

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13915
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMIE L. KEITH,

a.k.a. Jgottidaboss,

a.k.a. Cocho,

ARTARIOUS DAVIS,

a.k.a. Showboat,

a.k.a. Boat,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 1:19-cr-00058-LAG-TQL-1

Before WILLIAM PRYOR, Chief Judge, and JILL PRYOR and BRANCH,
Circuit Judges.

PER CURIAM:

Jamie Keith and Artarious Davis appeal their convictions for conspiracy to possess controlled substances with intent to distribute and possession of controlled substances with intent to distribute. Keith also appeals his sentence. Keith and Davis argue that the district court erred in permitting certain questioning during the cross-examination of Davis's only witness, Addy Cook, and the direct examination of rebuttal witnesses that led to the introduction of gang-affiliation testimony that they contend exceeded the scope of Cook's direct examination and prejudiced their substantial rights. Keith argues that the district court abused its discretion in failing to sever his trial based on the gang-affiliation testimony. Keith and Davis argue that the district court structurally erred when, in explaining the verdict form, it inadvertently instructed the jury that its verdict must be guilty when it meant unanimous. And finally, Keith argues that the district court clearly erred in applying a two-level firearm enhancement under section 2D1.1(b)(1) and a two-level drug-premises enhancement under section 2D1.1(b)(12) of the Sentencing Guidelines. We affirm.

I. BACKGROUND

In 2019, a grand jury charged 32 individuals, including Keith and Davis, in a 42-count superseding indictment about a criminal conspiracy to distribute controlled substances. Keith was charged with conspiracy to possess with intent to distribute more than 50 grams of methamphetamine, more than 5 kilograms of cocaine,

22-13915

Opinion of the Court

3

more than 280 grams of cocaine base, more than 100 grams of heroin, more than 400 grams of fentanyl, and other controlled substances, including oxycodone and marijuana, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), (iii), (vi), and (viii), (b)(1)(B)(i), (b)(1)(C), (b)(1)(D), 846 (Count 1); distribution of more than 50 grams of methamphetamine, *id.* § 841(a)(1), (b)(1)(A)(viii) (Count 9); and possession with intent to distribute more than 50 grams of methamphetamine, *id.* § 841(a)(1) & (b)(1)(A)(viii), 18 U.S.C. § 2 (Count 32). Davis was charged with Count 1; possession with intent to distribute more than 50 grams of methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), 18 U.S.C. § 2 (Count 12); possession with intent to distribute more than 400 grams of fentanyl and more than 100 grams of fentanyl analogue, 21 U.S.C. § 841(a)(1), (b)(1)(A)(vi), 18 U.S.C. § 2 (Count 13); possession of a firearm in furtherance of a drug-trafficking crime, *id.* §§ 2, 924(c)(1)(A)(i) (Count 14); possession of a firearm by a convicted felon, *id.* §§ 2, 922(g)(1), 924(a)(2) (Count 15); and possession of a stolen firearm, *id.* §§ 2, 922(j), 924(a)(2) (Count 16).

Keith and Davis moved to sever their trials, which the district court denied as moot because the trial would proceed in groups of defendants. The district court ordered the defendants to file new motions to sever if they had objections to the specific codefendant(s) for their trials. The district court later entered a scheduling order stating that Keith and Davis would be tried with another defendant, William Smith, to which neither Keith nor Davis objected. Smith pleaded guilty before trial.

At trial, the government called 21 witnesses, including 15 law enforcement officers, and 7 cooperating defendants, who testified about their respective roles in the conspiracy and through which evidence was admitted that Keith directed drug deals out of several of the other co-conspirators' residential and business properties. The government also introduced numerous wiretapped calls and text messages through special agents with the Georgia Bureau of Investigation, including Special Agent Toni Larrauri, who testified that the wiretaps were for phones used by Keith and one of his co-conspirators, Willie Keith Ware. The government also introduced over 25 exhibits of controlled substances, including methamphetamine, cocaine, heroin, and fentanyl, seized from the searches described below.

Deputy Sheriff Justin Childs of Crisp County testified that, on August 20, 2019, he responded to a call from Deputies Kenny Purvis and Kris Herrick about a traffic stop. When Childs arrived on the scene, Davis, as well as co-conspirators Demarcus and Addy Cook, were with the deputies. Deputy Childs searched the vehicle and found a large amount of methamphetamine, pills, and a firearm. Deputies Herrick and Purvis testified to the same information. Deputy Herrick added that Addy Cook had been driving, while Demarcus Cook, Addy's cousin, was in the front passenger seat and Davis was in the back seat on the passenger side. Deputy Childs testified that he also responded to a call from Deputies Purvis and Herrick about a traffic stop involving co-conspirator Antonio Green on October 13, 2019, during which the deputies seized

22-13915

Opinion of the Court

5

more methamphetamine. Georgia State Patrol officer Michael Allen testified that, on September 1, 2019, he conducted a traffic stop involving Keith who was found in possession of fentanyl pills.

In October 2019, officers executed a search warrant of Willie Keith Ware's auto shop, W&W Custom Auto Shop, during which they searched both the shop and a yellow building connected to the shop, which Ware used as a stash house, and discovered a scale, pills, a cutting agent, methamphetamine, and a firearm. Officers also executed a search warrant of Ware's residence where they found firearms, drug paraphernalia, and marijuana.

That same day, officers also searched the residence of co-conspirator Pope Calloway Jr. and found a bag containing drugs hidden inside a light in one bathroom and a firearm in another bathroom under the sink. Officers also executed a search warrant of Keith's and his wife's residence, where they did not find any drugs, but found a firearm and ammunition, and the residence of Kayla Lockett, the mother of Keith's child, where they found a digital scale, cutting agent, marijuana, heroin, and methamphetamine.

When the government rested, Keith and Davis moved for a judgment of acquittal, which the district court denied. Keith presented no evidence and rested. Davis called Addy Cook, who testified that Davis did not know there was a firearm in the vehicle when they were stopped on August 19, 2019, that it was his firearm, and that he pleaded guilty to possessing it. Addy Cook initially testified that he was taking Demarcus Cook to pick up chemotherapy pills from Keith and that he was unaware of the contraband in the

vehicle, but he later admitted that he knew they were going to participate in an illegal drug deal. He also testified that Davis was his drug dealer and that he had previously taken Demarcus Cook to meet Keith to pick up drugs. But he stated that Davis was not involved in picking up drugs from Keith, and that on the day of the August 19 traffic stop, he had asked Davis only to ride with him. He admitted that he helped his cousin deal drugs.

On cross, the government asked Addy Cook if Keith had helped Demarcus Cook bond out of jail after he intentionally overdosed two people with heroin with what he called a “hot shot.” The government then asked Addy Cook about Demarcus Cook being “pretty highly placed in the Piru Bloods,” and introduced photographs of Keith in blue clothing. Addy Cook also identified a red bandana that “signifie[d the Piru Bloods] gang” and a book from which they “obtain[ed] knowledge through their gang” that was found in Demarcus Cook’s bedroom. Davis objected to the questioning as “vastly outside the scope of the direct examination,” and the government responded that it intended to impeach Addy Cook. The district court overruled the objection.

In rebuttal, Special Agent Larrauri testified to text messages between Addy Cook and Davis about “user quantity” drug deals. Assistant Special Agent Luke Stripling of the Georgia Bureau of Investigation testified as to the execution of a search warrant at Demarcus Cook’s residence, where officers found a red bandana and a photocopy of a “Book of Knowledge” on the Bloods, of which he

22-13915

Opinion of the Court

7

had multiple copies. Both Keith and Davis renewed their motions for a judgement of acquittal, which the district court denied.

The district court instructed the jury that it must consider each crime and the relevant evidence separately for each defendant, and that if it found one defendant guilty of a crime, that must not affect its verdict for another crime or another defendant. The district court explained the verdict form and the lines to mark each defendant either guilty or not guilty for each offense. It explained that if, for example, the jury found Keith guilty of Count 1, later questions required the jury to find the amount of drugs for that count. It explained, “So, again, for methamphetamine 50 grams or more, less than 50 grams but more than 5 grams, or less than 5 grams. And you’ll make a determination as to that, okay?” The district court stated that, if the jury found a defendant not guilty of a count, it would not answer the later questions. The district court explained that, after the jury answered each question, each juror had to sign the back page. The district court then stated, “So everyone, as I’m about to explain to you, this verdict has to be guilty so everyone who deliberates is going to need to sign this form, all right?”

The government then approached and explained that the district court had misstated that the verdict must be guilty when it probably meant unanimous. Keith agreed. The district court stated that it would correct its mistake, and it told the jury, “[W]hen I was explaining this verdict form, I misspoke because I think I’ve been reading a lot. Your verdict must be unanimous. It does not need to

be guilty. I think [I may] have misspoken and said your verdict must be guilty. I did not mean to say that at all.” The district court told the jury again that the defendants were presumed innocent and that it was the government’s burden to prove guilt beyond a reasonable doubt, and that the verdict, whether guilty or not, must be unanimous. The district court then asked, “Is that satisfactory?”, and the parties confirmed that it was. The parties then gave closing arguments.

The jury found Keith guilty on all counts. As to Count 1, the jury found that Keith conspired to distribute 50 grams or more of methamphetamine; 5 grams or more of cocaine; 280 grams or more of cocaine base; more than 400 grams of fentanyl; more than 100 grams of fentanyl analogue; more than 100 grams of heroin; and marijuana. As to Count 9, the jury found that Keith distributed 50 grams or more of methamphetamine. As to Count 32, the jury found that Keith possessed with the intent to distribute 50 grams or more of methamphetamine.

The jury found Davis guilty of the drug-related counts (Counts 1, 12, and 13), but not guilty of the gun-related counts (Counts 14, 15, and 16). As to Count 1, the jury found that Davis conspired to distribute 50 grams or more of methamphetamine; 400 grams or more of fentanyl; more than 100 grams of fentanyl analogue; and marijuana. As for Count 12, the jury found that he possessed 50 grams or more of methamphetamine, and for Count 13, it found he possessed more than 400 grams of fentanyl and more than 100 grams of fentanyl analogue.

22-13915

Opinion of the Court

9

A probation officer prepared a presentence investigation report for both defendants. Keith's report calculated a base offense level of 38 because the offense involved 90,000 kilograms or more of converted drug weight. U.S.S.G. § 2D1.1(a)(5), (c)(1). The report added 2 levels based on the possession of a dangerous weapon for the firearms found at Keith's home and the home of Calloway, where "Keith stored controlled substances." *Id.* § 2D1.1(b)(1). The report added 2 levels because Keith maintained a premises for the purpose of manufacturing or distributing controlled substances, referring to Calloway's home again as well as Ware's auto shop, where it found Keith stored drugs. *Id.* § 2D1.1(b)(12). Finally, the report added 4 levels because Keith was the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, *id.* § 3B1.1(a), resulting in an adjusted offense level of 46. The report then stated that Keith was a career offender because he was previously convicted twice of possession of cocaine with intent to distribute, but that Keith's adjusted offense level of 46 was higher than the applicable offense level of 37 for career offenders, so his applicable offense level remained 46 under section 4B1.1(b). The report also stated that his total offense level of 46 would be treated as the maximum level of 43.

The report found that Keith's criminal history category would have been V based on his 11 criminal history points, but because he was a career offender under section 4B1.1(b), his criminal history category was VI. Based on a total offense level of 43 and a criminal history category of VI, the report calculated that his guide-

lines range was life imprisonment. Keith objected to the enhancements for possession of a dangerous weapon and maintenance of a premises for drug distribution.

