

NOT RECOMMENDED FOR PUBLICATION

No. 21-5787

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 31, 2022

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
v.)
) STATES DISTRICT COURT FOR
LEONARD JAMES ANDREW, JR.,) THE EASTERN DISTRICT OF
) KENTUCKY
)
Defendant-Appellant.)

O R D E R

Before: CLAY, ROGERS, and STRANCH, Circuit Judges.

Leonard James Andrew, Jr., represented by counsel, appeals his criminal sentence as procedurally unreasonable. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Andrew pleaded guilty to distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2). The district court calculated his advisory sentence range under the United States Sentencing Guidelines to be 210 to 240 months of imprisonment. The court varied downward from that range, imposing a 180-month sentence.

Andrew appeals, arguing that his sentence was procedurally unreasonable because the district court failed to address his request for a downward departure under USSG §§ 5H1.3 and 5K2.13 based on his lifelong intellectual disability.

Procedural reasonableness requires the district court to “properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence.” *United States v. Rayyan*, 885 F.3d

436, 440 (6th Cir. 2018) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). When a district court imposes a sentence outside the guidelines range, the Supreme Court has held that the district court must “ensure that the justification is sufficiently compelling to support the degree of the variance” and noted that “a major departure [from the Guidelines] should be supported by a more significant justification than a minor one.” *Gall*, 552 U.S. at 50.

We generally review a challenge to the procedural reasonableness of a sentence for an abuse of discretion. *United States v. Hills*, 27 F.4th 1155, 1193 (6th Cir. 2022). But when a defendant failed to “object to the adequacy of the court’s explanation [of his sentence], even after the court gave him a chance to do so,” we review that argument for plain error. *United States v. Bradley*, 897 F.3d 779, 785 (6th Cir. 2018) (citing *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc)); *see also United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004).

The government argues that plain-error review applies because Andrew did not raise an objection at the end of the hearing when invited by the district court. Andrew maintains that he preserved his challenge by providing notice of and argument about his request for a downward departure under §§ 5H1.3 and 5K2.13 prior to and at the sentencing hearing.

Yet given that Andrew argues that the district court failed to address his request for a downward departure, he did not “clearly articulate” his objection to his sentence, *Bostic*, 371 F.3d at 872, and thus “deprived the court of its due ‘opportunity to address the error in the first instance,’” *United States v. Igboba*, 964 F.3d 501, 508 (6th Cir. 2020) (quoting *Bostic*, 371 F.3d at 871). Indeed, although counsel stressed Andrew’s intellectual deficit in arguing for a below-guidelines sentence at the sentencing hearing, he raised no objection when the district court inquired after issuing its sentence. *See United States v. Judge*, 649 F.3d 453, 458 (6th Cir. 2011) (“[P]resenting the district court with substantive arguments is not the same as making an objection to the district court’s explanation of its consideration of those arguments.”). Therefore, Andrew’s argument is reviewed for plain error.

Under plain-error review, a defendant must “show (1) error (2) that ‘was obvious or clear,’ (3) that ‘affected defendant’s substantial rights’ and (4) that ‘affected the fairness, integrity, or public reputation of the judicial proceedings.’” *Vonner*, 516 F.3d at 386 (quoting *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)).

Andrew asserts that the district court did not address his request for a below-guidelines sentence based on his intellectual disability. Andrew argued for a downward departure from the guidelines range based on two policy statements in the Sentencing Guidelines. The first, § 5H1.3, “expressly addresse[s] the import of mental disabilities at sentencing,” *United States v. Hunter*, 842 F. App’x 999, 1004 (6th Cir. 2021), by providing that “[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines,” or if the departure would “be appropriate to accomplish a specific treatment purpose,” USSG § 5H1.3. The second, § 5K2.13, provides that courts may depart downward when a defendant suffered from “significantly reduced mental capacity” while committing the offense and that reduced capacity “contributed substantially to the commission of the offense.” USSG § 5K2.13.

In his sentencing memorandum, Andrew, through counsel, asked for a 105-month prison term “[b]ased on his history and characteristics, including his lifelong intellectual disability.” He noted his eighth-grade education and his “extremely low” IQ score of 65, which placed him in the lowest one percent of people his age. He scored similarly on other intellectual tests as well. Andrew also recounted his substance-abuse problems and his childhood abuse by his father. Given those issues, he sought not only a downward departure from the guidelines range but also psychological therapy. Counsel cited the policy statements in §§ 5H1.3 and 5K2.13 and concluded, “There is little doubt Mr. Andrew satisfies” them.

At the sentencing hearing, counsel reiterated these arguments, expounding at length on Andrew’s intellectual limitations in seeking a below-guidelines sentence. Counsel concluded that “his intellectual deficit is significant” and there was “no doubt that it was a primary factor in the commission of this offense.”

After counsel’s statement, the district court explained the reasoning behind its sentencing decision. The court referred to the “policy statements” that Andrew’s attorney brought “to [the court’s] attention.” The court also cited Andrew’s “thoughtful and fairly extensive sentencing memorandum which focuses on your specific characteristics [including] your history and your background and some of the struggles that you’ve had.” The court noted that “there are things in

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your record that are mitigating,” explaining “that I’m going to vary modestly because of it. One of those things is at this critical time in your life in which the people that were supposed to make you feel safe, didn’t.” The district court ultimately varied downward from the 210-to-240-month guidelines range by imposing a 180-month sentence.

Given that explanation, the district court did not plainly err with regard to Andrew’s request for a departure based on §§ 5H1.3 and 5K2.13. The court reviewed his arguments, both written and oral, and referred generally to the policy statements cited by counsel and to counsel’s description of Andrew’s history and characteristics. The court noted that it believed mitigating factors warranted a downward variance. Although the district court emphasized Andrew’s childhood abuse as the main reason for the variance, there is no indication that the court did not review or appreciate his argument based on his intellectual disability. “Although Congress requires a court to give ‘the reasons’ for its sentence, 18 U.S.C. § 3553(c), it does not say that courts must give the reasons for rejecting any and all arguments by the parties for alternative sentences.” *Vonner*, 516 F.3d at 387. The district court’s explanation for its sentence was adequate to permit meaningful appellate review, and it committed no plain error in handling Andrew’s arguments for a downward departure.

Accordingly, we **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk