

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4772

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRE RAMON COOPER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Malcolm J. Howard, Senior District Judge. (2:17-cr-00019-H-1)

Submitted: May 1, 2020

Decided: May 19, 2020

Before NIEMEYER, AGEE, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert L. McClellan, IVEY, MCCLELLAN, GATTON & SIEGMUND, LLP, Greensboro, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Andre Ramon Cooper pled guilty to Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (2018), brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (2018), and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (2018), and aiding and abetting the same violations. The district court sentenced Cooper to 171 months' imprisonment. On appeal, Cooper challenges his § 924(c) conviction, arguing that Hobbs Act robbery is not a crime of violence under § 924(c), and challenges the procedural reasonableness of his upward departure sentence. We affirm.

Section 924(c)(3) provides two definitions of the term “crime of violence”—the force clause in § 924(c)(3)(A) and the residual clause in § 924(c)(3)(B). Although the Supreme Court recently concluded that the residual clause in § 924(c)(3)(B) is unconstitutionally vague, *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the force clause in § 924(c)(3)(A) remains intact. Shortly after the Supreme Court decided *Davis*, we held in *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019), that “Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c).” Accordingly, Cooper’s argument is foreclosed by *Mathis* and his § 924(c) conviction is valid.

Cooper next challenges the procedural reasonableness of the district court’s upward departure, claiming that the court failed to provide him with proper notice and an opportunity to respond, failed to follow the five-factor sentencing analysis for departures laid out in *United States v. Rybicki*, 96 F.3d 754, 757-58 (4th Cir. 1996), erred by not

specifying which offenses listed in the presentence report were the basis for the departure, and failed to adequately explain the departure. We review Cooper's sentence for reasonableness under a deferential abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 51 (2007). We will not vacate a sentence based on a procedural sentencing error if the error was harmless. *See United States v. McDonald*, 850 F.3d 640, 643 (4th Cir. 2017) ("Rule 52(a) of the Federal Rules of Criminal Procedure mandates that we must disregard harmless errors.").

First, the Government's presentencing motion constituted adequate notice under the circumstances, and the district court was not required to provide Cooper with any additional notice of its intent to upwardly depart pursuant to U.S. Sentencing Guidelines Manual § 4A1.3 (2016). *See Fed. R. Crim. P. 32(h)* (district court must provide notice only when departing from the Guidelines range "on a ground not identified for departure either in the presentence report or in a party's prehearing submission"). Second, based on our review of the record, Cooper's trial counsel had an adequate opportunity to respond to the Government's upward departure motion at the sentencing hearing. Third, we conclude that Cooper failed to preserve his *Rybicki* claim for appellate review. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (holding that an issue is not preserved if it is not raised in the opening brief or if the brief "takes a passing shot at the issue") (internal quotation marks and citation omitted).

Next, the record does not support Cooper's assertion that the district court may have relied on impermissible criminal history information to justify the upward departure. Cooper's claim is speculative. There is no indication that the district court improperly

relied on arrests, dismissals, or other impermissible factors and the Government's departure motion did not include or rely on the contested criminal history. Therefore, this challenge lacks merit.

Finally, we address Cooper's argument that the district court failed to adequately explain the upward departure. When the district court imposes a departure or variance sentence, we "consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Washington*, 743 F.3d 938, 944 (4th Cir. 2014) (internal quotation marks omitted). "The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." *United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) (internal quotation marks omitted).

A district court may depart upward from an applicable Guidelines range "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." USSG § 4A1.3(a)(1), p.s. When departing in this manner, the district court must incrementally determine the degree of its upward departure. *United States v. Dalton*, 477 F.3d 195, 199 (4th Cir. 2007). "Section 4A1.3's mandate to depart incrementally does not . . . require a sentencing judge to move only one level, or to explain its rejection of each and every intervening level." *Id.* (internal quotation marks omitted). Nor must the district court "go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects." *Id.* (alterations and internal quotation marks omitted).

Here, the district court determined that the applicable sentencing range was 46 to 57 months, based on offense level 21 and criminal history category III. It then concluded that an upward departure to criminal history category V “captures the seriousness of [Cooper’s] criminal history and the likelihood that he will recidivate.” (J.A. 89). These observations are readily supported by Cooper’s numerous unscored prior convictions. A sentencing court may consider unscored convictions in determining whether an upward departure is warranted. *See United States v. Myers*, 589 F.3d 117, 126 (4th Cir. 2009).

Coupling criminal history category V and offense level 21 yielded a sentencing range of 70 to 87 months’ imprisonment. The 87-month upward departure sentence was 30 months longer than the top of Cooper’s predeparture Guidelines range, reflecting an upward departure of roughly 50% above the top of the Guidelines range. After considering the district court’s explanation, which focused on Cooper’s extensive criminal record—largely unaccounted for in his Guidelines range—as well as the risk of recidivism and the need to protect the public from Cooper’s criminal behavior, we conclude that the district court sufficiently justified the upward departure sentence and its rationale is supported by the record. *See id.* at 122, 126 (district court properly justified upward departure under § 4A1.3 when it relied on “the totality of [the defendant’s] past criminal conduct and threat of recidivism”). Further, even if any portion of the district court’s explanation was inadequate, any such error in this case would be harmless. *See United States v. Boulware*, 604 F.3d 832, 838-40 (4th Cir. 2010) (defining harmlessness in context of procedural reasonableness claim and noting that this court will not remand for resentencing when “the notion that having to explain its analysis further might have changed the district court’s

mind . . . is simply unrealistic”). Accordingly, we reject Cooper’s final procedural challenge to his sentence.

We therefore affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED