[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12142
Non-Argument Calendar

D.C. Docket No. 4:19-cr-00178-WTM-CLR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD MAYNOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(March 3, 2021)

Before WILSON, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Edward Maynor appeals his 70-month sentence imposed after he pleaded guilty to one count of possession of a stolen firearm, in violation of 18 U.S.C. § 922(j). He argues that the district court erred in applying (1) a two-level enhancement under U.S.S.G. § 2K2.1(b)(4)(A) for possession of a stolen firearm, and (2) a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) based on a finding that he committed the offense in connection with another felony offense—aggravated assault. After review, we affirm.

I. Background

Maynor pleaded guilty, pursuant to a written plea agreement, to one count of possession of a stolen firearm. The presentence investigation report ("PSI") indicated that police officers responded to a 911 call from a residence in Savannah, Georgia. Noel Williams told the responding officers that he had traveled to his mother's residence that day and, when he arrived, he and Maynor had a physical altercation, during which Williams's mother was knocked to the ground. According to Williams, Maynor then retrieved a rifle, pointed it at Williams, and threatened to "blow [Williams's] head off." Jody Washington, who accompanied Williams to his mother's house, confirmed that Williams and Maynor fought and Williams's mother was knocked down. Washington observed Maynor retrieve a rifle but did not see him point it at Williams; however, she heard Maynor threaten to shoot Williams. Williams's mother, Louise Hanna, was Maynor's girlfriend,

and she indicated that she was knocked down unintentionally when she tried to break up the fight. Hanna witnessed Maynor retrieve a rifle but did not see him point it at Williams. She remembered that Maynor threatened Williams, but she did not remember the specific words he used.

In preparing Maynor's presentence investigation report ("PSI") for sentencing, the United States Probation Office applied a base offense level of 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), because Maynor committed the instant offense after sustaining a felony controlled-substance conviction.[1] Because the firearm was stolen, Maynor received a two-level enhancement under U.S.S.G. § 2K2.1(b)(4)(A).[2] He also received a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B)[3] because he possessed the firearm in connection with an aggravated assault. Finally, Maynor received a three-level deduction for

[1] The 2018 Guidelines Manual was used to calculate Maynor's guidelines range. U.S.S.G. § 2K2.1(a)(1)–(8) sets forth the various base offense levels for firearms offenses, ranging from 8 to 26 points based on various factors (such as the type of firearm and the defendant's criminal history), and states that the greatest applicable offense level should be applied. *See generally* U.S.S.G. § 2K2.1(a)(1)–(8). Section 2K2.1(a)(4) provides that, where, as here, the defendant committed the instant offense subsequent to sustaining one felony conviction for a controlled-substance offense, the base offense level is 20.

[2] Section 2K2.1(b)(4) provides for a two-level enhancement if the firearm was stolen, unless the base offense level was calculated under § 2K2.1(a)(7)—which provides for a base offense level of 12 and accounts for a firearm being stolen. *See* U.S.S.G. § 2K2.1(b)(4); § 2K2.1, cmt. (n.8).

[3] Section 2K2.1(b)(6)(B) provides that a defendant convicted of illegal possession of a firearm receives a four-level increase under the Guidelines if he "used or possessed any firearm or ammunition in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6)(B).

acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, resulting in a total adjusted offense level of 23. Maynor had a criminal history category of IV, which when combined with the offense level resulted in a guidelines range of 70 to 87 months' imprisonment.

Maynor objected to the PSI, arguing that the assessment of two points under U.S.S.G. § 2K2.1(b)(4)(a) for the firearm being stolen constituted impermissible double counting because the base offense level already accounted for the fact that the firearm was stolen. He also objected to the U.S.S.G. § 2K2.1(b)(6)(B) enhancement, arguing that he did not possess a firearm during his altercation with Williams and there was insufficient evidence to support the conclusion that he possessed the stolen firearm in connection with an aggravated assault.

Maynor filed a sentencing memorandum, reiterating his objections to the proposed guidelines calculation in the PSI. With regard to the four-level enhancement for possession of a firearm in connection with an aggravated assault, Maynor highlighted various inconsistencies between the witnesses' statements to the 911 operators, the police officers, and the grand jury as to who pushed Hanna down, what type of gun Maynor had, and what Maynor allegedly did with the gun once police were called. Maynor maintained that Williams was biased against him because he lived with Hanna and did not pay rent and because Williams believed Maynor was using Hanna. Maynor asserted that Williams threatened to kill him,

and that the witnesses had "manufactured and perpetrated a lie about [him] to make him look worse than he is." Thus, Maynor argued that because of the contradictions in the witnesses' accounts, the government could not establish by a preponderance of the evidence that Maynor used the stolen firearm in conjunction with an aggravated assault. Maynor requested a below-guidelines sentence of 37 months' imprisonment. In support of his objections, Maynor submitted copies of the transcript of the 911 call, the police report, and a transcript of the testimony provided to the grand jury.

At the sentencing hearing, Maynor reiterated his objections to the application of the U.S.S.G. §§ 2K2.1(b)(6)(B) and 2K2.1(b)(4)(A) guidelines enhancements. In response, the government proffered Williams's testimony to prove by a preponderance of the evidence that Maynor possessed the firearm in connection with an aggravated assault.[4]

Williams testified that he had multiple convictions in his past but denied having a conviction or arrest for making false statements to the police. He stated that he knew Maynor "[f]rom the streets" and that Maynor was in a relationship with his mother. Williams explained that he went to his mother's house on the day

[4] At the time of the underlying incident, Maynor was on probation for another offense and Williams testified at the subsequent revocation hearing. At the sentencing hearing in the case at hand, the parties agreed that Williams's testimony from the revocation hearing would be made part of the record and considered for purposes of sentencing in this case.

in question because there was a "storm coming," and he wanted to help her board up her house because it was located near the ocean. When he arrived at his mother's house, Maynor stated that "[he] got this," and told Williams to leave. Williams testified that Maynor got angry and was yelling and spitting in Williams's face, so Williams pushed him. Williams's mother, who was 81 years old at the time, tried to get "in between" Williams and Maynor, and Maynor pushed her down. Maynor then went to his truck and pulled out a shotgun and threatened to "blow [Williams's] . . . brains out." Williams explained that he called 911 and Maynor got in a vehicle and left, but when the police arrived, Maynor came back. The gun was recovered from inside Williams's mother's house.

On cross-examination, when asked whether he did "not like" Maynor, Williams stated "[i]t's not that. I don't want to be affiliated with him, period, never did." Williams admitted that he told one of the responding officers that he wanted Maynor to get away from his mother, but he denied telling the officers that Maynor was using his mother. Williams denied threatening to kill Maynor, but he admitted that he told the police that they needed to get Maynor away "or something would happen." Defense counsel then questioned Williams about a false statement he made to law enforcement in the past, noting that he had a conviction for obstruction because of that false statement. The district court stated

that for purposes of the hearing, it would "accept the fact that, in the past, this witness has made false statements to law enforcement personnel" and that Williams had "a previous criminal record."

Defense counsel then questioned Williams about the 911 call, asking whether Williams initially told dispatch that Maynor had a pistol. Williams asserted that he said Maynor "had a shotgun. He had a gun, period." Defense counsel also pointed out that on the 911 call and in his testimony before the grand jury, Williams stated Maynor pushed his mother down, but according to the police report, Williams told the officers that Williams bumped into his mother during the scuffle and caused her to fall. Williams also denied telling 911 dispatch that Maynor took the gun with him when he left.

The government maintained that Williams's testimony was consistent with the 911 transcript, the grand jury transcript, and the police reports submitted by Maynor. Further, the government argued that his testimony established by a preponderance of the evidence that Maynor used a firearm in connection with another felony, and the U.S.S.G. § 2K2.1(b)(6)(B) enhancement was appropriate. The government also maintained that the U.S.S.G. § 2K2.1(a)(4)(A) enhancement for the firearm being stolen was appropriate.

The district court overruled Maynor's objections to the § 2K2.1(b)(6)(B) enhancement, concluding that in light of "all of the documents, exhibits, and the

sentencing memorandum . . . and the testimony today," the government established by a preponderance of the evidence that Maynor possessed, and threatened Williams with, the firearm, in connection with another felony offense—aggravated assault. The district court also overruled Maynor's objection to the two-level increase under § 2K2.1(b)(4)(A), finding that because his base offense level was determined under § 2K2.1(a)(4)(A), the enhancement for the firearm being stolen did not constitute double counting.

Maynor reiterated his objection to the § 2K2.1(b)(6)(B) enhancement, maintaining that the government did not meet its burden of showing by a preponderance of the evidence that an aggravated assault occurred in connection with the instant offense—emphasizing inconsistencies between Williams's testimony and the 911 call, the grand jury testimony, and the police report. Maynor also reiterated his objection to the § 2K2.1(a)(4)(A) enhancement, but he acknowledged that precedent permitted the application of the enhancement. The district court sentenced Maynor to 70 months' imprisonment followed by three years' supervised release. This appeal followed.

II. Discussion

1. Maynor's challenge to the U.S.S.G. § 2K2.1(b)(4)(A) enhancement

Maynor argues that the district court erred in applying a two-level enhancement under U.S.S.G. § 2K2.1(b)(4)(A) based on the fact that the firearm

was stolen. He maintains that the application of this enhancement constitutes impermissible double counting because the fact that the firearm was stolen is accounted for in the base offense level. As Maynor acknowledges, his claim is foreclosed by binding precedent. *See United States v. Adams*, 329 F.3d 802, 803 (11th Cir. 2003) (per curiam) (rejecting an impermissible double-counting challenge like the one raised here and "holding that the application of the two-level enhancement under subsection (b)(4) is appropriate unless the defendant's base offense level is determined under [§ 2K2.1](a)(7)"). Maynor's base offense level was determined under § 2K2.1(a)(4), not subsection (a)(7). Accordingly, the application of the two-level enhancement under subsection (b)(4) was appropriate and did not constitute impermissible double counting. *Id.*; *see also United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (explaining that under the prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*.").

2. Maynor's challenge to the § 2K2.1(b)(6)(B) enhancement

Maynor argues that the district court's determination that he possessed the firearm in connection with an aggravated assault, which resulted in a four-level enhancement under § 2K2.1(b)(6)(B), was clearly erroneous. He asserts that the evidence the government presented was insufficient to meet its burden of proof

because Williams's testimony was contradictory and inconsistent with prior statements that he had made during the 911 call and to the police. Further, he maintains that Williams's testimony was not credible because Williams had a history of making false statements and a significant criminal record.

We review the district court's interpretation and application of the Guidelines, including the application of enhancements to specific offense characteristics, *de novo*. *United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997). "[W]e review the district court's factual findings related to the imposition of sentencing enhancements only for clear error." *Id.*; *see also United States v. Castaneda-Pozo*, 877 F.3d 1249, 1251 (11th Cir. 2017) ("The district court's factual findings are reviewed for clear error, and its application of those facts to justify a sentencing enhancement is reviewed *de novo*." (quoting *United States v. Matchett*, 802 F.3d 1185, 1191 (11th Cir. 2015))). "We will not reverse a district court's factual finding unless we are 'left with a definite and firm conviction that a mistake has been committed.'" *Castaneda-Pozo*, 877 F.3d at 1251 (quoting *Matchett*, 802 F.3d at 1191).

"When a defendant objects to a factual finding that is used in calculating his guideline sentence, . . . the government bears the burden of establishing the disputed fact by a preponderance of the evidence." *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005). "The district court's factual findings for

purposes of sentencing may be based on, among other things, evidence heard during trial, undisputed statements in the PSI, or evidence presented during the sentencing hearing." *United States v. Polar*, 369 F.3d 1248, 1255 (11th Cir. 2004).

"Credibility determinations are typically the province of the fact finder because the fact finder personally observes the testimony and is thus in a better position than a reviewing court to assess the credibility of witnesses." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). Thus, "[w]e afford substantial deference to the factfinder . . . in reaching credibility determinations with respect to witness testimony" proffered during the sentencing hearing. *United States v. Pham*, 463 F.3d 1239, 1244 (11th Cir. 2006) (quotation omitted). We will accept a factfinder's credibility determination unless the proffered evidence "is contrary to the laws of nature[] or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Ramirez-Chilel*, 289 F.3d at 749.

A defendant convicted of illegal possession of a firearm receives a four-level increase under the Guidelines if he "used or possessed any firearm or ammunition in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6)(B). "Another felony offense" is defined as "any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal

charge was brought, or a conviction obtained." U.S.S.G. § 2K2.1, cmt. (n.14(C)). The defendant uses or possesses a firearm "in connection with" another felony offense "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." *Id.* (n.14(A)).

In Georgia, an assault is accomplished either by (1) attempting to commit a violent injury to the person of another, or (2) committing an act which places another in reasonable apprehension of immediately receiving a violent injury. O.C.G.A. § 16-5-20(a). Aggravated assault is a felony and occurs when a defendant commits an assault "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." *Id.* § 16-5-21(a)(2), (b).

Here, the district court did not clearly err in concluding that the government met its burden of proving by a preponderance of the evidence that Maynor possessed the stolen firearm in connection with another felony offense—aggravated assault. Williams testified that Maynor aimed the firearm at him and threatened to shoot him in the head, which satisfies Georgia's definition of aggravated assault—a felony offense. *See id.* §§ 16-5-20(a), 16-5-21(a), (b). Although Maynor argues that Williams's testimony was not credible due to his criminal history and inconsistencies between his testimony and the 911 call and the statement he gave to police officers, Maynor raised all of these points before the

district court. And the district court expressly noted that it accepted, for purposes of the hearing, that Williams had a history of making false statements to police and had a lengthy criminal history. Nevertheless, the district court found Williams's testimony credible. While Maynor quarrels with that determination, he has not shown that Williams's testimony was "contrary to the laws of nature, or . . . so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Ramirez-Chilel*, 289 F.3d at 749. Accordingly, in light of Williams's testimony, the district court's finding that the government met its burden of proving by a preponderance of the evidence that Maynor possessed the firearm in connection with an aggravated assault was not clearly erroneous. *Castaneda-Pozo*, 877 F.3d at 1251. Consequently, the four-level § 2K2.1(b)(6)(B) enhancement was appropriate.

For the above reasons, we affirm Maynor's sentence.

AFFIRMED.