

United States Court of Appeals
For the Eighth Circuit

No. 24-2357

United States of America

Plaintiff - Appellee

v.

Joshua Nesbitt, also known as T

Defendant - Appellant

No. 24-2382

United States of America

Plaintiff - Appellee

v.

Shawn Burkhalter, also known as Deuce

Defendant - Appellant

Appeals from United States District Court
for the Western District of Missouri - Kansas City

Submitted: January 15, 2026

Filed: August 20, 2026

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

SHEPHERD, Circuit Judge.

A jury convicted Joshua Nesbitt and Shawn Burkhalter of committing a spate of federal crimes in the Kansas City, Missouri, area. Based on these convictions, the district court sentenced Nesbitt to four consecutive life sentences, and Burkhalter to five. Nesbitt and Burkhalter appeal. They challenge the district court's¹ denial of Burkhalter's motion to sever their trials, the sufficiency of the evidence as to several of the charges of which they were convicted, the district court's decision to admit certain witnesses' grand jury testimony, the instructions given to the jury, and the procedural soundness and substantive reasonableness of part of their sentences. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In the summer of 2015, Burkhalter and his friend Anthony Peltier burgled an AR-15 rifle from the apartment of one of Peltier's coworkers.² The rifle was black, but it bore distinctive white markings on its magazine. Near the time of the theft, Burkhalter met Nesbitt, who had recently moved to Kansas City from Mississippi. The two hit it off; Nesbitt soon moved into the apartment that Burkhalter shared with his girlfriend, Joslyn Lee.

On September 8, 2015, Burkhalter, Nesbitt, and an associate robbed a Fast Stop convenience store at a Kansas City gas station. Burkhalter cased the store

¹The Honorable Brian C. Wimes, then United States District Judge for the Western District of Missouri, now Chief Judge.

² "We recite the facts in the light most favorable to the jury's verdict." United States v. Galloway, 917 F.3d 631, 632 (8th Cir. 2019) (citation omitted).

before the robbery. Nesbitt entered the store after Burkhalter left and leveled the stolen AR-15 at the cashier, demanding money.

Two days later, on September 10th, Nesbitt and Burkhalter met a drug dealer named Danny Dean in the parking lot of the Mama China restaurant in Raytown, Missouri. They stole Dean's drugs. And Nesbitt shot Dean four times with the stolen rifle, killing him.

Anthony Johnson, who lived in the same apartment complex as Nesbitt and Burkhalter and whom Burkhalter considered a cousin, overheard Nesbitt and Burkhalter discussing their involvement in the Mama China shooting. On September 11th, the day after the shooting, Johnson approached Kansas City, Missouri police officers responding to an unrelated incident. One of the officers put Johnson on the phone with a detective. Johnson reported overhearing the conversation between Burkhalter and someone he knew as "T." "T" is Nesbitt's nickname. Johnson also stated that Burkhalter was boasting of his involvement in a "clap out" at Mama China and noted that "someone got smoked." Johnson's understanding was that an assault rifle had been used in the murder; he told the officers that someone he knew was thinking about buying the weapon. On September 12th, Johnson called an anonymous tips hotline and relayed the same general information about the Mama China killing.

On September 14th, two Raytown detectives, following up on Johnson's tip, attempted to speak with Burkhalter and Nesbitt at their apartment. Without prompting, Burkhalter asked if they were there about "the Raytown homicide." Then, he fled into the woods adjacent to the apartment complex. After Burkhalter escaped, the detectives continued speaking with Nesbitt, whom they briefly detained. Unaware that Nesbitt was the "T" referenced in Johnson's tip, they decided not to arrest him at that point.

On October 2nd, law enforcement officers located Burkhalter in his vehicle and tried to conduct a traffic stop. Burkhalter fled, leading police on a high-speed

chase that ended only when Burkhalter drove his vehicle into a truck. The police arrested Burkhalter and interviewed him about the Mama China killing. During the interview, one of the officers present mentioned that law enforcement had received a tip about Burkhalter and Nesbitt's involvement in the Mama China shooting.

On October 3rd, Johnson visited the apartment that Nesbitt and Burkhalter shared with Lee. Two other women—Nickayla Jones and Rachel Ryce—had also recently moved in. Johnson shared marijuana with Lee, Jones, and Ryce. He bragged that he was “a little spoiled rich kid that sells weed.”

The next day, Burkhalter called Lee from jail. Lee told him that Johnson had claimed to have “weed and money.” Burkhalter asked Lee to tell Nesbitt to “go holler at” Johnson, and Nesbitt, who was listening in, confirmed that he would do so. Later in that call, Burkhalter told Nesbitt that the police said they were looking for somebody named “T.” And Nesbitt told Burkhalter that Johnson was the one tipping off the police. He also expanded on Lee's statements that Johnson had weed and money, claiming that Johnson had both “bread” and “a pound of shit.” Burkhalter told Nesbitt to “go down there, bruh” and “take everything.” Nesbitt responded, “Alright, say no more.” On another call that morning, October 4th, Burkhalter told a friend that his cousin “Ant” had snitched on him to the police. Later, he confirmed to that friend that all was well because he “had somebody holler at him.”

On the afternoon of October 4th, Nesbitt, Lee, Ryce, Jones, and a man named Autry Hines gathered in the shared apartment, where Nesbitt and Hines discussed robbing Johnson. Nesbitt told Hines that Johnson had marijuana, and Hines understood that the plan was to steal that marijuana. Nesbitt, Hines, and Jones went downstairs to Johnson's apartment with the stolen AR-15. Lee and Ryce waited in Hines's vehicle, a red Chevrolet HHR, on a nearby street.

Nesbitt knocked on Johnson's door. When Johnson opened it, Nesbitt, Hines, and Jones entered. They made Johnson sit on his couch while they stole marijuana

and other property. Nesbitt then shot Johnson three times with the AR-15, killing him. Nesbitt, Hines, and Jones fled to the waiting HHR, which Lee drove to the apartment Hines shared with his girlfriend, Kira Williams. Nesbitt cleaned the gun and Hines burned rubber gloves used during the robbery. Nesbitt left the gun at Hines's apartment for safekeeping. He also split the marijuana taken from Johnson among the conspirators.

On a recorded jail call, Lee confirmed to Burkhalter that Johnson was dead. Burkhalter was pleased. He exclaimed, "On my mama, salute that." He and Nesbitt then discussed the death of "that bitch" downstairs; Nesbitt remarked, "That ho gone, boy." And Burkhalter told a friend, "That n*****, Ant, gone, bruh," and laughed.

On October 7th, three days after murdering Johnson, Nesbitt, with the assistance of Burkhalter's friend Peltier and Lee, Ryce, Jones, and someone from Atlanta called "Scoop," robbed drug dealers in Lawrence, Kansas. Peltier knew those dealers dealt in cocaine and marijuana. The robbery's purpose was—at least in part—to send money to Burkhalter in jail. Lee kept Burkhalter apprised of the robbery's progress via phone as it happened. The robbers ultimately made off with marijuana, cocaine, and money. Burkhalter later described the robbery to one of his friends as "one of [his] . . . little missions."

After carrying out the Lawrence robbery, Nesbitt informed Burkhalter that the AR-15—previously stashed at Hines's residence—had gone missing. Burkhalter was displeased with that development. He exclaimed, "Man, man, man, man, man, man, fuck, fuck, fuck, fuck, fuck," and "bruh, that, that, that will, bruh, that, that, that fucks me in the ass, bruh." And he said that the missing gun was "jeopardizing every fuckin' thing" and that they were "fuckin' fucked" if the gun did "not come up." Burkhalter implied that this was the case because he had killed several people with the gun; he noted that Nesbitt had "two tons" on the gun as well. He threatened to kill Lee and others if the gun was not located.

In an attempt to locate the gun, Nesbitt, Lee, Jones, and Ryce went to the workplace of Williams, Hines's girlfriend. They put her on the phone with Burkhalter, who threatened to kill her, Hines, and Hines's family if she did not return the AR-15. The same day, police pulled Hines over in the HHR. They arrested him and seized the gun. Forensic analysis later confirmed that this was the weapon that had fired the bullets recovered at the Mama China and Johnson murder scenes. The police later located and arrested Nesbitt.

A federal grand jury indicted Nesbitt, Burkhalter, Lee, Jones, Ryce, Hines, and others on various charges relating to Nesbitt and Burkhalter's crime spree in February 2018. A third superseding indictment charged Nesbitt and/or Burkhalter with 15 counts: Count 1 (conspiracy to distribute and possess with intent to distribute cocaine and marijuana); Count 2 (possession of cocaine with intent to distribute, in connection with the Mama China murder); Count 3 (discharge of a firearm in furtherance of a crime of violence and a drug trafficking crime, also relating to the Mama China murder); Count 4 (possession of marijuana with intent to distribute, relating to the Johnson murder); Count 5 (discharge of a firearm in furtherance of a drug trafficking crime and a crime of violence, relating to the Johnson murder); Count 6 (murder resulting from use of a firearm, in connection with the Mama China murder); Count 7 (murder resulting from use of a firearm, in connection with the Johnson murder); Count 8 (conspiracy to tamper with witnesses and evidence); Count 9 (witness tampering by murder); Count 10 (evidence tampering through intimidation of Williams); Count 11 (witness tampering against Burkhalter alone, relating to post-indictment threats he made against Lee); Count 12 (witness tampering against Burkhalter alone, relating to post-indictment threats against Ryce); Count 13 (Hobbs Act robbery, relating to the Fast Stop robbery); Count 14 (brandishing a firearm in furtherance of a crime of violence, relating to the Fast Stop robbery); and Count 15 (unlawfully possessing the AR-15 as convicted felons).

Nesbitt and Burkhalter moved to sever their trials. The district court denied their requests. At trial, the district court admitted grand jury testimony about the Mama China murder over Nesbitt's and Burkhalter's objections. The district court

also overruled objections to the jury instructions on Hobbs Act robbery, which served as a predicate crime for the firearm discharge counts.

The jury found Nesbitt guilty of every Count he was charged with; it also found Burkhalter guilty of every Count he faced, save Count 12, one of the post-indictment witness-tampering charges. The district court denied oral and written motions for judgments of acquittal. Before sentencing, the Government moved to dismiss Counts 6 and 7, noting potential double jeopardy concerns in light of the United States Supreme Court’s decision in Lora v. United States, 599 U.S. 453 (2023). The district court granted that motion. It ultimately sentenced Nesbitt to four consecutive life sentences, and Burkhalter to five, based on their other convictions.

Nesbitt and Burkhalter appeal. They raise various challenges to the sufficiency of the evidence presented at trial. They also challenge the procedural soundness and substantive reasonableness of their sentences for Count 14 and the district court’s decision to admit grand jury testimony. Burkhalter further contends that the district court erred in denying his motion to sever and in formulating its Hobbs Act robbery jury instructions.

II.

