[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11004
Non-Argument Calendar

D.C. Docket No. 8:18-cr-00323-SCB-AAS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIX ANTEQUERA RIVERA, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 3, 2021)

Before WILSON, JILL PRYOR and LUCK, Circuit Judges.

PER CURIAM:

Felix Rivera, Jr., appeals his conviction and sentence for one count of being a felon-in-possession of a firearm. On the night in question, two police officers were patrolling an apartment complex where they saw Rivera, a convicted felon out on probation, from their patrol vehicle. The officers, familiar with Rivera, noticed a bulge in the front of his sweatpants that they believed was a gun. One of the officers exited the vehicle intending to stop Rivera for, among other reasons, having a gun when he was not allowed to. Rivera, accompanied by his then-pregnant girlfriend who had invited him to her apartment, walked off and tried to enter her apartment. The officer told Rivera to stop as he reached the apartment door. When Rivera did not stop, the officer grabbed Rivera and a struggle ensued, which involved Rivera getting ahold of the officer's taser. After the struggle, Rivera was arrested for violating probation and resisting arrest. A search incident to arrest turned up a firearm.

Before trial, Rivera sought to suppress all physical evidence and any statements related to his arrest as products of an illegal search and seizure. The district court denied the motion to suppress because the officers' testimony at the evidentiary hearing established that they had reasonable and articulable suspicion of criminal activity.

Also pretrial, the government sought two rulings. Relevant here, it requested that the district court rule on the admissibility of certain evidence it

wanted to introduce at trial under Federal Rule of Evidence 404(b). Specifically, it sought permission to use Rivera's prior 2011 convictions for armed robbery with a firearm and being a felon in possession of a gun and ammunition. The court allowed the government to introduce evidence of Rivera's prior felon-in-possession convictions with a limiting instruction that it could only consider the evidence to determine if Rivera had the intent to commit the present offense or whether it was a mistake or accident. The court also allowed the government to use that evidence to impeach Rivera's credibility when he testified that he did not possess the gun and it was planted.

The jury convicted Rivera. Thereafter, a presentence investigation report (PSI) was prepared by a probation officer. Relevant to the present appeal, the report applied the six-level official-victim enhancement under U.S.S.G. § 3A1.2(c)(1) for assaulting a government officer in a way that created a substantial risk of serious bodily injury. Rivera objected to the official-victim enhancement, which the court overruled.

On appeal, Rivera asserts five challenges to the district court proceedings: (1) the district court erred in denying his motion to suppress because police violated his Fourth Amendment rights; (2) the district court abused its discretion by admitting evidence of his prior convictions under Federal Rule of Evidence 404(b) in the government's case in chief and for impeachment while

Rivera testified; (3) the jury's verdict was not supported by sufficient evidence; (4) the district court erred at his sentencing by applying the official-victim enhancement; and (5) police used excessive force in his arrest, a claim he raises for the first time on appeal. We will address each contention in turn.

I.

District court rulings on suppression motions present a mixed question of fact and law, and, thus, we review any factual findings by the district court for clear error and the application of law to those facts de novo. *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir. 2000). "[A]ll facts are construed in the light most favorable to the prevailing party below." *Id.* On review, "we review the entire record, including trial testimony." *United States v. Newsome*, 475 F.3d 1221, 1224 (11th Cir. 2007) (per curiam). "The individual challenging the search bears the burdens of proof and persuasion." *Id.* "Under the clearly erroneous standard, we must affirm the district court unless review of the entire record leaves us with the definite and firm conviction that a mistake has been committed." *United States v. McPhee*, 336 F.3d 1269, 1275 (11th Cir. 2003) (internal quotation marks omitted). "[W]e allot substantial deference to the factfinder . . . in reaching credibility determinations with respect to witness testimony." *Id.*

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

U.S. Const. amend. IV. Pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968), "police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). This requires, though, "something more than an inchoate and unparticularized suspicion or hunch." *Id.* (internal quotation marks omitted). Yet, the threshold is less than a preponderance of the evidence or even probable cause, which the Supreme Court has defined as "a fair probability that contraband or evidence of a crime will be found." *Id.* In reviewing the validity of a stop, the totality of the circumstances must be considered. *See id.* at 8.

"[T]he presence of a visible, suspicious bulge on an individual may give rise to reasonable suspicion, particularly when the individual is present in a high-crime area." *United States v. Jordan*, 635 F.3d 1181, 1187 (11th Cir. 2011) (internal quotation marks omitted).

While reasonable suspicion is all that is necessary for a valid seizure under *Terry*, should the stop turn into an arrest, probable cause is required. *See United States v. Acosta*, 363 F.3d 1141, 1145–46 (11th Cir. 2004). "Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." *United States v. Floyd*, 281 F.3d 1346,

1348 (11th Cir. 2002) (per curiam). Probable cause depends "on the assessment of probabilities in particular factual contexts" and the totality of the circumstances, but all definitions of probable cause are based in "a reasonable ground for belief of guilt . . . [that is] particularized with respect to the person to be searched or seized." *See Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003). "To determine whether an officer had probable cause to arrest an individual, [courts] examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Id.* at 371 (internal quotation marks omitted).

"[A]lthough a warrant presumptively is required for a felony arrest in a suspect's home, the Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred." *United States v. Goddard*, 312 F.3d 1360, 1362 (11th Cir. 2002). "Since the custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment, a search incident to the arrest requires no additional justification." *Id.* at 1364. "[A] search incident to arrest may only include the arrestee's person and the area within his immediate control." *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (internal quotation marks omitted).

In *Payton v. New York*, the Supreme Court held that police were prohibited "from making a warrantless and nonconsensual entry into a suspect's home in

order to make a routine felony arrest." 445 U.S. 573, 576 (1980). "[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

Here, the officer had reasonable suspicion to stop Rivera based on the bulge he and his partner observed, which was consistent with a firearm, and their knowledge that Rivera was a convicted felon prohibited from possessing such. Once the officer attempted a *Terry*-stop, and a struggle ensued, officers had probable cause to arrest Rivera and Rivera's search was justified under the search-incident-to-arrest doctrine. Additionally, we note that while Rivera had permission to be at his girlfriend's apartment and thus makes arguments about the officer crossing the threshold, even assuming the officer did so, Rivera was apparently merely invited to the apartment, which does not allow him to claim Fourth Amendment protection. *See id.* Accordingly, we affirm the district court in this respect.

II.

We review a district court's rulings on admission of evidence under an abuse-of-discretion standard. *United States v. Jimenez*, 224 F.3d 1243, 1249 (11th Cir. 2000). Erroneous evidentiary rulings will be reversed only when the error was not harmless, but errors are harmless unless there is a reasonable likelihood that it

affected a defendant's substantial rights. *United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999).

"Rule 404(b) prohibits [admitting] evidence of another crime, wrong, or act to prove a person's character in order to show action in conformity therewith." *United States v. Sanders*, 668 F.3d 1298, 1314 (11th Cir. 2012) (per curiam). Such evidence is admissible, though, for other purposes including to prove absence of mistake or accident. *Id.* For Rule 404(b) evidence to be admissible, (1) it must be relevant to an issue other than a defendant's character; (2) there must be sufficient proof of the prior act to allow a jury to determine that the defendant committed the prior act, and (3) the evidence's probative value cannot be substantially outweighed by undue prejudice and must otherwise meet the requirements of Federal Rule of Evidence 403. *See id.* A determination on the third prong, "lies within the sound discretion of the district judge and calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness." *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997) (internal quotation marks omitted).

Under Rule 403, "district court[s] [may] exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice." *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003) (internal

quotation marks omitted). "Rule 403 is an extraordinary remedy which the district court should invoke sparingly, and the balance . . . should be struck in favor of admissibility." *Id.* (omission in original and internal quotation marks omitted). Thus, "we look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *Id.* At the same time, there are limits for "the quality and quantity of evidence that may be introduced," and "Rule 403 demands a balancing approach between the degrees of probative value that a piece of evidence has and its prejudicial effect." *Id.*

Federal Rule of Evidence 609 explains how a defendant's character for truthfulness may be attacked by evidence of a prior felony conviction. *See* Fed. R. Evid. 609(a)(1), (a)(1)(B). It provides that the evidence "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B).

We have said that our caselaw "establishes clearly the logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time (or, put differently, that his possession at the subsequent time is not mistaken or accidental)." *United States v. Jernigan*, 341 F.3d 1273, 1281 (11th Cir. 2003). As to that specific

defendant, we said that "[p]ut simply, the fact that [he] knowingly possessed a firearm in a car on a previous occasion makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." *Id.* at 1281–82.

As an initial matter, we note that the district court only allowed Rivera's prior felon-in-possession conviction as Rule 404(b) evidence during the government's case-in-chief with a limiting instruction. Rivera's prior conviction was relevant to showing a lack of mistake or accident in this case, the judgment provided sufficient proof he committed the prior possession, and its probative value was not substantially outweighed by unfair prejudice.

Moreover, once Rivera took the stand and testified, the government was allowed to attack his character for truthfulness with prior felony convictions. While the district court may have allowed the government to impeach Rivera beyond what Rule 609 permits, it not clear that this was unreasonable, given the particular situation presented to the district court. In any event, it is unlikely that any errors affected Rivera's substantial rights, because of the strength of the government's case-in-chief. Thus, this would not entitle him to relief. *See Hands*, 184 F.3d at 1329. Therefore, we affirm on this issue.

III.

We review de novo a verdict challenged for sufficiency of the evidence, resolving all reasonable inferences in favor of the verdict. *United States v. Lee*,

603 F.3d 904, 912 (11th Cir. 2010). We must affirm "unless no trier of fact could have found guilt beyond a reasonable doubt." *Id.* Further, if a defendant testifies on his own behalf, he risks the jury concluding the opposite of his testimony is true. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). Statements made by the defendant may also be considered as substantive evidence of his guilt if the jury disbelieves it. *Id.* If there is some corroborative evidence of guilt for the charged offense, and the defendant testifies on his own behalf, his testimony denying guilt may, by itself, establish elements of the offense. *Id.* at 314–15. This is especially true where the offense includes highly subjective elements, such as intent or knowledge. *Id.* at 315.

Under 18 U.S.C. § 922(g), it is unlawful for anyone, "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . . ." *See also id.* § 922(g)(1). The government, when prosecuting under § 922(g), "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019).

Due to a stipulation that Rivera received his first felony conviction in 2004 and, since then, had been a convicted felon, prohibited from possessing guns or ammunition, including the date in question, we note that the sole issue at trial was

whether Rivera possessed the gun. The jury heard from officers that the gun was discovered in Rivera's pants and, apparently, disbelieved Rivera's denial that he possessed the gun. Thus, we affirm on this issue as well.

IV.

We review district court interpretations of the Sentencing Guidelines and the application of the guidelines to the facts de novo, but a district court's factual findings for clear error. *United States v. Dimitrovski*, 782 F.3d 622, 628 (11th Cir. 2015). The guidelines must be interpreted in light of its commentary and application notes, which are binding unless contradictory to the Guidelines' plain meaning. *Id.* Factual findings are clearly erroneous when they leave us "with a definite and firm conviction a mistake has been made." *Id.*

Sentencing Guideline § 3A1.2(c) provides that "[i]f, in a manner creating a substantial risk of serious bodily injury, the defendant . . . knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom," the defendant receives a six-level increase. U.S.S.G. § 3A1.2(c), (c)(1). The commentary states that this applies when there are specified individuals who are victims of the offense, "in circumstances tantamount to aggravated assault" against police "committed in the course of, or in immediate flight following, another offense," and "is limited to assaultive conduct against such official victims that is

sufficiently serious to create at least a 'substantial risk of serious bodily injury.'" *See* § 3A1.2 cmt. 4(A). Commentary states that "'[s]ubstantial risk of serious bodily injury' includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious injury) if it occurs." *Id.* cmt. 4(B).

Here, the official victim enhancement was justified by the risk of serious bodily injury presented by Rivera's conduct. There was testimony that, as officers attempted to take him into custody, Rivera was trying to reach towards his waistband, where the gun was ultimately discovered, as well as officer equipment, and one officer said that, at one point, Rivera did get ahold of his taser. Accordingly, we affirm the district court in this respect.

V.

We review claims of constitutional error de novo, but when not raised in the district court—as Rivera failed to do with his excessive-force claim—we review for plain error. *See United States v. Williams*, 527 F.3d 1235, 1239 (11th Cir. 2008) (double-jeopardy claim). Under plain error, we will correct an error when (1) an error occurred, (2) which was plain, and (3) it affected a defendant's substantial rights. *Id.* at 1240. If each of those conditions are met, we may exercise discretion to review a forfeited error, but only if it seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *See id.* The Supreme Court has guided "that plain error review should be exercised sparingly,

and only in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005) (citation and internal quotation marks omitted).

Suppression motions must be made before trial where the basis "is then reasonably available and" it "can be determined without a trial on the merits." *See* Fed. R. Crim. P. 12(b)(3), (b)(3)(C). "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely[, b]ut a court may consider the defense, objection, or request if the party shows good cause." *Id.* 12(c)(3). Where a defendant cannot show good cause as to why he did not file a timely motion to suppress before trial, the issue is deemed waived and will not be reviewed for the first time on appeal. *See United States v. Lall*, 607 F.3d 1277, 1288 (11th Cir. 2010).

We have stated that "[f]ederal courts possess the power and duty to dismiss federal indictments obtained in violation of the Constitution or laws of the United States." *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983) (district court dismissal of indictment based on prosecutorial abuse of the grand jury process).

To the extent that Rivera raises this claim as a new reason to suppress his arrest and evidence, he has not shown good cause for failing to raise it below, nor does this appear to be a situation where *Pabian* applies. More generally, though,

since this is an issue raised for the first time on appeal, his claim is subject to plain error review and Rivera has failed to show any plain error committed by the district court in this respect.[1] Accordingly, we affirm the district court.

AFFIRMED.

[1] To the extent that Rivera makes an argument that his civil rights were violated under 42 U.S.C. § 1983, given that this is a direct criminal appeal of his conviction and sentence, we lack jurisdiction over such claim. *See* 28 U.S.C. § 1343(a)(3); *cf. Ortega v. Schramm*, 922 F.2d 684, 690 (11th Cir. 1991) (per curiam) (explaining that in § 1343(a)(3) Congress authorized federal courts to hear § 1983 suits in separate civil actions).