NOT RECOMMENDED FOR PUBLICATION

No. 20-6296

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
JOSEPH D. BROWN,	)	TENNESSEE
	)	
Defendant-Appellant.	)	

ORDER

Before: MOORE, WHITE, and THAPAR, Circuit Judges.

Joseph D. Brown appeals his criminal sentence under the Armed Career Criminal Act. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Brown was indicted on two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty, in accordance with a plea agreement, to one of the charges, and the government dismissed the other. The district court sentenced him to 180 months of imprisonment. In crafting Brown's sentence, the district court determined that he qualified for an enhancement under the Armed Career Criminal Act ("ACCA"), because he had at least three prior convictions that were "violent felon[ies]," 18 U.S.C. § 924(e). On appeal, Brown argues that the district court's ACCA finding and consequent sentence were in error because two of his predicate convictions "more properly constituted one continuous criminal episode."

Because Brown objected to the district court's determination that he committed two distinct offenses for purposes of the ACCA, we review that decision de novo. *See United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017).

A defendant convicted under § 922(g) faces a potential maximum sentence of ten years of imprisonment. *See* § 924(a)(2). The ACCA increases that sentence to a minimum of fifteen years. *See* § 924(e)(1). To qualify for the enhancement, a § 922(g) defendant must have at least three predicate convictions that were "committed on occasions different from one another." *Id.*

Brown's presentence report, which the district court used at his sentencing, listed his three predicate convictions: an aggravated-burglary conviction for an offense on October 24, 2015, and an aggravated-burglary conviction and a burglary of a business for offenses on October 25, 2015, all under Tennessee law. Brown concedes that one of the aggravated-burglary convictions was an ACCA predicate. He argues that his other two convictions for offenses on October 25, however, were not separate offenses and therefore that he did not have enough predicate offenses to qualify for the ACCA enhancement.

Brown explains that he was committing a burglary of a business—Chattanooga Trailer and Rental—when the business's alarm went off. He fled the building "under the pressure of hot pursuit" from police, and "immediately stepped into a detached garage on the premises," where police found him. Brown was convicted of aggravated burglary of the garage, but he maintains that he entered that structure "only to hide and without meaningful opportunity to reflect on an effort to avoid that second crime." Therefore, he argues that two offenses were not in fact separate for ACCA purposes.

We have "recognized 'at least three indicia that offenses are separate from each other,'" as reflected in these three questions: (1) "[i]s it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins?"; (2) "[w]ould it have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense?"; and (3) "[w]ere the offenses committed in different residences or business locations?" *United States v. Wooden*, 945 F.3d 498, 504 (6th Cir. 2019) (citing *United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006)), *cert. granted in part*, 141 S. Ct. 1370 (2021).

Brown argues that he committed only one continuous offense when, after burglarizing the business, he "merely stepped into an unoccupied, detached garage of a residence to avoid detection, apprehension and arrest." In support, he relies on an Eleventh Circuit case, *United States v. Sweeting*, 933 F.2d 962, 967-68 (11th Cir. 1991); a dissenting opinion in our decision in *United States v. Brady*, 988 F.2d 664, 670-77 (6th Cir. 1993) (en banc) (Jones, J., dissenting); and several (generally older) cases from this court, including *United States v. Thomas*, 211 F.3d 316, 318-21 (6th Cir. 2000), *rev'd on other grounds, United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017); and *United States v. Graves*, 60 F.3d 1183, 1187 (6th Cir. 1995); as well as more recent unpublished precedent, like *United States v. Mann*, 552 F. App'x 464, 470 (6th Cir. 2014). He concludes that these cases support his contention that his two convictions were not separate offenses for ACCA purposes.

But Brown acknowledges that, to determine whether multiple offenses count as a single ACCA predicate, this court looks to the "informative standards" in the above "three basic questions." *United States v. Jenkins*, 770 F.3d 507, 509-10 (6th Cir. 2014). And under that rubric, Brown's two October 25 burglaries satisfy each of the indicia of separateness: it is possible to discern when he completed the first burglary and began the second; he could have ceased his criminal conduct after the first burglary and withdrawn without committing the second; and the burglaries happened in separate structures. *See Hill*, 440 F.3d at 298 (holding that a defendant who burglarized an abandoned business and then went across the street to another property and stole a motor from a boat had committed separate offenses).

Moreover, the government corrects Brown's characterization of the second burglary as a mere attempt to flee or hide after setting off the alarm while he committed the first. According to the documents that Brown himself relies on, *see United States v. King*, 853 F.3d 267, 272 (6th Cir. 2017) (citing *Shepard v. United States*, 544 U.S. 13, 20 (2005)), police officers saw Brown "step inside a garage," where "[a]pparently he was looking through it with a small flashlight." That Brown's second conviction was for burglary, rather than trespass, supports that account, given that Tennessee burglary required entry into a building "with intent to commit a felony, theft or assault."

Tenn. Code Ann. § 39-14-402(a)(1). Brown replies that his indictment alleged only that he entered the garage "with the intent to commit theft," and that he was not found to have taken any items from the garage. But the fact that Brown was apprehended before he was able to steal anything while he searched the garage with a flashlight does not transform the second burglary to a continuation of the first or a mere effort to hide or flee. That Brown was not simply attempting to hide from police when he entered the garage lends even more justification for holding, in view of the three *Hill* questions, that the burglaries were separate offenses for ACCA purposes. In sum, the district court did not err in sentencing Brown under the ACCA.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk