

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted June 14, 2024*

Decided July 11, 2024

BeforeMICHAEL B. BRENNAN, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*

No. 23-1755

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*HAILEY GIST-HOLDEN,
*Defendant-Appellant.*Appeal from the United States District
Court for the Northern District of
Indiana, Hammond Division.

No. 2:21CR71-002

Philip P. Simon,
*Judge.***ORDER**

A jury found Hailey Gist-Holden guilty of armed robbery and murder in violation of 18 U.S.C. §§ 2113(a), (d), (e), 924(c)(1)(A), (j). He was sentenced to two

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

consecutive terms of life imprisonment. He now challenges his conviction, raising numerous pre-trial, trial, and post-trial errors. We affirm.

Background

Gist-Holden partially owned and coached the Illini Panthers, a minor league football team. In 2021, he and the team ran into financial troubles. Gist-Holden approached James King and Kenyon Hawkins, two players on the football team, about a plan to rob a bank in Gary, Indiana, so that the team would have money for lodging and other costs. King and Hawkins agreed to participate in the robbery.

On June 11, 2021, Gist-Holden brought King and Hawkins to his home in Gary to plan the operation. Gist-Holden provided two firearms, a handgun and an AR-style rifle, that his girlfriend had purchased. At that time, King sent a photo to another teammate that showed Gist-Holden holding a firearm.

The group then left the home, driving in a U-Haul that Gist-Holden had rented. Hawkins dropped King and Gist-Holden off near the bank, where a security guard stood out front. Bank security footage shows Gist-Holden shooting the guard in the head with the rifle, killing him. King entered the bank and collected approximately \$9,000 from registers, while Gist-Holden stood in a vestibule, yelling that it was a robbery and shooting out the windows of the bank with the rifle.

Approximately two hours later, King was apprehended by Indiana authorities in the woods adjacent to the bank. There, authorities recovered the handgun and the money. In the bank, authorities also found shell casings connected to the rifle used by Gist-Holden. Authorities questioned King, and he told them to check the serial number of his handgun. King later identified Gist-Holden as the robber in a photo lineup.

In the meantime, Hawkins and Gist-Holden had driven to Atlanta. Authorities identified Gist-Holden's phone numbers and sought to locate him. On June 12 and 14, a federal magistrate judge issued a search warrant for the call detail records and real-time location data for one phone. On June 16, the magistrate judge issued a search warrant for the location data of another phone. Authorities also sent a preservation letter to a cell phone provider on June 15, asking it to preserve historical cell-site data while they obtained a warrant, which occurred on March 3, 2022.

In addition, law enforcement agents applied for a search warrant for Gist-Holden's house. The affidavit supporting the warrant relied on King's identification of

Gist-Holden as a co-conspirator in the robbery, King's photo showing an armed Gist-Holden sitting inside his house before the robbery, and agents' contact with Gist-Holden's landlord, who stated that he was significantly behind on rent. Agents obtained the warrant the night of June 15 and executed it the next day. During the search, agents recovered a bag of ammunition, empty rifle cartridge casings, and empty handgun cartridge casings. (In September 2022, a ballistics expert testified that the rifle casings from the robbery scene and from Gist-Holden's home had been "cycled through the same weapon.") In the basement of the house, agents also found marijuana growing; combined with the packaging and jars, it weighed over 15,000 grams.

A federal criminal complaint drafted the day of the search charged Gist-Holden with possession of marijuana with intent to distribute. 21 U.S.C. § 841(a). The same agent who supported the federal complaint also filed a probable cause affidavit relating to state robbery and murder charges against Gist-Holden, leading to an arrest warrant.

Eventually, Gist-Holden was pulled over and arrested by Georgia police on June 17, after engaging in a nine-mile high-speed chase with officers. After he was taken into custody, a nurse conducted a medical screening and confirmed that Gist-Holden did not suffer any injury or distress and looked alert and responsive. FBI agents in Georgia later explained to Gist-Holden that he had been arrested for the high-speed chase and for federal marijuana charges, but he would not be questioned until agents from Indiana arrived. He was brought into an interview room that had a video camera, four chairs, and a table, to await the agents' arrival. Gist-Holden asked one of the local agents, "Is there anybody who could counsel me right now by the time [Indiana authorities] arrive?" The agent responded that an attorney would be difficult to obtain at that hour, but that he had the right to not speak with the agents and could go back to his cell. Gist-Holden stayed in the interrogation room.

When agents arrived from Indiana later that night, Gist-Holden was read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). He reviewed the written admonitions himself, and agents verbally confirmed that he understood that, by signing the waiver, he was agreeing to speak without counsel. Gist-Holden then signed. During the interrogation, he denied taking part in the robbery, but admitted that the morning of the robbery he was at his house with King and Hawkins and later drove Hawkins to Georgia. He also wrote down that the rifle was "gone." He again referred to obtaining counsel, including by saying, "I want a lawyer to assist with some kind of deal." But he continued to answer questions until agents asked him to clarify his intent to obtain

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counsel. He then stated that he wanted a lawyer before further questioning, and the interview stopped.

