1-1-105(2) are applicable to Ms. Walker's conviction, "our judicial obligations compel us to examine independently" the error Ms. Walker alleges the district court committed. *Young v. United States*, 315 U.S. 257, 258–59 (1942); *see also United States v. Furman*, 112 F.3d 435, 438 n.2 (10th Cir. 1997) (determining this court "[wa]s not constrained by the government's ill-considered concession").

offenses listed under § 843.5, such as child neglect, specifically refer to definitions under § 1-1-105, while § 843.5(B) instead provides its own definition of child abuse. *Compare* Okla. Stat. tit. 21, § 843.5(B) (providing definition of "enabling child abuse" without referring to definition under § 1-1-105) *with* Okla. Stat. tit. 21, § 843.5(C) (defining "child neglect" as "the willful or malicious neglect, as defined by Section 1-1-105 of Title 10A of the Oklahoma Statutes, of a child under eighteen (18) years of age by another").

Again, our reading is supported by Oklahoma precedent. The Oklahoma Supreme Court has determined in analyzing other subsections of § 843.5 that the Oklahoma Legislature's decision to cross-reference definitions from § 1-1-105 in some places, but not in others, suggests the definitions from § 1-1-105 should be imported to § 843.5 only where the statute expressly cross-references § 1-1-105. *See State v. Green*, 474 P.3d 886, 889 (Okla. 2020) (determining § 843.5(C) did not adopt definition of "child" from § 1-1-105 because "[j]ust as the Legislature specifically referenced the definition of 'neglect,' so too would it have specifically incorporated the definition of 'child,' had it intended that both these definitions inform the criminal neglect statute").

The legislative history provides further evidence that § 843.5(B) does not incorporate the definitions of "abuse" and "[h]arm or threatened harm to the health or safety of a child" from § 1-1-105. Section 843.5(B) previously cross-referenced § 1-1-105(2), but, in 2014, the Oklahoma Legislature amended § 843.5(B), removing the cross-reference to § 1-1-105(2) and replacing it with a definition of child abuse

specific to § 843.5(B). *Compare* Okla. Stat. tit. 21, § 843.5(B) (2013) ("'[E]nabling child abuse' means the causing, procuring or permitting of a willful or malicious act of child abuse, as defined by paragraph 2 of Section 1-1-105 of Title 10A of the Oklahoma Statutes, of a child under eighteen (18) years of age by another.") *with* Okla. Stat. tit. 21, § 843.5(B) (2014) ("'[E]nabling child abuse' means the causing, procuring or permitting of a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare of a child under eighteen (18) years of age by another.").

Ms. Walker cites only the definitions of "abuse" and "[h]arm or threatened harm to the health or safety of a child" under § 1-1-105(2) to support her argument that the district court should have instructed the jury to consider the "accidental" and "ordinary force as a means of discipline" exceptions to the definition of child abuse.[7] *See* Walker's Br. at 17–18; Walker's Reply at 7–10. Because these statutory definitions are not applicable to her statute of conviction, she has not demonstrated

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[7] Two separate statutory provisions, §§ 843.5(L) and 844, describe an exception for "ordinary force as a means of discipline" to § 843.5(B), but Ms. Walker does not raise §§ 843.5(L) and 844 in her arguments on appeal, and we will not make the argument for her. *See United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011) (noting we "cannot make arguments for [the appellant]"); *see also* Okla. Stat. tit. 21, § 843.5(L) ("[N]othing contained in this section shall prohibit any parent or guardian from using reasonable and ordinary force pursuant to Section 844 of this title."); Okla. Stat. tit. 21, § 844 ("[N]othing contained in this act shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling.").

the district court erred, or plainly erred, by not giving the jury instructions on these exceptions.

4. Sufficiency of the Evidence

Ms. Walker argues the district court erred by denying her motion for acquittal because the prosecution did not produce sufficient evidence to satisfy the knowledge element of enabling child abuse under § 843.5(B).

a. Standard of review

"We review . . . the sufficiency of the evidence to support a conviction or the denial of a defendant's motion for judgment of acquittal de novo." *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (alteration in original) (quotation marks omitted). "This review is highly deferential, meaning we consider the evidence and make reasonable inferences in the light most favorable to the Government." *United States v. Burtrum*, 21 F.4th 680, 685–86 (10th Cir. 2021) (internal quotation marks omitted). We do "not weigh conflicting evidence or consider witness credibility." *Id.* at 686 (quotation marks omitted). "[W]e will reverse the conviction only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted). "The evidence, together with the reasonable inferences to be drawn therefrom, must be substantial, but it need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt." *Rufai*, 732 F.3d at 1188 (quotation marks omitted). "[W]e will not uphold a conviction . . . that was obtained by nothing more than piling inference upon inference . . . or where the evidence raises no more than a mere

suspicion of guilt." *Id.* (second and third alterations in original) (quotation marks omitted).

b. Analysis

Ms. Walker argues the Government produced insufficient evidence to demonstrate she had knowledge of the risk of entrusting R.T. to Mr. Morrison's care to satisfy the elements of either of the two counts of enabling child abuse for which she was convicted. We reject Ms. Walker's argument, concluding the Government produced sufficient evidence for a rational juror to find beyond a reasonable doubt that Ms. Walker knew or reasonably should have known of the risk of leaving R.T. with Mr. Morrison in December 2019 and February 2020.

Ms. Walker was convicted on two counts of enabling child abuse under § 843.5(B). The first count was based on Ms. Walker "willfully and maliciously . . . permitting the abuse of R.T. . . . by allowing [Mr.] Morrison to physically injure R.T." "[o]n or about February 18, 2020." Walker ROA Vol. I at 43. This count was based on the abuse of R.T. leading to his hospitalization on February 18, 2020. The second count alleged Ms. Walker "willfully and maliciously . . . permit[ted] the abuse of R.T. . . . by allowing [Mr.] Morrison to physically injure R.T. . . . "[o]n or about December 15, 2019." *Id.* at 45. This count was based on Mr. Morrison slapping R.T. and leaving a handprint-shaped bruise in December 2019.

To convict Ms. Walker on these two counts of enabling child abuse, the jury had to determine the Government proved beyond a reasonable doubt that Ms. Walker (1) "willfully or maliciously . . . caus[ed], procur[ed] or permit[ted]" (2) "a willful or

malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare" (3) "of a child under eighteen (18) years of age" (4) "by another." Okla. Stat. tit. 21, § 843.5(B). Within these elements, to "'permit' means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse as proscribed by this subsection." *Id.*

Ms. Walker's insufficiency of the evidence argument is directed at the "knows or reasonably should know" element of the offense. The prosecution had the burden of demonstrating that when Ms. Walker left R.T. in Mr. Morrison's care in December 2019 and February 2020, Ms. Walker "kn[ew] or reasonably should [have] know[n]" that "authoriz[ing] or allow[ing] for the care of [R.T.] by [Mr. Morrison]" "placed [R.T.] at risk" of "a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to [his] health, safety, or welfare." *Id.* Notably, the Government did not have to prove that Ms. Walker knew Mr. Morrison would abuse R.T. Instead, the Government needed to prove only that she knew or reasonably should have known of the "risk" of Mr. Morrison abusing R.T. *Id.* We review the evidence produced to support Ms. Walker's two counts of enabling child abuse in chronological order, starting with Count Two, which is based on events that took place earlier in time.

i. Count Two: December 2019 abuse

The strongest evidence showing Ms. Walker had knowledge of the risk of leaving R.T. in Mr. Morrison's care prior to December 2019 is testimony about what

witnesses referred to as the "pizza incident." Morrison ROA Vol. III at 150. Ms. Partain, Ms. Webb, Ms. Walker, and Ms. Walker's minor daughter, M.L., all testified about the pizza incident, but because Ms. Partain's testimony described the pizza incident in the way most favorable to the Government, we recount Ms. Partain's testimony here. *See Burtrum*, 21 F.4th at 685–86. Ms. Partain testified that the month after Mr. Morrison moved in with Ms. Walker, in August 2019, "very early on in [Ms. Walker and Mr. Morrison's] relationship," Mr. Morrison was attempting to feed R.T. pizza, but R.T. "was a terribly picky eater" and "did not want the pizza." *Id.* at 182. Ms. Partain testified that "Mr. Morrison decided that [R.T.] had to have [the pizza] and continued shoving it into [R.T.'s] mouth, and [R.T.] was choking and crying." *Id.* Ms. Partain "yelled at [Mr. Morrison] to stop because [R.T.] was crying," and R.T. was choking "[b]ecause [the pizza] was being force fed to him." *Id.* at 183. According to Ms. Partain, Ms. Walker was in the living room when Mr. Morrison was force feeding pizza to R.T. and she saw R.T. choking and crying. Ms. Partain testified that despite witnessing Mr. Morrison's acts, "[Ms. Walker] left the room, immediately went to her bedroom and closed the door. When [Ms. Partain] went to check on [Ms. Walker], [Ms. Walker] said she didn't want to hear [R.T.] crying." *Id.* at 201. Ms. Partain reported that after this incident, Ms. Walker still left R.T. in Mr. Morrison's care. Ms. Partain further testified that during the investigation following R.T.'s hospitalization, Ms. Walker instructed Ms. Partain "not to tell [the police] about the pizza incident." *Id.* at 184–85.

Ms. Partain's testimony was sufficient to demonstrate Ms. Walker had knowledge of the risk associated with leaving R.T. in Mr. Morrison's care prior to December 2019. Based on Ms. Partain's testimony, a jury could reasonably find that Mr. Morrison's forcibly feeding R.T. pizza to the point R.T., who was two years old at the time, was choking and crying was "a willful or malicious act of harm." *See* Okla. Stat. tit. 21, § 843.5(B). Further, because Ms. Partain testified that Ms. Walker witnessed the pizza incident and later instructed Ms. Partain not to tell the police about it, the jury could have reasonably inferred that Ms. Walker recognized that Mr. Morrison was willfully harming R.T. And if the jury believed Ms. Partain's testimony that Ms. Walker had witnessed Mr. Morrison willfully or maliciously harm R.T. as early as August 2019, the jury could have rationally found beyond a reasonable doubt that Ms. Walker should have reasonably known that R.T. was at risk of further harm from Mr. Morrison when she left R.T. in Mr. Morrison's care in December 2019.

ii. Count One: February 2020 abuse

There was even more evidence demonstrating that, by February 2020, Ms. Walker knew or reasonably should have known that allowing Mr. Morrison to care for R.T. placed R.T. at risk of abuse. *See id.* In addition to Ms. Partain's testimony about the pizza incident, the Government produced evidence that (1) Ms. Partain expressed concern to Ms. Walker about a handprint-shaped bruise on R.T.'s face in December 2019, and (2) when confronted with the seriousness of

R.T.'s injuries following his February 2020 hospitalization, Ms. Walker minimized or made excuses for R.T.'s injuries.

Ms. Partain testified that in December 2019, "[R.T.] came over to [her] house with a very dark bruise handprint on the side of his face stretching up to his earlobe." Morrison ROA Vol. III at 179. Ms. Partain photographed R.T. because she was worried about the bruise, and it looked like a handprint to her. She was also concerned with small bruises on R.T.'s buttocks and photographed these as well. The Government presented Ms. Partain's photographs of the bruising on R.T. in December 2019, as evidence to the jury. Ms. Partain testified that when she asked Ms. Walker about the bruise on R.T.'s face, Ms. Walker explained that "Mr. Morrison had a night terror where he rolled over and smacked [R.T.] in the face." *Id.* at 182. According to Ms. Partain, Ms. Walker told her the bruise on R.T.'s buttocks was from him falling off his bed. Ms. Partain further testified that after the investigation of R.T.'s injuries began, Ms. Walker instructed her not to tell the police about Mr. Morrison hitting R.T. during a night terror.

The Government also presented evidence from which the jury could infer that Ms. Walker's behavior during the Child Crisis Unit's investigation of R.T.'s injuries demonstrated she knew that R.T. was being abused. Detective Hays, a detective with the Child Crisis Unit, testified that when he confronted Ms. Walker with photographs of R.T.'s severe injuries, Ms. Walker "kind of started to minimize the injuries" and stated that R.T.'s injuries were not the result of abuse but "were just normal injuries and that [R.T.] gets these all the time." *Id.* at 231. Detective Hays testified R.T.'s

injuries were some of the worst he had seen in his career investigating child abuse as far as multitude, stating "just the multitude, we do not get cases [like] this much [] where [a] child ha[d] this many injuries." *Id.* at 247. Dr. Beeson also testified that R.T. had suffered blunt force trauma to his liver and pancreas, injury to his kidney, had suffered from internal bleeding, and had bruising in places that were not typical of children's accidental injuries. Dr. Beeson testified that when she was interviewing Ms. Walker, Ms. Walker told her R.T. "had a two or three month history of easy bruising that [Ms. Walker] had noticed, and [Ms. Walker] was worried about leukemia." *Id.* at 318. Dr. Beeson testified that based on R.T.'s labs and examination, he had no bleeding disorder that would explain his bruising.

This evidence collectively was sufficient for a juror to have rationally concluded beyond a reasonable doubt that Ms. Walker knew or should have known that "authoriz[ing] or allow[ing] for the care of [R.T.] by [Mr. Morrison]" placed R.T. at risk of abuse on February 18, 2020. Okla. Stat. tit. 21, § 843.5(B). Ms. Partain, Detective Hays, and Dr. Beeson all testified about Ms. Walker making excuses for R.T.'s injuries, and the severity of those injuries was documented by the photographs the Government produced as evidence. From this, jurors could have reasonably concluded that Ms. Walker was engaged in a pattern of covering for Mr. Morrison's abuse.

Ms. Walker argues the pictures of R.T.'s December 2019 injuries and Ms. Partain's testimony about the incident do not demonstrate she had knowledge of the risk of leaving R.T. with Mr. Morrison because she told Ms. Partain that the

bruise was caused by Mr. Morrison hitting R.T. during a night terror. But the jury did not have to believe Ms. Walker's night terror story, or that she believed it. Indeed, Ms. Partain's testimony that Ms. Walker directed her not to tell the police about the night terror injury could have demonstrated to the jury that Ms. Walker was aware that the story was implausible and it was more likely that Mr. Morrison had been harming R.T.

