UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4845

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIE RICARDO GORDON, a/k/a Rico,

Defendant - Appellant.

No. 19-4846

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS YOUNG, a/k/a Lay Low,

Defendant - Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. J. Michelle Childs, District Judge. (3:18-cr-00628-JMC-7; 3:18-cr-00628-JMC-10)

Submitted: July 6, 2022 Decided: July 15, 2022

Before MOTZ, AGEE, and QUATTLEBAUM, Circuit Judges.

Affirmed and remanded by unpublished per curiam opinion.

ON BRIEF: Scarlet B. Moore, Greenville, South Carolina. John M. Ervin, III, ERVIN LAW OFFICE, Darlington, South Carolina, for Appellants. Peter M. McCoy, Jr., United States Attorney, Kathleen Michelle Stoughton, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals, Willie Ricardo Gordon and Marcus Young appeal their convictions and sentences after the jury convicted them of drug distribution and firearm offenses. On appeal, Young contends that he is entitled to relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because the jury was not instructed to find that he knew he was a convicted felon at the time of his 18 U.S.C. § 922(g)(1) offense; and Gordon contends that the district court erred in its factual findings on drug quantity and obstruction of justice at sentencing. We affirm Appellants' convictions and sentences, but we remand for correction of clerical error in Gordon's judgment.[*] *See* Fed. R. Crim. P. 36.

Young contends that he is entitled to relief under *Rehaif*, because the jury was not instructed to find that he knew he was a convicted felon at the time of his § 922(g) offense. Because Young did not raise this issue in the district court, we review it for plain error. *See Greer v. United States*, 141 S. Ct. 2090, 2096 (2021); *United States v. Caldwell*, 7 F.4th 191, 213 (4th Cir. 2021) ("plain-error review applies to unpreserved *Rehaif* errors"). "To succeed in obtaining plain-error relief, a defendant must show (1) an error, (2) that is plain, (3) and that affects substantial rights." *Caldwell*, 7 F.4th at 211. Young must show that absent the jury instruction error, "there is a 'reasonable probability' that he would have been acquitted." *Greer*, 141 S. Ct. at 2097 (citation omitted). "If those three requirements

[*] Gordon's judgment erroneously cites the statute for his conviction of possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(i).

are met, [we] may grant relief if [we] conclude[] that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 2096-97.

"[I]n *Rehaif*, the Supreme Court concluded that to obtain a § 922(g) conviction, the government 'must show that the defendant knew he possessed a firearm *and also that he knew he had the relevant [felon] status when he possessed it*." *Caldwell*, 7 F.4th at 213 (quoting *Rehaif*, 139 S. Ct. at 2194). "As the Supreme Court has noted, '[i]n a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: If a person is a felon, he ordinarily knows he is a felon.'" *Id*. (quoting *Greer*, 141 S. Ct. at 2097). However, "the mere undisputed fact that [the defendant] was a felon at the time of the [offense] is not dispositive." *Id*.

"[T]here may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms." *Greer*, 141 S. Ct. at 2097. "But if a defendant does not make such an argument or representation on appeal, [we] will have no reason to believe that the defendant would have presented such evidence to a jury, and thus no basis to conclude that there is a 'reasonable probability' that the outcome would have been different absent the *Rehaif* error." *Id*.; *see United States v. Hobbs*, 24 F.4th 965, 973 (4th Cir.) (concluding defendant failed to make required showing where he testified he was not allowed to possess firearms and had "not proffered 'a sufficient argument or representation' that he would have presented a factual basis at trial for contradicting this

evidence that he knew he was a felon") (quoting *Greer*, 141 S. Ct. at 2100), *cert. denied*, __ S. Ct. __, 2022 WL 2111431 (June 13, 2022); *Caldwell*, 7 F.4th at 213 (concluding defendant could not make required showing where he never disputed validity of his felony convictions and had served sentences longer than a year "making it virtually impossible to believe he did not know he had been convicted of crimes punishable by such sentences").

Although there was plain error in this case, we conclude that Young has failed to show that his substantial rights were affected, i.e., that absent the error, there is a reasonable probability that he would have been acquitted. In the district court, Young stipulated that he had a felony conviction and never disputed his felon status; and in his testimony, he not only admitted he was a convicted felon, but also that it meant he could not be in a house with guns; he knew he should not have guns in his house; and he had guns moved out of his house because he did not want to be charged with possessing them. Moreover, Young received and served sentences longer than one year prior to the offense; and on appeal, he has not proffered a sufficient argument or representation that he would have presented a factual basis at trial for contradicting the evidence that he knew he was a felon.

Gordon contends the district court erred at sentencing in finding the drug quantity attributable to him and that he obstructed justice under U.S. Sentencing Guidelines Manual § 3C1.1. "When evaluating a sentencing court's calculation of the advisory Guidelines range, this Court reviews the district court's factual findings, and its judgment regarding factual disputes, for clear error." *United States v. Medley*, 34 F.4th 326, 337 (4th Cir. 2022) (internal quotation marks omitted). "We will not reverse a lower court's finding of fact simply because we would have decided the case differently." *Id*. (internal quotation marks

omitted). "Instead, clear error occurs when the lower court's 'factual findings are against the clear weight of the evidence considered as a whole.'" *Id*.

"Under the Guidelines, '[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.'" *United States v. Williamson*, 953 F.3d 264, 273 (4th Cir. 2020) (quoting USSG § 2D1.1 cmt. n.5). The district court is accorded "considerable leeway in crafting this estimate" and "may 'give weight to any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its accuracy.'" *Id*. "[W]hen the approximation [of drug quantity] is based only upon uncertain witness estimates, district courts should sentence at the low end of the range to which the witness testified." *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (internal quotation marks omitted). In reviewing the calculation of drug quantity, "we afford 'great deference' to a district judge's credibility determinations and how the court may choose to weigh the evidence." *Williamson*, 953 F.3d at 273.

To apply an enhancement under USSG § 3C1.1, "the district court must conclude that the government has shown, by a preponderance of the evidence, that the defendant 'willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice.'" *United States v. Kiulin*, 360 F.3d 456, 460 (4th Cir. 2004). "Under that provision, an increase for obstruction of justice is justified when, *inter alia*, a convicted defendant 'threaten[s], intimidat[es], or otherwise unlawfully influenc[es] a co-defendant, witness, or juror, directly or indirectly, or attempt[s] to do so.'" *United States v. Brooks*, 957 F.2d 1138, 1149 (4th Cir. 1992) (quoting USSG § 3C1.1 cmt. n.4(A)). "At a minimum, section

3C1.1 requires that the defendant either threaten the codefendant, witness, or juror in his or her presence or issue the threat in circumstances in which there is some likelihood that the codefendant, witness, or juror will learn of the threat." *Id*. at 1149-50.

We have reviewed the record and conclude that the district court did not clearly err in finding Gordon's drug quantity was at least 4.5 kilograms of actual methamphetamine and that he willfully attempted to obstruct and impede the administration of justice by threatening, intimidating, or otherwise unlawfully influencing a codefendant or witness, directly or indirectly, or attempting to do so. The probation officer calculated that Gordon was accountable for 25.45 kilograms of actual methamphetamine, and his base offense level was 38. Gordon objected, primarily challenging the 20 kilograms attributed to him by one witness at trial. The court accepted Gordon's argument not to count the entire 20 kilograms, but it found he was still responsible for at least 4.5 kilograms and a base offense level 38 due to consistent corroborating testimony of another witness at trial. Moreover, while the court overruled his objection to the enhancement under § 3C1.1, it sustained his objection to the leadership enhancement; and we find no clear error in its rulings.

Accordingly, we affirm Appellants' convictions and sentences, but we remand for correction of clerical error in Gordon's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AND REMANDED