FILED
United States Court of Appeals
Tenth Circuit

October 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES MICHAEL STEWART,

Defendant - Appellant.

No. 22-7025
(D.C. No. 6:20-CR-00126-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BRISCOE**, and **MORITZ**, Circuit Judges.

Following a jury trial, Defendant James Michael Stewart was convicted of one count of attempted aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(a), and 2246(2)(A), and sentenced to 72 months of imprisonment and five years of supervised release. Stewart challenges the sufficiency of the evidence, the exclusion of his expert witness, and the application of a sentencing enhancement. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reject Stewart's arguments and affirm the judgment of the district court.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

A. Factual Background

On May 24, 2018, Heather Drywater visited a friend's house after work. While there, Stewart sent a text message to Drywater, inviting her to go out drinking. Drywater and Stewart had known each other for several years, initially meeting at a bar while playing pool. The two never had a sexual or romantic relationship; rather, their friendship consisted of "[r]un[ning] around to the bars, shoot[ing] pool, [and] drink[ing] together." ROA, Vol. IV at 78.

Stewart picked up Drywater from her friend's house, and they attempted to go to several bars, but all were closed due to the late hour. Eventually, they ended up at the local Veterans of Foreign Wars (VFW) post, where they had a few beers and shots. After the VFW closed, the two decided to rent a hotel room at Studio 6 so they could continue drinking.

This was not the first time that Stewart and Drywater had gone to a hotel together. In fact, after a night of drinking, they would often rent a hotel room to continue drinking and then stay the night. During their previous hotel stays, they shared a bed but never engaged in any sexual activity. Stewart usually slept nude, while Drywater remained clothed so that Stewart "wouldn't get any ideas." *Id.* at 83. As regards the night in question, Stewart and Drywater had no prior mutual understanding or conversation about engaging in sexual activity at the hotel.

Stewart and Drywater checked into the hotel room at around 2:30 a.m. on May 25, 2018, and continued consuming alcohol. After the two drank about twelve beers,

Stewart removed all of his clothing. Drywater went into the bathroom to either take a shower or pretend to. When Drywater emerged from the bathroom, she was fully clothed.

While Drywater was on her phone standing at the foot of the hotel bed, Stewart lifted Drywater by her legs and forcefully pushed her onto the bed. As he pressed his nude body against hers, Drywater's back was lying flat on the bed. As Stewart laid on top of Drywater, they were positioned "stomach to stomach" or "chest to chest." *Id.* at 87. Stewart attempted to spread Drywater's legs open and, while "dry humping" her, said into her ear: "I want to fuck you." Gov. Ex. 6 at 4:50–5:00. Drywater struggled to breathe as Stewart's full weight pressed down on her. She attempted to push Stewart off using her arms, which were trapped under him. Stewart remained on top of her for approximately "five breaths" before she managed to escape. ROA, Vol. IV at 93. As she pushed him off, "[h]e raised up enough . . . for [her] to slide out from underneath him." *Id.* at 88. From Drywater's perspective, Stewart raised off her because she pushed him, not because he did so voluntarily.

Following her escape, Drywater retreated to the bathroom, locked the door, and dialed 9-1-1 to report the sexual assault. While she was on the phone with the 9-1-1 operator, Stewart attempted to get into the bathroom by jiggling the door handle and knocking. He then started banging and pounding on the door.

In response to the 9-1-1 call, two Muskogee Police Department officers, Officer Justin Wardour and Sergeant Christopher Dean, were dispatched to the hotel room at around 6:30 to 7:00 a.m. Dispatch had informed the officers of a reported

sexual assault and that a female had barricaded herself in the bathroom. Upon arrival, they knocked on the exterior door of the hotel room and Stewart opened the door still fully nude. Officer Wardour noted that Stewart appeared highly intoxicated. Once the officers entered the room, Stewart walked over to the bed and started getting dressed. The officers explained their presence to Stewart, stating that they needed to contact the female who had called from the bathroom. Officer Wardour then began asking Stewart basic questions, including what had happened the evening before and that morning.

At the same time, Sergeant Dean attempted to communicate with Drywater by knocking on the bathroom door and identifying himself as a police officer. Sergeant Dean could hear Drywater crying from inside the bathroom. With the door still closed, Drywater inquired about Stewart's whereabouts. Sergeant Dean reassured her that if she came out of the bathroom, they would work to avoid Stewart. Drywater complied and emerged from the bathroom. According to Sergeant Dean, Drywater appeared noticeably fearful. He guided her out of the bathroom, shielding her from Stewart, and escorted her into the hotel hallway. Sergeant Dean noted that Drywater appeared intoxicated, but nothing indicated to him that she was "blackout drunk." *Id.* at 113.

The police officers escorted Stewart out of the hotel room, and Drywater went back into the room and slept there. Later that day, Sergeant Dean returned to the hotel to obtain a statement from Drywater. Stewart was placed under arrest at some point that day.

B. Procedural Background

1. The Superseding Indictment

On November 17, 2020, a grand jury in the Eastern District of Oklahoma returned a superseding indictment charging Stewart with three counts, including one count for attempted aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(a), and 2246(2)(A), arising out of the incident involving Drywater.[1] This count, Count Three, alleged that on or about May 25, 2018, Stewart, "an Indian, did knowingly attempt to cause [Drywater] to engage in a sexual act . . . to wit: penetration, however slight, between the penis and the vulva, by the use of force, and by threatening and placing [Drywater] in fear that any person would be subject to death, serious bodily injury, and kidnapping." ROA, Vol. I at 25. Stewart was arraigned on November 18, 2020, and entered a plea of not guilty to all three counts.

2. Stewart's Proposed Intoxication Expert and Trial

On April 8, 2021, prior to trial, Stewart filed a notice informing the government of his intention to offer expert testimony from Dr. Jason Beaman regarding the mental and physical effects of alcohol consumption. Stewart stated in

[1] Count One charged Stewart with aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(a)(1), and 2246(2)(B), and Count Two charged Stewart with aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(a)(1), and 2246(2)(A). Counts One and Two stem from a distinct incident that occurred on October 21, 2018, involving a separate victim. Stewart was acquitted of those charges, and they are not relevant to the issues presented in this appeal.

the notice that "[t]his testimony may be considered by the jury for multiple purposes in this case, one of which is to support an inference that Mr. Stewart did not have the mental capacity to form the specific intent to attempt to commit [Count Three]." *Id.* at 307.

Trial commenced on June 8, 2021. On the second day of trial, the government, for the first time, sought to exclude Dr. Beaman from testifying. Following argument from both sides, the district court excluded Dr. Beaman's testimony under Federal Rule of Evidence 702, reasoning that his testimony would invade the province of the jury and would be unhelpful and misleading. Stewart then made a proffer of Dr. Beaman's proposed testimony.

Ultimately, the jury found Stewart guilty of attempted aggravated sexual abuse as alleged in Count Three. On July 8, 2021, Stewart timely filed a post-trial motion for judgment of acquittal or, in the alternative, a motion for a new trial. The district court issued a written order denying the motion.

3. Sentencing

Prior to sentencing, the Probation Office prepared a Pre-Sentence Report (PSR). Applying United States Sentencing Guideline (U.S.S.G.) § 2A3.1(a)(2), the PSR calculated Stewart's base offense level as a level 30. The PSR then applied the four-level enhancement outlined in U.S.S.G. § 2A3.1(b)(1), which is appropriate "[i]f the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." This resulted in a total offense level of 34. Accordingly, the PSR calculated Stewart's guideline

range of imprisonment as 151 to 188 months (offense level 34, criminal history category I).

Stewart filed a sentencing memorandum objecting to the four-level enhancement imposed under U.S.S.G. § 2A3.1(b)(1). He also filed a motion requesting the district court vary downward from the advisory guidelines range.

At the June 7, 2022, sentencing hearing, the district court addressed the application of U.S.S.G. § 2A3.1(b)(1) and rejected Stewart's objection. However, the district court partially granted Stewart's motion for a non-guideline sentence, relying in part on Stewart's lack of criminal history, cooperation with law enforcement, conduct while under pre-trial release, and military service and resulting PTSD. Accordingly, the district court sentenced Stewart to 72 months of imprisonment, followed by five years of supervised release. The district court also required Stewart to register as a sex offender.

Judgment was entered on June 10, 2022, and Stewart timely appealed.

II

Stewart challenges his conviction on three grounds: (1) the evidence presented at trial was insufficient to sustain his conviction of attempted sexual abuse; (2) the district court erred in excluding the testimony of his proposed intoxication expert; and (3) the district court erred in imposing a four-level sentencing enhancement pursuant to U.S.S.G. § 2A3.1(b)(1). We conclude that none of these arguments support a basis for reversal of Stewart's conviction or a remand for resentencing.

A. Sufficiency of the Evidence

Stewart first challenges the sufficiency of the evidence to support his conviction of attempted aggravated sexual abuse under 18 U.S.C. § 2241(a). Specifically, Stewart argues there was insufficient evidence establishing his specific intent to have non-consensual vaginal intercourse with Drywater.

1. Standard of Review

Stewart preserved this issue for appeal by moving for acquittal at the close of the government's case and again in a post-trial motion. We "review the sufficiency of the evidence and the district court's denial of a motion for judgment of acquittal de novo." *United States v. Xiang*, 12 F.4th 1176, 1184 (10th Cir. 2021). In doing so, we view "'the evidence in the light most favorable to the [g]overnment' and assess whether 'any rational trier of fact could have found the defendant guilty . . . beyond a reasonable doubt.'" *Id.* (quoting *United States v. Delgado-Uribe*, 363 F.3d 1077, 1081 (10th Cir. 2004)). "When conducting this 'highly deferential' review," we "consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses." *Id.* (quoting *United States v. Griffith*, 928 F.3d 855, 868–69 (10th Cir. 2019)). This assessment is not undertaken by "examining the evidence in 'bits and pieces.'" *United States v. Tennison*, 13 F.4th 1049, 1059 (10th Cir. 2021) (quoting *United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004)). Rather, "we evaluate the sufficiency of the evidence by 'considering the collective inferences to be drawn from the evidence as a whole.'" *Id.* (quoting *Nelson*, 383 F.3d at 1229).

2. Attempted Aggravated Sexual Abuse

Under 18 U.S.C. § 2241(a), a person commits attempted aggravated sexual abuse if they "knowingly [attempt to] cause[] another person to engage in a sexual act" by either "using force against that other person" or "threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping." An act is done knowingly if it is done "voluntarily and intentionally, and not because of mistake or accident." Tenth Circuit Pattern Jury Instructions (Criminal) § 1.37 (2021). A "sexual act" includes "contact between the penis and the vulva," which "occurs upon penetration, however slight." 18 U.S.C. § 2246(2)(A). Although not explicitly stated in the statute's text, the sexual act must be non-consensual. *United States v. Martin*, 528 F.3d 746, 752 (10th Cir. 2008).

Unlike the completed crime of aggravated sexual abuse, specific intent is an essential element of the inchoate crime of attempted aggravated sexual abuse. *See United States v. Vigil*, 523 F.3d 1258, 1267 (10th Cir. 2008). To establish attempt, the government must show both (1) an "intent to commit the substantive offense," and (2) the "commission of an act which constitutes a substantial step towards commission of the substantive offense." *Id.* (quoting *United States v. Smith*, 264 F.3d 1012, 1015 (10th Cir. 2001)).

Accordingly, to demonstrate specific intent in this context, Stewart must have had the conscious purpose or objective to induce Drywater to engage in vaginal intercourse without her consent. In other words, the government was required to

prove that Stewart's actions were not accidental or coincidental but were undertaken deliberately to achieve that precise result.

We note that where there is no "direct evidence" of a defendant's knowledge and intent, "a jury may make reasonable inferences of knowledge and intent from circumstantial evidence." *United States v. Rufai*, 732 F.3d 1175, 1192 (10th Cir. 2013). "This, of course, is entirely appropriate: proof of *mens rea*, of what lies inside the recesses of the defendant's mind, very often must depend on circumstantial, rather than direct, evidence." *United States v. Lovern*, 590 F.3d 1095, 1105 (10th Cir. 2009).

3. Analysis

Stewart argues that the jury "was forced to speculate as to whether he intended to force Heather Drywater to have sex with him even if she rejected his advances." Aplt. Br. at 26. Stewart contends that when viewed separately, his nudity, his words, and his actions "give[] equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence." *Id.* at 27 (quoting *Lovern*, 590 F.3d at 1107). Stated differently, according to Stewart, when his nudity, his words, and his actions are each independently considered, they only support an intention to initiate a sexual advance towards Drywater, but if she declined, he would stop.

We reject Stewart's view that we should analyze each piece of evidence in isolation. We agree that an individual's nudity, in and of itself, may be "unrelated to any thoughts of sexual activity." *Id.* at 28. Nor would stating "I want to fuck you," on its own, necessarily establish "a criminal expression of one's intent to rape a

woman." Reply Br. 8. However, *when viewed together*, Stewart's nudity, his actions, and his explicit words support the jury's conclusion that he acted with deliberate intent to commit a non-consensual sexual act. While nude, Stewart forcefully pushed Drywater onto the hotel bed and pinned her down by laying on top of her. Stewart attempted to spread Drywater's legs open and, while "dry humping" her, said into her ear: "I want to fuck you." Gov. Ex. 6 at 4:50–5:00. Drywater only escaped by pushing him off.

Contrary to Stewart's arguments, his physical restraint of Drywater, his subsequent actions toward Drywater which can only be described as sexual, and his uttering an explicit statement to her indicate an intent beyond a mere advance. When considered together, this evidence supports Stewart's intent to pursue a sexual encounter irrespective of Drywater's objections or lack of consent. In other words, a rational trier of fact could have reasonably concluded, beyond a reasonable doubt, that Stewart possessed the specific intent to engage in vaginal intercourse with Drywater without her consent. Accordingly, we conclude that there was sufficient evidence to support the jury's verdict.

B. Exclusion of Expert Testimony

Stewart next argues that the district court erred in excluding the testimony of his proposed expert witness on alcohol intoxication, Dr. Jason Beaman. According to Stewart, the district court abused its discretion by excluding his expert witness and, thereby resulting in a violation of his constitutional right to present a complete

defense as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

1. Standard of Review

Stewart preserved this issue for appeal by raising it during trial and in a post-trial motion for a new trial. Typically, we review the district court's application of the standard for determining the admissibility or exclusion of expert testimony for an abuse of discretion. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) "[W]e will not disturb the district court's ruling unless it is 'arbitrary, capricious, whimsical or manifestly unreasonable' or when we are convinced that the district court 'made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Id.* (quoting *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1163–64 (10th Cir. 2000)). However, because Stewart asserts the district court's evidentiary ruling deprived him of his constitutional right to present a defense, we review the constitutionality of the ruling de novo. *United States v. Hammers*, 942 F.3d 1001, 1009–10 (10th Cir. 2019).

The right to present a defense arises under the Fifth and Fourteenth Amendment right to due process and the Sixth Amendment guarantee of compulsory process. *See United States v. Nixon*, 418 U.S. 683, 711 (1974). These amendments "concomitantly provide a criminal defendant the right to present a defense by compelling the attendance, and presenting the testimony, of [their] own witnesses." *United States v. Serrano*, 406 F.3d 1208, 1215 (10th Cir. 2005). A defendant's right to present witnesses, however, is not absolute. *Id.* "In presenting witnesses, the

defendant must still 'abide [by] the rules of evidence and procedure, including standards of relevance and materiality.'" *United States v. Williams*, 934 F.3d 1122, 1131 (10th Cir. 2019) (quoting *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005)). Indeed, "[t]he accused does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

To establish that an evidentiary ruling excluding expert testimony deprived a defendant of their constitutional right to present a defense, the defendant must demonstrate that: (1) the district court abused its discretion in excluding the testimony at issue, and (2) the excluded testimony was relevant and material. *Dowlin*, 408 F.3d at 659.

2. Federal Rule of Evidence 702

Federal Rule of Evidence 702 "governs the admissibility of expert opinion testimony." *United States v. Pehrson*, 65 F.4th 526, 540 (10th Cir. 2023). It "imposes on a district court a gatekeeper obligation to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *Dodge*, 328 F.3d at 1221 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)).

Rule 702(a) specifically requires a district court to "satisfy itself that the proposed expert testimony . . . will assist the trier of fact, before permitting a jury to assess such testimony." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006). To evaluate whether the testimony will assist the trier of fact, courts consider, inter alia, whether the testimony (1) is relevant; (2) falls within the jury's

common knowledge and experience; and (3) would usurp the jury's role of evaluating witness credibility. *Id.* at 1123.

3. Analysis

Stewart proffered Dr. Beaman as an expert who would testify on several topics, including: (1) the impact of alcohol on memory and cognitive function, specifically its interference with the formation of long-term memories and diminished judgment and perception as blood alcohol levels increase; (2) the physiological effects of alcohol consumption, including blood alcohol levels and potential blackout drunkenness; and (3) the correlation between higher intoxication levels and engagement in riskier behaviors. Accordingly, Dr. Beaman's testimony had two primary purposes: (1) to establish that evidence of Drywater's intoxication could be used to impeach her testimony, and (2) to support the theory that Stewart's intoxication affected his ability to form specific intent.

At trial, Stewart's counsel and the district court had the following exchange in discussing the admissibility of Dr. Beaman's testimony:

> THE COURT: So[,] Dr. Beaman's testimony goes to not only -- even though he won't specifically say this -- goes to not only the alleged victims, but also to Mr. Stewart?
>
> MR. VAN DALSEM: Correct.
>
> THE COURT: And Dr. Beaman's testimony is going to the issue of whether or not their testimony and description of events is believable?
>
> MR. VAN DALSEM: That as well.
>
> THE COURT: Okay. The Court is going to exclude the testimony of Dr. Beaman. It invades the province of the jury. It is not helpful to the jury

> and it could mislead the jury to the effect that he is telling the jury who to believe and not to believe. Even though he is not applying his opinions to these facts, that is whole reason for his testimony in the first place. So, Dr. Beaman will also be excluded.

ROA, Vol. IV at 316. Ultimately, the district court excluded Dr. Beaman's testimony under Rule 702(a), reasoning that his testimony would invade the province of the jury by assessing witness credibility and would be unhelpful and misleading.

We conclude, as an initial matter, that the bulk of Dr. Beaman's proffered testimony fell within the jury's common knowledge and experience. Subject areas that are not within the jury's common knowledge and experience may warrant expert testimony. For example, "[b]ecause the average juror is often innocent of the ways of the criminal underworld, expert testimony is allowed in order to provide jurors a context for the actions of defendants." *United States v. Garcia*, 635 F.3d 472, 477 (10th Cir. 2011). Conversely, expert testimony on subject areas within the jurors' common understanding are properly excluded.

Unlike the effects of specific drugs, for instance, the average juror likely understands the general effects of alcohol intoxication on cognitive and physical functions. Moreover, even if a juror does not drink alcohol, he or she is likely to have a basic understanding of its effects through personal observation, as well as through portrayals in literature and media. As such, it was not an abuse of discretion for the district court to exclude Dr. Beaman's proposed testimony on the basis that his testimony would fall within the average juror's common knowledge and experience.

Second, we agree with the district court that Dr. Beaman's testimony would have usurped the jury's role in evaluating witness credibility. "The credibility of witnesses is generally not an appropriate subject for expert testimony." *United States v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014) (quoting *United States v. Toledo*, 985 F.2d 1462, 1470 (10th Cir. 1993)). Rather, "the life experiences of 12 adults is our time-tested traditional mechanism for assessing whether demeanor, manner of speaking, internal contradictions, inconsistencies with other evidence, etc., indicate that a person is fabricating a story." *United States v. Rodriguez-Flores*, 907 F.3d 1309, 1322 (10th Cir. 2018). Nevertheless, expert testimony touching on credibility may be appropriate in narrowly circumscribed situations, such as where it is used to explain a recognized mental or personality disorder. *Hill*, 749 F.3d at 1262.

Although we have not specifically addressed whether a proffered expert's testimony on alcohol intoxication could interfere with the jury's assessment of credibility, we have considered issues involving proffered experts in eyewitness identification. Whether an expert is opining on the effects of alcohol intoxication or on the reliability of eyewitness identifications, either could provide opinions that may ultimately lead jurors to question the accuracy or reliability of a witness's testimony. We ruled in *United States v. Smith*, 156 F.3d 1046, 1052–54 (10th Cir. 1998), that the district court did not abuse its discretion in excluding a defendant's expert witness on eyewitness identification. Our decision in *Smith* was animated, in part, by the fact that "jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or

inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination." *Id.* at 1053 (quoting *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993)).

Here, the jury viewed the officers' body camera footage depicting Stewart and Drywater shortly after the attempted sexual assault. This footage gave the jury a first-hand opportunity to observe both individuals as they spoke, moved, and interacted with the officers. As a result, the jurors were able to use their own common sense and observational skills to assess whether alcohol intoxication had an impact on Stewart and Drywater's cognitive functions and, ultimately, the accuracy of each individual's perceptions. Dr. Beaman's testimony had the potential of unduly influencing the jury to assign either too much or too little weight to the role of alcohol intoxication in determining witness credibility. *Hill*, 749 F.3d at 1258.

In sum, we conclude the district court did not abuse its discretion when it excluded Dr. Beaman's proposed testimony on the basis that it would invade the province of the jury by interfering in its assessment of witness credibility. We note, however, that we are not adopting a per se rule that would exclude all expert testimony on alcohol intoxication. Rather, like expert testimony pertaining to eyewitness identification, the admissibility of a proffered expert's testimony on the effects of alcohol intoxication should be determined on a case-by-case basis. *Smith*, 156 F.3d at 1053.

C. Sentencing Enhancement

Lastly, Stewart takes issue with the district court's application of a four-level enhancement to his base offense level pursuant to U.S.S.G. § 2A3.1(b)(1). Stewart asserts that the application note accompanying the guideline precludes the guideline's application to *attempted* aggravated sexual abuse. We disagree.

1. Standard of Review

Stewart preserved this issue for appeal by raising his objection to the district court's application of U.S.S.G. § 2A3.1(b)(1) before sentencing. When a defendant challenges the district court's application of an enhancement under the guidelines, we "review factual findings for clear error, but to the extent the defendant asks us to interpret the [g]uidelines or hold that the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review." *United States v. Hamilton*, 587 F.3d 1199, 1222 (10th Cir. 2009) (quoting *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008)). Stewart does not dispute the district court's factual findings; rather, he argues that the district court erred in its interpretation of the guidelines. Accordingly, we review the challenge de novo.

2. The Enhancement

The applicable sentencing guideline for convictions under 18 U.S.C. § 2241(a) is U.S.S.G. § 2A3.1. *See* U.S.S.G. App. A. U.S.S.G. § 2A3.1(a) establishes a base offense level of 38 if the defendant was convicted under 18 U.S.C. § 2241(c) or a base offense level of 30 in all other instances. U.S.S.G.

§ 2A3.1(a)(1)–(2). Additionally, U.S.S.G. § 2A3.1(b)(1) allows for a four-level enhancement "[i]f the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." "Offense" includes "the offense of conviction and all relevant conduct." U.S.S.G. § 1B1.1, cmt. n. 1(I).

As referenced in the guideline, and as pertinent here, 18 U.S.C. § 2241(a) provides:

> **(a) By force or threat.--**Whoever . . . knowingly causes another person to engage in a sexual act--
>
> > **(1)** by using force against that other person; or
> >
> > **(2)** by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
>
> *or attempts to do so*, shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 2241(a) (emphasis added).

Additionally, the relevant application note to U.S.S.G. § 2A3.1 states:

> **Definitions.**--For purposes of subsection (b)(1), "conduct described in 18 U.S.C. § 2241(a) or (b)" is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

U.S.S.G. § 2A3.1, cmt. n. 2(A).

3. Interpreting the Guidelines

We "interpret the Sentencing Guidelines according to accepted rules of statutory construction." *United States v. Reaves*, 253 F.3d 1201, 1203 (10th Cir. 2001). This includes application of the plain language or meaning rule. *See, e.g.*, *United States v. Maldonado-Passage*, 4 F.4th 1097, 1103–04 (10th Cir. 2021). In interpreting a guideline, we look at the language in the guideline itself, as well as at the policy statements and commentary to the guidelines provided by the Sentencing Commission. *Stinson v. United States*, 508 U.S. 36, 42–43 (1993). However, "if the legally operative language of the guideline itself is clear, 'it is not necessary to look beyond the plain language' of that guideline provision." *United States v. Nacchio*, 573 F.3d 1062, 1073 (10th Cir. 2009) (quoting *United States v. Robertson*, 350 F.3d 1109, 1116 (10th Cir. 2003)).

Nonetheless, the commentary to the guidelines "explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." *Stinson*, 508 U.S. at 44. Accordingly, commentary that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. A guideline and its commentary are inconsistent when "following one will result in violating the dictates of the other." *Id.* at 43. Where the two are inconsistent, "the Supreme Court has made it clear that we must comply with the guideline rather than the commentary." *Nacchio*, 573 F.3d at 1073 n.10 (citing *Stinson*, 508 U.S. at 43). If possible, we "construe the guideline and its commentary together and seek to

harmonize them." *United States v. Keck*, 643 F.3d 789, 800 (10th Cir. 2011) (quoting *United States v. Pedragh*, 225 F.3d 240, 245 (2d Cir. 2000)).

4. Analysis

Stewart argues that because his conviction was predicated on an attempted rather than a completed sexual act, applying the four-level enhancement permitted by U.S.S.G. § 2A3.1(b)(1) to the calculation of his guideline range was erroneous. Had the enhancement not been applied, Stewart's sentencing range would have been 97 to 121 months instead of 151 to 188 months. For reference, the district court varied downward from the 151 to 188 months sentencing range and sentenced Stewart to 72 months of imprisonment.

To support his contention that the application note should control, Stewart argues that the application note provides an exhaustive list detailing what constitutes "conduct described in 18 U.S.C. § 2241(a) or (b)," yet conspicuously omits any reference to "attempt." Stewart maintains that this omission limits application of the four-level enhancement to only completed sexual acts, and he cites *United States v. Platero*, 996 F.3d 1060 (10th Cir. 2021) in support. Additionally, Stewart asserts that his interpretation is persuasive because (1) applying the enhancement to every violation of 18 U.S.C. § 2241(a) or (b) would render the base offense level of 30 a nullity, and (2) distinguishing between attempted and completed sexual assaults is consistent with proportionality in sentencing, one of the objectives of the Sentencing Guidelines. Lastly, Stewart contends that the rule of lenity applies here because the

differing interpretations of what constitutes "conduct described in 18 U.S.C. § 2241(a) or (b)" suggest ambiguity.

