UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4779

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTRAYA ANTWAIN ATKINSON, a/k/a Hardbody,

Defendant - Appellant.

No. 18-4848

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RENALDO RODREGUS CAMP, a/k/a Rodeo, a/k/a Drop,

Defendant - Appellant.

No. 19-4093

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER O'BRIEN MOORE, a/k/a Ratchet,

Defendant - Appellant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Frank D. Whitney, Chief District Judge. (3:17-cr-00134-FDW-DSC-3; 3:17-cr-00134-FDW-DSC-10; 3:17-cr-00134-FDW-DSC-55)

Submitted: February 13, 2020 Decided: May 29, 2020

Before KEENAN, FLOYD, and RICHARDSON, Circuit Judges.

No. 18-4779, affirmed; Nos. 18-4848 and 19-4093, dismissed by unpublished per curiam opinion.

Joseph L. Bell, Jr., BATTS, BATTS & BELL, Rocky Mount, North Carolina; Roderick G. Davis, Charlotte, North Carolina; James. P. Craven, III, Durham, North Carolina, for Appellants. R. Andrew Murray, United States Attorney, Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated cases, Montraya Antwain Atkinson, Renaldo Roregus Camp, and Christopher O'Brien Moore appeal the sentences imposed after they each pled guilty to various charges related to and including conspiracy to participate in racketeering activity (RICO conspiracy), in violation of 18 U.S.C. §§ 1962(d), 1963(2) (2012). In particular, Atkinson (Appeal No. 18-4779) asserts that his sentence is procedurally unreasonable because the district court miscalculated his offense level. According to Camp (Appeal No. 18-4848), the district court erroneously determined he was not entitled to an offense level reduction because the court found Camp breached his plea agreement. Moore (Appeal No. 19-4093) asserts that his sentence is unlawful because the district court abused its discretion when it refused to run his entire federal sentence concurrent to his state sentence. We affirm the district court's judgment against Atkinson and dismiss Camp's and Moore's appeals.

We review Defendants' sentences for reasonableness, applying an abuse-of-discretion standard, *see Gall v. United States*, 552 U.S. 38, 46 (2007), and we review unpreserved, non-structural sentencing errors for plain error, *see United States v. Lynn*, 592 F.3d 572, 575-76 (4th Cir. 2010). In order to prevail under plain error review, a defendant must show that an error: (1) occurred; (2) is plain (i.e., clear or obvious); and (3) affects his substantial rights. *See United States v. Strieper*, 666 F.3d 288, 295 (4th Cir. 2012). Even if the appellant satisfies these three elements, however, we "may exercise our discretion to correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and brackets omitted).

When reviewing a sentence for reasonableness, we must consider both the procedural and substantive reasonableness of the sentence. *See Gall*, 552 U.S. at 51. First, the court must assess whether the district court properly calculated the advisory Sentencing Guidelines range, considered the 18 U.S.C. § 3553(a) (2018) factors, analyzed any arguments presented by the parties, and sufficiently explained the selected sentence. *See Gall*, 552 U.S. at 49-51; *Lynn*, 592 F.3d at 575-76. In reviewing whether a sentencing court properly calculated a Guidelines range, including its application of a sentencing enhancement, we review the district court's legal conclusions de novo and its factual findings for clear error. *United States v. Fluker*, 891 F.3d 541, 547 (4th Cir. 2018).

We will find clear error only if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Cox*, 744 F.3d 305, 308 (4th Cir. 2014) (internal quotation marks omitted). Thus, "[a] court reviewing for clear error may not reverse a lower court's finding of fact simply because it would have decided the case differently. Rather, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *United States v. Wooden*, 693 F.3d 440, 451 (4th Cir. 2012) (internal quotation marks and brackets omitted). In addition, "[w]hen reviewing factual findings for clear error, we particularly defer to a district court's credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility[.]" *United States v. Palmer*, 820 F.3d 640, 653 (4th Cir. 2016) (internal quotation marks and brackets omitted).

Assuming no procedural error is found, "[a]ny sentence that is within or below a properly calculated Guidelines range is presumptively reasonable[,]" *United States v.*

Louthian, 756 F.3d 295, 306 (4th Cir. 2014), and "[t]hat presumption can only be rebutted by showing that the sentence is unreasonable when measured against the . . . § 3553(a) factors[,]" *United States v. Vinson*, 852 F.3d 333, 357-58 (4th Cir. 2017) (internal quotation marks omitted). "[B]ecause district courts are in a superior position to find facts and judge their import, all sentencing decisions—whether inside, just outside, or significantly outside the Guidelines range—are entitled to due deference." *United States v. Spencer*, 848 F.3d 324, 327 (4th Cir. 2017) (internal quotation marks omitted).

I. Atkinson

According to Atkinson, his sentence is procedurally unreasonable because the district court erroneously: (1) calculated the drug weight with which he should be attributed because the Government failed to establish by a preponderance of the evidence that he should be held responsible for at least five kilograms of cocaine; (2) increased his offense level two levels because it found he "used violence, made a credible threat to use violence, or directed the use of violence in relation to a drug trafficking offense[;]" and (3) increased his offense level four levels for being an organizer or leader of the criminal activity to which he pled guilty. We discern no error.

A. Drug Weight

"[T]he government must prove the drug quantity attributable to a particular defendant by a preponderance of the evidence." *United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2011). "Under the Guidelines, the drug quantities that may be attributed to the defendant include the quantities associated with the defendant's offense of conviction and any relevant conduct." *United States v. Flores-Alvarado*, 779 F.3d 250, 255 (4th Cir.

2015). "Relevant conduct in conspiracy cases includes all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." *Id.* (internal quotation marks omitted); *see* USSG § 1B1.3(a)(1)(B). "[I]n order to attribute to a defendant for sentencing purposes the acts of others in jointly-undertaken criminal activity, those acts must have been within the scope of the defendant's agreement and must have been reasonably foreseeable to the defendant." *Flores-Alvarado*, 779 F.3d at 255 (internal quotation marks omitted).

Where, as here, part of "the drug quantity is not proven by actual seizures or comparable direct evidence, the government must present evidence from which the sentencing court may approximate the quantity." *Bell*, 667 F.3d at 441 (internal quotation marks omitted). A district court may approximate drug quantity based on any reliable evidence, including the direct or hearsay testimony of lay witnesses as to the quantities attributable to the defendant. *Id*. We review "the district court's calculation of the quantity of drugs attributable to a defendant for sentencing purposes for clear error." *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (internal quotation marks omitted). We have reviewed the record and considered the parties' arguments and conclude that the Government presented ample evidence allowing the district court to approximate that at least five kilograms of cocaine was reasonably foreseeable to Atkinson during the course of his participation in the conspiracy to which he pled guilty.

B. Use of Violence Enhancement

Sentencing Guideline § 2D1.1(b)(2) provides for a two-level increase to a defendant's offense level where a defendant "used violence, made a credible threat to use

violence, or directed the use of violence[.]" "'[V]iolence' encompasses acts where one uses physical force with the intent to injure, regardless whether an injury actually occurs." *United States v. Pineda-Duarte*, 933 F.3d 519, 523 (6th Cir. 2019). As a factual finding by the district court, we review this assignment of error for clear error. *See United States v. Slade*, 631 F.3d 185, 188 (4th Cir. 2011).

We find that, based on the admissions Atkinson made in the factual basis supporting his guilty plea and law enforcement testimony regarding Atkinson's conduct during the underlying conspiracy, the Government presented sufficient evidence from which the district court could conclude that Atkinson directed violence as part of his participation in the racketeering conspiracy. We reject Atkinson's suggestion that the district court erred when it credited law enforcement's interpretation of the meaning of text messages Atkinson sent and received. *See Palmer*, 820 F.3d at 653.

C. Aggravating Role Enhancement

We also reject Atkinson's assertion that the district court erred when it enhanced his offense level based on his aggravated role in the conspiracy to which he pled guilty. Notably, given Atkinson's undisputed rank within the organization of which he was a member, Atkinson's admissions in the statement of facts to which he agreed, and law enforcement's testimony regarding Atkinson's role in the offense, the district court did not clearly err when it enhanced Atkinson's offense level three levels for being a leader or organizer of the RICO conspiracy. *See United States v. Wolf*, 860 F.3d 175, 196 (4th Cir. 2017).

II. Camp

Camp argues that his Guidelines range was erroneously calculated because the district court erred when it denied a reduction in his offense level for acceptance of responsibility. The Government asserts that Camp's appeal is barred by the appellate waiver in his plea agreement.

It is well-established that a defendant may waive the right to appeal if that waiver is knowing and intelligent. *See United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005). When the Government seeks to enforce an appeal waiver and did not breach its obligations under the plea agreement, we will enforce the waiver if the record establishes that: (1) the defendant knowingly and intelligently waived his right to appeal; and (2) the issues raised on appeal fall within the waiver's scope. *Id.* at 168-69. Generally, if the district court fully questions a defendant regarding the waiver of his right to appeal during the Fed. R. Crim. P. 11 colloquy, the waiver is both valid and enforceable. *See United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005).

Even a valid waiver does not waive all appellate claims, however. Specifically, a valid appeal waiver does not preclude a challenge to a sentence on the ground that it exceeds the statutory maximum or is based on a constitutionally impermissible factor such as race, arises from the denial of a motion to withdraw a guilty plea based on ineffective assistance of counsel, or relates to claims concerning a violation of the Sixth Amendment right to counsel in proceedings following the guilty plea. *See id.*; *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993). Camp does not assert that his appellate waiver was unknowing or involuntary and he does not challenge his sentence on any of the above-

mentioned grounds. Thus, Camp's challenge to his Guidelines range calculation—which is clearly a challenge to his sentence—is barred by the appellate waiver.

Camp nonetheless claims that the Government breached its obligations in his plea agreement and, thus, he should not bound by the appellate waiver. Admittedly, "a party's waiver of the right to seek appellate review is not enforceable where the opposing party breaches a plea agreement." *United States v. Bowe*, 257 F.3d 336, 342 (4th Cir. 2001). "[A] defendant alleging the Government's breach of a plea agreement bears the burden of establishing that breach by a preponderance of the evidence[,]" however. *United States v. Snow*, 234 F.3d 187, 189 (4th Cir. 2000). Camp failed to establish that the Government breached his plea agreement so as to allow him to escape the appellate waiver bar. Accordingly, we will enforce Camp's appellate waiver and dismiss his appeal.

III. Moore

Moore argues that the district court abused its discretion when it denied, in part, his motion for a variant sentence. According to Moore, the district court should have granted his request for a variance and imposed his entire federal sentence to run concurrent to his state sentences for robbery, rather than granting the variance only to the extent that 12 months would run concurrently. Like Camp, Moore waived in his plea agreement the right to challenge his sentence on appeal and the Government has fully invoked the appellate waiver. Moreover, Moore does not argue—let alone suggest—that that his decision to waive his right to appeal was unknowing or involuntary. *See Blick*, 408 F.3d at 169. Accordingly, we dismiss Moore's appeal.

Based on the foregoing, we affirm the district court's judgment against Atkinson and dismiss Moore's and Camp's appeals. 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 in the decisional process.

No. 18-4779 – AFFIRMED;
Nos. 18-4848 and 19-4093 – DISMISSED