UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4445

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RONNIE DESHAWN MONTGOMERY,

Defendant – Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:21-cr-00061-CCE-1)

Argued: May 5, 2022 Decided: May 25, 2022

Before MOTZ, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Eric David Placke, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greensboro, North Carolina, for Appellant. Veronica Lynn Edmisten, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Louis C. Allen, Federal Public Defender, John A. Duberstein, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greensboro, North Carolina, for Appellant. Sandra J. Hairston, 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Unpublished opinions are not binding precedent in this circuit.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:

Ronnie Deshawn Montgomery appeals, arguing that the district court erred in applying certain provisions of the U.S. Sentencing Guidelines to calculate his advisory sentencing range.[1] We disagree, and so affirm.

I.

A.

On August 6, 2020, E.M. called 911 to report that an armed man was trying to break into her home.[2] Two police officers reported to the scene. Officer Eric Salava approached the back of the home, while Officer Tyler Carleton approached the front. Outside the back of the home, Officer Salava saw Ronnie Deshawn Montgomery — E.M.'s former intimate partner — kick the closed back door twice with the bottom of his shoe. Officer Salava announced himself and told Montgomery to stop kicking the door. Montgomery complied,

[1] Montgomery also filed a *pro se* Rule 28(j) letter raising two additional arguments, both of which are meritless. *See* Pro Se Suppl. Authorities, *United States v. Montgomery*, No. 21-4445 (4th Cir. Feb. 18, 2022) (ECF No. 26). The first argument is that his sentence violates the Double Jeopardy Clause because the indictment assertedly charged him with two offenses for the same conduct. This argument misunderstands the nature of his indictment. The indictment charged Montgomery with only *one* offense; it merely alleged *two ways* in which he had committed that single offense. Montgomery's second argument is that a case currently pending in the Supreme Court, *United States v. Taylor*, No. 20-1459 (U.S.), supports his contention that the district court erred in applying Guideline § 2K2.1(c)(1)(A) to calculate his sentence. But the question presented in *Taylor* is "[w]hether 18 U.S.C. [§] 924(c)(3)(A)'s definition of 'crime of violence' excludes attempted Hobbs Act robbery." *See* Br. for the United States at (I), *Taylor*, No. 20-1459 (filed Sept. 7, 2021). This question has no relevance to Montgomery's case.

[2] We draw these facts from the factual basis for Montgomery's plea and from the testimony provided at Montgomery's sentencing hearing.

but he also bent down and put something between the back door and screen door. Officer Salava detained Montgomery.

While Officer Salava was at the back of the home, E.M. let Officer Carleton inside through the front door. E.M. told Officer Carleton that Montgomery had tried to kick in her front door before going to the back door. Officer Carleton noticed dents on the front door, but E.M. told him that they were not new. Officer Carleton walked through the home to the back door, where he noticed that the door's deadbolt, hinge, and faceplate were bent; he asked E.M. whether the damage was new, but she did not recall. Officer Carleton then found what Montgomery left between the back door and screen door: a loaded .38 caliber revolver. E.M. told Officer Carleton that she did not want to press charges.

Montgomery would later testify that he had not intended to hurt E.M. or the parties' minor child. And as recounted by Officer Salava, Montgomery insisted that he merely wanted to "see [the] mother of his children." But at the time of the incident, Montgomery was subject to a Domestic Violence Order of Protection Consent Order (the "Consent Order"), under which he had agreed not to "commit any further acts of domestic violence" against E.M. and which prohibited him from visiting E.M.'s home. The Consent Order included an exception to allow Montgomery to visit his and E.M.'s child with E.M.'s written permission, but there is no evidence that E.M. had agreed to allow Montgomery to do so on the day in question.

A grand jury indicted Montgomery for a single count of possession of a firearm by a prohibited person, in violation of 18 U.S.C. §§ 922(g)(1) and 922(g)(8). The indictment charged that Montgomery was prohibited from possessing a firearm for two separate

reasons: (1) he had previously been convicted of a felony; and (2) he was subject to a domestic violence court order. §§ 922(g)(1), 922(g)(8). Montgomery pled guilty to the charge.

B.

A probation officer prepared a presentence report to determine Montgomery's advisory sentencing range under the U.S. Sentencing Guidelines. The probation officer found that Montgomery had an offense level of sixteen and a criminal history category of VI, resulting in an advisory range of forty-six to fifty-seven months' imprisonment. The calculations that the probation officer made to arrive at an offense level of sixteen are lengthy, but they are directly relevant to the issues on appeal. We thus take care to describe those calculations in detail.

First, the probation officer applied Guideline § 2K2.1(a)(6) to find that Montgomery had a base offense level of fourteen because he had pled guilty to a charge of possession of a firearm by a prohibited person. The officer then applied a four-level sentencing enhancement under § 2K2.1(b)(6)(B) because Montgomery had possessed a firearm in connection with another felony offense — namely, "break[ing] or enter[ing] any building with intent to terrorize or injure an occupant" in violation of North Carolina law. *See* N.C. Gen. Stat. § 14-54(a1). This resulted in an adjusted offense level of eighteen.

Second, the officer applied the cross-reference in Guideline § 2K2.1(c)(1)(A). The cross-reference applies to defendants who "used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense." U.S.S.G. § 2K2.1(c)(1). Here, the probation officer

found that the cross-reference applied to Montgomery because he had possessed a firearm in connection with an attempt to commit burglary: the state law breaking-and-entering offense mentioned above.[3]

The cross-reference instructs that, if the offense level for an attempt to commit the "[]other offense" — here, burglary — is higher than the one that the defendant would have received for the charge of possession of a firearm by a prohibited person, the defendant should be assigned that higher offense level. *Id.* § 2K2.1(c)(1)(A). Under the Guidelines, Montgomery's offense level for an attempt to commit burglary would have been nineteen.[4]

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[3] To determine whether an offense qualifies as burglary under the Guidelines, we compare the elements of the offense at issue to the "generic" definition of burglary. *United States v. Mungro*, 754 F.3d 267, 268–69 (4th Cir. 2014). The generic definition of burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with *intent to commit a crime*." *Taylor v. United States*, 495 U.S. 575, 598 (1990) (emphasis added). Here, the court found that Montgomery violated N.C. Gen. Stat. § 14-54(a1), which applies to "[a]ny person who breaks or enters any building with *intent to terrorize* or injure an occupant of the building." (emphasis added). The Government admitted at oral argument that "terrorizing" is not a separate crime under North Carolina law, but argued that "the acts that would underpin any act of terrorizing" are separate crimes, such that N.C. Gen. Stat. § 14-54(a1) qualifies as generic burglary. *See* Oral Arg. at 15:52–17:34, *United States v. Montgomery* (4th Cir. May 5, 2022) (No. 21-4445), https://www.ca4.uscourts.gov/OAarchive/mp3/21-4445-20220505.mp3. Given that Montgomery failed to argue before the district court or on appeal that violating N.C. Gen. Stat. § 14-54(a1) with an intent to terrorize does not qualify as generic burglary, any argument to that effect is waived and we need not resolve that issue here.

[4] *See* U.S.S.G. § 2K2.1(c)(1)(A) ("If the defendant . . . possessed any firearm or ammunition cited in the offense of conviction in connection with the . . . attempted commission of another offense . . . apply — (A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above. . . ."); *id.* § 2X1.1(a) (stating that the base offense level for an attempt is "[t]he base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty"); *id.* §§ 2B2.1(a)(1), 2B2.1(b)(4) (stating that the base offense (Continued)

Because the offense level for an attempt to commit burglary would be higher than the offense level for the charge of possession of a firearm by a prohibited person, the probation officer increased Montgomery's offense level from eighteen to nineteen.

Third, the probation officer decreased Montgomery's offense level by three levels because Montgomery had accepted responsibility and timely notified authorities of his intention to plead guilty. *Id.* §§ 3E1.1(a), 3E1.1(b). In doing so, the officer arrived at the final calculation: an offense level of sixteen.

Montgomery objected to the presentence report. He contended that the district court should apply neither the § 2K2.1(b)(6)(B) enhancement nor the § 2K2.1(c)(1)(A) cross-reference for the same reason: he had not attempted to break or enter E.M.'s home "with intent to terrorize or injure an occupant" in violation of N.C. Gen. Stat. § 14-54(a1). The district court overruled Montgomery's objection, finding that Montgomery had attempted to break or enter E.M.'s home with an intent to terrorize an occupant. In explaining this finding, the court reasoned that:

> It's hard actually to imagine why [Montgomery had] the gun, the loaded gun, if he's going to see his children. And [E.M. was] calling 911; she clearly doesn't want him there. And there is a domestic violence protective order in place. He's kicking the door. That's some indication of violence. He apparently kicked the front door, [E.M.] said, and then he went around and opened the screen door, which is a breaking or entering for misdemeanor purposes, and then you have him — then he's kicking the door, and he's got the loaded gun. So I think that that is a fair inference, and I will overrule the objection.

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level for the substantive offense of burglary of a residence is seventeen and that this base level should be increased by two "[i]f a dangerous weapon (including a firearm) was possessed").

After overruling Montgomery's objection, the district court adopted the presentence report in full. The court then imposed a within-Guidelines sentence of forty-eight months' imprisonment and three years of supervised release. Montgomery noted a timely appeal from the sentence, arguing that the court erred in overruling his objection because he had not attempted to break or enter E.M.'s home with an *intent to terrorize* in violation of N.C. Gen. Stat. § 14-54(a1).

II.

On appeal, Montgomery makes the same argument, i.e., that he did not *intend to terrorize* in violation of N.C. Gen. Stat. § 14-54(a1). If Montgomery is correct, then the district court erred in applying the § 2K2.1(b)(6)(B) enhancement and the § 2K2.1(c)(1)(A) cross-reference, and we would need to remand for resentencing.

When deciding whether a district court has erred in applying a Guidelines provision, we review the court's legal conclusions de novo and factual findings for clear error. *United States v. Allen*, 446 F.3d 522, 527 (4th Cir. 2006). Whether a defendant acted with a particular intent is a factual question, which we review for clear error. *United States v. Robinson*, 855 F.3d 265, 269 (4th Cir. 2017). If the evidence in the record allows for "two permissible views" as to whether or not a defendant acted with the requisite intent, "the factfinder's choice between [those views] cannot be clearly erroneous." *Walsh v. Vinoskey*, 19 F.4th 672, 681 (4th Cir. 2021) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

We look to North Carolina law to determine what constitutes an "intent to terrorize" under N.C. Gen. Stat. § 14-54(a1). Few North Carolina cases address the "intent to

terrorize" language in the statute, but the ones that do guide our analysis. In *State v. Walker*, a 2017 unpublished opinion, the Court of Appeals of North Carolina acknowledged that it had "not yet addressed what constitutes 'intent to terrorize or injure' under this statute." 801 S.E.2d 180, 2017 WL 2608057, at *3 (N.C. Ct. App. June 6, 2017) (unpublished). But the court recognized that the word "'terrorize' has been repeatedly defined for the purposes of kidnapping as, more than just putting another in fear. It means putting that person in some *high degree of fear, a state of intense fright or apprehension*." *Id.* (emphasis added). The court then applied that definition to N.C. Gen. Stat. § 14-54(a1), finding that the evidence was sufficient for the jury to find that the defendant acted with an "intent to terrorize and injure" when the defendant had "burst through the door without knocking" and "badly beat[]" the victim "without provocation." *Id.* at *4.

Two years later, the Court of Appeals of North Carolina issued *State v. Griffin*, the court's only published opinion directly addressing the "intent to terrorize" standard for this statute. 826 S.E.2d 253 (N.C. Ct. App. 2019). In *Griffin*, the court recognized that *Walker* was "unpublished and nonprecedential" but proceeded to affirmatively cite *Walker*'s discussion of the "intent to terrorize" standard. *Id.* at 256 n.2, 257. The court then held, as in *Walker*, that the evidence was sufficient to find that the defendant had an intent to terrorize because that evidence showed that the defendant acted as to "put the victim in a *high degree of fear*," including because the defendant "entered uninvited and did not announce himself" and "proceeded to violently attack" the victim. *Id.* at 257 (emphasis added).

Collectively, *Walker* and *Griffin* thus outline the standard for finding an "intent to terrorize" under N.C. Gen. Stat. § 14-54(a1): a defendant acts with an intent to terrorize when the evidence shows that he acted so as to "put the victim in a high degree of fear." *Id.* In applying that standard to the facts in this case, we can only conclude that the district court did not err in finding sufficient evidence that Montgomery had acted with an "intent to terrorize."

That evidence shows that even though a domestic violence court order prohibited Montgomery from visiting E.M.'s home without written permission, he appeared at the home with a loaded revolver and kicked both the front and back doors to obtain entrance. At a minimum, those facts are consistent with finding that Montgomery intended to put E.M. in a high degree of fear. Montgomery insists that he did not intend to harm E.M. and that he merely wanted to "see [the] mother of his children," but as the district court found, it is difficult to imagine why he had a loaded revolver and tried to force his way into her home if he merely wanted to "see" her.

Montgomery also asserts that E.M. did not know that he had a gun, and so could not have been "terrorized," but that misses the point. The question is whether the evidence shows that the *defendant*, i.e., Montgomery, had an intent to terrorize, not whether the *victim* was in fact terrorized. *Cf. State v. Baldwin*, 540 S.E.2d 815, 821 (N.C. Ct. App. 2000) (Wynn, J.) ("In determining whether . . . the defendant acted with the purpose of terrorizing [the victim], 'the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her.'" (quoting *State v. Moore*, 340 S.E.2d 401, 405 (N.C. 1986))). And even if

the focus were on E.M.'s point of view, we know that E.M. called 911, a fact that is consistent with finding that she was in a high degree of fear.

Of course, unlike the present case, both *Walker* and *Griffin* involved physical attacks. But the North Carolina statute does not require a defendant to have physically attacked someone in order to have acted with an intent to terrorize. Rather, in *Griffin*, the court explained that a defendant need only act so as to put someone in a "high degree of fear," a state that need not be accomplished by physical attack. 826 S.E.2d at 257. And in any event, Montgomery has not argued that only those who physically attack someone could have an intent to terrorize.[5]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[5] Montgomery also relies heavily on our unpublished decision in *United States v. Tabron*, in which we upheld the application of the § 2K2.1(b)(6)(B) enhancement where the defendant had possessed a firearm in connection with a violation of the same breaking-and-entering offense at issue here. 744 F. App'x 819, 820–21 (2018) (unpublished) (per curiam). Montgomery insists that because the conduct of the defendant in *Tabron* was assertedly more severe than his own, *Tabron* supports his position that he did not act with an intent to terrorize. But our opinion in *Tabron* did not address whether the defendant acted with an intent to terrorize but rather an entirely different question: whether the defendant had "constructively" broken or entered a residence. *Id.* at 821. In any event, the facts of *Tabron* differ from those in this case only in that the defendant in *Tabron* retrieved a gun from his car (rather than already having it on him) and parked his car "straddled across the walkway only steps from the front door." *Id.* at 820. Neither of those distinctions bears out Montgomery's contention that the conduct of the defendant in *Tabron* was more severe than his own. And of course, as an unpublished decision, *Tabron* holds no precedential value; we cite *Tabron* here only because Montgomery relies on it.