As an initial matter, we start with the text of the applicable guideline and conclude its language is unambiguous. The four-level enhancement authorized by U.S.S.G. § 2A3.1(b)(1) applies when the actions underlying the conviction involve conduct described in 18 U.S.C. § 2241(a) or (b). Subsection (a) of 18 U.S.C. § 2241 explicitly criminalizes "knowingly caus[ing] another person to engage in a sexual act . . . *or attempt[ing]* to do so." (emphasis added). It logically follows, then, that the enhancement applies if the events underlying the conviction involve an *attempt* to cause another person to engage in a sexual act.

To be sure, Stewart is correct that the relevant application note does not explicitly reference attempt. U.S.S.G. § 2A3.1, cmt. n. 2(A) ("'[C]onduct described in Section 2241(a) or (b)' is engaging in, or causing another person to engage in, a sexual act with another person."). However, reading the note to exclude the application of the enhancement to attempt would be inconsistent with the unambiguous text of the guideline itself, as the guideline explicitly incorporates all conduct that falls within the scope of 18 U.S.C. § 2241(a) and (b). In this regard, we agree with the government's reading of *Platero* to reject limiting the scope and reach of § 2A3.1(b)(1) to only completed sexual acts. *See Platero*, F.3d at 1064–65. Given the unambiguous language of the guideline, we reject Stewart's interpretation of the explanatory application note, which would give the note primacy over the guideline itself.

Instead, we harmoniously interpret the guideline and commentary and construe the note to implicitly encompass attempt. This is, in part, because the note closely mirrors the statute's language and attempt is a lesser included offense of the completed crime. Indeed, it is more reasonable to view the note as a non-exhaustive list of examples illustrating conduct covered by the enhancement than as a limitation on its scope. This interpretation is further bolstered by the fact that the note does not explicitly *exclude* attempt from falling within the purview of the enhancement. The Sentencing Commission has narrowed guideline language in commentary in other parts of the guidelines but chose not to do so here. *See, e.g.*, *United States v. Frazier*, 53 F.3d 1105, 1113 (10th Cir. 1995).

Notably, there are no indications that the Sentencing Commission intended to differentiate between completed and attempted sexual assault or to exclude attempted acts from the scope of U.S.S.G. § 2A3.1(b)(1). Indeed, in enacting 18 U.S.C. § 2241, Congress made no distinction regarding the potential penalties that apply to each offense.

Further, contrary to Stewart's contentions, this reading of the guideline would not render the base offense level of 30 proscribed in U.S.S.G. § 2A3.1(a)(2) a nullity. Subsection (a)(2) applies to a wide range of criminal convictions, including convictions under 18 U.S.C. § 37 (violence at international airports); 18 U.S.C. § 113(a)(1) (assault); 18 U.S.C. § 2237(b)(2)(B)(ii)(III) (obstructing law enforcement on vessels); and 18 U.S.C. § 2242 (sexual abuse by placing a person in fear). *See* U.S.S.G. App. A.

Finally, the rule of lenity has no application here. "The rule of lenity applies where a statute is facially ambiguous and resort to the legislative history does not reveal the congressional intent of the language." *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993). "Under these circumstances, courts construe the statute favorably to the criminal defendant." *Id.* As we have concluded that the language of U.S.S.G. § 2A3.1(b)(1) is clear on its face, the rule of lenity does not come into play.

We conclude the district court did not err in applying the four-level enhancement proscribed in U.S.S.G. § 2A3.1(b)(1) to Stewart's base offense level, as it applies to both completed and attempted sexual acts.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

Entered for the Court

Mary Beck Briscoe
Circuit Judge