First, Burkhalter argues that the district court erred in denying his motion to sever his trial from Nesbitt’s. He contends that severance was warranted because he wanted to call Nesbitt as a witness on his behalf. “We review a district court’s denial of a motion to sever for an abuse of discretion.” United States v. May, 70 F.4th 1064, 1071 (8th Cir. 2023) (citation omitted).

Under Federal Rule of Criminal Procedure 14(a), a district court “may . . . sever the defendants’ trials” if “the joinder of defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant.” “In this circuit, it is not reversible error to deny severance requested on the ground that a

defendant wants to call a codefendant as a witness, unless the defendant shows that the codefendant is likely to testify at a separate trial and the testimony would exculpate him.” United States v. Garcia, 647 F.2d 794, 795-96 (8th Cir. 1981) (citation omitted). The first showing—that a codefendant is likely to testify at trial—requires a “‘firm representation’ that [the] co-defendant would be willing to testify on the defendant’s behalf.” United States v. Ali, 799 F.3d 1008, 1023 (8th Cir. 2015) (citation omitted). Otherwise, there is no abuse of discretion in denying the motion to sever. Id.

Burkhalter filed a motion to sever, asserting that Nesbitt would “likely . . . testify at a separate trial.” He speculated that this was so based on three pieces of evidence. First, during a status conference, Nesbitt exclaimed that he wanted to “work with the Government” and that Burkhalter “had nothing to do with . . . this shit.” Second, a person purporting to be Nesbitt produced a written statement confessing to the murders and contending that Burkhalter had nothing to do with them. And third, a person purporting to be Nesbitt attempted to call one of Burkhalter’s lawyers and told a paralegal that he “want[ed] to speak on [Burkhalter’s] behalf.” The district court denied Burkhalter’s motion to sever, reasoning that Burkhalter had “not supplied the Court with a firm representation that Nesbitt [was] likely to testify on his behalf at a separate trial.”

We discern no abuse of discretion in the district court’s severance decision. Burkhalter’s representation that Nesbitt would “likely . . . testify at a separate trial”—supported only by equivocal evidence—does not constitute a firm representation that Nesbitt would be willing to testify on his behalf. See id.; Christian v. Dingle, 577 F.3d 907, 912 (8th Cir. 2009) (recognizing that codefendants’ purported “intimat[ions] that they would be prepared to testify for” the defendant did not support a “firm representation” that they would testify). Not once did Nesbitt actually say he would *testify at trial* on Burkhalter’s behalf; all he said was that he intended to cooperate with the Government and that he wanted to speak on Burkhalter’s behalf in some unspecified capacity. But despite ample opportunity, he never acted upon or otherwise firmed up his purported

statements: Nesbitt never cooperated with the Government, nor did he ever expressly offer to testify.

On appeal, Burkhalter notes a fourth piece of evidence that he contends shows Nesbitt was likely to testify at a separate trial: when Burkhalter indicated during trial that he wished to call Nesbitt as a witness, Nesbitt's counsel referenced tension between Nesbitt's Fifth Amendment right against self-incrimination and Burkhalter's right to compulsory process and said the solution would have been to sever the defendants' trials. But again, an argument supported by that statement falls short of a "firm representation" that Nesbitt would be willing to testify on Burkhalter's behalf. At best, it reflects Nesbitt's counsel's apparent misunderstanding that Nesbitt would not retain his privilege against self-incrimination at Burkhalter's separate trial. See, e.g., United States v. Barber, 442 F.2d 517, 529 n.22 (3d Cir. 1971) ("It would appear axiomatic that the constitutional right of a defendant not to testify at the behest of a co-defendant remains his right despite the severance of their trials."). That is a far cry from a commitment that Nesbitt would testify on Burkhalter's behalf.

Burkhalter contends that our decision in United States v. Starr, 584 F.2d 235 (8th Cir. 1978), governs here. In that case, we concluded that the district court erred in denying a motion to sever where the defendant's codefendant had testified favorably to him in grand jury proceedings. Id. at 238-39. We reasoned that "[t]he fact that [the codefendant] was willing to exculpate [the defendant] before the grand jury in sworn testimony demonstrates that it was at least likely that he would do the same in [the defendant's] trial if he were not being tried in the same proceeding." Id. at 239. But no statement Burkhalter attributes to Nesbitt or his counsel supports the inference we made in Starr. Nesbitt's in-court outburst, his purported letter and phone call, and his counsel's apparent misunderstanding of his Fifth Amendment rights do not at all resemble the sworn prior testimony showing that the codefendant was likely to testify on the defendant's behalf in Starr. In short, Burkhalter's reference to Starr does not persuade us.

We hold that the district court did not abuse its discretion in denying Burkhalter’s request to sever his trial from Nesbitt’s.

III.

Next, Nesbitt and Burkhalter raise several challenges to the sufficiency of the evidence supporting their convictions. “We review de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the jury verdict and giving the verdict the benefit of all reasonable inferences.” United States v. Foard, 108 F.4th 729, 735 (8th Cir. 2024) (citation omitted).

A.

Nesbitt and Burkhalter contend that the Government failed to present sufficient evidence at trial to support their convictions for conspiracy to distribute or possess with intent to distribute cocaine and/or marijuana as alleged in Count 1 of the Third Superseding Indictment. To prove that charge, the Government had to show that (1) there was an agreement to distribute cocaine or marijuana (or possess with intent to distribute cocaine or marijuana); (2) Nesbitt and Burkhalter knew of the conspiracy; and (3) Nesbitt and Burkhalter intentionally joined the conspiracy. See United States v. Davis, 826 F.3d 1078, 1081 (8th Cir. 2016) (detailing elements of conspiracy).

When construed in the light most favorable to the jury’s verdict, the evidence supports Nesbitt’s and Burkhalter’s convictions for the conspiracy charged in Count 1. The evidence shows that Nesbitt and Burkhalter participated in multiple robberies of drug dealers—including Dean, Johnson, and the dealers robbed in Lawrence. Witness Marcus Johnson testified that Burkhalter made money from robbing drug dealers and that Burkhalter tried to sell him drugs after the Mama China robbery. The robberies involved an overlapping cast of participants (including Nesbitt and Burkhalter) and occurred close in time. The robberies support Nesbitt’s and Burkhalter’s conspiracy convictions. See United States v. Lindsey, 702 F.3d 1092,

1102-03 (8th Cir. 2013) (finding that sufficient evidence existed to prove beyond a reasonable doubt that the defendants joined a conspiracy to distribute drugs where the defendants robbed a known drug dealer’s house and a witness testified to other incidents of the defendants selling drugs obtained through robberies of drug dealers); United States v. Campbell, 963 F.3d 309, 317 (4th Cir. 2020) (“[T]he robbery of a drug dealer by members of an active drug conspiracy—who then sell the stolen heroin and split the proceeds—is evidence of the charged drug conspiracy.”).

The Government also presented evidence of an agreement to distribute cocaine and marijuana beyond the robberies themselves. That evidence included: that Burkhalter purchased cocaine and marijuana from sources known as “6-0” and “Mike the weed man”; that Lee observed Burkhalter distributing cocaine and marijuana to friends and acquaintances; that Burkhalter told Lee he sold marijuana; that Nesbitt accompanied Burkhalter to drug buys; that witnesses testified that Burkhalter had tried to sell them cocaine (or that they had purchased cocaine from Burkhalter); that Nesbitt acknowledged possessing “pills, powder, and coke” during his time living in Kansas City, and stated on a recorded jail call that he was “a thug” and that “[e]verything [he] do[es] is illegal, sell dope and all type[s] of shit”; and that, after crashing his car, Burkhalter dispatched an associate to the tow lot to retrieve contraband from under the wrecked vehicle’s steering wheel—an area to which a drug dog later alerted.

Nesbitt and Burkhalter nevertheless argue that this evidence is thinner than that sometimes supporting drug-distribution conspiracy convictions. They point out that there were no controlled buys and no large-scale drug seizures. But there did not have to be. See United States v. Wiley, 122 F.4th 725, 729 (8th Cir. 2024) (recognizing that participation in a drug-distribution conspiracy may be proved circumstantially); United States v. Edwards, 834 F.3d 180, 199 (2d Cir. 2016) (“[P]roof of a narcotics trafficking conspiracy—even proof beyond a reasonable doubt—does not demand a seizure of drugs.”). Nesbitt also argues that there is no direct evidence that he sold any drugs. But again, there did not have to be. Salinas v. United States, 522 U.S. 52, 63 (1997) (“A conspiracy may exist even if a

conspirator does not agree to commit or facilitate each and every part of the substantive offense.”); United States v. Bynum, 669 F.3d 880, 887 (8th Cir. 2012) (“[F]ederal drug distribution charges do not require an exchange for value.”). Moreover, Nesbitt admitted on a recorded jail call to selling drugs; the jury could have inferred that he himself engaged in drug distribution on that basis.

Nesbitt and Burkhalter also argue that, to the extent the evidence proves any conspiracy, it proves multiple conspiracies rather than the single conspiracy charged in the indictment. They contend that there is thus a fatal variance between the indictment and the evidence from trial. “A variance results where a single conspiracy is charged but the evidence at trial shows multiple conspiracies.” United States v. Morales, 113 F.3d 116, 119 (8th Cir. 1997). “Whether the government’s proof established a single conspiracy or multiple conspiracies is a question of fact for the jury.” Id. In addressing a challenge to that finding, “we consider the totality of the circumstances, including the nature of the activities, the location and time frame in which the activities were performed, and the participants involved.” Id.

Here, while Nesbitt and Burkhalter contend that a variance may have existed, they do not identify what the multiple conspiracies proven were. Presumably, they view one or more of the drug-dealer robberies as implicating a separate conspiracy or conspiracies. But the robberies all followed the same pattern (using a firearm to rip off a known drug dealer), occurred close in time, included a highly overlapping cast of characters, and involved the same obvious objective: stealing drugs. The jury could have easily inferred that a single drug-distribution conspiracy existed. See United States v. Gilbert, 721 F.3d 1000, 1005 (8th Cir. 2013) (“A single conspiracy may be found when the defendants share a common overall goal and the same method is used to achieve that goal, even if the actors are not always the same.” (citation omitted)). Under the totality of the circumstances, and viewing the evidence in the light most favorable to the jury’s verdict, we conclude that the jury reasonably found that the single conspiracy charged in the indictment existed.

Accordingly, we reject Nesbitt's and Burkhalter's challenges to their convictions under Count 1 of the Third Superseding indictment.

B.

Nesbitt and Burkhalter next contend that the district court erred in withholding judgments of acquittal on the witness and evidence tampering charges alleged in Counts 8, 9, and 10 of the Third Superseding Indictment.³ According to Nesbitt and Burkhalter, the Government did not present sufficient evidence that Nesbitt's and Burkhalter's tampering offenses had a federal nexus.

The federal witness tampering statute requires a federal nexus, which is present if a defendant tampers with a witness either (1) to prevent testimony or evidence from being presented in an "official proceeding" or (2) to prevent the witness from communicating with a "law enforcement officer." See 18 U.S.C. § 1512; see also Arthur Andersen LLP v. United States, 544 U.S. 696, 707-08 (2005) (discussing proof requirements for the official proceeding theory); Fowler v. United States, 563 U.S. 668, 671-78 (2011) (discussing proof requirements for the law enforcement officer theory). The parties dispute whether the evidence sufficiently supported the law enforcement officer and official proceeding theories on Counts 8 and 9 (a tampering conspiracy charge and the tampering charge relating to the Johnson murder). They also dispute whether the evidence supports the official proceeding theory as to Count 10 (the tampering charge dealing with Nesbitt's and Burkhalter's efforts to intimidate Williams).

The evidence presented at trial sufficiently supports applying the federal proceeding theory, and thus Burkhalter's and Nesbitt's convictions of all the tampering counts. We thus do not reach the parties' arguments about the sufficiency of the evidence as to the federal officer theory.

³They also challenge their convictions under Count 5, for which the substantive witness tampering offense alleged in Count 9 served as a predicate. Our analysis below resolves this challenge.

The term “official proceeding” as used in § 1512 includes federal grand jury and federal court proceedings. See 18 U.S.C. § 1515(a)(1)(A). It does not include a state proceeding. United States v. Petruk, 781 F.3d 438, 444 (8th Cir. 2015). To prove the federal nexus for tampering on an official-proceeding theory, the Government does not have to prove that “an official proceeding [is] pending or about to be instituted at the time of the offense.” 18 U.S.C. § 1512(f). Moreover, “no state of mind need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States.” Id. § 1512(g)(1). That is, “the government need not prove that the defendant was aware the proceeding was federal in nature.” Petruk, 781 F.3d at 444. Ultimately, the Government must prove “beyond a reasonable doubt that the defendant contemplated a foreseeable proceeding, and that the contemplated proceeding constituted an ‘official proceeding.’” Id. at 445.

Here, Nesbitt and Burkhalter argue that the evidence does not show they anticipated being haled into federal court. But they did not have to. See 18 U.S.C. § 1512(g)(1); United States v. Abdullahi, 144 F.4th 1034, 1042 (8th Cir. 2025) (“What the Government had to prove was that Abdullahi ‘ha[d] in contemplation a[] particular’ federal proceeding, not that he knew the proceeding was federal.” (alterations in original) (citations omitted)). The evidence shows that Nesbitt and Burkhalter plainly foresaw the possibility that they would be prosecuted for robbing and murdering Dean. As it happened, that prosecution turned out to be a federal one. That is enough. See United States v. Mink, 9 F.4th 590, 610 (8th Cir. 2021) (finding the evidence sufficient to support a jury verdict on a tampering charge where the defendant, pre-indictment, sought his father’s assistance in destroying evidence and creating a false alibi with regard to crimes that were not inherently federal). When the evidence is viewed in the light most favorable to the jury’s verdict, it was sufficient to establish that Nesbitt and Burkhalter contemplated a particular, foreseeable proceeding when they murdered Johnson and threatened Williams.

Nesbitt and Burkhalter contend that our decisions in Petruk and Abdullahi compel a contrary result. These decisions do not. In both cases, we held that the

evidence was insufficient to show that the defendants contemplated particular, foreseeable proceedings that constituted “official proceedings.” Petruk, 781 F.3d at 444-46; Abdullahi, 144 F.4th at 1041-44. But critically, the defendants were already facing state charges, and there was no evidence that they anticipated additional proceedings when they tampered—i.e., the evidence showed that they were concerned with thwarting their ongoing state cases, as opposed to future potential federal ones. Petruk, 781 F.3d at 444-46; Abdullahi, 144 F.4th at 1041-44. While these cases hold that a defendant must contemplate a particular proceeding, they do not support Nesbitt’s and Burkhalter’s arguments that a defendant must foresee such a proceeding’s federal status.⁴

In sum, adequate evidence supports Nesbitt’s and Burkhalter’s convictions of Counts 8, 9, and 10 of the Third Superseding Indictment.

C.

Nesbitt next argues that insufficient evidence supports his convictions under Counts 2 and 3 of the Third Superseding Indictment (which charged cocaine possession and firearm discharge offenses in connection with the Mama China

⁴Burkhalter filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) contending that the reasoning of another case, United States v. Goodlow, 171 F.4th 1106 (8th Cir. 2026), “applies . . . to the facts of this case.” In Goodlow, we held that the Government failed to establish the federal nexus requirement under the official proceeding theory where the Government’s evidence did not show that the defendant contemplated any particular proceeding. Id. at 1112. We emphasized that at the time of the alleged tampering, “no criminal investigation was underway.” Id. Here, in contrast, Burkhalter had already been arrested and interrogated about the Mama China murder, and communicated to Nesbitt that the police were interested in Nesbitt’s involvement in that homicide, before the two committed the charged tampering offenses. Goodlow does not require us to conclude that the Government failed to prove Nesbitt and Burkhalter contemplated a particular proceeding, where they clearly understood that they were under investigation for the Mama China killing.

murder). He contends that a reasonable jury could not have found that he was involved with the Mama China murder. We disagree.

After killing Dean, Nesbitt and Burkhalter were not exactly discreet about what they had done. They bragged about their involvement to multiple witnesses. For instance, Burkhalter told one such witness, Marcus Johnson, that he had gone to Mama China to conduct a drug deal “and it went bad, [so] his home boy had to get rid of the person.” Burkhalter also told Marcus Johnson that he was trying to get rid of an AR-15 that was connected with the murder. Jones overheard Nesbitt and Burkhalter discussing how Nesbitt had “caught his first body” at Mama China. And Nesbitt told Jones that he was looking for the women with whom he had ridden in the car that day because he wanted to kill them. Nesbitt also told Lee that he had met Dean to buy pills and had shot Dean because he thought Dean was reaching for a gun.

