UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7503

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANNY McGEE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-1:92-115-B)

(July 8, 1994)

Before JOHNSON, BARKSDALE, and DeMOSS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:[1]

Pursuant to numerous claims of error, most of which are frivolous, Danny McGee challenges his conviction and sentence for second degree murder. We **AFFIRM**.

I.

On September 2, 1992, Thomas Alan Byram was murdered at a rest area on the Natchez Trace Parkway (a federal enclave) in Mississippi. According to McGee, Byram made homosexual advances to

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

him. McGee got a metal pipe from his truck, and struck Byram with it; Greg Dingler took the pipe and struck Byram several more times.

McGee and Dingler were charged with first degree murder, in violation of 18 U.S.C. §§ 2, 7(3), and 1111, and conspiracy to commit murder, in violation of 18 U.S.C. § 1117. McGee's motion to sever the trials was granted.[2] As noted, McGee testified at trial; and, at the close of the evidence, his motion for acquittal on the conspiracy charge was granted. The jury found him guilty of second degree murder without premeditation. McGee was sentenced, *inter alia*, to 180 months imprisonment.

II.

In raising issues on appeal, McGee has employed the seldom successful "shotgun approach". His challenges to his conviction include the admission of both a recorded telephone conversation and his post-arrest statement to authorities, the sufficiency of the evidence, the exclusion of evidence of the victim's criminal record, the district court's refusal to instruct the jury on justifiable homicide and its response to a jury question, and the denial of his motion for a new trial on the ground that one of the jurors suffered from narcolepsy. Concerning his sentence, he contends that he should have received a reduction in his offense level for acceptance of responsibility, that prior misdemeanor convictions should not have been considered in calculating his

[2] Dingler was also convicted of second degree murder; his conviction was affirmed on appeal. ***United States v. Dingler***, No. 93-7643 (5th Cir. Apr. 1, 1994) (unpublished).

criminal history score, and that he was entitled to a downward departure because the victim's conduct provoked the murder.

A.

On September 7, five days after the incident, Dingler was arrested on an unrelated charge, along with David Crumby. Dingler told Crumby about the murder, and Crumby apparently told the authorities. When questioned by the FBI, Dingler agreed to place a monitored and recorded telephone call to McGee, during which McGee made incriminating statements. McGee contends that his recorded conversation should have been suppressed because the Government did not prove that Dingler consented voluntarily to the recording.

"[T]he consent required for the admissibility of a tape recording is a question of fact to be determined from the totality of circumstances". ***United States v. Gomez***, 947 F.2d 737, 738 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1504 (1992). "Our task on appeal is limited to determining whether there was sufficient evidence to support the district court's finding of fact, a finding we must accept unless clearly erroneous". ***Id***. Although the Government has the burden of proving that Dingler consented, "in most cases the requisite consent is deemed extant where `the informant placed the telephone call knowing that it would be recorded'". ***Id***. (quoting ***United States v. Kolodziej***, 706 F.2d 590 (5th Cir. 1983)).

At a hearing conducted outside the presence of the jury, FBI Agent Denham testified that Dingler wanted to cooperate and agreed

to place the call to McGee; that Dingler signed a consent form in which he agreed to allow the authorities to monitor and record the call;[3] and that state investigator Pickens and Natchez Trace Ranger Atkins were present when Dingler signed the form. In addition, Pickens testified that Dingler signed the consent form and that he was present when Dingler made the call. This evidence is sufficient to support the consent finding.

We reject McGee's contention that Dingler's testimony was necessary for finding consent. McGee called Dingler as a witness, but Dingler invoked his Fifth Amendment privilege and refused to testify. McGee maintains that the Government should have granted Dingler immunity to testify as to his consent. We disagree. Denham's testimony, the tape and its contents, and the consent form signed by Dingler in Denham's presence were sufficient to demonstrate consent; Dingler's testimony was not necessary. *Cf*. ***Gomez***, 947 F.2d at 738 (finding of consent not clearly erroneous despite co-defendant's testimony that no one sought his consent to record a telephone conversation with defendant).[4]

B.

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[3] The consent form, apparently made part of the record for identification only, is not included in the record on appeal.

[4] McGee's assertion that the Government had ample time to obtain a warrant for electronic surveillance, even if true, is unavailing, because it is not "unlawful ... for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception". 18 U.S.C. § 2511(2)(c).

McGee asserts that a statement he gave to Denham should have been suppressed because Denham told him falsely that the autopsy revealed that the first blow killed Byram. In fact, the autopsy report states that the cause of death was "[c]erebral edema and hemorrhage due to extensive head trauma" and that Byram "died as a result of multiple blows to his head". McGee claims that Denham's statement was calculated to foster remorse and guilt so that he would admit to a murder he did not commit.

"The government has the burden of proving by a preponderance of the evidence that [McGee] voluntarily waived his rights and that the statement[] he made [was] voluntary". ***United States v. Rojas-Martinez***, 968 F.2d 415, 417 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 828 (1992), and *cert. denied*, ___ U.S. ___, 113 S. Ct. 995 (1993). "Voluntariness depends upon the totality of the circumstances and must be evaluated on a case-by-case basis". ***Id***. at 418. "We treat the district court's findings of fact as valid unless clearly erroneous but make an independent review of the legal conclusion of voluntariness". ***Id***.

Before admitting the statement in evidence, the district court conducted a hearing outside the presence of the jury. At that hearing, Denham and Pickens testified that McGee was advised of his rights, stated that he understood them, waived them, voluntarily answered questions, and later signed a written statement. Denham admitted on cross-examination that he had asked McGee, "would it surprise you if the autopsy indicated that the first blow killed [Byram]", in an "effort to see if [McGee] was trying to minimize

his own involvement". McGee testified at the suppression hearing that he admitted killing Byram only because he had already admitted striking Byram once, and because Denham told him that the autopsy revealed that the first blow killed Byram. Pickens, who was present when McGee gave his statement, testified that he did not recall Denham telling McGee that the autopsy revealed that the first blow killed Byram.

Even assuming that McGee's version about Denham's comment is correct, our court has held that "`there is nothing inherently wrong with efforts to create a favorable climate for confession. Neither `mere emotionalism and confusion,' nor mere `trickery' will alone necessarily invalidate a confession'". ***Self v. Collins***, 973 F.2d 1198, 1205 (5th Cir. 1992) (quoting ***Hawkins v. Lynaugh***, 844 F.2d 1132, 1140 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988)), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1613 (1993). Whether McGee's statement was voluntary is viewed in light of the totality of the circumstances, which include the following: (1) McGee was advised of his rights and validly waived them; (2) he had already confessed to striking Byram before Denham made the alleged statement; and (3) prior to the hearing on the admissibility of McGee's statement, the physician who performed the autopsy had testified that any of Byram's head wounds would have been fatal if left untreated. We also note that McGee's statement to Denham was generally consistent with his testimony at trial. Considering all of these circumstances, we hold that McGee's statement was given

voluntarily. Accordingly, the district court did not err in admitting it.

C.

McGee contends that the evidence is insufficient to prove either that he killed Byram or that he aided and abetted Dingler in doing so. "We review a claim of insufficiency to determine whether a rational trier of fact could have found each of the substantial elements beyond a reasonable doubt". ***United States v. Rojas-Martinez***, 968 F.2d at 420. "We view all facts and credibility choices in the light most favorable to the verdict". ***Id***. "[S]econd degree murder under the federal statute [18 U.S.C. § 1111] includes (1) the physical element of unlawfully causing the death of another, and (2) the mental element of malice, satisfied either by an intent to kill, an intent to cause serious bodily injury, or the existence of a depraved heart". ***United States v. Browner***, 889 F.2d at 552. McGee was also charged with aiding and abetting Dingler in the murder, in violation of 18 U.S.C. § 2.[5] That statute "imposes criminal liability on anyone who associates in a criminal venture, shares the principal's criminal intent, and engages in affirmative conduct designed to make the venture succeed". ***United States v. Villarreal***, 963 F.2d 725, 730 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 353 (1992).

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[5] The aiding and abetting statute provides that "[w]hoever ... aids, abets, counsels, commands, induces or procures [the] commission" of "an offense against the United States" "is punishable as a principal". 18 U.S.C. § 2(a).

The evidence, including McGee's testimony, may be summarized as follows. On September 2, 1992, McGee and Dingler stopped at a rest area on the Natchez Trace, talked with Byram, and left to purchase beer. When they returned, Byram was still there; the three resumed conversation, including about Byram's painting. Byram stated that he preferred to paint nude males, and told McGee and Dingler that he was a homosexual. According to McGee, Byram made homosexual advances toward him, pulling on his shorts. McGee went to his truck (parked about 60 feet away), got a metal pipe, returned, and intentionally swung it at Byram, striking him in the head. Dingler then took the pipe from McGee, and struck Byram with it several more times. Dingler concealed Byram's body by dragging it to the rear of the restroom area, where he struck Byram several more times. (The medical examiner testified that Byram died from cerebral edema and hemorrhage caused by multiple blows to his head, and that, as noted, any of the head wounds could have been fatal if left untreated. Neither McGee nor Dingler made any attempt to seek medical assistance for Byram.)

Dingler then gave the pipe back to McGee, who put it back in the truck. Dingler drove away in Byram's car. McGee left in his truck; a few minutes later, he picked up Dingler, who had run Byram's car off the road seven miles from the rest area. They threw the pipe and Dingler's bloody clothing into a creek, and spent the night in McGee's truck. The next day, they went to Alabama, called McGee's girlfriend,[6] and asked her to meet them.

[6] The girlfriend was married to McGee at the time of trial.

They told her what had happened at the rest area, and she returned them to Mississippi.

It goes without saying that this evidence is more than sufficient for the jury to conclude that McGee committed second degree murder, or aided and abetted Dingler in it. This contention is frivolous.

D.

McGee contends next that the district court erred by precluding evidence pertaining to Byram's July 7, 1992, Tishomingo County Justice Court conviction (two months before the murder) for loitering, indecent exposure and solicitation of prostitution. The district court granted the Government's motion in limine to prohibit evidence of the conviction, ruling that "specific instances are not admissible to show a trait or character, so [McGee] will have to bring in somebody to testify what [Byram's] reputation is as being a homosexual or making advances or whatever". McGee asserts that evidence of the conviction was admissible under Fed. R. Evid. 404(a)(2) and 405(b), to show Byram's propensity to conduct himself in a homosexual manner at a rest stop in the same general area as where the murder occurred, and within two months of it.

"[W]e review the district court's ruling regarding the exclusion of character evidence against an abuse of discretion standard". ***United States v. Marrero***, 904 F.2d 251, 260 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990). Rule 404(a) provides the general rule on admissibility of such evidence. It "is not

admissible for the purpose of proving action in conformity therewith on a particular occasion", Fed. R. Evid. 404(a); but an exception is made for, *inter alia*, "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused". Fed. R. Evid. 404(a)(2). If the evidence is admissible under Rule 404, Rule 405 specifies the methods by which character may be proved. Subsection (a) provides that "proof may be made by testimony as to reputation or by testimony in the form of an opinion" and that, "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct". Fed. R. Evid. 405(a). Subsection (b) provides that proof of specific instances of conduct is admissible "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense". Fed. R. Evid. 405(b). McGee contends that evidence of Byram's conviction was admissible under Rules 404(a)(2) and 405(b); he does not contend that it was admissible under Rule 405(a).[7]

Before reaching the merits of this contention, we must first determine our standard of review. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one excluding evidence, the substance of the evidence was

[7] Pursuant to Rule 405(a), because the Government did not introduce evidence of Byram's character on direct examination, there was no opportunity for defense counsel to cross-examine prosecution witnesses about specific instances of conduct. As discussed *infra*, testimony about Byram's reputation was, instead, brought out by defense counsel during cross-examination of Agent Denham, a prosecution witness.

made known to the court by offer or was apparent from the context within which questions were asked". Fed. R. Evid. 103(a)(2).

Our court has held that a defendant's objection to a motion in limine "does not meet the requirement of Rule 103". ***United States v. Estes***, 994 F.2d 147, 149 (5th Cir. 1993). Accordingly, when the Government succeeds through a motion in limine in excluding evidence, the defendant must attempt to offer the excluded evidence at trial to preserve the issue for appeal. ***Id***.; *see also* ***United States v. Graves***, 5 F.3d 1546, 1551-53 (5th Cir. 1993) (applying ***Estes***, but urging, in an appropriate case, en banc review of our circuit's rule on renewing objections to in limine rulings), *cert. denied*, ___ S. Ct. ___, 1994 WL 31737 (1994).

At trial, McGee did not attempt to offer evidence of Byram's conviction. During defense counsel's cross-examination of Agent Denham, the following transpired:

> Q Your job as an investigating agent in this case is to find the truth, isn't it?
>
> A Yes, sir.
>
> Q And did you attempt to find the truth concerning those allegations about what Mr. Byram was doing and the advances he was making?
>
> A I don't know how I could have proved that. There wasn't anybody else there during the murder as far as I could tell.
>
> Q Did you do anything to determine whether or not that conduct was consistent with other conduct --

The Government objected on the ground that defense counsel was trying to elicit information about Byram's conviction, the subject of its motion in limine. The district court responded, "Well, I

have already ruled that specific incident arrest and conviction is not relevant. I assume counsel is aware of that. I don't think he would get into it". Defense counsel replied:

> Judge, I was asking him -- in this particular incident the question was, did he determine anything as to whether or not these allegations that they said Mr. Byram was doing was consistent with any other conduct, and I think that is part of what his investigation involved, whether or not he did that. I think it is admissible to see if he is trying to elicit all the facts in his investigation. I wasn't going to ask him what he found out, but I think that is admissible.

The district court stated:

> Well, the objection will be overruled for that question. Of course, he could also be asked if in his criminal investigation did he gain an impression of his reputation or his character traits for doing certain things, but I will go on as long as you don't go into specific incidences.

Defense counsel then questioned Denham on what his investigation revealed as to Byram's reputation for homosexual conduct. Denham responded that his limited investigation revealed that Byram "was a very quiet gentle person, never violent, never harmed anyone, never would have approached a stranger and describe different things to them that would be personal in nature". Denham also testified that a Tishomingo County Deputy Sheriff had told him that Byram had been arrested. Defense counsel asked Denham whether the deputy sheriff "state[d] anything negative with reference to that of homosexual conduct of Mr. Byram", and Denham responded, "Well, I would say arrest is negative, yes, sir". McGee did not attempt to cross-examine Denham about Byram's conviction, and made no other attempt during trial to introduce such evidence.

Because McGee did not attempt at trial to offer evidence of Byram's conviction, we review the district court's ruling only for plain error.[8] *See* Fed. R. Evid. 103(d). "Unless the error is so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice, we will not reverse the conviction". ***Graves***, 5 F.3d at 1552-53 (internal quotation marks and citations omitted). Simply stated, as reflected by the evidence, including McGee's testimony, there was no plain error.[9]

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[8] Obviously, McGee's objection to the exclusion of evidence of Byram's conviction, asserted in his post-trial motion for judgment of acquittal or new trial, was untimely within the meaning of Rule 103.

[9] In the alternative, the district court did not err in ruling that evidence of Byram's conviction was inadmissible under Rules 404(a)(2) and 405(b). Rule 405(b) permits proof of specific instances of conduct "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense". Fed. R. Evid. 405(b). It applies in cases "in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion". Fed. R. Evid. 405 advisory committee's note; *see also* 22 C. Wright & K. Graham, ***Federal Practice & Procedure***, § 5267, at 602 (1978) (internal quotation marks and citation omitted): "Rule 405(b) only applies when character is actually in issue; that is, when character or a character trait is an operative fact which under the substantive law determines the legal rights of the parties". Examples include "a defamation action in which the defense of truth is raised with respect to a slander of the plaintiff's character; a prosecution for seduction or other sexual abuse under a statute requiring that the victim be of `chaste character'; or a tort action in which the negligence alleged consists in employing a person with dangerous propensities or permitting a person of reckless character to operate a motor vehicle". Wright & Graham § 5235, at 368-69.

McGee sought to introduce evidence of Byram's conviction as circumstantial evidence to prove that Byram "had the propensity to conduct himself in a homosexual manner at a reststop in the same

E.

McGee maintains that the district court erred in refusing to give his requested instruction on justifiable homicide.[10] McGee claims that the uncontradicted testimony showed that Byram made

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area within a two month period of the incident complained of". *See* ***United States v. Talamante***, 981 F.2d 1153, 1156 (10th Cir. 1992)(use of evidence of victim's conduct to prove that victim acted in conformity with that conduct is circumstantial use of character evidence), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1876 (1993). Byram's character (propensity to engage in homosexual conduct) was not an essential element of McGee's defense in the "strict sense" required by Rule 405(b). Accordingly, proof of Byram's character was permissible only through reputation or opinion evidence, pursuant to Rule 405(a), and not through evidence of his conviction. *See* ***United States v. Piche***, 981 F.2d 706, 713 (4th Cir. 1992) (when evidence of character is not an essential element of a charge, claim, or defense, "proof of character is limited to reputation or opinion evidence"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2356 (1993).

[10] McGee requested the following instruction:

> The defendant, DANNY McGEE, asserts that the killing of Thomas Alan Byram was justifiable homicide because the defendant's acts, which may have cause [sic] the death of Thomas Alan Byram were committed by him in resisting an attempt by Thomas Alan Byram to commit a felony upon him or in the lawful defense of Danny McGee's own person where he had reasonable ground to apprehend a great personal injury and there is eminent danger of such design being accomplished.
>
> The killing of a human being is justified if the defendant was acting in self defense by resisting an unlawful attempt by Thomas Alan Byram to commit the felony of sodomy upon him or because he had reasonable grounds to apprehend a great personal injury to himself and there was eminent danger of such design being accomplished by the deceased, Thomas Alan Byram.
>
> If you find that a homicide is justifiable, it is not necessary that you believe that DANNY McGEE had no ill will or malice towards Thomas Alan Byram.

homosexual advances toward him in violation of Miss. Code Ann. § 97-29-59,[11] and that he was therefore entitled to have the jury instructed on self-defense.

"[A] criminal defendant ... is entitled to an instruction on any defense ... whenever there is evidence sufficient for a reasonable jury to find in [his] favor". ***United States v. Browner***, 889 F.2d 549, 555 (5th Cir. 1989). "A district court's refusal of a defendant's proposed jury instructions is reviewed for abuse of discretion; the trial judge has substantial latitude in formulating the jury charge". ***United States v. Aggarwal***, 17 F.3d 737, 745 (5th Cir. 1994). "We may reverse only if the requested instruction (1) is substantially correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point such that failure to give it seriously impaired the defendant's ability to effectively present a given defense". ***Id***.

McGee was entitled to a self-defense instruction only if there was evidence that (1) he "was under an unlawful and present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury"; (2) he "had not recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]"; (3) he "had no reasonable, legal alternative to

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[11] Miss. Code Ann. § 97-29-59 provides:

> Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.

violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm", and (4) "a direct causal relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm". ***United States v. Gant***, 691 F.2d 1159, 1162-63 (5th Cir. 1982) (addressing justification defense to charge of violating 18 U.S.C. app. § 1202(a)(1), which proscribed possession of firearms by convicted felons) (internal quotation marks and citations omitted).

Needless to say, McGee was not entitled to a justifiable homicide instruction; the evidence does not support it. McGee had an opportunity to avoid the danger allegedly presented by Byram, but instead returned to it from a position of safety. After Byram made the alleged homosexual advance, McGee returned to his truck, got a pipe, returned to the rest area, and struck Byram. Obviously, he could have avoided the alleged danger by leaving the area.[12]

In any event, as quoted below, the district court instructed the jury that it could find McGee's actions excusable if it found that Byram's actions were sudden and sufficient provocation:

> The killing of a human being is an excusable homicide if the defendant's acts which may have caused the death of Thomas Allen Byram was a result of an accident or misfortune in the heat of passion upon sudden and sufficient provocation. If you find in this case that the death of Thomas Alan

[12] McGee testified that he could not leave without Dingler, because he had bonded Dingler out of jail, and would owe several thousand dollars if Dingler failed to make a court appearance. It goes without saying that, even if this were true, there were countless ways to have Dingler leave, short of returning and striking Byram.

> Byram was caused by an accident and misfortune occurring in the heat of passion upon sudden and sufficient provocation by the deceased, Thomas Alan Byram, then the homicide would be excusable under the law.

In sum, this issue is frivolous.

F.

During its deliberations, the jury asked for a copy of the elements of first degree murder and of the lesser included offenses. The district court responded with a note, attaching the "instructions setting out the elements of the alleged crimes". It denied McGee's request to include the above quoted excusable homicide instruction. McGee contends that the failure to include that instruction presented an unbalanced impression of the law to the jury and was prejudicial.

The formulation of a response to a jury's request for supplemental instructions is a matter "properly determined by the sound discretion of the trial judge". ***United States v. Acosta***, 763 F.2d 671, 677 (5th Cir.), *cert. denied*, 474 U.S. 863 (1985). "As a general principle, it is proper for a trial judge to limit reinstruction to the specific request made by a jury". ***Id***.; *see* ***United States v. Neiss***, 684 F.2d 570, 572 (8th Cir. 1982) (finding no abuse of discretion in trial court's refusal to include a self-defense instruction in a supplemental charge on second degree murder, malice, and manslaughter). But, in giving additional instructions, the court "should be especially careful not to give an unbalanced charge" and should take "appropriate steps to avoid any possibility of prejudice to the defendant". ***Acosta***, 763 F.2d

at 678. "[T]he trial court's actions must be evaluated in light of the totality of the circumstances, considering the complete instructions given to the jury". ***United States v. Colatriano***, 624 F.2d 686, 690 (5th Cir. 1980).

The jury requested only the elements of first degree murder and its lesser included offenses. The court's response was not unbalanced, and carefully referred to the elements of the alleged crimes, thus avoiding any possibility of prejudice to McGee. Considering the totality of the circumstances, the district court did not abuse its discretion. This contention borders on being frivolous.

G.

During defense counsel's closing argument, one of the jurors fell asleep and had to be awakened by the court, McGee did not request further inquiry by the court, or ask that the juror be replaced by an alternate. After trial, defense counsel learned that the juror suffered from narcolepsy and was treated with daily medication.[13]

McGee asserts that the district court erred in denying his motion for a new trial on the ground that the juror's narcolepsy was concealed from the court and counsel during *voir dire*, and deprived him of a fair trial. Defense counsel submitted an affidavit in which he stated that the juror told him that he did

[13] About two weeks after the trial, McGee moved for his counsel to contact the juror. The district court granted the motion, "for the purpose of determining whether ... the ... juror suffers from narcolepsy".

not mention his narcolepsy during *voir dire* because, when he appeared for jury service on two prior occasions, the court had advised him that his narcolepsy, as treated by medication, would not prevent him from serving as a juror.

There is no evidence that the juror either concealed his condition or failed to properly carry out his duties. This contention is frivolous.

H.

McGee contends that, pursuant to U.S.S.G. § 3E1.1, he is entitled to a reduction in his offense level for acceptance of responsibility, because he cooperated with the Government, and the information he provided helped the Government in the investigation and prosecution of this case.

Because "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility", his decision "is entitled to great deference on review". U.S.S.G. § 3E1.1, comment. (n.5). "[W]e review the district court's decision under a standard even more deferential than a pure clear error standard". ***United States v. Brown***, 7 F.3d 1155, 1162 (5th Cir. 1993).

McGee's not guilty plea, his claim of self-defense, and his subsequent statement to the probation officer that he did not kill Byram, all show that he did not demonstrate acceptance of responsibility for his criminal conduct. Accordingly, the district court did not clearly err in denying an offense level reduction. This contention is frivolous.

I.

McGee's criminal history score was increased by four points based on prior misdemeanor convictions (three for simple assault and two for driving under the influence (DUI)).[14] He contends that he should not have received any points for these convictions under U.S.S.G. § 4A1.2, because the sentences were either suspended or were for a term of imprisonment of less than 30 days.

McGee misunderstands the Guidelines. "As a general rule, misdemeanor offenses are to be counted in computing a criminal history score". ***United States v. Hardeman***, 933 F.2d 278, 280 (5th Cir. 1991). Section 4A1.2(c) provides that "[s]entences for misdemeanor and petty offenses are counted", except that sentences for certain listed offenses,[15] and offenses similar to the listed offenses, are counted only if "(A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense". U.S.S.G. § 4A1.2(c)(1). Sentences for other

[14] Although one point was assigned for each of the five misdemeanor convictions, only four points were included in McGee's criminal history score because that is the maximum that may be counted under § 4A1.2(c). U.S.S.G. § 4A1.1(c).

[15] The listed offenses are careless or reckless driving, contempt of court, disorderly conduct or disturbing the peace, driving without a license or with a revoked or suspended license, false information to a police officer, fish and game violations, gambling, hindering or failure to obey a police officer, insufficient funds check, leaving the scene of an accident, local ordinance violations, non-support, prostitution, resisting arrest, and trespassing. U.S.S.G. § 4A1.2(c)(1).

specified offenses are never counted.[16] U.S.S.G. § 4A1.2(c)(2). But, assault and DUI are not listed in either subsection (1) or (2) of § 4A1.2(c), nor are they similar to the offenses listed in subsection (1); therefore, it is irrelevant that McGee's sentences for the prior convictions were either suspended or were for a term of imprisonment of less than 30 days. We also note that the commentary specifically provides that convictions for driving under the influence are to be counted in calculating the criminal history score. U.S.S.G. § 4A1.2, comment. (n.5). McGee's prior misdemeanor convictions were properly included in calculating his criminal history score. This is yet another frivolous contention.

J.

Finally, McGee contends that because Byram's homosexual advances toward him contributed significantly to provoking the murder, he was entitled to a downward departure under U.S.S.G. § 5K2.10, which authorizes a departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior". U.S.S.G. § 5K2.10.[17]

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[16] Those offenses are hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions such as speeding, public intoxication, and vagrancy. U.S.S.G. § 4A1.2(c)(2).

[17] The factors to be considered in deciding the extent of a sentence reduction under this section include:

> (a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
>
> (b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

"Departures from the guidelines are within the broad discretion of the district court". ***United States v. Adams***, 996 F.2d 75, 78 (5th Cir. 1993). "It is well established in this Circuit that we will not review a district court's refusal to depart from the Guidelines, unless the refusal was in violation of the law". ***Id***. (internal quotation marks and citations omitted).

The district court's refusal to depart downward was not based on a mistaken belief that it lacked the authority to do so, but because it determined that the facts did not warrant a departure.[18] Accordingly, the refusal was not "in violation of the law", and we need not review it. *See* ***id***. at 79. But, even if we were to review it, we would find no abuse of discretion, in light of the undisputed evidence that McGee failed to take advantage of the opportunity to avoid the confrontation. This contention is frivolous.

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

U.S.S.G. § 5K2.10(a)-(e).

[18] The district court stated that "even though [McGee] might claim to have been afraid of the victim, even if what the defendant said happened did happen, ... the Court does not find ... that that circumstance would justify or call for a downward departure".

III.

Any remaining sub-issues raised by McGee, such as the claim that Dingler was acting as an agent of the government in making the call to McGee, are likewise rejected. For the foregoing reasons, the judgment of the district court is

AFFIRMED.