UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4323

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRUCE ALTENBURGER,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:18-cr-00027-TDS-1)

Submitted: June 29, 2022 Decided: July 7, 2022

Before WYNN, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Michael E. Archenbronn, Winston-Salem, North Carolina, for Appellant. Matthew G. T. Martin, United States Attorney, Clifton T. Barrett, Chief, Criminal Division, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bruce Altenburger pled guilty, pursuant to a plea agreement, to unlawful possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). The district court sentenced him to 85 months' imprisonment. On appeal, Altenburger argues that the court plainly erred in accepting his guilty plea and erred in calculating his Sentencing Guidelines range. We affirm.

Altenburger first argues that his § 922(g) conviction is invalid because he was unaware of the mens rea element of the offense established in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—that he knew he was a felon at the time he possessed the gun—when he entered his guilty plea. Because Altenburger neither raised an objection during the Fed. R. Crim. P. 11 proceeding nor moved to withdraw his guilty plea in the district court, we review the plea colloquy only for plain error. *United States v. Sanya*, 774 F.3d 812, 815 (4th Cir. 2014). To establish plain error, Altenburger "must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." *United States v. Lockhart*, 947 F.3d 187, 191 (4th Cir. 2020) (en banc). In the guilty plea context, a defendant can establish that his substantial rights were affected by showing a reasonable probability that he would not have pled guilty but for the Rule 11 error. *Sanya*, 774 F.3d at 816.

"In felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon." *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021). Here, Altenburger has made no such

argument or representation. Further, our review of the record reveals no reasonable probability that the outcome of the district court proceeding would have been different had the district court informed Altenburger of the mens rea element during the plea colloquy. The existence of prior felony convictions is "substantial evidence" that a defendant knew of his status as a felon. *Id.* at 2097-98. Accordingly, we conclude that Altenburger is not entitled to relief.

Turning to Altenburger's challenges to his sentence, he contends that the district court erred in determining that he had prior convictions for a crime of violence, resulting in a higher base offense level, and in applying an enhancement for possessing a firearm in connection with another felony offense. We review his sentence for reasonableness under a deferential abuse of discretion standard and, as is relevant here, must ensure that the district court did not commit procedural error by "failing to calculate (or improperly calculating) the Guidelines range." *Gall v. United States*, 552 U.S. 38, 41, 51 (2007).

"We review de novo whether a prior conviction qualifies as a crime of violence under the United States Sentencing Guidelines." *United States v. Salmons*, 873 F.3d 446, 448 (4th Cir. 2017). Generally, courts must employ a categorical approach to determine whether a prior offense constitutes a crime of violence, "look[ing] exclusively to the *elements* of the prior offense rather than the *conduct* underlying the particular conviction." *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016) (internal quotation marks omitted). However, "where a statute defines multiple crimes by listing multiple alternative elements, which renders the statute divisible, . . . the Court generally must first apply a modified categorical approach to determine which of the alternative elements are

integral to a defendant's conviction." *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018) (internal quotation marks omitted). Therefore, if a state statute is divisible, a court must then determine which crime forms the basis of the conviction by examining a "limited class of documents" approved by the Supreme Court. *Mathis v. United States*, 579 U.S. 500, 505-06 (2016); *see Shepard v. United States*, 544 U.S. 13, 16 (2005).

Altenburger argues that the district court erred in applying the modified categorical approach to determine whether his prior Pennsylvania robbery convictions qualified as crimes of violence under the Guidelines by improperly considering state court judgments. This argument is without merit. When the defendant has previously entered a guilty plea to a state offense, *Shepard*-approved sources "consist of conclusive judicial records such as the indictment, judgment, any plea agreement, the plea transcript or other comparable record confirming the factual basis for the plea, . . . and any document explicitly incorporated into one of the foregoing." *United States v. Linney*, 819 F.3d 747, 751-52 (4th Cir. 2016) (internal quotation marks omitted); *see also, e.g.*, *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005) (concluding that "[t]he trial judge was entitled to rely upon the [presentence report] because it bears the earmarks of derivation from *Shepard*-approved sources such as . . . state-court judgments"). Accordingly, the district court did not err in relying on state court judgments to determine that Altenburger previously committed a crime of violence under the Sentencing Guidelines.[*]

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[*] Altenburger also contends that the district court erred by determining that his prior Pennsylvania robbery convictions satisfied the "force clause" of U.S. Sentencing Guidelines Manual § 4B1.2(a) (2018), rather than beginning its analysis with the

Finally, Altenburger argues that the district court erred in applying a sentencing enhancement pursuant to USSG § 2K2.1(b)(6)(B) for possessing a firearm in connection with another felony offense. In assessing a Guidelines enhancement, we review findings of fact for clear error and legal decisions de novo. *United States v. Fluker*, 891 F.3d 541, 547 (4th Cir. 2018). "[C]lear error exists only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Slager*, 912 F.3d 224, 233 (4th Cir. 2019) (internal quotation marks omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Thorson*, 633 F.3d 312, 317 (4th Cir. 2011).

The Guidelines provide for a four-level increase to a defendant's offense level if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." USSG § 2K2.1(b)(6)(B). A firearm is used or possessed "in connection with" another felony offense for purposes of the enhancement "when that firearm facilitated or had the potential of facilitating another felony." *United States v. Bolden*, 964 F.3d 283, 287 (4th Cir. 2020) (cleaned up). "[A]nother felony offense" is "any federal, state, or local offense, other than the . . . firearms possession . . . offense, punishable by imprisonment

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"enumerated clause." *See United States v. Green*, 996 F.3d 176, 178 (4th Cir. 2021) (noting that the Guidelines provide two alternative definitions of "crime of violence"). We conclude, however, that Altenburger's passing reference to this claim is insufficient to preserve this issue for our review. *See* Fed. R. App. P. 28(a)(8)(A) (requiring argument section of appellant's brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." USSG § 2K2.1 cmt. n.14(C). We will find the "in connection with" standard "satisfied when a firearm has some purpose or effect with respect to the other offense, including cases where a firearm is present for protection or to embolden the actor." *Bolden*, 964 F.3d at 287 (internal quotation marks omitted). However, "a firearm does not have the requisite purpose or effect when it is present due to mere accident or coincidence." *Id.* (internal quotation marks omitted). "The government bears the burden of proving the facts supporting the enhancement by a preponderance of the evidence." *United States v. Andrews*, 808 F.3d 964, 968 (4th Cir. 2015).

We have previously recognized that "the possession of a firearm can facilitate a simple drug possession offense," as "[a] firearm can embolden the actor to possess the drugs or provide the actor protection for himself and his drugs." *United States v. Jenkins*, 566 F.3d 160, 163 (4th Cir. 2009). We have reviewed the record and discern no error by the district court. Rather, it was reasonable for the court to conclude, by a preponderance of the evidence, that the simultaneous possession of an accessible, loaded shotgun and controlled substances in public was not a mere accident or coincidence, but instead provided a sufficient evidentiary basis to apply § 2K2.1(b)(6)(B).

Accordingly, we affirm the district court's judgment. 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