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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Nathan R. ROLLINS, Jr., Defendant - Appellant.

No. 20-6166

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FILED August 12, 2021

### Synopsis

**Background:** Defendant was convicted in the United States District Court for the Western District of Oklahoma, No. 5:20-CR-00002-HE-1, [Joe Heaton](#), Senior District Judge, on his guilty plea to being a felon in possession of firearms, and was sentenced to the statutory maximum of 120 months' imprisonment. He appealed.

**Holdings:** The Court of Appeals, [Holmes](#), Circuit Judge, held that:

defendant was accountable for his passenger's acts, for purposes of calculating sentence;

Fifth Amendment did not require a higher standard of proof than a preponderance of the evidence for contested facts;

Sixth Amendment did not require a jury to find facts that resulted in an increased sentence; and

sentence of 120 months' imprisonment was substantively reasonable.

Affirmed.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

\*258 (D.C. No. 5:20-CR-00002-HE-1) (W.D. Oklahoma)

### Attorneys and Law Firms

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[William P. Earley](#), Office of the Federal Public Defender, Western District of Oklahoma, Oklahoma City, OK, for Defendant-Appellant.

Before [HOLMES](#), [MATHESON](#), and [McHUGH](#), Circuit Judges.

## ORDER AND JUDGMENT \*

Jerome A. Holmes, Circuit Judge

Nathan R. Rollins, Jr., pleaded guilty to being a felon in possession of firearms, a violation of 18 U.S.C. § 922(g)(1), and was sentenced to the statutory maximum of 120 months' imprisonment. Rollins appeals, arguing that: (1) the district court procedurally erred in calculating his sentencing guidelines range; (2) the district court violated his Fifth and Sixth Amendment rights by making factual findings without a jury and by a preponderance of the evidence; and (3) the sentence was substantively unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm.

### BACKGROUND

On December 11, 2019, Rollins was driving his black Dodge Charger on a highway in Oklahoma when he was cut off by a brown SUV. Rollins sped up and pulled alongside the SUV, and his front-seat passenger, Martavious Gross, rolled down his window, gestured with his middle finger, and yelled at the SUV driver. The SUV driver did not respond, and Rollins slowed back down. However, shortly thereafter, Rollins accelerated and caught up again with the SUV. The SUV driver heard a gunshot and saw Gross leaning out the window, staring at him, and holding a gun in his right hand. The SUV driver slowed down while Rollins sped away, at which point Gross handed the gun to his brother in the backseat to hide in the trunk.

The SUV driver called 911, and about thirty minutes later, Oklahoma State Troopers located Rollins's vehicle traveling 106 miles per hour in a 75-mile-per-hour zone. They caught up with him and activated their emergency lights, and Rollins pulled his vehicle over. The State Troopers smelled an odor of marijuana coming from the vehicle and, upon searching the vehicle, discovered: (1) one stolen AR-15 with a fully loaded 45-round magazine; (2) one stolen .40 caliber handgun with a fully loaded 15-round magazine; (3) one smoking pipe; (4) two black, molded, full-face masks; and (5) a backpack containing three cellphones, clear baggies, digital scales, marijuana, and another fully loaded 40-round magazine that fit the AR-15. Rollins admitted to the State Troopers that he owned the backpack, and Gross confessed that he fired his handgun at the SUV vehicle because he was mad the SUV cut them off and almost knocked them off the road. The SUV driver later identified \*259 Gross as the shooter based on a booking photograph.

On January 8, 2020, a federal grand jury indicted Rollins on one count of being a felon in possession of firearms in violation § 922(g)(1). Rollins pleaded guilty, admitting he was a felon and that he possessed the AR-15. The United States Probation Office then submitted a presentence investigation report (PSR). The PSR recommended a base offense level of 22 on the grounds that Rollins (1) admitted possessing the 40- and 45-round magazines, which were fully loaded for the AR-15; and (2) had previously been convicted of assault and battery by strangulation, a crime of violence. See U.S. Sentencing Guidelines Manual (USSG) § 2K2.1(a)(3)(A)(i) and (B) (U.S. Sent'g Comm'n 2018). The PSR recommended two enhancements: (1) two levels under § 2K2.1(b)(4)(A) because the firearm was stolen; and (2) four levels under § 2K2.1(b)(6)(B) because Rollins either constructively possessed the handgun that Gross used to commit a felony offense<sup>1</sup> or was liable for Gross's actions under relevant conduct principles, see USSG § 1B1.3(a)(1)(A) and (B) (U.S. Sent'g Comm'n 2018). The PSR then recommended a three-level reduction for acceptance of responsibility, for a total offense level of 25. See USSG § 3E1.1(a) and (b) (U.S. Sent'g Comm'n 2018). Next, the PSR calculated a criminal history score of 8, which established a criminal history category of IV, based on Rollins's prior offenses and because he committed the present offense while under a criminal justice sentence for domestic assault and battery by strangulation. Based on a total offense level of 25 and a criminal history category of IV, the PSR recommended a guideline range of 84 to 108 months' imprisonment.

At sentencing, the government moved for an upward variance, seeking the statutory maximum of 120 months' imprisonment. Rollins argued for a sentence below the guidelines range and objected to the four-level enhancement, contending he did not

constructively possess the handgun Gross used and should not be liable under relevant conduct principles. The district court agreed he did not constructively possess the handgun but concluded Gross's conduct was attributable to him under relevant conduct principles. The district court further concluded that the facts warranted an upward variance to the statutory maximum, noting, *inter alia*, the seriousness of the offense, the type of weapon Rollins possessed, his escalating pattern of violent conduct, and the combination of his severe anger management issues and abuse of firearms that posed a substantial risk to the public. The court therefore sentenced Rollins to 120 months' imprisonment. Rollins timely appealed.

## DISCUSSION

### I. Procedural Error

Rollins first contends the district court procedurally erred in calculating his sentencing guidelines range. “We review the district court's application of the Sentencing Guidelines for abuse of discretion. In applying that standard, we review questions of law de novo and factual findings for clear error.” *United States v. Stein*, 985 F.3d 1254, 1266 (10th Cir.) (citation and internal quotation marks omitted), *petition for cert. filed* (U.S. June 24, 2021) (No. 20-8458). “[W]e will not disturb the district court's factual findings unless they have no basis in the record, and we view the evidence and inferences therefrom in \*260 the light most favorable to the district court's determination.” *United States v. Hoyle*, 751 F.3d 1167, 1174 (10th Cir. 2014).

Rollins contests the district court's application of USSG § 2K2.1(b)(6)(B), which requires a four-level enhancement “[i]f the defendant ... used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.” The court found that Gross committed the felony offense under Okla. Stat. tit. 21, § 652(B) of using a vehicle to facilitate the intentional discharge of a firearm and that Rollins was accountable for Gross's acts under relevant conduct principles. Specifically, the court held him accountable both for aiding and abetting Gross's acts, *see* USSG § 1B1.3(a)(1)(A), and because Gross's acts “occurred during the commission of the offense of conviction” and were “(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity,” *id.* § 1B1.3(a)(1)(B); *see also id.* § 1B1.3 cmt. nn.2 (“In certain cases, a defendant may be accountable for particular conduct under more than one subsection of [§ 1B1.3]”), 4(A)(i) (same).

Rollins argues the district court erred in holding him accountable under § 1B1.3(a)(1)(A) and (B) because he did not share Gross's intent to commit the felonious conduct. He insists the district court relied on inferences that were unreasonable and “nothing more than speculation and conjecture.” *Aplt. Br.* at 17.

Proof of intent may—and often must—“be based on drawing inferences from the defendant's actions” and other evidence. *United States v. Rufai*, 732 F.3d 1175, 1191-92 (10th Cir. 2013). The inferences must be reasonable, meaning they “flow[ ] from logical and probabilistic reasoning,” *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005) (internal quotation marks omitted), and not “speculation and conjecture that renders [them] a guess or mere possibility,” *United States v. Bowen*, 527 F.3d 1065, 1076 (10th Cir. 2008) (internal quotation marks omitted). Inferences may be reasonable even if they are not required by the evidence or are not the same inferences we would have made as the trier of fact. *See United States v. Phillips*, 543 F.3d 1197, 1210 (10th Cir. 2008).

The district court found that the sequence of events and the manner in which Rollins drove his vehicle supported an inference that he shared Gross's intent to fire the gun and that they jointly undertook the criminal activity. Specifically, the court noted that the incident began with “an initial ... road rage, screaming-out-the-window incident followed by [Rollins] dropping back” behind the brown SUV and then accelerating at “a high rate of speed” to catch up to the brown SUV for “a second episode,” during which point Gross fired the handgun. *R. vol. 3* at 14. The court thus found that the way Rollins drove his vehicle suggested that he knew Gross had a firearm and intended to discharge it after catching up to the brown SUV, “in conscious disregard for the safety of another person or persons,” Okla. Stat. tit. 21, § 652(B).

Although Rollins takes a different view of the evidence, the district court's inferences were grounded in "logical and probabilistic reasoning" and were not clearly erroneous. *Summers*, 414 F.3d at 1295. The reasonable inferences, in turn, fully support the court's determination that Rollins was accountable for Gross's acts under § 1B1.3(a)(1)(A) and (B). Accordingly, we find no procedural error or abuse of discretion \*261 in the district court's application of the Sentencing Guidelines.

## II. Constitutional Error

Rollins next contends the district court violated his: (1) Fifth Amendment right that a conviction be based on proof beyond a reasonable doubt by finding him accountable for Gross's acts under relevant conduct principles based on only a preponderance of the evidence; and (2) Sixth Amendment right that a jury find facts resulting in an increased sentence by holding him accountable for Gross's conduct and effectively "finding [he] committed an additional crime [that] was the basis for both an increase in the advisory sentencing guideline range of imprisonment and the upward variance." *Aplt. Opening Br.* at 21. Rollins acknowledges his arguments are foreclosed by circuit precedent but advises the court he has raised the issues to preserve them for further review.

We agree that our precedents foreclose his arguments. See *United States v. Robertson*, 946 F.3d 1168, 1171-72 (10th Cir.) (collecting cases and noting the Fifth Amendment does not require a higher standard of proof than a preponderance of the evidence for contested facts at sentencing), *cert. denied*, — U.S. —, 141 S. Ct. 398, 208 L.Ed.2d 109 (2020); *United States v. Cassius*, 777 F.3d 1093, 1097-98 (10th Cir. 2015) (collecting cases and noting the Sixth Amendment does not require a jury to find facts that result in advisory guidelines enhancements or influence judicial discretion but do not otherwise increase the statutory sentencing range). And "this panel cannot overturn the decision of another panel of this court barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court." *United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000) (internal quotation marks omitted). Accordingly, we find no constitutional error in Rollins's sentencing proceeding.

## III. Substantive Reasonableness

Finally, Rollins contends that his sentence of 120 months' imprisonment, which was above the guidelines range of 84 to 105 months, was substantively unreasonable and that he should have received a sentence within, if not below, the guidelines range. "We review the substantive reasonableness of a sentence for abuse of discretion ... and will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir. 2020) (internal quotation marks omitted). "To determine the substantive reasonableness of a sentence, we look at the totality of the circumstances." *United States v. Balbin-Mesa*, 643 F.3d 783, 787 (10th Cir. 2011) (internal quotation marks omitted). And "[w]e defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings." *Lawless*, 979 F.3d at 855 (internal quotation marks omitted).

In explaining the basis for its sentence, the district court began by noting that it considers the guidelines and "give[s] them some weight" but "ultimately mak[es] [its] sentencing decision based on the statutory factors" in 18 U.S.C. § 3553(a). *R. vol. 3* at 30. As for the § 3553(a) factors, Rollins admits the district court addressed "the nature and circumstances of the offense, his history and characteristics, his criminal history, and the need to afford adequate deterrence." *Aplt. Opening Br.* at 27. However, he contests the court's treatment of those factors.

With respect to the nature and circumstances of the offense, the court found that Rollins's "possession of an AR-15" was "a \*262 more serious matter" with a "greater potential for abuse" than "possession of a handgun or a shotgun." *R. vol. 3* at 30-31. The court also found that "the possession of this weapon [w]as part of a broader course of conduct that is of considerable seriousness." *Id.* at 31. In particular, the court addressed: (1) the drive-by shooting, discrediting Rollins's claim that he did not know Gross had a gun; and (2) the other illegal activity suggested by several of the items found in Rollins's vehicle, including full-face masks and digital scales. Rollins argues the district court erred in considering the type of gun he possessed and the fact that he facilitated a drive-by shooting as aggravating circumstances on the ground that his offense level was increased as a result of these facts. But the court was permitted to do just that. See *United States v. Barnes*, 890 F.3d 910, 921 (10th Cir. 2018) (noting

“district courts have broad discretion to consider particular facts in fashioning a sentence under 18 U.S.C. § 3553(a), even when those facts are already accounted for in the advisory guideline range” (brackets and internal quotation marks omitted)).

With respect to Rollins's history and characteristics, the court first found he has “a significant criminal history,” with many prior offenses “involving violent conduct” and some involving “abuse of a firearm.” R. vol. 3 at 31. The court also noted “an escalating pattern” of violent conduct connected to his anger management issues. *Id.* at 35. Rollins disputes that characterization, stating his mere presence when Gross “decided to act out in the spur of the moment does not suggest he was on course to continue to engage in more and increasingly violent incidents.” *Aplt. Opening Br.* at 28. But as we held above, the court's finding that Rollins aided and abetted Gross's firing of the handgun or that they jointly undertook the criminal activity was supported by reasonable inferences and not clearly erroneous. Rollins also attempts to minimize his violent past by insisting it “was based primarily on a volatile relationship with a single individual.” *Id.* However, as the district court observed, the fact that several convictions related to “a contentious relationship ... doesn't justify criminal conduct in terms of trying to resolve it.” R. vol. 3 at 32. Moreover, Rollins's violent conduct plainly was not limited to that relationship. *See, e.g.,* R. vol. 2 at 9-10 (describing an incident in which he resisted an officer and had to be physically restrained); *id.* at 11-12 (describing an incident in which he fired a shotgun in the air after his friend got into a verbal altercation with another person).<sup>2</sup>

Rollins's history and characteristics also included mitigating circumstances, such as a “lack of guidance as a youth and the effects of childhood neglect on his behavior and actions in the instant case.” *Aplt. Opening Br.* at 29. He contends the district court failed to adequately consider these circumstances. Rollins cites no authority in support and presents this argument in a “conclusory and perfunctory” fashion. *United States v. Walker*, 918 F.3d 1134, 1153 (10th Cir. 2019) (noting such arguments may be deemed waived). In any event, the district court specifically recognized Rollins's mitigating circumstances. *See* R. vol. 3 at 32-33 (noting that his “anger issues ... very likely are related to [his] generally crappy childhood,” that he “certainly” did not “get appropriate guidance as a youth,” that “[s]ome of the \*263 abuse” he witnessed or suffered “has certainly ... contributed to how he reacts to others”). The court simply found such circumstances did not warrant a lower sentence. *See id.* at 33 (noting his childhood “makes his conduct perhaps more understandable” but “doesn't justify it”). To the extent Rollins suggests the court should have given greater weight to his mitigating circumstances, “reweighing the factors is beyond the ambit of our review.” *Lawless*, 979 F.3d at 856.

The district court next addressed the need for a sentence that afforded adequate deterrence and protected the public, particularly in light of Rollins's “history of violence ... and what appears to be a pattern of it getting more serious as time has gone on.” R. vol. 3 at 34. The court noted that previous incarceration “obviously didn't dissuade [Rollins] from continuing” down a violent path. *Id.* And the court found “particularly troubling” his “very explicit and repeated threats to kill the police who were arresting him” for trespass, which occurred less than a year before the incidents underlying the present case. *Id.* at 35. Although Rollins notes he was not charged with threatening the officers, he fails to explain how the lack of a separate charge has any bearing on the district court's finding that those threats indicate “an anger management problem which is so severe that[,] against the backdrop of the history of abuse of firearms, ... translates into a very substantial risk to the public from having [Rollins] on the streets.” *Id.*

Finally, Rollins contends the district court erred in “not offer[ing] any insight as to why the advisory guideline range was inadequate.” *Aplt. Opening Br.* 27. But Rollins appears to answer his own question: “The district court relied primarily on the nature and circumstances of the offense and Mr. Rollins[']s criminal history as to why a sentence outside the advisory range was warranted.” *Id.* Moreover, he appears to argue that the district court should have treated the guidelines as presumptively reasonable, rendering the court's upward variance presumptively unreasonable. Our case law squarely forecloses that contention. *See United States v. Cookson*, 922 F.3d 1079, 1090 (10th Cir. 2019) (“[W]e do not apply a presumption of unreasonableness to sentences outside the guidelines range.”).

Ultimately, the record confirms the district court “thoroughly weighed each of the[ ] § 3553(a) factors, reached a logical conclusion, and detailed its reasoning.” *Lawless*, 979 F.3d at 856. Rollins has failed to show his sentence was substantively unreasonable, and we find no abuse of discretion by the district court.

## CONCLUSION

The district court's judgment is affirmed.

## All Citations

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## Footnotes

- \* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. 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 *See* Okla. Stat. tit. 21, § 652(B) (describing the felony offense of using a vehicle to facilitate the intentional discharge of a firearm).
- 2 The PSR also lists a conviction for assault and battery that occurred when Rollins was 21 years old. Although the PSR notes that no details of the offense were available, the incident pre-dates Rollins's violent conduct related "to relationship issues," which he asserted began "[a]t age 23." R. vol. 1 at 14.