[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-12511

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEMETRIUS DAMON NELSON,

Defendant- Appellant.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 7:20-cr-00019-HL-TQL-1

Before GRANT, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Demetrius Damon Nelson appeals his 135-month sentence for forcible motor vehicle theft. On appeal, Nelson argues that the district court plainly erred in applying a four-level enhancement to his sentence pursuant to U.S.S.G. § 2B3.1(b)(3)(B) because his victim's injuries did not amount to "serious bodily injury" as defined in Application Note 1(M) to § 1B1.1 of the United States Sentencing Guidelines. After careful review, we affirm.

I.

Nelson was indicted for two counts of forcible motor vehicle theft in violation of 18 U.S.C. § 2119(1) (Counts One and Two), with the conduct associated with Count One taking place on June 29, 2019, and the conduct associated with Count Two taking place the following day. After Nelson pled not guilty to both counts, he successfully moved to dismiss Count Two. Nelson subsequently pled guilty to Count One.

The presentence investigation report ("PSI") initially calculated a base offense level of 20, pursuant to U.S.S.G. § 2B3.1(a). The PSI stated that Nelson pulled the victim from her car and struck her several times, causing injuries to her face and right knee. Nelson then dragged the victim along with the car for a short time as he drove away, resulting in the victim suffering road rash on her right calf. Neither the government nor Nelson objected to the PSI's characterization of the events or injuries sustained by the

victim. Based on these facts, the PSI applied an enhancement of four levels, pursuant to § 2B3.1(b)(3)(B), finding that the victim had sustained serious bodily injury. The PSI also applied an enhancement of two levels, pursuant to § 2B3.1(b)(5), because the incident involved a carjacking. Thus, Nelson's adjusted offense level was 26. Finally, the PSI applied a three-level total reduction for acceptance of responsibility and timely notifying authorities of his intent to plead guilty, pursuant to U.S.S.G. § 3E1.1(a)–(b). The PSI thus calculated Nelson's total offense level to be 23.

The PSI also calculated that Nelson had a criminal history score of 14. The PSI noted that Nelson had committed the instant offense while serving a sentence of probation, and the PSI thus applied an additional two points pursuant to U.S.S.G. § 4A1.1(d) for a total criminal history score of 16, establishing a criminal history category of VI. Based on Nelson's total offense level of 23 and criminal history category of VI, the PSI calculated that his guideline imprisonment range was 92 to 115 months. Nelson did not object to the proposed guidelines range in the PSI.

At sentencing, Nelson made various statements to the district court renouncing his responsibility and stating that he pled guilty only to avoid a harsher prosecution. The district court then asked the probation officer who prepared the PSI why Nelson was still entitled to the three-level reduction for acceptance of responsibility. The probation officer concluded that he was not. The district court recalculated Nelson's guidelines without the three-point reduction and found his total offense level to be 26 with a range of

120 to 150 months' imprisonment**.** Nelson did not object to the revised guidelines calculation. The district court otherwise accepted the facts as presented in the PSI and sentenced Nelson to 135 months' imprisonment to run concurrently to any probation revocation sentence to be imposed by the state and to be followed with 3 years' supervised release. Following the imposition of the sentence, Nelson objected to its reasonableness.[1]

II.

While we typically review *de novo* the district court's interpretation of the Sentencing Guidelines and its application of the Guidelines to the facts of a case, *United States v. Dougherty*, 754 F.3d 1353, 1358 (11th Cir. 2014), we review for plain error a sentencing challenge raised only for the first time on appeal, *United States v. Henderson*, 409 F.3d 1293, 1307 (11th Cir. 2005). To show plain error, a defendant must establish that (1) there was an error; (2) that was plain or obvious; and (3) affected his substantial rights. *Id.* "Once these three requirements are satisfied, we have the discretion to provide relief if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

---

[1] On appeal, Nelson did not raise a reasonableness argument in either of his briefs. We therefore deem that argument abandoned on appeal. *See United States v. Jernigan,* 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). (holding that an appellant had effectively abandoned his claim when he neglected to "devote[] a discrete section of his argument to [the] claim[]").

An error is plain if "the legal rule is clearly established at the time the case is reviewed on direct appeal." *United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015). If the explicit language of a statute or rule does not resolve an issue, plain error lies only where our or the Supreme Court's precedent directly resolves it. *United States v. Moore*, 22 F.4th 1258, 1266 (11th Cir. 2022); *Hesser*, 800 F.3d at 1325.

III.

U.S.S.G. § 2B3.1(b)(3) requires that "[i]f any victim sustained bodily injury, increase the offense level according to the seriousness of that injury," and lists three levels of severity of injury—bodily injury, serious bodily injury, and permanent or life-threatening bodily injury—followed by instructions regarding situations where a victim's injury falls between levels of severity. § 2B3.1(b)(3)(A)–(E). Depending on the severity of the victim's bodily injury, the defendant's offense level may be increased by two to six levels. *Id.* The text of § 2B3.1(b)(3) does not otherwise provide definitions for the different levels of injury it lists. *See id.*

Application Note 1(M) to § 1B1.1 of the Guidelines, however, provides:

> (M) "Serious bodily injury" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting

> criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

U.S.S.G. § 1B1.1, comment. (n.1(M)).

On appeal, Nelson argues that the district court plainly erred in applying the four-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(3)(B) because the victim's injuries did not amount to "serious bodily injury" as defined in Application Note 1(M) to § 1B1.1.[2] Nelson argues that, at most, the victim sustained "bodily injury" as defined in Application Note 1(B), which is subject to a two-point enhancement under § 2B3.1(b)(3)(A). Nelson argues that the victim's injuries did not rise to the level of seriousness that would warrant a four-level enhancement. Nelson further argues that this was plain error and that binding precedent is not necessary. In support of his argument, Nelson asserts that plain error occurred because a plain reading of the commentary's definition of serious bodily injury makes clear that the victim did not experience that level of pain or protracted impairment. Moreover, he argues that this error affected his substantial rights because it resulted in his sentence being 15 to 30 months longer than his maximum sentence would have been without it.

The government responds that the district court did not err in its determination that the victim sustained serious bodily injury

---

[2] Nelson incorrectly cites to Application Note 1(F), which defines "departure," at several points throughout his brief. *See* U.S.S.G. § 1B1.1 cmt. n.1(F). This appears to be a typographical error, as Application Note 1(M) defines "serious bodily injury." *See* § 1B1.1 cmt. n.1(M).

within the plain meaning of § 2B3.1(b)(3)(B) and that, even if it did, that error was not plain. The government argues that, pursuant to this Court's recent decision in *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc), courts may only consult the Guidelines commentary to provide definitional gloss for its terms if those terms remain genuinely ambiguous after exhausting traditional interpretive tools.

In reply, Nelson argues that *Dupree* does not apply here but that, even if it did, "serious bodily injury" as it appears in § 2B3.1(b)(3)(B) is ambiguous and thus, under *Dupree*, the district court should have looked to the Guidelines commentary to guide its interpretation and application of that phrase. Nelson argues that, had it done so, the district court would have found that Nelson's victim sustained "bodily injury" worthy of a two-level enhancement at most, and therefore plainly erred.

In *Dupree*, we concluded that courts need not defer to the commentary unless the text of the Guidelines is genuinely ambiguous. *Id.* We explained that, "[t]o determine whether ambiguity exists, courts first must exhaust all the traditional tools of construction." *Id.* at 1274 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)). Further, if no ambiguity exists after courts have emptied their legal toolbox, the analysis is complete, and there is "no need to consider, much less defer to" the commentary. *Id.* at 1279.

Here, we conclude that the district court did not plainly err in applying a four-level increase pursuant to § 2B3.1(b)(3)(B). Regardless of whether the district court erred in finding that Nelson's

carjacking victim sustained serious bodily injury, any error could not have been plain. First, the Guidelines themselves do not define serious bodily injury. *See* U.S.S.G. § 2B3.1(b)(3). And even assuming *arguendo* that "serious bodily injury" under § 2B3.1(b) is ambiguous and that we can look to the Guidelines commentary under *Dupree*, *see* 57 F.4th at 1276–77, the commentary definition does not plainly state that the victim's injury to her face, right knee, and right calf are not serious bodily injuries., *see* § 1B1.1 cmt. n.1(M). It is therefore not plain that the commentary's definition, which includes broad terms like "extreme physical pain," could not apply to the injuries to the victim's face, knee, and calf. *See id.* Nor is there any binding precedent from this Court or the Supreme Court specifically addressing what constitutes serious bodily injury for purposes of § 2B3.1(b). *Moore*, 22 F.4th at 1266.

Without such authority from the Guidelines or binding precedent from this Court or the Supreme Court, any error is not plain. *See Henderson*, 409 F.3d at 1307. Accordingly, we affirm Nelson's sentence.

AFFIRMED.