Eyewitness testimony also directly implicates Nesbitt in the Mama China murder. In portions of her grand jury testimony that were admitted at trial, a witness named Jazmine Hill stated that she had ridden in a car with Burkhalter, Nesbitt, and Tiara Cook to Mama China, where she had witnessed Nesbitt shoot Dean. Text messages support this account. After the murder, Cook text messaged Nesbitt that she was “not a rat period point blank”; that she was “not no snitch” and “wo[uld]n’t snitch” and that she would “never rat” because Nesbitt and Burkhalter “could kill [her] dead.”

Further, forensic evidence points to Nesbitt’s guilt. A ballistics analysis confirms that the AR-15 he used during the Fast Stop robbery—and that he later used to murder Johnson—was the same weapon that killed Dean. The jury saw photographs and video footage of Nesbitt holding that gun.

Significant evidence also reflects Nesbitt’s consciousness of guilt. Before Nesbitt murdered him, Johnson overheard Nesbitt and Burkhalter discussing the Mama China murder and tipped off the police about their involvement. Nesbitt and

Burkhalter discussed Johnson's tip on a recorded jail call before Nesbitt killed Johnson. The fact that Nesbitt killed Johnson—whom he knew was communicating with police about the Mama China murder—is circumstantial evidence that Nesbitt also murdered Dean. Further, Nesbitt and Burkhalter went to great lengths to get the murder weapon back after it went missing—a fact also reflective of guilt. Burkhalter became distressed when he learned the gun was gone. And he pointed out that the stakes were high for Nesbitt too: he noted that Nesbitt had “two tons” on the missing AR-15, which the jury could have taken as a reference to the Mama China and Johnson murders. The two discussed killing Hines and taking “everybody's memory card.” In an attempt to locate the weapon, Nesbitt visited Williams, Hines's girlfriend, at her place of work to threaten her. Nesbitt's and Burkhalter's evident concern about the murder weapon's whereabouts supports an inference that they killed Dean.

In the face of this evidence, Nesbitt contends that the Government's witnesses are not credible. He points out that some of its witnesses did not implicate Nesbitt in their initial contacts with law enforcement. He also argues that Hill's grand jury testimony about the details of the Mama China shooting is inconsistent with the forensic evidence law enforcement obtained at the scene. But witness credibility is “for the jury to evaluate” and “virtually unassailable on appeal.” United States v. Nosley, 62 F.4th 1120, 1130 (8th Cir. 2023) (citation omitted); see also United States v. Denson, 138 F.4th 1091, 1094 (8th Cir. 2025) (“[I]n reviewing the sufficiency of the evidence, ‘[i]t is axiomatic that we do not pass upon the credibility of witnesses or the weight to be given their testimony.’” (second alteration in original) (citation omitted)). We note only in passing that there are good reasons the jury could have rejected Nesbitt's inconsistency concerns. In this case about the murder of a government witness, it requires no great stretch of the imagination to understand the initial reticence of other witnesses to speak with law enforcement. Moreover, as noted above, significant evidence corroborates the broad strokes of Hill's grand jury testimony: Nesbitt was present at Mama China, and he pulled the trigger. We thus hold that sufficient evidence supports Nesbitt's convictions of the offenses charged in Counts 2 and 3 of the Third Superseding Indictment.

D.

Nesbitt next asserts that insufficient evidence supports his conviction under Count 5 of the Indictment, which charged him with discharge of a firearm in furtherance of various predicate offenses in connection with the Johnson murder. One of the predicate offenses for that charge was Hobbs Act robbery, which requires among other things, robbery that “obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” 18 U.S.C. § 1951(a). According to Nesbitt, the Government did not prove that he affected commerce when he used a firearm to rob Johnson.

As an initial matter, the Government argues that Nesbitt failed to preserve any sufficiency challenge on this issue, such that we should review only for plain error. See United States v. Garbacz, 33 F.4th 459, 466 (8th Cir. 2022) (“Sufficiency-of-the-evidence arguments raised for the first time on appeal . . . are reviewed for plain error.”). Nesbitt responds that he preserved his sufficiency challenge by objecting to the jury instructions for Hobbs Act robbery. But we need not reach the error-preservation issue. Even if we assume that Nesbitt preserved his sufficiency challenge, that challenge fails because the Government presented sufficient evidence that the robbery affected commerce.

In Taylor v. United States, the Supreme Court held that “if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer’s drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected,” because “as a matter of law, the market for illegal drugs is ‘commerce over which the United States has jurisdiction.’” 579 U.S. 301, 308-09 (2016). Here, despite Nesbitt’s claims to the contrary, the Government adequately proved that Johnson was a marijuana dealer and that Nesbitt targeted his drugs.

Johnson was a marijuana dealer by his own admission. The day before Nesbitt murdered him, while sharing marijuana with Lee, Jones, and Ryce in Lee’s

apartment, Johnson told them he was “a little spoiled rich kid that sells weed.” And the day of the murder, when Ryce asked Johnson for more marijuana, he said he wanted her to pay for it. On a recorded jail call, Lee informed Burkhalter that Johnson had “weed and money.” And Nesbitt told Burkhalter that Johnson had money and “a pound of shit,” which the jury could have taken as a reference to marijuana. Finally, when Nesbitt robbed Johnson, he obtained enough marijuana to divide among himself and at least three of his coconspirators. Taken together and construed in the light most favorable to the verdict, this evidence supports a finding that Nesbitt’s robbery of Johnson affected commerce within the meaning of the Hobbs Act robbery statute.

E.

Next, Burkhalter asserts that insufficient evidence supports his conviction of witness tampering as alleged in Count 11 of the Third Superseding indictment, which related to his efforts to intimidate Lee post indictment. Again, the Government disputes the applicable standard of review. It contends that Burkhalter did not preserve any sufficiency challenge on this issue; Burkhalter argues he did. And again, the standard of review ultimately does not matter: even if we assume Burkhalter preserved his sufficiency challenge, that challenge is meritless.

Burkhalter contends that the Government failed to prove the identity element of the charged offense—that is, that it was he who threatened Lee. In support of this argument, Burkhalter observes that Terron Maples, who conveyed Burkhalter’s threats to Lee, did not identify Burkhalter in court. But there was no requirement that Maples do so. Indeed, the Government may meet its burden of proving identity “through circumstantial evidence,” and “[c]ourtroom identification is not necessary when the evidence is sufficient to permit the inference that the defendant on trial is the person who committed the acts charged.” United States v. Perry, 61 F.4th 603, 607 (8th Cir. 2023) (alteration in original) (citation omitted).

The Government adequately proved identity through circumstantial evidence here. At trial, Maples testified that he had a conversation with a man known as “Deuce” in the holding area of the federal courthouse. Deuce told Maples, who was incarcerated at the same facility as Lee, that he wanted Lee “fucked up” because she was testifying against him. He instructed Maples to pass on a message about something that had happened at a baseball field. Maples did so.

Lee testified as to what this threat meant. She explained to the jury that at one point, Burkhalter suspected that she was cheating on him with another man. So Burkhalter lured that man to Lee’s apartment and ordered her and the man to have sex. When they refused, Burkhalter beat the man, took Lee to a baseball field, and raped her while holding a gun to her head.

Significant evidence shows that Burkhalter went by the pseudonym “Deuce.” That is how others referred to him. And that is how he referred to himself. For instance, his Facebook profile identified him as “TwoMuch Duece [sic].” Burkhalter also had a strong motive to threaten Lee: she was an important witness to the conduct he was then charged with, so it would be unsurprising that he wished to keep her from testifying. When this evidence is considered along with the extremely personal nature of the threat, it adequately supports a finding that Burkhalter—and not some other “Deuce”—was the person with whom Maples spoke. We hold that the evidence from trial is sufficient to support Burkhalter’s conviction of Count 11 of the Third Superseding Indictment.

IV.

Next, Nesbitt and Burkhalter challenge the district court’s decision to admit Hill’s and Cook’s grand jury testimony. “We review a district court’s ruling on the admissibility of evidence . . . for an abuse of discretion.” United States v. Euring, 112 F.4th 545, 551 (8th Cir. 2024).

In their grand jury testimony, Hill and Cook implicated Nesbitt and Burkhalter in the murder at Mama China. Hill testified that she was in the car while Burkhalter conducted the drug deal with Dean and Nesbitt shot Dean. And Cook testified about learning of the Mama China robbery from Burkhalter and Nesbitt and seeing Burkhalter with Xanax and cocaine and Nesbitt with a long gun shortly after the incident. She also testified that Burkhalter threatened to kill her, and told Nesbitt to kill a man who said he heard Nesbitt and Burkhalter committed a murder that was on the news. But at trial, Hill and Cook generally claimed not to remember anything about the Mama China murder or their grand jury testimony. The district court ultimately admitted the portions of that testimony inconsistent with their trial testimony under Federal Rule of Evidence 801(d)(1)(a).

The district court did not abuse its discretion in doing so. Rule 801(d)(1)(a) permits a prior statement to be admitted as substantive evidence—i.e., not simply for impeachment purposes—if “[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.” Hill’s and Cook’s grand jury testimony satisfies these requirements.

First, it was inconsistent with their trial testimony. For instance, at trial, Hill claimed she did not remember seeing Burkhalter or Nesbitt with a firearm and that she did not remember going to Mama China in 2015. And when confronted with her grand jury testimony to the contrary, she claimed the Government was “putting shit” in the transcript and “lying” and that she did not remember giving that testimony. Cook also generally claimed not to remember the substance of her grand jury testimony and the events she had testified to before the grand jury. As she put it when asked on cross-examination if there was any truth to what she had told the grand jury, she could not “testify to nothing.”

Though Nesbitt and Burkhalter argue, at least as to Hill, that claimed lack of memory does not qualify as inconsistency, they are wrong. See United States v.

Dean, 823 F.3d 422, 427 (8th Cir. 2016) (“In applying Rule 801(d)(1)(A), ‘inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, *inability to recall*, silence, or changes of position.’” (citation omitted)); United States v. Dennis, 625 F.2d 782, 796 (8th Cir. 1980) (“The trial judge correctly determined that Miller’s denials of and inability to recall grand jury testimony were ‘inconsistent’ with his trial testimony.”). We hold that the district court did not abuse its “considerable discretion in determining” that Hill’s and Cook’s grand jury testimony was “inconsistent with [their] trial testimony” for purposes of Rule 801(d)(1)(a). United States v. Matlock, 109 F.3d 1313, 1319 (8th Cir. 1997).

Second, grand jury proceedings constitute an “other proceeding” within the meaning of Rule 801(d)(1)(a). See Dennis, 625 F.2d at 795 (“Statements made before a grand jury are within the Rule 801(d)(1)(A) exception for statements given under oath and subject to the penalty of perjury.”). Nesbitt and Burkhalter do not argue otherwise.

Third, both Hill and Cook testified in court and were subject to cross examination. Nesbitt and Burkhalter’s strategic choice not to cross examine Hill and Hill’s and Cook’s claimed lack of memory do not change that fact. See United States v. Owens, 484 U.S. 554, 561-62 (1988) (recognizing that “[o]rdinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions,” and that asserted memory loss does not render a witness not subject to cross examination (citation omitted)).

Because Hill’s and Cook’s admitted grand jury testimony meets the requirements of Rule 801(d)(1)(a), we hold that the district court did not abuse its discretion in admitting it into evidence under that Rule. Further, any foundational shortcomings in the way some of the grand jury testimony was admitted into evidence would not change the result. Nesbitt and Burkhalter contend that the grand jury testimony was the only direct evidence placing them at the Mama China

location, but a sufficient portion of Hill’s grand jury testimony on that issue was properly admitted.

Nesbitt and Burkhalter assert various arguments grounded on Federal Rule of Evidence 613(b)—which governs impeachment—against the district court’s decision to admit Hill’s and Cook’s grand jury testimony. Because the district court admitted this testimony as substantive evidence under Rule 801(d)(1)(a), we do not reach these arguments. See United States v. Lashmett, 965 F.2d 179, 181 (7th Cir. 1992) (recognizing that Rules 801(d)(1)(a) and 613(b) are distinct bases for admitting inconsistent statements and have different requirements). The prior sworn statements Hill and Cook made before the grand jury meet the requirements of Rule 801(d)(1)(a). That is enough.

V.

Next, Burkhalter argues that the district court erred in formulating the jury instructions as to the interstate-commerce element of Hobbs Act robbery, which served as a predicate offense to the firearm discharge offenses charged in Counts 3 and 5 of the Third Superseding Indictment. “[W]e review a district court’s formulation of jury instructions for an abuse of discretion and its interpretation of law *de novo*.” United States v. Wilson, 142 F.4th 1045, 1049 (8th Cir. 2025) (citation omitted).

Hobbs Act robbery requires, among other things, that the defendant’s activity had an effect on interstate commerce. 18 U.S.C. § 1951(a), (b)(3). Here, the district court instructed the jury “that a robbery of cocaine [or marijuana] from a drug dealer affects commerce as a matter of law.” This language tracks the Supreme Court’s holding in Taylor: “if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer’s drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected,” because “as a matter of law, the market for illegal drugs is ‘commerce over which the United States has jurisdiction.’” 579 U.S. at 308-09.

Jury “instructions that closely track on-point Supreme Court precedent fairly and accurately describe the law.” United States v. Wright, No. 22-1194, 2023 WL 3163268, at *2 (8th Cir. May 1, 2023) (per curiam).

Burkhalter does not seriously dispute that the district court’s instructions correctly state Taylor’s holding. Rather, he says that the instructions compelled the jury to find that Dean and Johnson were drug dealers and that the robberies targeted cocaine and marijuana. But the instructions simply do not tell the jury to do that—they say that robberies of drugs from drug dealers affect commerce as a matter of law—which is a true statement of the law. They do not say that the jury must find that Dean and Johnson were drug dealers, or that Burkhalter targeted their drugs. Read as a whole, the jury instructions dictate that the jury had to find beyond a reasonable doubt that Burkhalter’s firearm discharge offenses as charged in Counts 3 and 5 affected interstate commerce, and that one way the Government could meet this burden was by proving that Dean and Johnson were drug dealers. The district court did not misinterpret or misstate the law, and we discern no error in the challenged instructions.

VI.

Finally, Nesbitt and Burkhalter contend that the district court imposed procedurally unsound and substantively unreasonable sentences for their convictions of the offense charged in Count 14 of the Third Superseding indictment—brandishing a firearm in connection with the Fast Stop robbery. According to Nesbitt and Burkhalter, the district court did not adequately explain its reasoning for imposing consecutive life sentences for their convictions of this charge, where the Guidelines sentencing range was only 84 months’ imprisonment. Moreover, in Nesbitt and Burkhalter’s view, the upward variance the district court imposed resulted in an extreme sentence for a convenience store robbery in which nobody was killed or physically injured.

We decline to reach the merits of Nesbitt and Burkhalter’s sentencing challenges. Under the concurrent sentence doctrine our cases recognize, we may “decline to review the validity of a concurrent conviction or sentence when a ruling in the defendant’s favor ‘would not reduce the time he is required to serve’ or otherwise” prevent prejudice to the defendant. Eason v. United States, 912 F.3d 1122, 1123 (8th Cir. 2019) (citation omitted). The logic underlying the concurrent sentence doctrine applies with equal force in the context of consecutive life sentences. See Oslund v. United States, 944 F.3d 743, 748, 748 n.3 (8th Cir. 2019) (affirming district court’s application of the concurrent sentence doctrine and agreeing with “the district court’s determination that [the defendant’s] consecutive life sentences are the functional equivalent of concurrent life sentences”). Because a favorable ruling on Nesbitt and Burkhalter’s challenge to their sentence for Count 14 would not benefit them in any way at this time (seeing as Nesbitt is serving three other consecutive life sentences, and Burkhalter is serving four), we need not and do not reach the validity of their sentences associated with their convictions of the offense charged in Count 14.

VII.

For the foregoing reasons, we affirm the judgment of the district court.