In sum, the Government produced sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Ms. Walker "kn[ew] or reasonably should [have] know[n]" that "authoriz[ing] or allow[ing] for the care of [R.T.] by [Mr. Morrison]" placed R.T. at risk of "a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to [his] health, safety, or welfare" when Mr. Morrison abused R.T. in December 2019 and February 2020. *Id.*

5. Cumulative Error

Ms. Walker contends the "[c]umulation of the unfettered discretion given by [§] 843.5(B), . . . the trial court's failure to instruct the jury regarding the legal exceptions to the definition of abuse, its rejection of Ms. Walker's proposed jury instruction, and insufficient evidence to support the conviction . . . should give this Court enough reason to vacate Ms. Walker's conviction." Walker's Br. at 22. "Cumulative error is present when the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Herrera*, 51 F.4th 1226, 1288 (10th Cir.

2022) (internal quotation marks omitted). "[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990). Because we have concluded each of Ms. Walker's individual error arguments are unavailing, she cannot show cumulative error.

B. Challenges to Sentences

1. *Apprendi* Argument

Ms. Walker argues that based on the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the district court plainly erred in violation of the Sixth Amendment by not submitting to the jury the question of whether Ms. Walker was aware of the potential severity of Mr. Morrison's abuse of R.T. Specifically, Ms. Walker posits the district court had to submit this question to the jury because the district court relied on the severity of R.T.'s injuries to apply a seven-level enhancement pursuant to USSG §2A2.2(b)(3)(C) and as part of its justification for granting the Government's motion for an upward variance from a Guidelines sentence. Ms. Walker concedes that she did not raise this issue before the district court, so it is subject to plain error review.

Ms. Walker fails to meet her burden on the first prong of plain error review because her argument is not supported by *Apprendi* or *Alleyne*. In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." 530 U.S. at 490. The

Court noted that even when a legislature refers to something as a "sentencing factor," "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. In *Alleyne*, the Court applied this inquiry to facts that increase the mandatory minimum sentence, determining that "[m]andatory minimum sentences increase the penalty for a crime," so "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *See Alleyne*, 570 U.S at 103. In summary, through *Apprendi* and *Alleyne*, the Supreme Court has held that any fact that raises the mandatory minimum or maximum sentence for a crime is an element of conviction and must be proven to a jury beyond a reasonable doubt.

The Court admonished in both *Apprendi* and *Alleyne,* however, that facts simply contributing to sentencing decisions need not be found by a jury. In *Apprendi*, the Court clarified that it was not suggesting that it "is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481; *see also id.* ("We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence[s] *within statutory limits* in the individual case."). In *Alleyne*, the Court reiterated this point, commenting that "[o]ur ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne*, 570 U.S. at 116.

Ms. Walker's statutory sentencing range under § 843.5(B) was from a $500 fine to life imprisonment, and she has not identified a fact that increased either her mandatory minimum or maximum potential sentence. Instead, Ms. Walker points to (1) the seven-level enhancement applied to her Guidelines offense level pursuant to USSG §2A2.2(b)(3)(C) based on the PSR's finding that R.T. sustained life-threatening bodily injury and (2) the district court's referring to the gravity of R.T.'s injuries in its analysis of the § 3553(a) factors and ultimately adopting an upward variance. She argues the district court's reliance on the severity of R.T.'s injuries in these two parts of its sentencing decision rendered the severity of R.T.'s injuries an element that had to be proven beyond a reasonable doubt to a jury. Neither *Apprendi* nor *Alleyne* support Ms. Walker's argument. It is also in conflict with the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005) and our post-*Booker* precedent.

In *Booker*, the Supreme Court held the Guidelines are "merely advisory provisions that recommend[], rather than require[], the selection of particular sentences in response to differing sets of facts," so "their use [does] not implicate the Sixth Amendment." *See Booker*, 543 U.S. at 233, 245. Accordingly, the district court's application of a seven-level enhancement under the Guidelines based on the severity of R.T.'s injuries does not implicate the Sixth Amendment concerns addressed in *Apprendi* and *Alleyne*. *See United States v. Cassius*, 777 F.3d 1093, 1097 (10th Cir. 2015) (holding that district court did not err when it "used its larger drug quantity finding solely as a sentencing factor to help determine Defendant's

sentence within the prescribed statutory range" without "increas[ing] Defendant's statutory sentencing range"). The district court's consideration of facts while weighing factors under § 3553(a) is similarly permissible under "the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233. In considering the severity of R.T.'s injuries in its decision to grant the Government's motion for an upward variance, the district court did not raise Ms. Walker's mandatory minimum sentence, or her maximum possible sentence, but exercised its broad discretion in imposing a sentence within the statutory range—$500 fine to life imprisonment. Accordingly, the district court did not err by not instructing the jury to determine whether Ms. Walker knew or should have known that Mr. Morrison's abuse of R.T. might lead to serious injuries.

2. USSG §3A1.3

Mr. Morrison, joined by Ms. Walker, argues the district court erred by applying a two-level enhancement pursuant to USSG §3A1.3 based on the victim being physically restrained during the course of the offense when Mr. Morrison force fed R.T. Ms. Walker adopts this argument, pointing to where she objected to the application of §3A1.3 before the district court. The district court applied the two-level enhancement to Mr. Morrison's and Ms. Walker's offense levels based on identical underlying factual findings. Accordingly, if the district court erred in applying the two level-enhancement for Mr. Morrison holding R.T. while force feeding him, it also erred in applying the two-level enhancement for Ms. Walker permitting Mr. Morrison to hold R.T. while force feeding him.

a. Standard of review

Mr. Morrison and Ms. Walker preserved this issue for appeal by raising their objections to the district court's application of §3A1.3 to their sentences before the district court.[8] When an appellant challenges the district court's application of an enhancement under the Guidelines, "we review factual findings for clear error, but to the extent the defendant asks us to interpret the Guidelines or hold that the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review." *United States v. Hamilton*, 587 F.3d 1199, 1222 (10th Cir. 2009) (quotation marks omitted). Mr. Morrison and Ms. Walker do not dispute the district court's factual findings; rather, they argue the district court's factual findings were insufficient as a matter of law to warrant application of the physical restraint enhancement. Accordingly, we review their challenge de novo.

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[8] While Mr. Morrison presented the same argument to the district court that he raises on appeal, Ms. Walker only cursorily stated in her motion for a downward variance that she "object[ed] to the inclusion of two (2) points for the restraining of R.T. . . . as that is [] not supported by the evidence at trial." Walker ROA Vol. I at 230–31. In her written objection to the PSR, and at her sentencing hearing, Ms. Walker challenged the application of §3A1.3 to her sentence on the basis she did not see Mr. Morrison restrain R.T. or know that R.T. had been restrained, a different argument than has been raised by Mr. Morrison on appeal. However, we treat the issue as preserved for both Mr. Morrison and Ms. Walker because the Government has waived the waiver by not arguing that Ms. Walker failed to preserve the argument and responding to it on the merits. *See* Appellee's Br. at 43–44 (Walker); *see also United States v. Rodebaugh*, 798 F.3d 1281, 1306 (10th Cir. 2015) (stating it was "textbook waiver or forfeiture of the waiver" where the government both failed to argue waiver in its responsive brief and addressed the argument on the merits).

b. Analysis

Under §3A1.3, a defendant is subject to a two-level enhancement if "a victim was physically restrained in the course of the offense." USSG §3A1.3. Mr. Morrison and Ms. Walker argue Mr. Morrison's holding of R.T. while forcing him to eat pizza did not amount to physical restraint and was too distant in time from the offense conduct to serve as the basis of an enhancement pursuant to §3A1.3. We reject Mr. Morrison's and Ms. Walker's argument, determining the district court relied on sufficient facts to conclude (1) Mr. Morrison "physically restrained" R.T. and (2) the physical restraint took place "in the course of the offense." USSG §3A1.3.

i. Physical restraint

Mr. Morrison and Ms. Walker argue the district court erred in determining Mr. Morrison physically restrained R.T. when Mr. Morrison placed his hands on R.T.'s wrist and chin and fed him pizza with force sufficient to cause R.T. to choke because this "fleeting hold" was not sufficient in "magnitude and duration" to be considered physical restraint under §3A1.3. Morrison's Br. at 15 .

The application notes for §3A1.3 refer to the definition of "physically restrained" under USSG §1B1.1. In turn, USSG §1B1.1 defines "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." USSG §1B1.1, comment, n.1(L). This court has adopted the plain meanings of "forcible" and "restraint" to further interpret this definition, determining "forcible" means the "use [of] physical force or another form of compulsion to achieve the restraint" and "restraint" means "the defendant's conduct must hold the

victim back from some action, procedure, or course, prevent the victim from doing something, or otherwise keep the victim within bounds or under control." *United States v. Checora*, 175 F.3d 782, 790–91 (10th Cir. 1999). We have also concluded the Guidelines' use of the language "such as" demonstrates that being "tied, bound, or locked up" are just some examples of physical restraint and that §3A1.3 is not limited to these factual scenarios. *United States v. Roberts*, 898 F.2d 1465, 1470 (10th Cir. 1990). And we have concluded §3A1.3 applies even when the physical restraint was "brief." *Checora*, 175 F.3d at 792.

The district court's factual findings fall within our definition of physical restraint. The court found Mr. Morrison "had his hand around R.T.'s wrist and chin," "prevented R.T. from moving [away] from the impediment to his breathing," "forcibly [fed] R.T. pizza," and that "the force with which [Mr. Morrison] fed R.T. pizza caused him to choke." Morrison ROA Vol. III at 26–27. These findings, unchallenged by either defendant, are sufficient to support a finding of "forcible restraint." *Checora*, 175 F.3d at 790. Specifically, Mr. Morrison's holding R.T.'s wrist and chin involved the "use [of] physical force . . . to achieve the restraint," *id.*, and Mr. Morrison's "prevent[ing] R.T. from moving [away] from the impediment to his breathing," Morrison ROA Vol. III at 27, "prevent[ed] [R.T.] from doing something, or otherwise ke[pt] [R.T.] within bounds or under control," *Checora*, 175 F.3d at 791.

Mr. Morrison and Ms. Walker argue that these acts were insufficient to show physical restraint because they were lesser in "magnitude and duration" than other

acts this court has previously determined satisfied §3A1.3. Mr. Morrison and Ms. Walker are correct that our prior decisions have often involved either a stronger use of force, typically holding a victim with some form of deadly weapon, or lengthier restraint. *See United States v. Ivory*, 532 F.3d 1095, 1106 (10th Cir. 2008) (determining victim was "physically restrained" where defendant rammed her vehicle, blocking her ability to drive, and shot at her); *Checora*, 175 F.3d at 791 (determining victim was physically restrained when defendants tackled victim to the ground and prevented him from escaping); *United States v. Fisher*, 132 F.3d 1327, 1329 (10th Cir. 1997) (determining defendant physically restrained bank's guard when he held a gun to the guard's head prohibiting him from interfering with robbery); and *Roberts*, 898 F.2d at 1470 (determining defendant physically restrained victim when he held victim around the neck at knife-point). Mr. Morrison's and Ms. Walker argument fails, however, because they do not explain why either a greater magnitude or duration are necessary for an enhancement under §3A1.3. Notably, this court has not relied on the length or severity of the restraint to determine a physical restraint occurred. Rather, we have determined a victim was physically restrained when the victim "was being kept within bounds or under control." *Ivory*, 532 F.3d at 1106; *see also Checora*, 175 F.3d at 791 (determining physical restraint enhancement applied when defendants "forcibly denied [victim] freedom of movement" despite the restraint being "brief"); *Fisher*, 132 F.3d at 1330 ("*Keeping someone from doing something* is inherent within the concept of restraint."). The district court's factual findings—that Mr. Morrison held R.T.'s wrist

and chin, prevented him from moving, and force fed him to the point of choking—were sufficient to show Mr. Morrison used force to keep R.T. under his control. Accordingly, Mr. Morrison and Ms. Walker have not demonstrated the district court erred in determining Mr. Morrison physically restrained R.T.

ii. In the course of the offense

Mr. Morrison and Ms. Walker also argue the district court erred by enhancing their offense levels under §3A1.3 because the pizza incident "occurred many months before the two instances of abuse for which Mr. Morrison [and Ms. Walker] w[ere] convicted." Morrison's Br. at 14. This court has interpreted §3A1.3's reference to "in the course of the offense," to "include[] any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct)." *United States v. Holbert*, 285 F.3d 1257, 1262–63 (10th Cir. 2002). Mr. Morrison conceded at oral argument that he was not challenging the district court's determination that Mr. Morrison forcibly feeding R.T. pizza was "relevant conduct" under Guideline §1B1.3. *See* Oral Argument at 6:57–7:18, *United States v. Morrison*, No. 22-5014 (10th Cir. May 18, 2023). Where Mr. Morrison admits that his forcibly feeding R.T. pizza was relevant conduct under §1B1.3, there is no basis to determine the pizza incident did not take place in "the course of the offense." USSG §3A1.3. Ms. Walker has offered no separate argument on the issue. Accordingly, we reject Mr. Morrison's and Ms. Walker's argument that Mr. Morrison's act of physically restraining R.T. did not take place in the course of the offense because it occurred four months prior to the conduct for which they were charged.

3. Allocution

Mr. Morrison[9] argues the district court plainly erred "by conclusively announcing it would vary upwards as requested by the government prior to giving Mr. Morrison the opportunity to allocute." Morrison's Br. at 17. Mr. Morrison concedes he did not object to the timing of his allocution before the district court, so plain error review applies. Morrison's Br. at 17. We conclude Mr. Morrison has demonstrated the district court erred but his challenge fails on prong two of plain error review because the district court's error was not plain.

a. Error

Federal Rule of Criminal Procedure 32(i)(4)(A) states that "[b]efore imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Rule 32 reflects "the common-law right of allocution," under which, "[a]s early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say

[9] Ms. Walker joins Mr. Morrison's argument, but not with sufficient specificity to allow us to consider her challenge. "We will allow [appellants] to adopt one another's arguments but only to the extent we can discern a clear and straightforward application to the facts that is fairly presented." *Renteria*, 720 F.3d at 1251. Ms. Walker's notice of joinder does not address the differences between her sentencing and Mr. Morrison's sentencing, including that the district court used different language when granting the Government's motion for an upward variance in her proceeding than in Mr. Morrison's, and that she proceeded to allocute and request a within Guidelines sentence after the district court's statement. Because Ms. Walker has not explained how Mr. Morrison's argument applies to her separate sentencing proceedings despite these significant differences, we consider only Mr. Morrison's allocution challenge.

before sentence was imposed required reversal." *Green v. United States*, 365 U.S. 301, 304 (1961). By guaranteeing each defendant the right to speak personally, Rule 32 recognizes "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* "Rule 32 provides a defendant with two rights: 'to make a statement in his own behalf, and to present any information in mitigation of punishment.'" *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1135 (10th Cir. 2017) (quoting *Green*, 365 U.S. at 304).

Our precedents recognize three different ways a district court may violate a defendant's right to allocute: (1) completely denying the defendant allocution; (2) conclusively stating a defendant's sentence prior to allowing the defendant to allocute; or (3) expressly limiting the scope of a defendant's allocution. *United States v. Jimenez*, 61 F.4th 1281, 1285–86 (10th Cir. 2023). With respect to the second of these categories, when the court states a defendant's sentence conclusively prior to allowing the defendant to allocute, it "effectively communicate[s] to [the defendant] that his sentence had already been determined, and that he would not have a meaningful opportunity to influence that sentence through his statements to the court." *United States v. Landeros-Lopez*, 615 F.3d 1260, 1268 (10th Cir. 2010). However, the district court may discuss the sentence it is planning to impose prior to allocution, so long as the court stops short of conclusively stating the defendant's sentence. *See United States v. Valdez-Aguirre*, 861 F.3d 1164, 1165 (10th Cir. 2017). The third category, an express limitation on the allocution, is also a violation because

under Rule 32, a defendant is entitled to "present *any* information to mitigate the sentence." *United States v. Jarvi*, 537 F.3d 1256, 1262 (10th Cir. 2008) (quoting Fed. R. Crim. P. 32(i)(4)(A)(ii)).

Mr. Morrison argues the district court's announcement that it would grant the Government's motion for an upward variance prior to allowing him to allocute violated his right to allocute by (1) conclusively stating his sentence prior to allowing him to allocute or (2) at a minimum, denying him the opportunity to argue for a Guidelines sentence.

Mr. Morrison's first argument is unavailing. In Mr. Morrison's case, after discussing the § 3553(a) factors at length, the district court stated that "the government's motion will be granted in terms of a request for an upward variance." Morrison ROA Vol. III at 39. Mr. Morrison contends the district court's statement was the equivalent to stating Mr. Morrison would be sentenced to 300 months—the exact upward variance sought in the Government's motion. But by stating "the government's motion will be granted *in terms of a request for an upward variance*," the district court stopped short of granting a specific variance. Morrison ROA Vol. III at 39 (emphasis added). And the district court's statement is distinguishable from statements this court has determined were "conclusive statements [that] effectively communicated to [the defendant] that his sentence had already been determined." *Landeros-Lopez*, 615 F.3d at 1268.

In *Landeros-Lopez*, we held the district court conclusively stated the defendant's sentence prior to allocution when it stated, "*[I]t is and will be* the

judgment of this Court that the defendant . . . is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 115 months." *Id.* at 1265. In *United States v. Slinkard*, 61 F.4th 1290 (10th Cir. 2023), we determined the district court conclusively stated a defendant's sentence prior to allowing him to allocute when it stated:

> Based upon the information provided by the parties, I will not vary from the advisory guideline level as the factors fail to separate this defendant from the minerun of similarly situated defendants. . . . There is no way in good conscience that I could ever allow this defendant to be among the public or near any child.

Id. at 1293. In *Slinkard*, the defendant's Guidelines range was life in prison, so any sentence that was not based on a variance from the Guidelines range was necessarily a life sentence. *See id.* at 1292. In both *Landeros-Lopez* and *Slinkard*, the district courts definitively stated the defendant's exact sentence prior to allowing the defendant to allocute. In contrast, the district court's statement here—that it would grant the Government's motion "in terms of an upward variance"—informed Mr. Morrison only that his sentence would be over the Guidelines range of 84 to 105 months. Morrison ROA Vol. III at 39.

Although the district court stopped short of conclusively stating Mr. Morrison's sentence, we agree with Mr. Morrison's second argument that the district court's statement that it would grant an upward variance implicitly denied him the opportunity to argue for a within Guidelines sentence. The district court did not say it was "tentatively" granting the Government's motion, or "intending" to grant the Government's motion; the district court conclusively stated Mr. Morrison

would be receiving a sentence above the Guidelines range. *See Valdez-Aguirre*, 861 F.3d at 1166–67. In *Jimenez*, this court contemplated a similar situation, where the district court, prior to giving the defendant an opportunity to allocute, stated, "Based upon the information provided by the parties, I will not vary from the advisory guideline level as the factors fail to separate this defendant from the minerun [sic] of similarly situated defendants; therefore, defendant's motion [for a downward variance] is denied." 61 F.4th at 1285. Mr. Jimenez argued that by making this statement prior to giving Mr. Jimenez the opportunity to allocute, the district court "denied [him] the meaningful opportunity to argue for a variant sentence below the guidelines in his allocution." *Id.* at 1288 (internal quotation marks omitted). The *Jimenez* court acknowledged that "the district court's statement at least implicitly limited the scope of Defendant's allocution." *Id.* at 1289 (emphasis omitted). However, the *Jimenez* court ultimately "assumed without deciding" that Mr. Jimenez had demonstrated his right to allocute had been violated, but held he failed to satisfy his burden on prong two of plain error review because any presumed error was not plain. *Id.* at 1289.

Based on this court's past holdings that (1) a court deprives a defendant the right to meaningfully allocute when it conclusively states the defendant's sentence prior to allocution; and (2) a court violates a defendant's right to allocute when it limits the scope of what a defendant can address in her allocution, the district court erred by definitively stating it would grant the Government's motion for an upward variance prior to giving Mr. Morrison the opportunity to allocute. Even though we

interpret the district court's statement as conclusively telling Mr. Morrison only that he would be sentenced to some term above the Guidelines range, this statement implicitly denied Mr. Morrison the opportunity to meaningfully address the Court with any argument that he should receive a within Guidelines sentence. *See Landeros-Lopez*, 615 F.3d at 1268 (explaining that by conclusively stating the defendant's sentence prior to allowing the defendant to allocute the court "effectively communicated to [the defendant] that his sentence had already been determined, and that he would not have a meaningful opportunity to influence that sentence through his statements to the court"); *Jarvi*, 537 F.3d at 1262 (stating a defendant is entitled to "present *any* information to mitigate the sentence" and that it is "important . . . to allow the defendant an opportunity to argue for a variance from the Guidelines range"). Accordingly, Mr. Morrison has met his burden on the first prong of plain error review.

b. Plain error

But Mr. Morrison has not met his burden to demonstrate the district court's error here was plain. "An error is plain if it is clear or obvious under current, well-settled law." *United States v. Thornburgh*, 645 F.3d 1197, 1208 (10th Cir. 2011) (internal quotation marks omitted). "A law is well-settled in the Tenth Circuit if there is precedent directly on point from the Supreme Court or the Tenth Circuit, or if there is a consensus in the other circuits." *United States v. Egli*, 13 F.4th 1139, 1146 (10th Cir. 2021).

Mr. Morrison's prong two argument relies on his contention that the district court's statement it would grant the Government's motion in terms of an upward variance amounted to a "conclusive announcement of [Mr. Morrison's] sentence" prior to allocution. Morrison's Reply at 2. If the district court's statement were a conclusive announcement of Mr. Morrison's sentence, then the district court plainly erred based on this court's holdings in *Landeros-Lopez* and *Slinkard*. *See Landeros-Lopez*, 615 F.3d at 1268 (determining district court erred by making "conclusive statements [that] effectively communicated to [the defendant] that his sentence had already been determined" prior to giving defendant an opportunity to allocute); *Slinkard*, 61 F.4th at 1296 (holding district court erred because the court's "statement definitively communicate[d] to the defendant that allocution [wa]s futile, thereby depriving the defendant of a meaningful opportunity to address the court").

As addressed above, however, the district court's statement in Mr. Morrison's sentencing proceeding is distinguishable from the statements in *Landeros-Lopez* and *Slinkard* because the district court stopped short of conclusively stating Mr. Morrison's actual sentence. Mr. Morrison has identified no previous Tenth Circuit or Supreme Court decision holding that a district court violates a defendant's right to allocute where it states it will grant a motion for an upward variance but does not announce the extent of the variance until after giving the defendant the opportunity to allocute. *Cf. Jimenez*, 61 F.4th at 1288 ("assum[ing] without deciding" the district court erred by stating it would not vary downward from a Guidelines sentence prior to allowing defendant to allocute but determining error was not plain

because of lack of controlling precedent). Accordingly, although we determine the district court erred by announcing it would grant the Government's motion for an upward variance prior to giving Mr. Morrison the opportunity to allocute, the error was not plain.

4. Cumulative Errors in Sentencing

Mr. Morrison, joined by Ms. Walker, argues the district court's cumulative errors of (1) applying a two-level enhancement under §3A1.3 and (2) failing to give Mr. Morrison a meaningful opportunity to allocute, warrant resentencing, even if the court determines the errors independently were not prejudicial. Ms. Walker argues the court should also consider her *Apprendi* argument in assessing whether cumulative errors warrant resentencing in her case. "We consider cumulative error only if the appellant has shown at least two errors that were harmless." *United States v. Christy*, 916 F.3d 814, 827 (10th Cir. 2019). "Anything less would leave nothing to cumulate." *Id.* Neither Mr. Morrison nor Ms. Walker have identified two harmless errors, so cumulative error review does not apply here.

5. Substantive Reasonableness

Mr. Morrison[10] argues the district court imposed a substantively unreasonable sentence by varying upwards from his Guidelines range of 84 to 105 months to a 300-month term of imprisonment.

a. Standard of review

"We review a district court's sentencing decision for substantive reasonableness under an abuse-of-discretion standard, looking at the totality of the circumstances." *United States v. Cookson*, 922 F.3d 1079, 1090 (10th Cir. 2019) (internal quotation marks omitted). "A district court abuses its sentencing discretion only if the sentence exceeded the bounds of permissible choice." *United States v. Barnes*, 890 F.3d 910, 915 (10th Cir. 2018) (internal quotation marks omitted). "Applying this standard, we give substantial deference to the district court and will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly

[10] Ms. Walker joins Mr. Morrison's substantive reasonableness argument, contending the district court imposed a substantively unreasonable sentence by sentencing her to a 120-month term of imprisonment. An appellant joining another appellant's argument must explain how the argument applies to her case. *Renteria*, 720 F.3d at 1251. Ms. Walker has not explained how Mr. Morrison's argument applies to her separate sentencing, and its application is not obvious due to the significant differences between Mr. Morrison's and Ms. Walker's sentencing proceedings. Because Mr. Morrison's argument rests on citations to his sentencing proceedings and decisions by the district court that are distinct from the district court's sentencing of Ms. Walker, Ms. Walker cannot rely on Mr. Morrison's brief to argue her sentence was substantively unreasonable. *See United States v. Swingler*, 758 F.2d 477, 493 (10th Cir. 1985) ("[W]e decline to hold that . . . [Rule 28(i)] obliges us to manufacture an argument for a defendant just because he refers us to an inapplicable argument made by another defendant."). We therefore address only Mr. Morrison's argument that his sentence is substantively unreasonable.

unreasonable." *United States v. Peña*, 963 F.3d 1016, 1024 (10th Cir. 2020) (internal quotation marks omitted). We apply this deference "without regard to whether the district court impose[d] a sentence within or outside the advisory guidelines range." *Cookson*, 922 F.3d at 1090 (quotation marks omitted). This substantial deference reflects that the "sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case." *Id.* at 1091 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Accordingly, we also "give substantial deference to the district court's weighing of [the § 3553(a)] factors." *Barnes*, 890 F.3d at 915. Still, we do "not just provide a rubber stamp of approval" and "therefore must determine if the district court's proffered rationale, on aggregate, justifies the magnitude of the sentence." *Peña*, 963 F.3d at 1024.

b. Analysis

Mr. Morrison argues the district court imposed a substantively unreasonable sentence because 300 months is too long, and too large of a variance from his Guidelines range, under the factors listed in 18 U.S.C. § 3553(a). Mr. Morrison contends the district court did not sufficiently justify the 195-month upward variance in his conviction because (1) the district court failed to recognize the extent Mr. Morrison's Guidelines range already accounted for the aggravating factors in his case; (2) the district court disregarded Mr. Morrison's proffer of seven similar cases demonstrating a sentence of twenty-five years would create significant disparities in sentencing; and (3) the district court unreasonably analogized to an inapplicable

federal sentencing statute, 18 U.S.C. § 3559(f)(2). We conclude the district court did not abuse its discretion in sentencing Mr. Morrison.

"In the wake of *United States v. Booker*, 543 U.S. 220 (2005), which converted the mandatory federal sentencing scheme into a discretionary one, we review sentences imposed by the district court for reasonableness." *Cookson*, 922 F.3d at 1091. We review for two types of reasonableness—procedural and substantive. *Id.* "Procedural reasonableness addresses whether the district court incorrectly calculated or failed to calculate the Guidelines sentence, treated the Guidelines as mandatory, failed to consider the § 3553(a) factors, relied on clearly erroneous facts, or failed to adequately explain the sentence." *United States v. Huckins*, 529 F.3d 1312, 1317 (10th Cir. 2008). When addressing substantive reasonableness, this court determines "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)." *Cookson*, 922 F.3d at 1091 (quotation marks omitted). "The distinction between procedural and substantive reasonableness is a significant but not necessarily sharp one, especially as it concerns a sentencing court's explanation for the sentence." *Barnes*, 890 F.3d at 916. At times, there is "a blurring of the line between procedural and substantive reasonableness when it comes to the district court's explanation for a given sentence." *Cookson*, 922 F.3d at 1090. "Stated another way, we rely on the district court's procedurally-required explanation in order to conduct 'meaningful appellate review' of a sentence's substantive reasonableness." *Id.* at 1091 (quoting *Gall*, 552 U.S. at 50).

To determine if Mr. Morrison's sentence is substantively reasonable, we review the § 3553(a) factors, summarize the district court's analysis of the § 3553(a) factors, address the issues with the district court's analysis raised by Mr. Morrison, and ultimately determine whether the district court's imposition of a 300-month sentence was arbitrary, capricious, whimsical, or manifestly unreasonable. We conclude that it was not.

Section 3553(a) directs sentencing courts to consider seven factors:

> (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;
>
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for--
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . .
>
> (5) any pertinent policy statement . . . .
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

"[S]entencing courts can and should engage in a holistic inquiry of the § 3553(a) factors." *Barnes*, 890 F.3d at 916 (internal quotation marks omitted). A district court should not rely solely on one § 3553(a) factor without addressing other relevant factors. *See United States v. Walker*, 844 F.3d 1253, 1259 (10th Cir. 2017). Still, "the

district court need not afford equal weight to each § 3553(a) factor, and we will defer on substantive-reasonableness review not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings." *Cookson*, 922 F.3d at 1094 (internal quotation marks and citation omitted).

When a district court "decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. Appellate courts reviewing a sentencing court's upward variance from a Guidelines sentence "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 51. "A 'major' variance should have 'a more significant justification than a minor one.'" *United States v. Lente*, 759 F.3d 1149, 1158 (10th Cir. 2014) (quoting *Gall*, 552 U.S. at 50).

The district court explained its reasoning for sentencing Mr. Morrison to a 300-month term, a major upward variance from a Guidelines sentence, both during the sentencing proceedings and in a written statement of reasons. The court stated that although it agreed with the PSR's conclusion that the aggravated assault Guideline was the most analogous to Mr. Morrison's offense of conviction, Mr. Morrison's "case show[ed] how inappropriate a strict application of the aggravated assault guideline would be to address the harms of child abuse." Morrison ROA Vol. III at 36. Addressing the first factor under § 3553(a), the court noted that the "nature and circumstances of [Mr. Morrison's] offenses . . . [we]re grave" due to

the evidence presented at trial demonstrating a pattern of abuse over approximately six months and that R.T., a three-year-old child, suffered severe injuries including damage to his internal organs. *Id.* Further, the court concluded Mr. Morrison's history and characteristics supported a major upward variance because Mr. Morrison was previously imprisoned for domestic abuse, but his "predilection for violence and abuse ha[d] not been deterred by his prior imprisonment. Rather his behavior escalated to targeting and repeatedly severely injuring R.T., a small child." *Id.* at 37.

Next, the court addressed § 3553(a)(6), which asks courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The court stated that "strict application of the guideline provisions to assimilated crimes would cause, rather than mitigate, disparity between defendant and other defendants with similar records." Morrison ROA Vol. III at 38. The court found the Government's argument persuasive that 18 U.S.C. § 3559(f), a federal statute setting mandatory minimum sentences in cases involving violent crimes against children, "demonstrate[d] that Congress gives great weight to consequences for committing a violent crime against a child." *Id.* The court noted that under § 3559(f), the mandatory minimum sentence for kidnapping or maiming a child is twenty-five years and the mandatory minimum sentence for seriously injuring a child is ten years. Next, the court turned to the types of sentences available, determining Mr. Morrison's Guidelines range of 84 to 105 months would be "woefully inadequate" considering "the characteristics of the instant offenses [and the] defendant's history and characteristics." *Id.* at 38–39. In this analysis, the court

noted that under Mr. Morrison's statute of conviction, the maximum sentence is life imprisonment. In explaining the reasoning of its sentence, the court also stressed that R.T. would probably take years to recover from the "mental and physical ramifications" of Mr. Morrison's abuse. *Id.* at 44. Based on these reasons, the district court concluded a major upward variance was justified in Mr. Morrison's case.

i. Factors accounted for by Guidelines

First, Mr. Morrison argues the sentence imposed was substantively unreasonable because the district court unreasonably justified an upward variance by relying on aggravating factors that were already accounted for by his Guidelines range. Mr. Morrison contends that by varying upward based on factors already reflected in his Guidelines range, the district court failed to give adequate weight to § 3553(a)(4), which requires the court to consider the sentence range established by the Guidelines, and § 3553(a)(6), which directs the court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Specifically, Mr. Morrison points to the district court's conclusion through its § 3553(a) analysis that a Guidelines sentence would be inadequate to account for the severe harm Mr. Morrison caused to a three-year-old child. Mr. Morrison argues a major upward variance on this basis was not justified because his Guidelines range already included a seven-level enhancement based on R.T.'s injuries having been life-threatening and a two-level enhancement based on R.T. having been a vulnerable victim. Mr. Morrison similarly argues the district court should not have relied on Mr. Morrison's previous domestic abuse

conviction to justify a major upward variance because that conviction was already accounted for in his Guidelines range through his criminal history points.

The district court did not abuse its discretion in considering Mr. Morrison's history of domestic violence, the severity of the harm caused by his offenses, and the vulnerability of the victim, in its § 3553(a) analysis. We have previously determined that "[d]istrict courts have broad discretion to consider particular facts in fashioning a sentence under 18 U.S.C. § 3553(a), even when those facts are already accounted for in the advisory guidelines range." *Barnes*, 890 F.3d at 921. Mr. Morrison recognizes this precedent but argues the district court here "unreasonably disregarded the guidelines range because of its (erroneous) view that the range *did not* account for child abuse, not that it did not account *enough* for such crimes." Morrison's Br. at 34. To support his argument, Mr. Morrison points to a Sixth Circuit decision that a sentence was substantively unreasonable because the sentencing judge varied from a Guidelines sentence based on factors the judge claimed were not addressed by the Guidelines, but, in fact, were. *See United States v. Aleo*, 681 F.3d 290, 301 (6th Cir. 2012). Mr. Morrison also cites an Eighth Circuit decision stating that "substantial variances based upon factors already taken into account in a defendant's guidelines sentencing range seriously undermine sentencing uniformity." *United States v. Martinez*, 821 F.3d 984, 989–90 (8th Cir. 2016) (quoting *United States v. Solis–Bermudez*, 501 F.3d 882, 885 (8th Cir. 2007)).

Mr. Morrison is correct that there is some overlap between factors accounted for by the Guidelines, and the district court's analysis of the "nature and

circumstances" of Mr. Morrison's offenses and Mr. Morrison's "history and characteristics" under § 3553(a). However, under an abuse of discretion standard, the district court's determination that a Guidelines sentence would not fully account for the gravity of child abuse, or Mr. Morrison's history of domestic violence, was not arbitrary, capricious, whimsical, or manifestly unreasonable. The most obvious overlap is in the severity of the harm Mr. Morrison caused R.T. This was directly accounted for under the Guidelines by a seven-level enhancement pursuant to § 2A2.2(b)(3)(C) which applies to aggravated assault sentences when the victim suffered "permanent or life-threatening bodily injury."

Mr. Morrison also contends the fact that R.T. was a young child in his care was accounted for in his Guidelines range because he received a two-level enhancement under USSG §3A1.1(b)(1), which applies where "the defendant knew or should have known that a victim of the offense was a vulnerable victim." Although the PSR based its application of §3A1.1(b)(1) on R.T.'s young age and R.T. having been in Mr. Morrison's care at the time of the offenses, the application of §3A1.1(b)(1) does not mean the Guidelines range fully accounted for R.T. being between the ages of two and three and in Mr. Morrison's care. Guideline 3A1.1(b)(1) applies in all instances where the defendant should be aware the victim of an offense is vulnerable and is not specifically tailored to address the harms caused by child abuse. *See, e.g.*, *United States v. Hardesty*, 105 F.3d 558, 562 (10th Cir. 1997) (affirming application of vulnerable victim enhancement where defendant defrauded two ninety-year-olds suffering from deteriorating physical and mental conditions);

United States v. Scott, 529 F.3d 1290, 1303 (10th Cir. 2008) (affirming application of vulnerable victim enhancement where victim was petite, a runaway, and naive). A wide range of individuals may qualify as vulnerable victims under §3A1.1(b)(1) and the egregiousness of the circumstances of the offense may vary accordingly. The district court did not abuse its discretion by determining "a strict application of the aggravated assault guideline would be [inappropriate] to address the harms of child abuse." Morrison ROA Vol. III at 36.

Similarly, although Mr. Morrison's Guidelines range accounted for his previous felony domestic assault conviction by raising his criminal history level, this does not mean the district court abused its discretion by determining Mr. Morrison's past domestic assault conviction demonstrated a pattern of escalating domestic violence. The district court, in evaluating Mr. Morrison's history and circumstances under § 3553(a)(1), was not concerned only with the fact that Mr. Morrison has been convicted of a felony, which was accounted for in his Guidelines range, but with the pattern of Mr. Morrison's use of violence with those closest to him, even after serving time in prison. While the Guidelines range accounted for Mr. Morrison's overall criminal history, it did not address the district court's specific concern—a pattern of escalating use of violence at home. The district court was within its discretion to determine Mr. Morrison's escalating use of violence justified a significantly longer sentence. *See United States v. Adams*, 751 F.3d 1175, 1183 (10th Cir. 2014) (determining "the reasons expressed by the district court—particularly [the d]efendant's history of repeated criminal offenses— . . . satisfied the

reasonableness standard for substantive review of a sentence" in case where district court varied upwards from Guidelines range).

ii. Need to avoid unwarranted sentence disparities

Second, Mr. Morrison argues his sentence is substantively unreasonable because the district court failed to adequately consider § 3553(a)(6), "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," by "disregarding almost entirely Mr. Morrison's proffer of seven cases demonstrating a disparity with an upward variance here." Morrison's Br. at 35. The district court's failure to address expressly six of the comparator cases Mr. Morrison brought to its attention did not make Mr. Morrison's sentence substantively unreasonable. Section 3553(a)(6) "requires a district court to take into account only disparities *nationwide* among defendants with similar records and Guideline calculations." *United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010) (internal quotation marks omitted). Accordingly, this court has determined a sentence was not substantively unreasonable where the district court failed to consider "statistics stemming only from Tenth Circuit sentences" because this "argument plainly d[id] not implicate the kind of disparities that § 3553(a)(6) seeks to avoid—that is, *nationwide* disparities." *United States v. Garcia*, 946 F.3d 1191, 1215 (10th Cir. 2020). Additionally, in any case where "the district court correctly computed and carefully considered the Guidelines range," we consider this to demonstrate the district court "necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *Id.*

Under substantive reasonableness review, this court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 552 U.S. at 51. Here, the district court addressed the likelihood of a major upward variance leading to sentencing disparities at multiple points in its analysis. First, the district court noted that it "underst[ood] and . . . read" the cases cited by Mr. Morrison exemplifying lower sentences for similarly situated offenders committing similar offenses, and "didn't take those lightly." Morrison ROA Vol. III at 34. After stating that he would not discuss the cases cited by Mr. Morrison where he was not the sentencing judge, the district court judge discussed one of the cases Mr. Morrison cited at length, explaining that he had been hesitant to accept a twenty-year sentence in that case, but it was distinguishable from Mr. Morrison's because the defendant there accepted responsibility for the offense, injured the child only one time, and the victim's family asked the court to accept the plea agreement. The court then noted that although it must consider the need to avoid disparate sentences, "disparate sentences are allowed where the disparity is explicable by the facts on the record." *Id.* at 38.

The court further explained it had concluded "strict application of the [G]uideline provisions" in Mr. Morrison's case "would cause, rather than mitigate, disparity between [Mr. Morrison] and other defendants with similar records." *Id.* The court explained that under a statutory sentencing provision not charged in Mr. Morrison's case, 18 U.S.C. § 3559(f), "Congress specified that the sentencing range . . . for kidnapping or maiming of a child is 25 years to life, and the range for a

crime of violence resulting in serious bodily injury is 10 years to life." *Id.*; ROA Vol. V at 18. Section 3553(a)(6) states district courts must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Notably, it refers to "defendants . . . who have been found guilty of similar conduct" as opposed to defendants charged with identical crimes. Accordingly, the district court did not abuse its discretion by considering the sentencing ranges under 18 U.S.C. § 3559(f) to the extent they applied to "similar conduct." Mr. Morrison has not demonstrated that his sentence was substantively unreasonable due to the district court's failure to adequately weigh the need to avoid disparate sentences because the district court reasonably engaged with this factor, determining similar conduct typically resulted in sentences significantly longer than Mr. Morrison's Guidelines range.

iii. 18 U.S.C. § 3559(f)(2)

Finally, Mr. Morrison argues his sentence is substantively unreasonable because the district court found the Government's analogy to 18 U.S.C.§ 3559(f)(2) persuasive, despite the fact Mr. Morrison was not charged under § 3559(f)(2) and his conduct was not sufficient to warrant a twenty-five-year mandatory minimum sentence under the statute. Specifically, Mr. Morrison argues the district court erred by analogizing to § 3559(f)(2)'s mandatory minimum sentence of twenty-five years for individuals convicted of kidnapping or maiming a child because his offense conduct did not satisfy § 3559(f)(2)'s definition of "maiming." *See* 18 U.S.C. § 3559(f)(2) (referring to 18 U.S.C. § 114 for definition of "maiming"); *see also* 18

U.S.C. § 114 (defining "maiming" as when an individual "with intent to torture . . . , maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person" or "with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance"). Mr. Morrison's argument fails because it does not accurately reflect the district court's analysis.

Although the district court noted the Government had argued the district court should consider the minimum punishment under § 3559(f)(2) of twenty-five years for kidnapping or maiming a child as an example of a sentence for analogous conduct, the district court at no point stated it agreed with the Government that Mr. Morrison's behavior was comparable to kidnapping or maiming. Rather, the court stated it

> f[ound] persuasive the government's argument regarding . . . Section 3559(f) and its mandatory minimum sentences for violent crimes against children. Congress specified that the sentencing range for murder of a child is 30 years to life, range for kidnapping or maiming of a child is 25 years to life, and the range for a crime of violence resulting in serious bodily injury is 10 years to life. These serious sentences demonstrate that Congress gives great weight to consequences for committing a violent crime against a child.

Morrison ROA Vol. III at 38. Mr. Morrison points to no place in the district court's decision where the court ties its decision to sentence Mr. Morrison to a twenty-five-year sentence to the mandatory minimum sentence under § 3559(f)(2). The district court discussed § 3559(f) in full, including its sentence ranges for murdering, kidnapping and maiming, or seriously injuring a child, as an example of Congress's approach toward crimes against children. But nowhere does the district court state it

relied upon § 3559(f)(2) to reach its sentence here. Rather, the district court stated its decision to vary upwards was to account for the nature and circumstances of the crime, Mr. Morrison's characteristics and history, and the need to avoid disparate sentences for similar conduct.

In sum, based on the district court's weighing of the relevant § 3553(a) factors, its imposition of a 300-month sentence was not arbitrary, capricious, whimsical, or manifestly unreasonable.

III. CONCLUSION

We AFFIRM Ms. Walker's and Mr. Morrison's convictions and sentences.