Later, a federal grand jury indicted King and Gist-Holden for engaging in an armed bank robbery that caused another's death, 18 U.S.C. § 2113(a), (d), (e), and using a firearm during a crime of violence resulting in murder, *id.* §§ 2, 924(c)(1)(A), (j). The government dismissed the marijuana complaint. The government later charged Hawkins (eventually arrested in Florida) as well. King and Hawkins pleaded guilty and agreed to testify against Gist-Holden at his trial.

Before trial, Gist-Holden, who proceeded pro se, moved to suppress (1) the record of numbers dialed from his cell phones; (2) tracking and location data gleaned from cell-tower records; (3) his statements during the interrogation in Georgia; and (4) all evidence recovered from his home. He requested a *Franks* hearing to challenge the validity of the search and arrest warrants on the ground that they were based on perjured statements. *See Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). Without a hearing, the district court denied the motions, explaining that Gist-Holden's assertions of perjury largely lacked support and that the records, evidence, and statements were validly obtained.

At his nine-day jury trial in October 2022, Gist-Holden continued to act pro se, with the assistance of standby counsel. The jury found him guilty on both counts. Five months after the verdict, Gist-Holden moved for a new trial on the basis that his co-defendants and various law enforcement officers gave perjured testimony. FED. R. CIV. P. 33. The district court denied the motion as untimely. Gist-Holden was sentenced to two consecutive terms of life imprisonment.

Gist-Holden timely appealed. We appointed counsel on appeal, but Gist-Holden moved to terminate the representation and have a different lawyer appointed. After we denied that motion, Gist-Holden moved to proceed pro se on appeal. We ordered his attorney to "report back to the court with her assessment whether defendant Gist-Holden's desire to proceed pro se on appeal is knowing, intelligent, voluntary, and unequivocal." *See Faretta v. California*, 422 U.S. 806, 835 (1975). Appellate counsel reported that she had a "thorough discussion" with Gist-Holden about his background and abilities and the consequences of handling his appeal without counsel. She concluded that his decision to proceed pro se was knowing, intelligent, voluntary, and unequivocal. Thereafter, we granted Gist-Holden's motion to terminate counsel and proceed pro se, and we set the briefing schedule.

Analysis

On appeal, Gist-Holden argues that the district court committed multiple reversible errors before, during, and after trial. We address each argument in turn.

I. Request for a *Franks* Hearing

Gist-Holden challenges the denial of his motion for a *Franks* hearing to establish that the search and arrest warrants were invalid because law enforcement officers obtained them “by deliberately or recklessly providing false, material information or deceptive omissions to the issuing judge.” *United States v. Vines*, 9 F.4th 500, 510–11 (7th Cir. 2021). A defendant is entitled to an evidentiary hearing on this question if he makes “a substantial preliminary showing of specific intentional or reckless misrepresentations or omissions” and shows that “if the deliberately or recklessly false statements were omitted, or if the . . . misleading omissions included, probable cause would have been absent.” *Id.* (quotations and citations omitted). We review the denial of a *Franks* hearing for clear error and any underlying legal conclusions de novo. *See id.*

a. Validity of Search Warrants for Cell Phone Data and House

First, Gist-Holden asserts that a *Franks* hearing should have been held to determine whether FBI agents knowingly relied on false statements by King to obtain search warrants for his cell phone call records and his house. Gist-Holden asserts that King was not a reliable informant because he “lied” about Gist-Holden’s height and haircut, told agents that he committed the robbery with his “teammates” rather than his coach, and was not truthful about his own whereabouts. But even if these details in the affidavit are inaccurate, they are not material to whether there was probable cause to believe that Gist-Holden’s home and cell phone records would contain evidence of a bank robbery and murder. Immaterial information in a probable-cause affidavit, even if intentionally misleading, does not trigger the need for a *Franks* hearing. *See United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000); *Vines*, 9 F.4th at 511. Moreover, Gist-Holden failed to point to any evidence that the affiant used King’s statements with the intent to deceive or with reckless disregard of the truth. *See United States v. Spears*, 673 F.3d 598, 605 (7th Cir. 2012). Gist-Holden’s speculation that agents knew King made false statements is not enough to obtain a *Franks* hearing. *See United States v. Johnson*, 580 F.3d 666, 671 (7th Cir. 2009).

b. Validity of Arrest Warrant for Federal Marijuana Charges

Second, Gist-Holden asserts that the district court should have held a *Franks* hearing to determine whether agents made perjurious statements to obtain a warrant to arrest him on federal marijuana charges. He argues that the agent-affiant falsely attested that there were 15,000 grams of marijuana inside Gist-Holden's house. This is incorrect. The agent stated that a "significant amount of marijuana" was found in the house, and, together with the packaging, the weight "was greater than 15,000 grams." This use of an approximate weight did not require a *Franks* hearing. See *United States v. Maro*, 272 F.3d 817, 822 (7th Cir. 2001) (alleged affidavit shortcomings were not egregious errors that warranted *Franks* hearing). Further, any statement about the overall weight was immaterial because federal law prohibits possessing with intent to distribute *any* quantity of marijuana. 21 U.S.C. § 841(a)(1), (b)(1)(D).

II. Suppression of Cell Phone Identifiers, Real-Time Tracking Data, Historical Cell-Site Data, and Evidence from Home Search

Next, Gist-Holden challenges the district court's denial of his motions to suppress evidence from the search of his home and his cell phones' identifiers, real-time tracking information, and historical location data. He argues that authorities obtained unlawful consent from his landlord to search the house before obtaining a warrant and improperly "hacked" into his phones without a warrant.

As to the search of Gist-Holden's house, a landlord cannot consent to a search of a tenant's premises, and thus a warrantless search based on a landlord's consent may violate the Fourth Amendment. See *United States v. Thomas*, 65 F.4th 922, 924–25 (7th Cir. 2023). But Gist-Holden provided no evidence in the district court that the search occurred before law enforcement obtained a warrant or that law enforcement went to the landlord to gain entry. (Before the search, agents talked to the landlord about Gist-Holden's tenancy but did not seek the landlord's consent to search). Gist-Holden says only that the search *must* have occurred before the warrant's issuance on June 15 at 8:55 p.m. because photos from the search show daylight. Indeed, the search occurred during the day—but on June 16, the day after the warrant's issuance.

As to the identifiers from Gist-Holden's cell phones that agents obtained by subpoena to his wireless carrier, no court has held that a defendant has a reasonable expectation of privacy in the phone numbers dialed from a particular phone. See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *United States v. Soybel*, 12 F.4th 584, 591 (7th Cir.

2021). Thus, a warrant was unnecessary, and a subpoena sufficed, to obtain this information. *See United States v. Caira*, 833 F.3d 803, 809 (7th Cir. 2016).

The tracking and historical location data gleaned from Gist-Holden's cell phones, however, raises an expectation of privacy under the Fourth Amendment, and a warrant is required for that information. *See Carpenter v. United States*, 585 U.S. 296, 316–17 (2018). Here, law enforcement obtained warrants before obtaining the tracking and historical location data from Gist-Holden's cell phones. Gist-Holden does not challenge the validity of these warrants; he ignores them in simply alleging "hacking." And even if the warrants were invalid, the exigent circumstances exception to the warrant requirement would apply because Gist-Holden had not yet been located after fleeing from Indiana, and law enforcement needed to locate him quickly. *See id.* at 319–20.

III. Fifth Amendment Right Against Self-Incrimination

Next, Gist-Holden argues that the district court erred when it denied his motion to suppress inculpatory statements made to law enforcement. We review the denial of the motion de novo. *See United States v. Hunter*, 708 F.3d 938, 942 (7th Cir. 2013).

Gist-Holden first argues that he did not waive his *Miranda* rights knowingly and intelligently because agents coerced him into speaking. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986). We reviewed the video and audio footage of Gist-Holden's waiver, and there is more than enough evidence to conclude that Gist-Holden understood his *Miranda* rights; received a written copy of the warnings and took time to read them; heard an explanation of his rights; and knew he had the option to remain silent throughout questioning. Moreover, there is no evidence that his statements were coerced. The agents did not threaten or injure him; he did not express any fear; and the interrogation occurred in a standard-sized room in unremarkable conditions.

Second, Gist-Holden argues that his statements should have been suppressed because questioning should have stopped when he said, "Is there anybody who could counsel me right now by the time [Indiana authorities] arrive?" and "I want a lawyer to assist with some kind of deal." During a custodial interrogation, when a suspect clearly asserts his right to counsel, all questioning must stop, and any admissions after that point must be suppressed. *See Edwards v. Arizona*, 451 U.S. 477, 484–85, 487 (1981). A statement is sufficient to invoke the right to counsel if it shows "a certain and present desire to consult with counsel." *Hunter*, 708 F.3d at 942. But if the suspect makes an "ambiguous or equivocal" reference to an attorney, and a reasonable officer would

conclude only that the suspect *might* be requesting counsel, questioning can continue. *See Davis v. United States*, 512 U.S. 452, 459 (1994).

As the district court concluded, none of Gist-Holden's statements were unambiguous requests for counsel. The first statement ("Is there anybody who could counsel me right now by the time [Indiana authorities] arrive?") uses hedging, conditional language, and we have distinguished words such as "should," "could," or "might" from a clear request. *Hunter*, 708 F.3d at 943–44. Further, the forward-looking clause ("by the time [Indiana authorities] arrive") would allow a reasonable officer to believe that Gist-Holden was not yet requesting an attorney. His second statement ("I want a lawyer to assist with some kind of deal") did not reference the ongoing interrogation. A reasonable officer would not believe that Gist-Holden was requesting an attorney to be present for questioning rather than expressing a desire for a lawyer-negotiated plea bargain. Regardless, the officers asked clarifying questions—a practice that is encouraged but not required, *see United States v. Lee*, 413 F.3d 622, 625 (7th Cir. 2005)—and Gist-Holden still did not make an unambiguous statement. When he did so later in the interrogation, all questioning stopped. Thus, officers did not infringe his rights under the Fifth Amendment as understood by *Miranda* and *Edwards*.

IV. Sixth Amendment Right to Counsel

Gist-Holden also challenges his interrogation on Sixth Amendment grounds because, he asserts, state robbery and murder charges had already been filed at the time the agents started questioning him without a lawyer. The Sixth Amendment right to counsel attaches at the initiation of formal judicial proceedings. *See McNeil v. Wisconsin*, 501 U.S. 171, 180–81 (1991). But here, when Gist-Holden was questioned in Georgia, he had not yet been brought before a judge, so the Sixth Amendment had not yet attached. *See id.*; *Garcia v. Hepp*, 65 F.4th 945, 950 (7th Cir. 2023). Regardless, Gist-Holden agreed to waive his *Miranda* rights, which generally suffices as a valid abandonment of Sixth Amendment rights in addition to those under the Fifth Amendment. *See Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

V. Evidence

Gist-Holden next argues that the government failed to meet its burden to prove at trial that he committed the murder and armed robbery. He cites various perceived holes in the government's case, including: (1) that King and Hawkins were unreliable witnesses because local officers on the scene identified only two robbers exiting the bank; (2) that Gist-Holden obtained the agreement of an FBI witness that *had* Gist-

Holden been “let’s just say, near O’Hare Airport” at the time of the robbery (though no evidence supported Gist-Holden’s theory that he was not at the bank during the robbery), it would have been impossible for him to commit the robbery; (3) that none of his DNA or fingerprints were found at the crime scene; and (4) that none of the bank employees or eyewitnesses identified Gist-Holden’s proper height.

Gist-Holden did not raise a sufficiency argument at the close of the government’s case or after the verdict in a motion under Rule 29 of the Federal Rules of Criminal Procedure. Accordingly, we review his challenge for plain error. *See United States v. Lundberg*, 990 F.3d 1087, 1095 (7th Cir. 2021). For unpreserved sufficiency challenges, we can overturn a jury verdict “only if no rational trier of fact could have agreed with the jury.” *Id.* We view the evidence in the light most favorable to the government and do not reweigh evidence or reassess credibility of witnesses. *See United States v. Wallace*, 991 F.3d 810, 812 (7th Cir. 2021). Ultimately, Gist-Holden must show that the record is “devoid of evidence pointing to guilt” or that the evidence on a key element is so “tenuous” that a conviction is “shocking.” *Lundberg*, 990 F.3d at 1095.

The evidence against Gist-Holden is overwhelming. It includes a video recording of him shooting the security guard, real-time text messages placing Gist-Holden at his home with the co-defendants just before the robbery, shell casings in his home connected to the same weapon used for the murder, testimony from co-defendants about his role in the robbery, cell phone records and location data, and evidence of his consciousness of guilt (fleeing the jurisdiction and engaging in a high-speed chase). The holes that Gist-Holden points to are trivialities when weighed against the evidence of his guilt and did not require the jurors to reject the ample evidence against him.

VI. Motion for New Trial

Finally, Gist-Holden argues that the district court should have granted his motion for a new trial. In his motion five months after the jury verdict, Gist-Holden asserted that, in its closing argument, the government improperly relied on a statement from King that Gist-Holden had impeached. (King falsely denied ever saying that “he would say or do anything to get out of jail.”) The district court denied the motion as untimely, and Gist-Holden now asserts that his motion should have been granted.

The court did not err. Gist-Holden’s motion was not filed within 14 days of the verdict, as required by Rule 33(b)(1) of the Federal Rules of Criminal Procedure. Even if timely, the weight of the evidence of Gist-Holden’s guilt was so overwhelming that the jury would have convicted him with or without the government referring to King’s

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statement in its closing. The possibility that the jury relied on a statement bolstering King's credibility is too abstract to create a reasonable doubt about his guilt.

AFFIRMED