UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. HUNTER JACOB PENEAUX, Defendant.	3:22-CR-30105-RAL OPINION AND ORDER GRANTING MOTION TO DISMISS INDICTMENT

Federal law prohibits the possession of a firearm by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Defendant Hunter Peneaux pleaded guilty to domestic abuse in Rosebud Sioux Tribal Court on three separate occasions. He was later indicted by a grand jury for violating § 922(g)(9). Peneaux now moves to dismiss the indictment, arguing that his tribal court convictions do not qualify as misdemeanor crimes of domestic violence because they did not have "as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Under the sometimes-frustrating analysis required by the Supreme Court, this Court must dismiss Peneaux's indictment.

I. Background

Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as "an offense that . . . (i) is a misdemeanor under Federal, State, Tribal, or local law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C.

§ 921(a)(33)(A). The statute also requires that the perpetrator "have a familial or similar domestic relationship to the victim." United States v. Horse Looking, 828 F.3d 744, 746 (8th Cir. 2016).

Peneaux has three convictions under Rosebud Sioux Tribe Law and Order Code (RSTLOC) 5-38-2, which criminalizes "Domestic Abuse":

> Section 2. CRIME OF DOMESTIC ABUSE.
> A person commits the crime of domestic abuse if he or she:
> 1. purposely or knowingly causes bodily injury to a family member or household member; or
> 2. purposely or knowingly causes apprehension of bodily injury in a family member or household member.

RSTLOC 5-38-2 (emphasis in original). The RSTLOC defines "[b]odily injury" as "physical pain, illness, or an impairment of physical condition." RSTLOC 5-38-1.B. It defines "[c]ausing apprehension of bodily injury" as "any physical act which is intended to cause another person reasonably to fear imminent serious bodily injury or death." RSTLOC 5-38-1.C. RSTLOC 5-38-2 makes Domestic Abuse a "Class A crime" under tribal law.

Peneaux's first conviction for domestic abuse came in 2016. Doc. 31-1 at 1. The criminal complaint alleged that Peneaux "did commit the crime of Domestic Abuse, in that the Defendant did purposely or knowingly cause bodily injury to Selena Pretty Bird, a household member, by repeatedly striking her in the face and body, in violation of RSTLOC 5-38-2." Doc. 31-1 at 1. The judgment of conviction says that Peneaux pleaded guilty to "5-38-2." Doc. 31-2 at 1.

Peneaux's next domestic abuse conviction came in 2017. The criminal complaint alleged that Peneaux "did commit the crime of Domestic Abuse, in that the Defendant did purposefully or knowingly cause apprehension of bodily injury to Selena Pretty Bird, a household member, arguing with her and yelling at her causing her to flee the home with her children in fear of bodily injury, in violation of RSTLOC 5-38-2." Doc. 31-3 at 1. The judgment of conviction for this 2017 charge states that Peneaux pleaded guilty to "5-38-2." Doc. 31-4 at 1.

Peneaux was convicted of domestic abuse a third time in 2020.[1] Doc. 31-5. The criminal complaint for that charge alleged that Peneaux "did commit the crime of Domestic Abuse, in that the Defendant did purposefully or knowingly cause apprehension of or actual bodily injury to Selena Pretty Bird, a household member, by hitting her, causing her to fear bodily injury, in violation of RSTLOC 5-38-2." Doc. 31-5 at 1. The judgment of conviction for this third charge reflects that Peneaux pleaded guilty to "5-38-2." Doc. 31-6.

II. Analysis

Peneaux's motion challenges whether his convictions under RSTLOC 5-38-2 have, "as an *element*, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii) (emphasis added). RSTLOC 5-38-2 is alternatively phrased; it criminalizes "1. purposely or knowingly caus[ing] bodily injury to a family member or household member; *or* 2. purposely or knowingly caus[ing] apprehension of bodily injury in a family member or household member." (emphasis added). The parties agree that purposely or knowingly causing bodily injury satisfies § 921(a)(33)(A)(ii)'s physical force requirement but that causing mere apprehension of bodily injury would not. Doc. 31 at 7–8; Doc. 34 at 8–9; see also United States v. Castleman, 572 U.S. 157, 169 (2014) (concluding that "knowing or intentional causation of bodily injury necessarily involves the use of physical force").

The parties disagree, however, on how this Court should determine whether 5-38-2 has the use of physical force as an *element*. Peneaux argues that this Court must apply the "categorical approach" to 5-38-2 because subsections 1 and 2 of the statute list alternative means of committing the single crime of domestic abuse. The Government disagrees, contending this Court should

[1]The Government claims in its brief that Peneaux was charged with domestic abuse a fourth time but that the charge was dismissed. Doc. 34 at 3. The Government did not file that charge in the record and § 922(g) requires an underlying conviction of domestic violence to apply.

employ the "modified categorical" approach because subsections 1 and 2 set forth different elements.

A brief review of the "byzantine" analysis used to determine whether a predicate offense has a particular element provides context for the parties' arguments. United States v. Escalante, 933 F.3d 395, 406 (5th Cir. 2019); see also United States v. Battle, 927 F.3d 160, 163 n.2 (4th Cir. 2019) (describing the categorical approach as an "*Alice in Wonderland* path"). The Supreme Court established what has become known as the "categorical approach" to determine whether an offense has the "use of physical force" as an element. Castleman, 572 U.S. at 168. Under the categorical approach, courts must look only to the statutory definition of the offense—not the facts underlying the conviction—to determine whether the particular element is present. Descamps v. United States, 570 U.S. 254, 261 (2013). If the offense has the "use of physical force" as an element—because, for instance, it requires a jury to find that the defendant intentionally caused bodily injury—the defendant's conviction would qualify as a misdemeanor crime of domestic violence. United States v. Horse Looking, 828 F.3d 744, 747 (8th Cir. 2016). But if the offense covers conduct that would not necessarily involve the use of physical force—say, by forbidding threats or "physical menace" that place another in fear of imminent bodily injury—the offense is not "categorically" a misdemeanor crime of domestic violence, even if the underlying facts show that the defendant actually used physical force. Id.

The categorical approach works well enough when a statute "sets out a single (or 'indivisible') set of elements to define a single crime." Mathis v. United States, 579 U.S. 500, 504–05 (2016). Things become more complicated, however, when confronting an alternatively phrased statute like 5-38-2. Courts in that situation must start by determining whether the statute lists "elements in the alternative, and thereby define[s] multiple crimes," or whether the statute

creates only a single crime and specifies "various factual means" of committing an element of that crime. Id. at 505–06, 517. If the statute lists alternative elements and creates multiple crimes, it is "divisible" and courts may use the "modified categorical approach" to determine which of the alternative elements formed the basis of the defendant's conviction. Id. at 505–06, 517; Horse Looking, 828 F.3d at 747. Under that approach, courts may consult the defendant's indictment, the plea agreement, a transcript of the plea colloquy, and "any explicit factual finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13, 16 (2005). If the statute merely lists alternative means of "committing some component of the offense," the statute is indivisible and subject only to the categorical approach. Mathis, 579 U.S. at 506.

The Supreme Court's decision in Mathis provides some guidance on distinguishing elements from means in alternatively phrased statutes. "Elements," the Court explained, "are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." Id. at 504 (cleaned up and citation omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." Id. (cleaned up and internal citation omitted). Means, "by contrast, are mere real-world things—extraneous to the crime's legal requirements." Id. "They are circumstances or events having no legal effect or consequence: In particular, they need neither be found by a jury nor admitted by a defendant." Id. (cleaned up and citation omitted).

Mathis directs judges to look to state law, including state court decisions interpreting a state statute, to determine whether statutory alternatives constitute elements or means. Id. at 517–18. And sometimes the statute itself will answer the question. Id. at 518; see also United States v. McConnell, No. 21-3759, 2023 WL 2942813, at *3 (8th Cir. Apr. 14, 2023) (explaining that, among other things, courts should look to a "statute's text and structure" when analyzing

divisibility). "If statutory alternatives carry different punishments," for instance, then "they must be elements." Mathis, 579 U.S. at 518. By contrast, "if a statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission." Id. "And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." Id. When state law "fails to provide clear answers," Mathis allows courts to "peek" at the "record of a prior conviction" to determine whether the listed items are elements or means. Id. An indictment and correlative jury instruction charging the defendant with all the terms of an alternatively phrased statute would clearly indicate that "each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." Id. at 519. "Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime." Id. The Court in Mathis recognized, however, that the record materials might not "speak plainly" enough to satisfy the categorical approach's "demand for certainty." Id. (cleaned up and citation omitted); see also United States v. Naylor, 887 F.3d 397, 401 (8th Cir. 2018) (en banc) ("If the record materials do not speak plainly on the means-elements issue, we will be unable to meet the demand for certainty required of any determination that a conviction qualifies as a violent felony under the ACCA." (cleaned up and citation omitted)).

Neither this Court nor the parties found any decisions by the Rosebud Sioux Supreme Court addressing whether the alternatives in 5-38-2 constitute elements or means.[2] The parties also agree

[2]This does not reflect negatively on the Tribe, of course. State law is often inconclusive on the means/elements distinction, and the Tribe has a well-developed court system. See Mathis, 579 U.S. at 531 (Breyer, J., dissenting) (stating that "there are very few States where one can find authoritative judicial opinions that decide the means/elements question").

that the Tribe does not publish model jury instructions.[3] Doc. 34 at 5; Doc. 31 at 9, 13. This leaves for resolving the elements or means question only the text and structure of 5-38-2 and possibly the records of conviction.[4]

RSTLOC 5-38-2 does not have any statutory feature Mathis said might distinguish between elements and means: its statutory alternatives do not carry different punishments, it does not contain an illustrative list, and it does not identify which things must and need not be charged. Mathis, 579 U.S. at 518. Eighth Circuit case law suggests that statutes lacking any of these features do little to clarify whether they set forth alternative means or elements. See McConnell, 2023 WL 2942813, at *4 (explaining that a statute's text did "not offer helpful guidance" on the divisibility question when it imposed a uniform punishment (cleaned up and citation omitted)); United States v. Harris, 950 F.3d 1015, 1018 (8th Cir. 2020) ("The text of a statute does not provide helpful guidance as to whether the phrase 'person or property' lists alternative means or alternative elements where there is a uniform punishment for commission of the offense." (cleaned up) (quoting United States v. McMillan, 863 F.3d 1053, 1057 (8th Cir. 2017))); United States v. Coleman, 918 F.3d 592, 593–94 (8th Cir. 2019) (stating that the text of a statute suggested it was indivisible where the statute set forth alternative "purposes" in different subsections but named only one offense and imposed the same punishment regardless of which purpose the defendant had); United States v. Kinney, 888 F.3d 360, 364 (8th Cir. 2018) (remarking that an alternatively

[3]Defense counsel explains that he visited the Rosebud Sioux Tribal Court while trying to find opinions or jury instructions addressing the elements/means issue. Doc. 31 at 12. The Tribal Court staff informed defense counsel that the Tribal Court typically uses South Dakota pattern jury instructions when there is a trial. Id. at 13 n.54.

[4]The Eighth Circuit in United States v. Long, 870 F.3d 741 (8th Cir. 2017), affirmed a § 922(g)(9) conviction where the defendant's predicate offense was a domestic abuse conviction in Rosebud Sioux Tribal Court. Id. at 745–747. The defendant in that case, however, never argued that the Tribe's domestic abuse statute lacked the requisite use-of-physical-force element.

phrased statute did "little to guide us" where the alternatives did not have different punishments and the statute did not identify which things had to be charged).

There are, of course, some features of 5-38-2 that might suggest the statute is divisible. After all, each subsection of 5-38-2 lists all the things necessary to secure a conviction under that particular subsection. And subsections 1 and 2 of 5-38-2 clearly criminalize different conduct, with subsection 1 addressing bodily injury and subsection 2 addressing apprehension of bodily injury. As the Fifth Circuit recognized, however, the "extent to which features like this bear on the divisibility question is unclear." United States v. Herrold, 883 F.3d 517, 527 (5th Cir. 2018) (en banc), vacated, 139 S. Ct. 2712 (2019).[5] Indeed, the Fifth Circuit in Herrold put little stock in the government's argument that a statute was divisible because each subsection of the statute was separated by the word "or" and "each subsection require[d] different and separate acts to commit the offense enumerated in that subsection." Id. (cleaned up and citation omitted); see also id. at n.58 (explaining that there "is reason to be quite cautious of this sort of appearance-based reasoning").

The Government argues that RSTLOC 5-38-2 is similar to the statute the Third Circuit found divisible in United States v. McCants, 952 F.3d 416 (3d Cir. 2020). McCants involved the following New Jersey robbery statute:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:
> (1) Inflicts bodily injury or uses force upon another; or
> (2) Threatens another with or purposefully puts him in fear of immediate bodily injury; or
> (3) Commits or threatens immediately to commit any crime of the first or second degree.

[5]After remand from the Supreme Court, the en banc Fifth Circuit reinstated that portion of Herrold to which this Court cites. United States v. Herrold, 941 F.3d 173, 177 (5th Cir. 2019) (en banc).

952 F.3d at 425 (quoting N.J. Stat. Ann. § 2C:15-1). The Third Circuit concluded that the statute did "not identify an individual element of which subsections (a)(1)–(3) are mere examples" but rather listed "in the disjunctive three separately enumerated, alternative elements of robbery." 952 F.3d at 426. According to the Third Circuit, subsections (a)(1)–(3) were "elements because each requires different proof beyond a reasonable doubt to sustain a second-degree robbery conviction." Id.

The Government has not cited any Eighth Circuit case adopting the approach in McCants or finding that alternatives in a statute were elements because they required different proof. Beyond that, there is some doubt about whether a different-proof test is a viable way of distinguishing between means and elements. As noted above, the government in Herrold argued that a statute was divisible because "each subsection require[d] different and separate acts to commit the offense enumerated in that subsection." 883 F.3d at 527 (cleaned up and citation omitted). The Fifth Circuit found that this argument "verges on circularity: disjunctively phrased offenses, by their very nature, involve different kinds of conduct or mens rea requirements. Disjunction *means* difference." Id. (footnote omitted). Lacking any of the statutory features Mathis identified as relevant, the text and structure of RSTLOC 5-38-2 do not provide "clear answers" on the divisibility question. Mathis, 579 U.S. at 518.

That leaves the records of Peneaux's prior convictions. Unfortunately, these too are inconclusive. On the one hand, the criminal complaints for Peneaux's 2016 and 2017 convictions suggest that RSTLOC 5-38-2 is divisible because both complaints charged one alternative without referencing the other. Doc. 31-1 at 1 (2016 complaint alleging that Peneaux "cause[d] bodily injury to Selena Pretty Bird"); Doc. 31-3 at 1 (2017 complaint alleging that Peneaux "cause[d] apprehension of bodily injury to Selena Pretty Bird"); see also Descamps, 570 U.S. at 272 ("A

prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives."). The 2020 complaint, on the other hand, suggests that 5-38-2 is indivisible; it alleges that Peneaux "did purposefully or knowingly cause apprehension of or actual bodily injury to Selena Pretty Bird, a household member, by hitting her, causing her to fear bodily injury." Doc. 31-5 at 1; see also Mathis, 579 U.S. at 519 (stating that an indictment and correlative jury instruction that reiterate "all the terms of" a law "is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt"); Kinney, 888 F.3d at 364–65 (finding that a statute was indivisible based on an indictment charging all of a statute's alternatives).

At bottom, both the text and structure of RSTLOC 5-38-2 and the records of conviction are inconclusive on whether the statute sets forth alternative means or elements.[6] Under these circumstances, this Court must treat 5-38-2 as indivisible and apply the categorical approach. See United States v. Winrow, 49 F.4th 1372, 1380 (10th Cir. 2022) ("When neither the statute nor state law shows that the statute's alternatives are elements, and the record materials do not speak plainly, we must treat the statute as indivisible and proceed under the standard categorical approach." (cleaned up and citation omitted)); Harris, 950 F.3d at 1020 (concluding that the "categorical approach's 'demand for certainty' ha[d] not been met" where the statute's language was inconclusive, state law did not provide clear answers, and the record materials did not speak plainly (quoting Mathis, 579 U.S. at 519)); United States v. Bain, 874 F.3d 1, 30 (1st Cir. 2017) ("If neither

[6]The Tribe's stated purpose in enacting the chapter criminalizing domestic abuse was "to recognize domestic abuse as a serious crime against our society and to assure the victim of domestic abuse the maximum protection from abuse which the law and those who enforce the law can provide." RSTLOC 5-38. Victims of domestic abuse on the Rosebud Reservation would undoubtedly be better protected if their abusers could not possess firearms. The Tribe could further Chapter 5-38's protective purpose by clarifying that the alternatives in 5-38-2 are, in fact, elements.

state law nor the Shepard documents speaks plainly about whether a crime is divisible, a sentencing court must assume that it is not." (cleaned up and citation omitted)); United States v. Sykes, 864 F.3d 842, 844 (8th Cir. 2017) (Colloton, J., dissenting from denial of a petition for rehearing en banc) (explaining that an "inconclusive" divisibility inquiry of an overbroad statute "means that the prior convictions do not qualify, and the sentencing enhancement does not apply"). Because 5-38-2 covers conduct that would not necessarily involve the use of physical force—namely, causing apprehension of bodily injury—the offense is not "categorically" a misdemeanor crime of domestic violence, and Peneaux's prior convictions cannot serve as predicate offenses. This Court therefore grants Peneaux's motion to dismiss.

This result likely frustrates the intention of Congress in passing § 922(g)(9),[7] especially since the 2016 domestic abuse conviction was under the portion of RSTLOC 5-38-2 that would qualify as a misdemeanor crime of domestic violence. But this Court is not at liberty to disregard the Mathis decision in favor of approaches taken by those justices who dissented in Mathis. See Mathis, 579 U.S. at 523 (Breyer, J., dissenting) and at 536 (Alito, J., dissenting). Indeed, this Court previously was reversed in a § 922(g)(9) case because the record did not establish with the requisite certainty that a defendant who admitted to pushing his wife down and causing her some

[7]"The use of illicit drugs and a history of physical fights in the home are important risk factors for homicide in the home. Rather than confer protection, guns kept in the home are associated with an increase in the risk of homicide by a family member or intimate acquaintance." Arthur R. Kellermann et al., Gun Ownership as a Risk Factor for Homicide in the Home, 329 New Eng. J. Med. 1084, 1084 (1993). Studies found that "people who lived with handgun owners had a much higher rate of being fatally shot by a spouse or intimate partner. The vast majority of such victims, 84%, were women . . . . Living with a handgun owner particularly increased the risk of being shot to death in a domestic violence incident, and it did not provide any protection against being killed at home by a stranger, the researchers found." People in homes with handguns more likely to be shot dead, major study finds, The Guardian (Apr. 7, 2022), theguardian.com/us-news/2022/apr/07/guns-handguns-safety-homicide-killing-study; see also Castleman, 572 U.S. at 160 (explaining that "the presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide").

abrasions had been convicted of a subsection of South Dakota's simple assault statute that had the required use-of-force element. Horse Looking, 828 F.3d at 746–49. Although it likely does not promote the interests of public safety to do so, proper application of the categorical approach rubric consistent with Supreme Court authority necessitates dismissal.

Therefore, it is

ORDERED that Defendant's Motion to Dismiss Indictment, Doc. 30, is granted.

DATED this 2nd day of May, 2023.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE