United States Court of Appeals
For the Eighth Circuit

No. 25-3252

United States of America,

Plaintiff - Appellee,

v.

Mark Joseph Moss,

Defendant - Appellant.

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 25, 2026
Filed: November 23, 2026

Before COLLOTON, Chief Judge, L.R. SMITH and TRAYNOR, Circuit Judges.

COLLOTON, Chief Judge.

Mark Moss appeals the sentence of 130 months' imprisonment imposed by the district court[*] after Moss pleaded guilty to unlawful possession of a firearm as a felon.

[*]The Honorable Sarah E. Pitlyk, United States District Judge for the Eastern District of Missouri.

See 18 U.S.C. § 922(g)(1). In calculating an advisory sentencing range under the sentencing guidelines, the district court determined that Moss's prior conviction for fourth-degree domestic assault in Missouri was a "crime of violence" under USSG §§ 2K2.1(a)(1) and 4B1.2(a)(1). Moss argues that this conclusion was procedural error. We agree with the district court and affirm the judgment.

Moss unlawfully possessed a semi-automatic firearm that is capable of accepting a large-capacity magazine. Therefore, under the sentencing guidelines, Moss was subject to a base offense level of 26 if he committed the instant offense after sustaining two felony convictions for a crime of violence. USSG § 2K2.1(a)(1). Moss acknowledges one qualifying conviction, but disputes that his conviction for domestic assault, fourth degree in Missouri was a second.

An offense qualifies as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1). A person commits fourth-degree domestic assault in Missouri if he "attempts to cause or recklessly causes physical injury, physical pain, or illness to [a] domestic victim." Mo. Rev. Stat. § 565.076.1(1).

Moss concedes that the Missouri statute and subsection (1) are divisible into separate offenses. *Cf. United States v. Doyal*, 894 F.3d 974, 976-77 (8th Cir. 2018) (holding that second-degree domestic assault statute is divisible). Therefore, we proceed on the understanding that "attempt[ing] to cause . . . physical injury" and "recklessly caus[ing] physical injury" are separate offenses under the statute. Moss acknowledges that he was convicted of attempting to cause physical injury. The charging information to which he pleaded guilty accused Moss of "attempt[ing] to cause physical pain to Victim 1 by striking her in the face." R. Doc. 42-1, at 2.

Moss argues that the domestic assault offense of attempting to cause physical injury is not a crime of violence because an offender can commit the offense with a

mens rea of recklessness, as opposed to purposefulness or intent. An offense committed with ordinary recklessness does not qualify as a crime of violence. *United States v. Frazier*, 48 F.4th 884, 886 (8th Cir. 2022); *see Borden v. United States*, 593 U.S. 420 (2021).

The district court concluded that Moss's attempt offense required "a purposeful mental state or specific intent," S. Tr. 8, and that the offense thus constituted a crime of violence. The court relied on *State v. Whalen*, 49 S.W.3d 181 (Mo. 2001), where the Missouri Supreme Court explained that an offender attempts to commit an offense when he acts "with the purpose of committing the offense." *Id*. at 186. According to *Whalen*, that definition applies whether the attempt offense is charged under the general attempt statute or under separate provisions proscribing attempt to commit specific crimes. In *Whalen*, the court held that "in order to be found guilty of first-degree assault for attempting to kill or attempting to cause serious physical injury, one must, *with the purpose of committing that offense*, take a substantial step toward committing it." *Id*. (emphasis added).

Moss argues that the reasoning of *Whalen* does not apply in the context of fourth-degree domestic assault, and that decisions of the Missouri Court of Appeals suggest that his attempt offense could be committed recklessly. When a State's highest court has not resolved an issue, this court must predict how that court would decide it. Decisions of intermediate appellate courts are not binding on issues of state law, but they can be persuasive authority that a federal court will follow when they are the best evidence of state law. *See GEICO Cas. Co. v. Isaacson*, 932 F.3d 721, 725-26 (8th Cir. 2019).

Moss highlights three intermediate court decisions after *Whalen*. In *State v. Blackburn*, 168 S.W.3d 571 (Mo. Ct. App. 2005), the Missouri Court of Appeals addressed a conviction for domestic assault in the second degree, which applies to an offender who attempts to cause or knowingly causes physical injury. In rejecting an

argument that the jury should have been instructed instead on the elements for domestic assault in the third degree, the court reasoned that the culpable mental states are different under the two statutes. An offender commits domestic assault in the third degree when he "attempts to cause or recklessly causes physical injury." *Id.* at 576. The court of appeals opined that for third-degree domestic assault, "[t]he culpable mental state required for conviction is 'recklessly,' and this requirement applies whether the physical injury is either merely attempted or actually accomplished." *Id*. The court in *Blackburn* did not mention the Missouri Supreme Court's decision in *Whalen* or explain how an offender could attempt to cause physical injury without having a purpose to commit the offense.

The same intermediate court then decided *State v. Ondo*, 232 S.W.3d 622 (Mo. Ct. App. 2007), which held that where a defendant was charged with committing second-degree domestic assault by choking, the trial court was not required to instruct the jury on third-degree domestic assault. In *Ondo*, the statute specified that attempt to cause physical injury "by choking" constitutes second-degree assault, so the court saw no ambiguity that might have justified instructing on third-degree assault as an equivalent offense. The defendant urged the court to reconsider *Blackburn* in light of *Whalen*, but the court declined to do so "under the facts of this case." *Id*. at 629-30. The *Ondo* court, however, seemed to recognize tension between *Blackburn* and *Whalen* when it recounted *Whalen*'s holding that "an attempt crime *always* requires proof of a 'purposeful' mental state on the part of the defendant." *Id*. at 629.

A third decision, *In re J.M.W.*, 676 S.W.3d 81 (Mo. Ct. App. 2023), relied on *Blackburn*'s conclusion that a *mens rea* of recklessness applies where an offender is defined as one who "attempts to cause or recklessly causes physical injury." *Id*. at 88. Although the charging document in *J.M.W.* alleged that the juvenile offender committed fourth-degree assault by "attempting to cause physical injury," the court concluded that the offender was charged "with fourth-degree assault, not *attempted* fourth-degree assault." *Id.* at 89. Where the evidence showed that the offender

kicked the victim several times in the leg, the court held that there was sufficient evidence that the offender "attempted to cause or recklessly caused physical injury" to the victim. *Id.* at 89-90.

Having considered these authorities, we believe the better view of Missouri law is that an offender who "attempts to cause . . . physical injury," and thereby commits the offense of fourth-degree domestic assault, must act purposefully, not merely with recklessness. The Missouri Supreme Court was clear in *Whalen* that an offender attempts to commit an offense when he acts "*with the purpose* of committing the offense," and that the rule applies "under separate provisions proscribing attempting a specified crime." 49 S.W.3d at 186 (internal quotation omitted). The fourth-degree domestic assault statute proscribes attempting to cause physical injury, and the attempt offense requires a finding that the defendant acted purposefully, even if the offense may be committed recklessly by causing injury.

We do not think the Missouri Supreme Court would endorse the intermediate appellate decision in *Blackburn*, which was later applied in *J.M.W.* *Blackburn* did not acknowledge the state supreme court's decision in *Whalen*. *Blackburn* reasoned that where a statute defines an offender as one who "attempts to cause or recklessly causes," the *mens rea* of recklessness applies both to attempts and completed offenses. That textual analysis is unlikely to prevail with the Missouri Supreme Court, because the statutory term "recklessly" does not modify "attempts to cause." As a leading treatise explains:

> It has been held, in the domestic assault context, that the mental state for attempting to cause physical injury is recklessness, but the plain text of the statute does not support that conclusion, since the text refers to "recklessly causing," not "recklessly attempting to cause" physical injury. The Supreme Court has clearly held that the definition of attempt includes "purpose" and does not include any reference to recklessness.

Robert H. Dierker, 32 Missouri Practice Series, Missouri Criminal Law § 19:4 (2d ed. 2025) (footnote omitted).

We therefore conclude that Moss's prior conviction for fourth-degree domestic assault by attempting to cause physical injury was a conviction for a crime of violence under USSG § 2K2.1(a)(1). The offense of conviction required a finding that Moss acted purposefully when attempting to cause physical injury, so the "force clause" of USSG § 4B1.2(a)(1) encompasses the offense. The district court correctly concluded that Moss committed the instant firearms possession offense after he sustained two prior convictions for a crime of violence, and there was no procedural error in calculating the advisory guideline range.

The judgment of the district court is affirmed.
