

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-11809
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KELVIN LARON HOWARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 1:20-cr-00026-JRH-BKE-1

Before NEWSOM, BRASHER, and WILSON, Circuit Judges.

PER CURIAM:

Defendant-Appellant Kelvin Laron Howard appeals his convictions and total sentence of 175 months' imprisonment for possession with intent to distribute heroin, possession of a firearm in

furtherance of a drug trafficking crime, and possession of a firearm as a felon. Howard's convictions stem from a search of his apartment, where Howard made several incriminating statements and law enforcement found firearms and over 70 grams of heroin. The search warrant for his apartment was based on a controlled buy by a confidential source (CS). Howard proceeded pro se during the district court proceedings and represented himself at a suppression hearing, a jury trial, and sentencing. On appeal, Howard argues various errors occurred throughout these proceedings. After careful review, we find no error and we affirm his convictions and sentence.

I.

First, Howard contends that the district court erred in finding that Investigator Charles Kaminer's affidavit established sufficient probable cause to support the no-knock search warrant of his apartment. Because rulings on motions to suppress present mixed questions of law and fact, we review the district court's factual findings for clear error and its application of the law to those facts de novo. *United States v. Gonzalez*, 107 F.4th 1304, 1307 (11th Cir. 2024). We will construe the facts in the light most favorable to the party that prevailed below. *Id.*

We ordinarily review de novo "whether the facts set forth in an affidavit constitute a sufficient basis for a finding of probable cause." *United States v. Lopez*, 649 F.3d 1222, 1245 (11th Cir. 2011). But "[w]e review for plain error any theories supporting a motion to suppress that were not raised below." *United States v. Spearman*,

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178 F.4th 1295, 1306 (11th Cir. 2026). Plain error requires (1) an error (2) that is plain and (3) that affects the defendant’s substantial rights.¹ *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005).

The Fourth Amendment provides for the right to be free from unreasonable searches and seizures and requires that all search warrants be supported by probable cause. U.S. Const. amend. IV. “Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding contraband or evidence at a particular location.” *United States v. Brundidge*, 170 F.3d 1350, 1352 (11th Cir. 1999) (per curiam). To establish probable cause to search a residence, an affidavit submitted in support of a search warrant must contain fresh facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises, or in other words, “a link between the residence and any criminal activity.” *United States v. Martin*, 297 F.3d 1308, 131 (11th Cir. 2002). If the affidavit involves information from an informant, the affidavit must “demonstrate the informant’s veracity and basis of knowledge” unless there is sufficient independent corroboration of the informant’s information. *Id.* (quotation marks omitted).

¹ “‘If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.’” *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005) (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)).

At the district court, Howard did not challenge the sufficiency of the affidavit and contended that the affidavit was “facially sufficient.” Now, Howard argues that the affidavit was insufficient because the affidavit did not allege facts establishing the CS’s reliability and the basis for the CS’s knowledge. Because Howard did not pursue this theory at the district court, we review for plain error. *See Spearman*, 178 F.4th at 1306.

Howard cannot meet this standard. Kaminer’s affidavit explains that the CS made recent contact with Howard to buy heroin. Specifically, Kaminer explained that he met the CS before the controlled buy and searched the CS and the CS’s vehicle, verifying that the CS did not have any pre-existing contraband. Kaminer provided the CS with government-recorded funds and then observed the CS enter Howard’s apartment building, stay for a short time, and leave. Kaminer followed the CS to a pre-arranged meeting place, where the CS surrendered heroin and told Kaminer that the CS had purchased it from Howard “inside . . . apartment 1321.” The CS told Kaminer that Howard kept a semi-automatic pistol on or near his person during drug transactions. Kaminer then field tested the heroin “with positive results.” The information Kaminer gathered from the CS was more than enough to establish the CS’s veracity and basis of knowledge. *Martin*, 297 F.3d at 1314.

On appeal, Howard also argues that the affidavit contained a false statement and was void under *Franks v. Delaware*, 438 U.S. 154 (1978). Unlike the sufficiency argument, Howard pursued this theory at the district court, so it is preserved and we review it de

novo. *See Gonzalez*, 107 F.4th at 1307. Under *Franks*, the defendant must make a substantial preliminary showing that a false statement was included in an affidavit knowingly and intentionally or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause. 438 U.S. at 155–56.

To support his claim that the affidavit contained a false statement, Howard points to Kaminer’s testimony that he did not personally observe the controlled buy, even though the affidavit said that he “observed activity” indicating that narcotics and firearms were stored at Howard’s apartment. But Howard selectively chooses language from the affidavit to support his argument. When looking at the affidavit as a whole, Kaminer clearly explains both the activity he observed—several unknown people arriving at various times of the day and night, staying for a short time and then leaving—and the knowledge Kaminer received from the CS—that Howard kept a firearm near him when conducting drug sales. Thus, his affidavit does not contradict his testimony that he did not personally observe the controlled buy. Because Howard has not shown a false statement, the district court did not err in rejecting Howard’s argument under *Franks*.²

² Both at the district court and on appeal, Howard focuses on the lack of corroborating evidence, such as records of field tests or audio or video evidence. While this other evidence would have bolstered Kaminer’s allegations in the affidavit, its absence does not prove that Kaminer fabricated the controlled buys. The district court found Kaminer’s testimony supporting the affidavit credible and Howard’s “self-serving testimony that the controlled buys never

Thus, the district court did not err in finding that the search warrant was properly issued and that suppression was unwarranted.

II.

Second, Howard argues that the magistrate judge erred in denying his motion to disclose the identity of the CS based on the government's assertion that this information was privileged. But we lack jurisdiction to hear Howard's appeal of this order from the magistrate judge because Howard did not ask the district court to review the order. *See United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009) (per curiam) (holding that because criminal defendant "failed to appeal to the district court the magistrate judge's denial of his motion for self-representation, . . . we lack jurisdiction to hear his appeal"); Fed. R. Crim. P. 59(a) ("Failure to object in accordance with this rule waives a party's right to review.").

III.

Third, Howard argues that the magistrate judge erred in failing to postpone a suppression hearing based on standby counsel's absence. We normally review a district court's denial of hybrid representation to a defendant for an abuse of discretion. *See United States v. LaChance*, 817 F.2d 1491, 1498 (11th Cir. 1987). But under the contemporaneous objection rule, to properly preserve a claim

occurred" not credible. And we defer to a district court's credibility determinations unless the resulting understanding of the facts is unbelievable. *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002).

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of error on appeal, the litigant must object to the court's action and state the grounds for that objection at the time the erroneous ruling or order is made, unless the litigant lacked the opportunity to do so. *United States v. Hakim*, 30 F.4th 1310, 1319 (11th Cir. 2022); Fed. R. Crim. P. 51(b). Accordingly, when a litigant fails to comply with the contemporaneous objection rule, we will review the asserted claim of error on appeal for plain error. *See Hakim*, 30 F.4th at 1319.

At the suppression hearing in August 2021, Howard's standby counsel was not present. Howard made passing remarks that he had not been in touch with standby counsel or heard from standby counsel regarding information Howard had requested. But at the time, Howard did not object to moving forward with the hearing without his standby counsel. Because Howard did not comply with the contemporaneous objection rule, we review Howard's claim for plain error.

While the Sixth Amendment provides criminal defendants with the right to assistance of counsel, U.S. Const. amend. VI, criminal defendants also have an equivalent right to self-representation, *United States v. Wilson*, 979 F.3d 889, 912 (11th Cir. 2020). When a defendant elects to proceed pro se, a court may appoint standby counsel to assist the defendant in his defense. *McKaskle v. Wiggins*, 465 U.S. 168, 170 (1984).

Howard's claim centers around the magistrate judge "reprimanding" Howard during the suppression hearing.³ But Howard has not shown how standby counsel's absence and the subsequent alleged reprimand affected his substantial rights because Howard's motion to suppress would have still failed on the merits as discussed above. Further, standby counsel was "not responsible for preparing, presenting or otherwise conducting" Howard's defense. Thus, the magistrate judge did not plainly err in failing to sua sponte postpone the suppression hearing based on standby counsel's absence.⁴

IV.

Fourth, Howard asserts that the district court erred in failing to grant his motion to dismiss the indictment based on a post-indictment violation of his speedy trial rights. He points to the almost four-month delay between when he was indicted in May 2020 and then his initial appearance in September 2020.

³ We pause to note that Howard does not exactly identify what the reprimand was, only noting that the magistrate judge suggested that Howard should have a lawyer represent him instead of proceeding pro se. After reviewing the transcript, we cannot agree with Howard's characterization of the magistrate judge's language.

⁴ Howard asserts that standby counsel's absence at the suppression hearing was a structural error not subject to harmless error review. But our case law does not support that argument. *See United States v. Wilson*, 979 F.3d 889, 912 (11th Cir. 2020) (applying harmless error review to claims of error based on standby counsel's absence).

Howard unsuccessfully moved to dismiss the indictment for being arrested in August 2019 but not indicted until May 2020, but Howard never moved to dismiss the indictment because of the delay between the indictment and his initial appearance. Thus, we review newly raised claims of error on appeal for plain error. *Rodriguez*, 398 F.3d at 1298. “An error cannot be plain unless the issue has been specifically and directly resolved by the explicit language of a statute or rule or on point precedent from the Supreme Court or this Court.” *United States v. Sanchez*, 940 F.3d 526, 537 (11th Cir. 2019).

A defendant can challenge his right to a speedy trial under both the Sixth Amendment and the Speedy Trial Act. In Howard’s brief, he uses the title “Speedy Trial Act Violation,” but his argument is based in the constitutional challenge under the Sixth Amendment. So we proceed with reviewing Howard’s claim solely under the Sixth Amendment.⁵

⁵ Even if Howard’s counseled brief could be construed to assert a Speedy Trial Act violation, that claim still fails. The Speedy Trial Act “generally imposes a requirement that a trial begin ‘within seventy days from the filing date (and making public) of the information or indictment.’” *United States v. Ogiekpolor*, 122 F.4th 1296, 1312 (11th Cir. 2024) (quoting 18 U.S.C. § 3161(c)(1)). But the Act “permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public’s and defendant’s interests in a speedy trial.” *United States v. Dunn*, 83 F.4th 1305, 1314 (11th Cir. 2023). Pandemic-related continuances fall within the ends of justice exception to the Speedy Trial Act. *Id.* at 1316–18. Howard has shown no plain error in the district court’s exclusion of the challenged

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. In *Barker v. Wingo*, the Supreme Court articulated a four-factor test to assess whether a defendant’s constitutional right to a speedy trial has been violated. 407 U.S. 514, 530–33 (1972). These factors include “(1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of the speedy trial right; and (4) the prejudice to the defendant.” *United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006).

Under plain error review, Howard did not point to any case, statute, or rule that says that a four-month delay between indictment and initial appearance during a global pandemic violates the Sixth Amendment right to a speedy trial. Further, this was not an intentional delay by the government but resulted from a global pandemic and the need for the state prison to safely and securely transport him to federal custody. See *United States v. Oliva*, 909 F.3d 1292, 1298 (11th Cir. 2018) (per curiam) (explaining that a valid excuse justifies delay but not an intentional attempt to delay the trial by the government).

V.

Last, Howard contends that the district court erred in applying a two-level obstruction of justice enhancement to his offense level under U.S.S.G. § 3C1.1 (2023) based on his trial testimony.

four-month delay under the Speedy Trial Act based on the COVID-19 pandemic and the ability to safely and securely move him from state to federal custody.

When a district court imposes an enhancement for obstruction of justice, we review the district court’s factual findings for clear error and the district court’s application of the Sentencing Guidelines to those facts de novo. *United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006).

The Sentencing Guidelines provide for a two-level enhancement to a defendant’s sentencing level where “(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense.” U.S.S.G. § 3C1.1. The commentary⁶ to § 3C1.1 defines covered conduct to include “committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction.” *Id.* § 3C1.1, comment. n.4(B). “Perjury here is defined as false testimony concerning a material matter with the will-

⁶ We have held that courts may not defer to the commentary to the Sentencing Guidelines if the relevant guideline is unambiguous. *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc). But if “[n]o party contests the commentary’s validity” to the issue at hand, then we may consider the commentary. *United States v. Jews*, 74 F.4th 1325, 1327 n.2, 1328 (11th Cir. 2023). Here, the parties do not dispute the validity of the commentary’s interpretation of obstruction of justice.

ful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *United States v. Moran*, 778 F.3d 942, 981 (11th Cir. 2015) (quotation marks omitted).

“In order to apply the [sentence] increase, a district court must make an independent factual finding that the defendant gave perjured testimony on a material matter.” *Id.* While “a district court preferably should make specific findings as to each instance of obstruction by identifying the materially false statements individually, it is sufficient if the court makes a general finding of obstruction of justice that encompasses all of the factual predicates of perjury.” *Id.* (quotation marks omitted).

The district court explained that it listened to all the testimony at trial, including Howard’s, and watched the body camera footage from the search of Howard’s apartment. Howard’s statements during the search directly contradicted what he testified to at trial. The court recognized that Howard said that he was under duress during the search but found that the jury had rejected that claim and the body camera footage showed no evidence of duress.

Howard asserts that the district court did not identify specific portions of his testimony as false. But the district court made a general finding of obstruction that encompassed all of the factual predicates of perjury, which was sufficient to support the enhancement. *See id.* Thus, the district court did not clearly err in finding that Howard committed perjury to apply a two-level obstruction-of-justice enhancement under § 3C1.1.

AFFIRMED.