UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4443

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESSE MELVIN LOCKLEAR,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. N. Carlton Tilley, Jr., Senior District Judge. (1:18-cr-00269-NCT-1)

Submitted: June 29, 2022 Decided: July 15, 2022

Before MOTZ, THACKER, and HARRIS, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

ON BRIEF: Sarah M. Powell, Durham, North Carolina, for Appellant. Sandra J. Hairston, United States Attorney, Kyle D. Pousson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jesse Melvin Locklear appeals the 151-month sentence imposed following his guilty plea to two counts of distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). On appeal, Locklear argues that the district court plainly erred in designating him a career offender, imposing Sentencing Guidelines enhancements for possession of a firearm and leadership role, and calculating his criminal history score. He also argues that the district court imposed a substantively unreasonable sentence. For the reasons that follow, we affirm in part, vacate in part, and remand for resentencing.

I.

We review a criminal sentence for reasonableness "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). We first evaluate its procedural reasonableness, considering whether the district court properly calculated the defendant's advisory Guidelines range, analyzed the 18 U.S.C. § 3553(a) factors, considered the parties' arguments, and sufficiently explained the selected sentence. *Id.* at 51. "[I]f, and only if, we find the sentence procedurally reasonable can we consider [its] substantive reasonableness[.]" *United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019) (cleaned up).

Because Locklear did not object to the district court's Guidelines calculations, we review his Guidelines challenges for plain error. *See United States v. Muslim*, 944 F.3d 154, 167 (4th Cir. 2019). To satisfy this standard, Locklear must show that (1) an error occurred, (2) the error was plain, and (3) the error affected his substantial rights. *Henderson v. United States*, 568 U.S. 266, 272 (2013). Even if Locklear makes this

showing, we will exercise our discretion to correct the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up).

II.

Locklear first challenges his career offender enhancement,[1] asserting that the two prior convictions identified in the PSR in support of the enhancement do not qualify as valid predicates. A defendant qualifies as a career offender if, among other requirements, he has two or more prior felony convictions for a "crime of violence" or a "controlled substance offense." USSG § 4B1.1(a)(3). A "controlled substance offense" is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG § 4B1.2(b).

When determining whether a prior conviction triggers a career offender enhancement, we generally employ the categorical approach, "focus[ing] on the *elements*

[1] Throughout his brief, Locklear argues that the district court committed plain error by relying solely on the presentence report (PSR) to calculate the applicable Guidelines range. He also asserts that the district court erred in failing to place on the record a detailed explanation for its Guidelines calculations. Because Locklear did not object to the PSR, the district court was entitled to accept the information therein as findings of fact. *See* Fed. R. Crim. P. 32(i)(3)(A); *United States v. Love*, 134 F.3d 595, 606 (4th Cir. 1998) (explaining that, absent "an affirmative showing the information is inaccurate, the court is free to adopt the findings of the [PSR] without more specific inquiry or explanation" (internal quotation marks omitted)). Moreover, we are unpersuaded by Locklear's argument that the district court was required to provide specific reasons for applying each enhancement, despite the parties' agreement as to those enhancements and the rationale provided in the PSR. Whether the findings in the PSR support the disputed enhancements is a separate question that we address below.

of the prior offense rather than the *conduct* underlying the conviction." *United States v. Dozier*, 848 F.3d 180, 183 (4th Cir. 2017) (internal quotation marks omitted). A prior conviction qualifies as a predicate controlled substance offense "only if all of the ways of violating the statute, including the least culpable, satisfy the Guidelines' definition" of a controlled substance offense. *United States v. Walker*, 858 F.3d 196, 199 (4th Cir. 2017). Where a statute is divisible, we may apply the modified categorical approach, relying on *Shepard*[2]-approved sources to determine whether the specific version of the offense that the defendant committed categorically qualifies as a controlled substance offense. *See United States v. Cornette*, 932 F.3d 204, 211 (4th Cir. 2019).

In *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), we considered the validity of a career offender enhancement predicated on a defendant's prior conviction under a West Virginia statute that "makes it 'unlawful for any person to manufacture, *deliver*, or possess with intent to manufacture or deliver a controlled substance.'" *Id.* at 441-42 (quoting W. Va. Code § 60A-4-401(a) (emphasis added)). West Virginia defines "deliver" as "'the actual, constructive *or attempted* transfer from one person to another of' controlled substances." *Id.* at 442 (quoting W. Va. Code § 60A-1-101(h) (emphasis added)). "In other words, the least culpable conduct criminalized by the West Virginia statute is an attempt to deliver a controlled substance." *Id.*

Applying the categorical approach, we determined that USSG § 4B1.2(b)'s definition of "controlled substance offense" does not include an attempt to deliver a

[2] *Shepard v. United States*, 544 U.S. 13 (2005).

controlled substance. *Id.* at 442-49. We explained that the text of USSG § 4B1.2(b) does not define "controlled substance offense" to encompass attempt offenses, while the commentary to USSG § 4B1.2 includes attempt offenses. *Id.* at 442, 444. We held that the commentary's expanded definition is plainly inconsistent with the Guidelines' unambiguous text and, thus, not entitled to deference. *Id.* at 444-47. Because Campbell's prior conviction under W. Va. Code § 60A-4-401(a) did not qualify as a "controlled substance offense" supporting the career offender designation, we vacated the judgment and remanded for resentencing. *Campbell*, 22 F.4th at 449.

Here, Locklear's career offender enhancement was predicated in part on a 2003 conviction identified in the PSR as felony sale or delivery of a controlled substance within 300 feet of a school.[3] The Government makes no attempt to distinguish the operative statutory language in *Campbell* from that underlying Locklear's 2003 conviction, *see* N.C. Gen. Stat. §§ 90-87(7), 90-95(a)(1), and we find *Campbell*'s reasoning readily applicable to Locklear's offense. *See State v. Moore*, 395 S.E.2d 124, 127 (N.C. 1990) ("[E]ach single transaction involving transfer of a controlled substance [is] one criminal offense, which is

[3] While the PSR did not identify the statutory provision under which the 2003 conviction arose, it is clear from the filings in the district court and this court that the state statute at issue is N.C. Gen. Stat. § 90-95(a)(1), (e)(8). The parties dispute whether we can apply the modified categorical approach, either by relying on the PSR's description of the offense or by taking judicial notice of *Shepard* sources provided by the Government for the first time on appeal. We need not wade into the substance of this dispute, however. Under either party's preferred approach, Locklear's career offender challenge succeeds if the offense of sale or delivery of a controlled substance offense under N.C. Gen. Stat. § 90-95(a)(1) sweeps more broadly than the Guidelines' definition of "controlled substance offense."

committed by either or both of two acts—sale or delivery."); *State v Beam*, 688 S.E.2d 40, 43-44 (N.C. Ct. App. 2010) (acknowledging that "delivery" under § 90-87(7) is satisfied by attempted transfer, which requires proof of elements of attempt); *see also United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018) (observing that court applying categorical approach "is bound by the interpretation of the offense articulated by that state's courts" (cleaned up)).

The Government's attempt to limit *Campbell*'s holding to our construction of USSG § 4B1.2 is unpersuasive. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *Payne v. Taslimi*, 998 F.3d 648, 655 (4th Cir.) ("If necessary to the outcome, a precedent's reasoning must be followed[.]"), *cert. denied*, 142 S. Ct. 716 (2021). And, it is well settled that "[a] panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting en banc can do that." *World Fuel Servs. Trading, DMMC v. Hebei Prince Shipping Co., Ltd.*, 783 F.3d 507, 523-24 (4th Cir. 2015) (internal quotation marks omitted). We therefore conclude that Locklear's 2003 conviction is not a controlled substance offense, and the district court erred in applying the career offender enhancement.

We also conclude that Locklear satisfies his burden to establish plain error. In light of *Campbell*, the district court's error is plain. *See United States v. Hope*, 28 F.4th 487, 507 (4th Cir. 2022) (observing that error is "plain" if "clear or, equivalently, obvious" under law "at the time of appellate consideration" (internal quotation marks omitted)).

Additionally, because nothing in the sentencing record suggests that the court selected its sentence "independent of its error in deeming [Locklear] a career offender and enhancing his Guidelines range accordingly," the error affected Locklear's substantial rights. *United States v. Green*, 996 F.3d 176, 186-87 (4th Cir. 2021); *see Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016). Finally, we conclude that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings.[4] *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018).

III.

Locklear next challenges the district court's application of a Guidelines enhancement for possession of a firearm during a drug transaction. A two-level enhancement applies "[i]f a dangerous weapon (including a firearm) was possessed." USSG § 2D1.1(b)(1). "The [G]overnment bears the initial burden of proving, by a preponderance of the evidence, that the weapon was possessed in connection with the relevant illegal drug activity." *United States v. Mondragon*, 860 F.3d 227, 231 (4th Cir. 2017). Establishing the requisite nexus requires the Government to "prove only that the weapon was present, which it may do by establishing a temporal and spatial relation linking the weapon, the drug trafficking activity, and the defendant." *Id.* (internal quotation marks omitted); *see* USSG § 2D1.1 cmt. n.11(A). "If the [G]overnment carries its burden, the sentencing court presumes that the weapon was possessed in connection with the relevant

[4] Because we conclude that the 2003 conviction, one of only two career offender predicates specifically identified in the PSR, fails to support the enhancement under *Campbell*, we need not address Locklear's remaining challenges to either predicate.

drug activity and applies the enhancement, unless the defendant rebuts the presumption by showing that such a connection was clearly improbable." *Mondragon*, 860 F.3d at 231 (internal quotation marks omitted); *see* USSG § 2D1.1 cmt. n.11(A).

Locklear asserts that the facts in the PSR were insufficient to show that he possessed a firearm during any of the drug transactions to which he pled guilty. However, "[u]nder relevant conduct principles, the enhancement applies when the weapon was possessed in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction." *United States v. McAllister*, 272 F.3d 228, 233-34 (4th Cir. 2001) (internal quotation marks omitted). Based on the PSR's description of the circumstances surrounding the December 14, 2017, seizure of a firearm and marijuana, we find no plain error in the court's application of the enhancement.

IV.

Turning to Locklear's challenge to the leadership role enhancement, a two-level enhancement applies if "the defendant was an organizer, leader, manager, or supervisor in any criminal activity." USSG § 3B1.1(c). "The enhancement is appropriate where the evidence demonstrates that the defendant controlled the activities of other participants or exercised management responsibility." *United States v. Slade*, 631 F.3d 185, 190 (4th Cir. 2011) (internal quotation marks omitted); *see* USSG § 3B1.1 cmt. n.4 (describing relevant factors).

Contrary to *Slade*, *see* 631 F.3d at 190-91, the uncontested information in the PSR establishes that Locklear exercised direction and control over three other participants to his drug sales, directing the participants' activities and determining the terms of the drug

transactions. *See United States v. Burnley*, 988 F.3d 184, 188 (4th Cir. 2021) (collecting cases). We therefore find no plain error in the enhancement.

V.

Finally, Locklear argues that the district court improperly attributed two criminal history points to his 2010 consolidated judgment instead of one point, because he received a fully suspended sentence and did not serve any active prison term. Assuming, without deciding, that Locklear is correct, we conclude that any such error did not affect Locklear's substantial rights, even absent the career offender enhancement. *See* USSG ch. 5, pt. A (sentencing table) (assigning criminal history category of V to defendant with 10, 11, or 12 criminal history points); *Green*, 996 F.3d at 186 (explaining that defendant establishes effect on substantial rights by "show[ing] a reasonable probability of . . . a lower sentence . . . absent the error" (internal quotation marks omitted)).

VI.

Accordingly, we affirm the district court's judgment in part, vacate the judgment in part, and remand for resentencing. Although we deny Locklear's motions to proceed pro se on appeal and to relieve appellate counsel, we grant his motion for leave to file a pro se supplemental brief.[5] *See United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985). We deny as moot his motions to strike and to expedite decision. We dispense with oral

[5] We have thoroughly reviewed Locklear's pro se submission and identified no valid basis for relief independent of the grounds we have previously discussed.

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 IN PART,
VACATED IN PART,
AND REMANDED