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**OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT
(NOVEMBER 7, 2022)**

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIE LUMARRIS BAXTER,

Defendant-Appellant.

No. 21-4627

Appeal from the United States District Court for the
Western District of North Carolina, at Charlotte.
Frank D. Whitney, District Judge.
(3:20-cr-00308-FDW-DSC-1)

Before: NIEMEYER and HARRIS, Circuit Judges,
and MOTZ, Senior Circuit Judge.

PER CURIAM:

Willie Lumarris Baxter pleaded guilty, pursuant to a written plea agreement, to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1). At sentencing, Baxter objected to his classification

as an armed career offender under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). The district court overruled Baxter’s objection and sentenced him to the statutory minimum ACCA sentence of 180 months’ imprisonment. On appeal, Baxter challenges the district court’s determination that his conviction in 2010 for five counts of possession with intent to distribute cocaine base counted as separate ACCA predicates because the offenses were committed on separate occasions from one another. We affirm.

We review *de novo* the district court’s determination that a defendant committed ACCA predicate offenses on different occasions, but “review for clear error the district court’s factual findings made incident to this ultimate ruling.” *United States v. Linney*, 819 F.3d 747, 751 (4th Cir. 2016). The Government bears the burden to establish by a preponderance of the evidence that prior offenses were committed on separate occasions. *Id.* We may find clear error only if “on the entire evidence, [we are] left with the definite and firm conviction that a mistake has been committed.” *United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015) (internal quotation marks omitted). Such error occurs when the court’s “factual determinations are not supported by substantial evidence” or “are against the clear weight of the evidence considered as a whole.” *Id.* (internal quotation marks omitted).

A defendant convicted of violating § 922(g)(1) is subject to an enhanced, 15-year mandatory minimum sentence if he has three prior convictions for serious drug offenses that were “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). For ACCA purposes, “offenses occur on occasions different from one another when each offense arose out of a separate

and distinct criminal episode.” *United States v. Tucker*, 603 F.3d 260, 263 (4th Cir. 2010) (internal quotation marks omitted). “That is, each predicate offense must have a beginning and an end, such that they each constitute an occurrence unto themselves.” *Linney*, 819 F.3d at 751 (internal quotation marks omitted). Simply put, offenses occur on different occasions when they involve a separate “event, occurrence, happening, or episode.” *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022).

To determine whether offenses occurred on different occasions, we consider (1) whether the offenses were “committed close in time, in an uninterrupted course of conduct,” or whether they were “separated by substantial gaps in time or significant intervening events”; (2) whether the offenses occurred in physical proximity to one another; and (3) “the character and relationship of the offenses”—whether “they share a common scheme or purpose” or are otherwise intertwined or similar. *Id.* at 1071; *see also United States v. Carr*, 592 F.3d 636, 644 (4th Cir. 2010) (enumerating similar factors); *United States v. Letterlough*, 63 F.3d 332, 335–37 (4th Cir. 1995). “In many cases, a single factor—especially of time or place—can decisively differentiate occasions.” *Wooden*, 142 S. Ct. at 1071. Courts “have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a significant distance.” *Id.* (internal quotation marks omitted).

We conclude that the district court did not err in finding that each of Baxter’s 2010 counts of possession with intent to distribute cocaine base constituted a separate predicate offense. In this case, the fact that Baxter’s drug sales were separated by substantial,

weeks-long gaps in time is outcome determinative. Baxter had ample opportunity to consciously and knowingly decide that he wanted to engage in another sale of cocaine base on each occasion. Simply put, each sale matches the ordinary definition of an individual “occasion.” *See id.* at 1069.

Accordingly, we affirm Baxter’s criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED.

**CRIMINAL JUDGMENT,
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NORTH CAROLINA
(NOVEMBER 2, 2021)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

v.

WILLIE LUMARRIS BAXTER

Case Number. DNCW-320-CR-000308-001

USM Number: 23134-058

JUDGMENT IN A CRIMINAL CASE (For Offenses
Committed On or After November 1, 1987)

Before: Hon. Frank D. WHITNEY,
United States District Judge.

**JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed
on or after November 1, 1987)**

THE DEFENDANT:

Pleaded guilty to count(s) 1.

ACCORDINGLY, the court has adjudicated that
the defendant is guilty of the following offense(s):

Title and Section: 18:922(g)(1) and 924(e)(1)

Nature of Offense

Possession of a Firearm By a Convicted Felon

Date Offense Concluded: 10/06/2019

Counts: 1

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, *United States v. Booker*, 125 S. Ct. 738 (2005), and 18 U.S.C. § 3553(a).

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 10/27/2021

/s/ Frank D. Whitney

United States District Judge

Date: November 2, 2021

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED & EIGHTY (180) MONTHS. THE TERM OF IMPRISONMENT IMPOSED BY THIS JUDGMENT SHALL BE CONSECUTIVE TO ANY UNDISCHARGED TERM OF IMPRISONMENT IMPOSED BY ANY FEDERAL COURT, WHETHER PREVIOUSLY OR HEREAFTER IMPOSED.

- The Court makes the following recommendations to the Bureau of Prisons:
 1. Placed in a facility as close to Gastonia, NC. FCI Bennettsville, FCI Edgefield or FCC Butner as possible, consistent with the needs of BOP.
 2. Participation in any available educational and vocational opportunities.
 3. Participation in the Federal Inmate Financial Responsibility Program.
 4. Participation in any available substance abuse treatment program and, if eligible, receive benefits of 18:3621(e)(2).
 5. Defendant shall support all dependents from prison earnings.
- The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court (unless omitted by the Court).
4. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the discretionary conditions that have been adopted by this court and any additional conditions ordered.

5. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

App.9a

6. The defendant shall report to the probation officer in a manner and frequency as directed by the Court or probation officer.
7. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
8. The defendant shall answer truthfully the questions asked by the probation officer. However, defendant may refuse to answer a question if the truthful answer would tend to incriminate him/her of a crime. Refusal to answer a question on that ground will not be considered a violation of supervised release.
9. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives). If advance notification is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. The defendant shall allow the probation officer to visit him/her at any time at his/her home or any other reasonable location as determined by the probation office, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
11. The defendant shall work full time (at least 30 hours per week) at lawful employment,

actively seek such gainful employment or be enrolled in a full time educational or vocational program unless excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment or education.

12. The defendant shall not communicate or interact with any persons he/she knows is engaged in criminal activity, and shall not communicate or interact with any person he/she knows to be convicted of a felony unless granted permission to do so by the probation officer.
13. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
14. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or lasers).
15. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without first getting the permission of the Court.
16. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath

salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.

17. The defendant shall participate in a program of testing for substance abuse. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).
18. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
19. The defendant shall submit to a search if the Probation Officer has a reasonable suspicion that the defendant has committed a crime or a violation of a condition of supervised release. Such a search may be conducted by a U.S. Probation Officer, and such other law enforcement personnel as the probation officer may deem advisable, without a warrant or the consent of the defendant. Such search may be of any place where evidence of the above may reasonably be expected to be found,

including defendant's person, property, house, residence, vehicle, communications or data storage devices or media or office.

20. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.
21. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.
22. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.
23. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	RESTITUTION	FINE
\$100.00	\$0.00	\$0.00

INTEREST

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

- The court has determined that the defendant does not have the ability to pay interest and it is ordered that:
 - The interest requirement is waived.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- B ■ Payment to begin immediately (may be combined with ■ (D) below); or
- D ■ In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, payments shall be made in equal monthly installments of \$50.00 to commence 60 days

after release from imprisonment to a term of supervision. The U.S. Probation Officer shall pursue collection of the amount due, and may request to modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

- The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order document #8 entered 9/25/2020:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 1301, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____ months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/
Designated Witness

☐ The Court gives notice that this case may involve other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

STATUTORY PROVISION INVOLVED
18 U.S.C. § 924(E)

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2)

As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.) The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law:

(B) the term “violent felony” means any crime punishable by imprisonment For a term exceeding one year, or any act of juvenile delinquency Involving the use or carrying of a firearm, knife, or destructive device that would be punishable

by imprisonment for such term if committed by an adult, that —

- (1) has as an element the use, attempted use, or threatened use of physical force against another; or
 - (2) is burglary, arson, extortion, involves the use of explosives, or otherwise involved conduct that presents a serious potential risk of physical injury to another; and
- (C) the term “conviction” includes a finding that a person has committed An act of juvenile delinquency involving a violent felony.

INDICTMENT FROM PRIOR CRIMINAL CASE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

UNITED STATES OF AMERICA

v.

WILLIE LUMARRIS BAXTER
also known as “Buff”

DOCKET NO. 3:08-cr-189.W

BILL OF INDICTMENT

21 U.S.C. § 846

21 U.S.C. § 841

18 U.S.C. § 2

18 U.S.C. 922(g)

18 U.S.C. 924(c)

THE GRAND JURY CHARGES:

COUNT ONE

From in or about 2006 until on or about April 3, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

did knowingly and intentionally combine, conspire, confederate, and agree with “Killer,” “Fuzz,” “Shaffer,” “Pop,” “Niki,” and other persons known and unknown to the Grand Jury to distribute and to possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount

of cocaine base, also known as “crack cocaine,” a Schedule 11 controlled substance, a violation of Title 21, United States Code, Section 841(a)(1).

Said offense involved at least fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A).

COUNT TWO

On or about January 23, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

did knowingly and intentionally possess with intent to distribute and distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, also known as “crack cocaine,” a Schedule 11 controlled substance, a violation of Title 21, United States Code, Section 841(a)(1), and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least five (5) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Section 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT THREE

On or about February 8, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

**WILLIE LUMARRIS BAXTER,
also known as “Buff”**

did knowingly and intentionally possess with intent to distribute and distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, also known as “crack cocaine,” a Schedule II controlled substance, a violation of Title 21, United States Code, Section 841 (a)(1), and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least five (5) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Section 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT FOUR

On or about February 16, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

**WILLIE LUMARRIS BAXTER,
also known as “Buff”**

did knowingly and intentionally possess with intent to distribute and distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, also known as “crack cocaine,” a Schedule II controlled substance, a

violation of Title 21, United States Code, Section 841 (a)(1), and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Section 841(b)(1)(A), and Title 18, United States Code, Section 2.

COUNT FIVE

On or about March I, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

did knowingly and intentionally possess with intent to distribute and distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, also known as “crack cocaine,” a Schedule II controlled substance, a violation of Title 21, United States Code, Section 841 (a)(1), and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Section 841(b)(1)(A), and Title 18, United States Code, Section 2.

COUNT SIX

On or about April 3, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine base, also known as “crack cocaine,” a Schedule II controlled substance, a violation of Title 21, United States Code, Section 841(a)(1), and did aid and abet other persons known and unknown to the Grand Jury.

Said offense involved at least fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base.

All in violation of Title 21, United States Code, Section 841(b)(1)(A), and Title 18, United States Code, Section 2.

COUNT SEVEN

On or about April 3, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

during and in relation to a drug trafficking crime, that is, possession with intent to distribute cocaine base, a violation of Title 21, United States Code, Section 846, as charged in Count Six, for which he may be prosecuted in a court of the United States, did

knowingly and unlawfully use and carry one or more firearms, to wit, a .40 caliber Ultra Star pistol, a .22 caliber Revelation Model 115 rifle, and a 16-gauge Stevens Model 940 shotgun; and in furtherance of such drug trafficking crime, did possess said firearms.

All in violation of Title 18, United States Code, Section 924(c).

COUNT EIGHT

On or about April 3, 2007, in Gaston County, within the Western District of North Carolina, and elsewhere,

WILLIE LUMARRIS BAXTER,
also known as “Buff”

having been previously convicted of at least one crime punishable by imprisonment for a term exceeding one year, to wit: Possession of Marijuana and Maintaining a Vehicle to Keep/Sell Controlled Substances in Gaston County, North Carolina, on October 26, 1995; Possession with Intent to Sell/Deliver Cocaine in Gaston County, North Carolina, on March 20, 1997; and Possession of a Firearm by a Felon, Maintaining a Place to Keep/Sell Controlled Substances, and Possession of Cocaine in Gaston County, North Carolina, on January 3, 2001; did knowingly and unlawfully possess a firearm and ammunition in and affecting interstate commerce, that is, a .40 caliber Ultra Star pistol, a .22 caliber Revelation Model 115 rifle, a 16-gauge Stevens Model 940 shotgun, and assorted ammunition; all in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL:

Gretchen C.F. Shaffert
United States Attorney

/s/ Steven R. Kaufman
Assistant United States Attorney