At Keith's sentencing, the district court found, based on the trial evidence, that Keith, although he lacked an ownership interest in either Calloway's residence or Ware's auto shop, controlled drug activities at both. It also found that there were firearms readily available at both Keith's residence and Calloway's residence. The district court found that, because there were drugs and firearms at both residences, the burden shifted to Keith to prove that it was clearly improbable that the firearms were connected to the offense, and that when Calloway possessed a firearm, Keith could be held liable as a defendant so long as he was an active member of the conspiracy and it was reasonably foreseeable that Calloway or someone else in the conspiracy would have a firearm. The district court overruled Keith's objections. The district court determined that Keith's total offense level was 43 and that his criminal history category was VI, for a guidelines range of life imprisonment, but sentenced him to a total of 420 months of imprisonment.

II. STANDARDS OF REVIEW

Several standards govern our review. We review evidentiary rulings for abuse of discretion, *United States v. McGregor*, 960 F.3d 1319, 1323 (11th Cir. 2020), but when a party fails to object to the admission of evidence before the district court, we review for plain error, *United States v. Hawkins*, 934 F.3d 1251, 1264 (11th Cir. 2019). A general objection will not preserve an issue for appeal. *See United*

22-13915

Opinion of the Court

11

States v. Beach, 80 F.4th 1245, 1255 (11th Cir. 2023). To preserve an objection, a party must apprise the district court and opposing party of the specific ground on which relief will later be sought on appeal. *Id.*

We review the denial of a motion to sever for abuse of discretion. *United States v. Chavez*, 584 F.3d 1354, 1360 (11th Cir. 2009). When multiple defendants are tried together, a defendant preserves his challenge when he moves for severance before trial because the district court has a broad duty to monitor the joint trial, ensure neither party is prejudiced by the joint trial, and *sua sponte* sever the trials if prejudice would result. *See Smith v. Kelso*, 863 F.2d 1564, 1569 n.5 (11th Cir. 1989) (stating that a defendant’s challenge was preserved despite his failure to move for severance after a witness provided prejudicial testimony because the defendant moved for severance during jury selection, at pretrial hearings, and elsewhere throughout trial and because the court had a duty to “monitor the proceedings to insure that no defendant’s rights appear[ed] to be prejudiced by [the] joint trial”). “[E]ven an abuse of discretion will not warrant reversal where the resulting error was harmless.” *United States v. Barton*, 909 F.3d 1323, 1330 (11th Cir. 2018). Thus, reversal is not required “unless the objecting party has shown a substantial prejudicial effect from the ruling,” where an error had “substantial influence on the outcome” of the trial. *Id.* at 1330-31 (quotation marks omitted).

We review sentencing issues of law *de novo*, factual findings for clear error, and application of the Sentencing Guidelines to the

facts with due deference, which is akin to clear error review. *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010); *see also United States v. Pham*, 463 F.3d 1239, 1245 (11th Cir. 2006) (holding that we review a finding of fact about the application of a firearm enhancement under section 2D1.1(b)(1) for clear error), *United States v. George*, 872 F.3d 1197, 1204 (11th Cir. 2017) (holding that we review a finding that a defendant maintained a premises for the manufacture or distribution of drugs under section 2D1.1(b)(12) for clear error). The factual findings may be based upon evidence heard during trial, facts admitted by a guilty plea, undisputed statements in the presentence investigation report, or evidence presented at the sentencing hearing. *See United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009).

III. DISCUSSION

We divide our discussion into four parts. First, we explain that no reversible error occurred in permitting the government to ask questions that led to the introduction of gang-affiliation testimony. Second, we explain that the district court did not abuse its discretion in failing to sever Keith's trials. Third, we explain that the district court did not structurally err when it inadvertently told the jury that its verdict must be guilty when it then explained that it meant unanimous. Finally, we address Keith's sentencing enhancements and explain why no error occurred.

A. The District Court Did Not Reversibly Err In Permitting Questions that Led to Gang-Affiliation Testimony.

Keith argues that the district court erred in allowing the introduction of evidence that Demarcus Cook and Keith were in rival gangs. He argues that the evidence was unduly prejudicial because the government used the gang-affiliation evidence in its rebuttal closing argument to state a new theory that because Demarcus Cook and Keith were in rival gangs, “Keith employed Davis to carry a firearm to keep Cook in check—with instructions to blow his brains out if he did anything with □ Keith’s purported money.” He argues that the evidence was inadmissible as rebuttal evidence because Keith did not present a defense and the testimony did not “explain, repel, counteract, or disprove” Davis’s evidence. Davis also argues that the cross-examination of Addy Cook exceeded the scope of direct examination by probing whether Demarcus Cook killed someone through an intentional overdose, whether Keith bonded Demarcus out of jail for the killing, and whether Demarcus Cook was in a gang. He argues that this was not appropriate for impeachment purposes because the government had already impeached Demarcus Cook and the probative value of inquiring into his gang-affiliation did not outweigh the prejudicial impact.

Evidence is relevant if it has any tendency to make a material fact more or less probable than it would be without the evidence. *United States v. Lewis*, 40 F.4th 1229, 1245 (11th Cir. 2022) (citing Fed. R. Evid. 401). A district court may exclude relevant evidence if its probative value is substantially outweighed by the danger of

undue prejudice. *Id.* (citing Fed. R. Evid. 403). Federal Rule of Evidence 611 states that “[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility.” Fed. R. Evid. 611(b). “The court may allow inquiry into additional matters as if on direct examination.” *Id.* Trial courts have broad discretion under Rule 611(b) to determine the scope of cross-examination, which may include impeachment or discrediting of a witness. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Even if evidence was admitted or excluded improperly, we will not vacate unless the defendant’s substantial rights were affected. *United States v. Guzman*, 167 F.3d 1350, 1353 (11th Cir. 1999). Reversal is warranted only if the error “resulted in actual prejudice because it had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* (quotation marks omitted).

Because Keith and Davis did not object to the government’s examination of its rebuttal witnesses, we review for plain error. *See Hawkins*, 934 F.3d at 1264. We also review for plain error their challenge to the introduction of gang-affiliation evidence through Addy Cook, as Keith did not object to the questioning at trial, and Davis objected on other grounds. *See Beach*, 80 F.4th at 1255. The only challenge properly preserved for appeal was Davis’s objection to the cross-examination of Addy Cook as being outside the scope of his direct examination, but the district court did not abuse its discretion in overruling that objection. *See McGregor*, 960 F.3d at 1323.

Davis cannot establish that the gang-affiliation evidence introduced was “likely to provoke strong antipathy” from the jury where the evidence largely established Demarcus Cook’s own affiliation with a gang, not his own. *See United States v. Jernigan*, 341 F.3d 1273, 1284-85 (11th Cir. 2003) (holding that the district court did not abuse its discretion in admitting evidence of a defendant’s gang membership where the issue “was such a close one” and therefore “fell squarely within the ambit of the district court’s sound discretion”), *abrogated in part on other grounds by Rehaif v. United States*, 588 U.S. 225 (2019). None of the evidence suggested Davis was in a gang, and the only evidence that Keith might be in a gang was Addy Cook’s testimony that Keith was wearing blue, and Demarcus Cook’s gang was often associated with the color red. Davis cannot establish that his substantial rights were affected, especially given the overwhelming evidence of his guilt. *See Guzman*, 167 F.3d at 1353. The same goes for Keith.

B. The District Court Did Not Abuse Its Discretion by Not Severing Keith’s Trial.

Keith argues that because the trials were not severed, “significant prejudicial evidence” was introduced following Davis’s direct examination of Addy Cook that Keith was affiliated with a gang. He argues that the evidence would not have been admitted at a separate trial, and that it affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. We disagree.

Federal Rule of Criminal Procedure 8(b) permits the joinder of defendants “if they are alleged to have participated in the same act or transaction.” *Chavez*, 584 F.3d at 1359-60 (quotation marks omitted). “[T]he general rule is that [d]efendants indicted together should be tried together, especially in conspiracy cases.” *Id.* at 1360. Rule 14(a) permits severance if joinder “appears to prejudice a defendant.” *Id.* (quotation marks omitted). “To succeed on appeal the [d]efendant must carry the heavy burden of demonstrating the lack of a fair trial due to actual, compelling prejudice.” *Id.* We have “defined ‘compelling prejudice’ in this context as ‘the jury’s inability to separately appraise [sic] the evidence as to each defendant and render a fair and impartial verdict.’” *United States v. Wilson*, 894 F.3d 1245, 1253 (11th Cir. 1990) (quoting *United States v. Meester*, 762 F.2d 867, 883 (11th Cir. 1985)). Severance “is rarely granted.” *Chavez*, 584 F.3d at 1360.

The district court did not abuse its discretion. Keith cannot establish that the spillover effect from the introduction of gang-affiliation evidence, which primarily concerned a co-conspirator, resulted in any “actual, compelling prejudice” against him that prevented the jury from making an individual determination of his guilt. *See Chavez*, 584 F.3d at 1360-61. Although some of the evidence concerned Keith’s alleged membership in a rival gang, Keith has not established that any prejudice from his joint trial prevented the jury from making an individual assessment of his guilt for each count.

C. The District Court Did Not Structurally Err When It Inadvertently Told the Jury That Its Verdict Must Be Guilty but Later Explained that It Meant Unanimous.

Keith and Davis argue that the district court structurally erred in telling the jury “this verdict has to be guilty.” They argue that such an error is not subject to harmless error, based on their Fifth and Sixth Amendment rights, and the “fundamental unfairness” of a court instructing to a jury that it must return a verdict of guilty, and that “an instruction by the district court that directs a verdict, either in whole or in part, cannot be deemed harmless.”

When a criminal defendant fails to object to a constitutional error, there are two standards that can govern our review. *United States v. Coats*, 8 F.4th 1228, 1236 (11th Cir. 2021). “Under the standard most often used to gauge the impact of an error on substantial rights, a defendant must show that the error changed the outcome of the proceeding.” *Id.* “As to those rare instances when a defendant can establish that the error was ‘structural,’ however, we eliminate the requirement to establish actual prejudice because we conclude that such errors necessarily affect substantial rights.” *Id.* (quotation marks omitted). “The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees, which are necessary for a proceeding to reliably serve its function as a vehicle for determination of guilt or innocence.” *Id.* at 1237 (quotation marks and citations omitted).

“Structural errors are errors that affect the entire conduct of the proceeding from beginning to end,” and this “highly exceptional category” includes “the denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt.” *Greer v. United States*, 593 U.S. 503, 513 (2021) (quotation marks omitted and alteration adopted); *see also United States v. Dilg*, 700 F.2d 620, 622-27 (11th Cir. 1983) (holding that “a total failure to charge on the presumption of innocence accompanied by a defendant’s objection to such failure” constitutes reversible error that “requires reversal of a conviction and remand for a new trial without further inquiry”). Structural errors preclude the jury from reaching a verdict, “vitiate all the jury’s findings,” and produced “unquantifiable and indeterminate” consequences. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). “[D]iscrete defects in the criminal process—such as the omission of a single element from jury instructions or the omission of a required warning from a Rule 11 plea colloquy—are not structural because they do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Greer*, 593 U.S. at 513.

The district court’s initial misstatement that the verdict must be guilty instead of unanimous did not render the proceeding fundamentally unfair or an unreliable vehicle for determining guilt or innocence; it was an “error in the trial process itself.” *Coats*, 8 F.4th at 1237. Indeed, the district court promptly corrected itself and reminded the jury of the presumption of innocence and that

the burden was on the government to prove guilt beyond a reasonable doubt. The misstatement was a “discrete defect[] in the criminal process,” like the omission of an element from an instruction, not the “highly exceptional category” of structural errors that include the “failure to convey to a jury that guilt must be proved beyond a reasonable doubt.” *Greer*, 593 U.S. at 513. And because the district court promptly corrected its error, we presume that the jury followed the correct instructions.

D. The District Court Did Not Clearly Err in Applying a Firearm Enhancement or a Drug-Premises Enhancement.

Keith challenges sentencing enhancements for possessing a firearm and for maintaining a premises for the purpose of manufacturing or distributing drugs. As to the former, he argues that the district court clearly erred because the government failed to satisfy its initial burden of proving a connection between the firearm and his drug trafficking. And he argues that, even if the government satisfied its burden, it was clearly improbable that the firearm was related to his drug trafficking. He argues that, although firearms were found at Calloway’s residence, the government failed to establish that the firearm possession was within the scope of the drug trafficking conspiracy or that Keith could reasonably foresee that Calloway possessed them because there was “significant distrust between the members of the alleged conspiracy.” As to the latter, he argues that the district court clearly erred because he had no possessory interest in Calloway’s residence or Ware’s shop and he did not control activities there. He also argues that the district court did not consider whether drug distribution was the primary use of

the premises. He argues that although he owned Lockett's home, there was no evidence that he lived there or that the principal use of the home was manufacturing or distributing drugs, and that his own home was not primarily used for drug trafficking.

Section 2D1.1(b)(1) allows for a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The enhancement applies "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *United States v. George*, 872 F.3d 1197, 1204 (11th Cir. 2017) (quoting U.S.S.G. § 2D1.1 comment. (n.11(A))). The government bears the initial burden of proving by a preponderance of the evidence "that a firearm was 'present' at the site of the charged conduct or that the defendant possessed it during conduct associated with the offense of conviction." *Id.* If the government satisfies this burden, it then shifts to the defendant, "who must establish that a connection between the weapon and the offense was 'clearly improbable.'" *Id.*

The district court did not clearly err in applying the firearm enhancement. It is reasonably foreseeable that a co-conspirator would possess a firearm where the conspiracy involved trafficking in lucrative and illegal drugs. *Pham*, 463 F.3d at 1246. Contrary to Keith's argument, that there was "distrust" amongst members of the conspiracy does not make Calloway's gun possession unforeseeable; if anything, it makes it more so.

Under section 2D1.1(b)(12), a two-level enhancement applies to the offense level for a drug conviction if the defendant

22-13915

Opinion of the Court

21

maintained a premises for the purpose of manufacturing or distributing a controlled substance. U.S.S.G. § 2D1.1(b)(12). This enhancement applies so long as drug use is a primary use of the premises, even if it serves other purposes. *United States v. Rodriguez*, 75 F.4th 1231, 1243 (11th Cir. 2023). In making this determination, courts must consider how frequently the premises were used for manufacturing or distributing drugs versus for lawful purposes. *Id.* The commentary to section 2D1.1(b)(12) explains that the district court should consider “whether the defendant held a possessory interest in (e.g., owned or rented) the premises,” and “the extent to which the defendant controlled access to, or activities at, the premises.” U.S.S.G. § 2D1.1(b)(12), comment. (n.17).

The district court did not clearly err in finding that Keith controlled the activities at Calloway’s residence and Ware’s auto shop despite not having an ownership interest in either location, as ownership interest is not dispositive as to whether the drug-premises enhancement applies. *See id.* Several of his co-conspirators testified that Keith directed drug activities at both locations. Although Lockett’s residence was not used in the probation officer’s calculation of the enhancement, the district court did not clearly err in considering the evidence presented at trial and determining that the enhancement would also have applied based on the use of that residence, where Keith had an ownership interest, for drug trafficking. *See Martinez*, 584 F.3d at 1027.

IV. CONCLUSION

We **AFFIRM**.