

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 6, 2019

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUSTIN JAMAR SMITH,

Defendant-Appellant.

No. 18-8004
(D.C. No. 2:16-CR-00192-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MATHESON**, and **EID**, Circuit Judges.

In June 2016, Justin Jamar Smith robbed the front desk of the Fairfield Inn in Cheyenne, Wyoming. Smith pled guilty to the robbery. At sentencing, he disputed the government's allegation that he brandished a firearm during the robbery (as opposed to an instrument that "closely resembles" a firearm). *See* United States Sentencing Guidelines (USSG) § 1B1.1 Application Note 1(D), (G).¹ The district court found that the government had proved by a preponderance of the evidence that Smith had

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Smith was sentenced before October 31, 2018, we cite to the 2016 Guidelines Manual, which was in effect at the time.

brandished a firearm. The court applied the resulting five-level offense level enhancement and sentenced Smith to a prison term of 70 months. *See* USSG § 2B3.1(b)(2). On appeal, Smith argues that the government’s evidence was not sufficient to prove that he brandished a firearm. Exercising jurisdiction under 18 U.S.C. § 3742(a) and § 1291, we affirm the district court’s application of the firearms sentence enhancement.

I. BACKGROUND

On September 22, 2016, a grand jury indicted Smith on one count of interference with interstate commerce by means of robbery, in violation of 18 U.S.C. § 1951(a), and one count of using and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Prelim. ROA at 8.² Pursuant to a plea agreement, Smith entered a plea of guilty to interference with interstate commerce by means of robbery. *Id.* At the change of plea hearing, Smith denied under oath using a firearm during the robbery. App’x 3 at 29.

The probation office prepared a Presentence Report in anticipation of Smith’s sentencing. App’x 2 at 22. The report indicated that Smith had brandished a firearm during the robbery and recommended a five-level increase under USSG

² Record materials in this matter were filed in separate docket entries. The district court’s Order on Resentencing is contained only in the Preliminary Record on Appeal (“Prelim. ROA at [page]”), filed on January 5, 2018. The remainder of the record was filed in three volumes on January 31, 2018. It is indicated here as “App’x [Vol. number] at [page].”

§ 2B3.1(b)(2)(C). *Id.* at 29. Smith objected to the finding in writing and at the sentencing hearing held February 7, 2017. *Id.* at 53–54; App’x 3 at 38.

At the sentencing hearing, the only matter in dispute was whether the government had proven that Smith had brandished a firearm during the commission of the robbery. Prelim. ROA at 9. The district court determined that the government had met its burden, and it applied a five-level “firearm” enhancement to Smith’s offense level under the Sentencing Guidelines. *Id.* at 10. The district court focused on three key pieces of evidence to make that finding: (1) statements from the victim; (2) Smith’s gestures and behavior during the robbery captured on video; and (3) Smith’s criminal history. *Id.* at 11. Smith was sentenced to a prison term of 70 months. *Id.*

During that first hearing, the district court incorrectly indicated that the definition of “firearm” had not been incorporated into the sentencing guidelines. App’x 3 at 65. The matter reached this court on appeal, No. 17-8014, and we remanded the case to the district court for resentencing, App’x 1 at 27.

On remand, the district court adopted its factual findings from the first sentencing and found by a preponderance of the evidence that Smith had brandished a firearm during the robbery. Applying the five-level firearm enhancement, the court once again sentenced Smith to a prison term of 70 months. Prelim. ROA at 11.

II. ANALYSIS

A. Guidelines Framework

Section 2B3.1(b)(2) of the United States Sentencing Guidelines permits certain sentence enhancements based on the “specific offense characteristics” of an underlying

robbery conviction. If a “firearm” was “brandished or possessed” during the commission of the robbery, the offense level may be increased by five levels. USSG § 2B3.1(b)(2)(C). By contrast, if a “dangerous weapon” is “brandished or possessed,” the offense level may be increased by only three levels. *Id.* § 2B3.1(b)(2)(E).

In a separate section, the guidelines offer definitions for both “firearm” and “dangerous weapon.” A “firearm” is defined as

(i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.

USSG § 1B1.1, Application Note 1(G). By contrast, a “dangerous weapon” is defined as

(i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

Id. § 1B1.1, Application Note 1(D). The guidelines note that “[a] weapon, commonly known as a ‘BB’ or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.” *Id.* § 1B1.1, Application Note 1(G).

The government bears the burden of proving factors enhancing a sentence by a preponderance of the evidence. *United States v. Conley*, 131 F.3d 1387, 1389 (10th Cir. 1997). When weighing evidence presented by the government at sentencing, the district court is not strictly bound by traditional rules of evidence. *See United States v. Beaulieu*, 893 F.2d 1177, 1180 (10th Cir. 1990) (“The Guidelines expressly allow the use of any reliable information.”) (emphasis omitted).

B. The District Court's Finding

Smith asserts that the district court erred in finding that the government met its burden of proving, by a preponderance of the evidence, that Smith used a firearm during the robbery. This court reviews factual findings underlying upward sentencing adjustments with great deference, “overturning them only upon a determination that the findings were clearly erroneous or without factual support in the record such that our review leaves us with the firm and definite conviction that a mistake has been made.” *United States v. Pool*, 937 F.2d 1528, 1530 (10th Cir. 1991). To constitute clear error, the sentencing court’s finding must be “simply not plausible or permissible in light of the entire record on appeal.” *United States v. Torres*, 53 F.3d 1129, 1144 (10th Cir. 1995). If the district court’s finding is plausible, this court “may not reverse it even” if “it would have weighed the evidence differently.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985).

Although this case presents a close call, we are ultimately persuaded—in view of the high degree of deference owed to the district court’s factual findings—that the district court did not clearly err. The district court’s finding rested on three pieces of evidence: (1) statements from the robbery victim, (2) surveillance footage of Smith’s gestures and behavior during the robbery, and (3) Smith’s criminal history. Taking all the evidence together, it was permissible for the district court to find that Smith used a firearm.

We will discuss these pieces of evidence one by one.

1. Victim's Testimony

In finding that Smith brandished a firearm, the district court cited statements by the robbery victim, a hotel clerk. The clerk did not testify at the sentencing hearing, so the district court relied on the clerk's statements made to an interviewing officer. The district court observed:

[T]he victim in this case was unusual with respect to her composure, powers of observation, and the manner that she handled herself throughout her encounter with the Defendant. Therefore, the Court[] finds particularly compelling her consistent account that when the Defendant entered the business and jumped over the counter at her she was looking down the barrel of a gun.

Prelim. ROA at 11.

Smith argues that “the clerk’s testimony amounts to nothing more than an unsworn statement that the object looked like a gun.” Apl’t. Br. at 14. Smith distinguishes the clerk’s statements from the victim’s testimony in *United States v. Gilleo*, 683 F. App’x 85, 87 (2d Cir. 2017) (unpublished). There, the Second Circuit upheld the firearm enhancement after the victim, “who had familiarity with handguns and BB guns,” “gave a detailed description of the weapon (which she touched and observed during the robbery).” *Id.* Smith also notes that in *Gilleo*, the district court had the opportunity to observe the testimony of the victim directly. Apl’t. Br. at 14. Smith argues that “[s]omething that looks like a gun could be either a ‘firearm’ or a ‘dangerous weapon’ under the guidelines,” *id.*, and without testimony about familiarity with handguns, the clerk’s statements are essentially useless, see *id.*

Smith's argument is misplaced. Particularly where the burden of proof is a preponderance of evidence, one need not be a firearms expert to reliably state that a gun was pointed at one's face. Though the court in *Gilleo* took into account the victim's familiarity with firearms, the court did not state that only a victim with firearm experience could identify a handgun. *Gilleo*, 683 F. App'x at 87. In this case, the district court found that the clerk was a highly reliable witness with above average attention to detail. The clerk's statements about the weapon Smith brandished were clear and descriptive: she recalled "look[ing] right into the barrel of" an object being pointed at her, "which she described as a gun." App'x 3 at 53. She described the object as black in color. *Id.* And she recalled being "terrified to have [the gun] so close to her face." *Id.* It was not clearly erroneous for the district court to conclude that the victim's repeated description of the weapon as a firearm was evidence that the weapon was, in fact, a firearm. See *United States v. Jones*, 16 F.3d 487, 491 (2d Cir. 1994) (testimony of witnesses who were unfamiliar with weapons and did not observe the gun at close range was sufficient for a jury to conclude beyond a reasonable doubt that weapon was a firearm).

2. Surveillance Footage of the Robbery

Beyond the clerk's statements, the district court relied on other evidence offered by the government confirming the clerk's observation of a firearm. The district court noted that "the surveillance video indicates that the gestures of the Defendant are classic gestures of a person using a firearm in a threatening manner during the robbery of a business." Prelim. ROA at 11. The district court considered that the object might be a

replica, but concluded that there was no reason to “assume it is a replica[] when it is used so clearly as a threat.” App’x 3 at 67. In response, Smith argues “Mr. Smith brandish[ing] the object as if it were a firearm does not make it more likely that the object was a ‘firearm’ . . . as opposed to a dangerous weapon.” Aplt. Br. at 15. Smith asserts—without any record support—that “[d]efendants frequently use fake firearms (i.e., BB guns, pellet guns, or replicas) during the course of robberies.” *Id.* at 14.

In the context of sufficiency of the evidence claims, the Second and Sixth Circuits have held that “[t]he mere possibility that the object seen by witnesses may have been a sophisticated toy or other facsimile does not necessarily create a reasonable doubt, nor is the government required to disprove that theoretical possibility.” *United States v. Crowe*, 291 F.3d 884, 887 (6th Cir. 2002) (quoting *Jones*, 16 F.3d at 491). That logic applies here, too, where the government’s burden of proof is even lower. It was not unreasonable for the district court to conclude that a robber might treat a replica weapon differently than a real weapon—for example, by displaying confidence in the weapon’s power to threaten. It was thus within the district court’s discretion to determine, as the first-line factfinder, that the defendant’s gestures while using a weapon that looked like a firearm were consistent with the weapon being a firearm rather than a similar-looking object.

In addition, we note that Special Agent Jennifer Bridges of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) testified at the sentencing hearing that “[t]he surveillance footage indicated that Mr. Smith was holding an object, a firearm.” App’x 3 at 44. As an ATF agent, Agent Bridges would presumably have expertise in recognizing

firearms.³ *Cf. United States v. Sedillo*, 557 F. App'x 769, 771–72 (10th Cir. 2014)

(relying on ATF agent's opinion that defendant possessed a firearm during a robbery).

Agent Bridges' testimony provides further support for the district court's conclusion that the object Smith brandished during the robbery was a firearm.

3. Smith's Criminal History

Finally, the district court relied on Smith's "criminal history, which contains several convictions for theft or taking of firearms." Prelim. ROA at 11. According to the district court, that criminal background "indicates a familiarity with firearms and a recognition on [Smith's] part that firearms have value and use." *Id.* Smith responds that his "involvement in a spree of residential burglaries in July 2009" has no bearing on "whether Mr. Smith brandished a real firearm, as opposed to a BB gun or replica, during a robbery eight years later." Aplt. Br. at 16.

To be sure, Smith's prior thefts of firearms offer only weak support for the district court's finding. But again, in view of the deference owed to the district court, it was not clearly erroneous to consider this evidence as a point in favor of applying the firearms enhancement. *See Beaulieu*, 893 F.2d at 1179; 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may . . . consider for the purpose of imposing an appropriate sentence.").

³ Smith objected to Agent Bridges' statement on the basis of Federal Rule of Evidence 702, which governs testimony by expert witnesses. The district court overruled the objection. App'x 3 at 44.

III. CONCLUSION

Finding no clear error, we AFFIRM.

Entered for the Court

Allison H. Eid
Circuit Judge