In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1417

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY TINSLEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 19-cr-00368 — **James Patrick Hanlon**, *Judge*.

ARGUED DECEMBER 7, 2022 — DECIDED MARCH 13, 2023

Before FLAUM, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges*.

FLAUM, *Circuit Judge*. A jury convicted Gary Tinsley of armed bank robbery, drug possession with intent to distribute, and multiple gun-related crimes. He challenges these convictions on several bases, including the trial judge's evidentiary decisions, the sufficiency of the evidence supporting the jury's verdicts, and the trial judge's calculation of his sentence under the Sentencing Guidelines. Since the district court

did not err in any respect and there was sufficient evidence to convict Tinsley, we affirm.

I. Background

A. Factual Background

The Stock Yards Bank & Trust in Carmel, Indiana was robbed on May 13, 2019. Two men entered the bank, covered head-to-toe with black clothing and face masks. One, wearing a black Indiana Pacers hat, walked up to a teller and presented a demand note. The other robber, carrying a gun, confronted a bank manager. The robbers used zip ties to bind the two employees' hands and stole over $67,000. Surveillance footage shows the robbers exiting the bank and getting into a Chrysler Aspen SUV, which was parked at an angle next to the handicap space in the parking lot. Aspens were only manufactured for three years, and only 673 were registered in Indiana.

While investigating the robbery, police found a blue disposable glove in the bank parking lot, near the handicap spot. DNA analysis revealed Tinsley's DNA on the glove. After a vehicle records search showed a silver Aspen registered to Tinsley, police obtained a search warrant for the vehicle and Tinsley's home.

They conducted a traffic stop in September 2019, while Tinsley was driving his Aspen. Officers found two loaded guns on him. Searches of his vehicle and home revealed numerous other guns, along with extended magazines; baggies of marijuana; and various pills and a powder, each containing

methamphetamine. In addition, officers found blue disposable gloves, a black Pacers hat,[1] black clothing, and zip ties.

Officers also searched Tinsley's phone. Text messages from around the time of the robbery show individuals asking to purchase drugs and Tinsley replying that he did not have any to sell. Then, hours after the robbery, Tinsley contacted a supplier to purchase drugs. Soon after, he messaged his customers that he had restocked.

B. Procedural Background

The indictment charged Tinsley with the following crimes: armed bank robbery (Count One); brandishing a firearm in furtherance of a crime of violence (Count Two); possession of marijuana with intent to distribute (Count Three); possession of methamphetamine with intent to distribute (Count Four); carrying a firearm during and in relation to a drug trafficking crime (Count Five); and felon in possession of a firearm (Counts Six and Seven).

Before trial, Tinsley moved to sever the bank robbery counts (Counts One and Two) from the drug counts. He argued that a joint trial would prejudice his defense for the latter counts in light of the evidence the government intended to submit to prove the bank robbery—particularly text messages concerning drug deals from around the time of the robbery. The court denied the motion before trial, and Tinsley did not

[1] Tinsley argues that his Pacers hat had a white logo while the one worn by the robber had a black logo. There was conflicting testimony at trial concerning the color of the logo on the Pacers hat worn by the robber. Some witnesses identified it as black while others described it as gray or off-white. Even accepting Tinsley's characterization of the evidence, it does not change the outcome of this case.

renew it at the close of evidence. During trial, the government moved to admit the same text messages and Tinsley objected. The court overruled Tinsley's objection and ultimately admitted the texts subject to a limiting instruction to the jury to only consider them for the purpose of determining whether Tinsley had the motive, intent, or plan to commit the robbery.

The government introduced these text messages through FBI Special Agent Secor. Secor testified in a dual capacity; he was both an investigating officer and an expert witness with regard to "narcotics, code language, and distribution activities." In that second capacity, Secor interpreted the text messages Tinsley sent and received around the time of the robbery. When the court designated Secor as an expert witness, it instructed the jury that it was "up to [them] to determine how much weight, if any, to give [his] opinions."

Ultimately, the jury found Tinsley guilty on all seven counts. Tinsley did not object to the court's Sentencing Guidelines calculation and was sentenced to twenty-five years in prison.

II. Discussion

A. Motion to Sever

Federal Rule of Criminal Procedure 14(a) provides that "[i]f the joinder of offenses … in an indictment … appears to prejudice [the] defendant or the government, the court may order separate trials of counts." Fed. R. Crim. P. 14(a). Before trial, Tinsley moved to sever the trials for his robbery and drug offenses, but the court denied his motion.

Generally, "[f]ailure to renew a motion to sever at the close of evidence results in waiver." *United States v. Plato*, 629 F.3d 646, 650 (7th Cir. 2010). This is so "because the close of

evidence is the moment when the district court can fully ascertain whether the joinder of multiple counts was unfairly prejudicial to the defendant's right to a fair trial." *United States v. Cardena*, 842 F.3d 959, 980 (7th Cir. 2016) (quoting *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002)).

Failure to renew the motion at the close of evidence may be excused where "renewal would have been futile." *United States v. Maggard*, 865 F.3d 960, 970 (7th Cir. 2017). Because Tinsley did not renew his motion to sever, he invokes that exception.

Proving futility is a high bar. It is only found "in rare cases where the court makes abundantly clear that filing such a motion would be useless." *Id.* at 971 (citation omitted); *see also United States v. Cardena*, 842 F.3d 959, 980 (7th Cir. 2016). Here, the district court never indicated that renewing Tinsley's motion would be futile. *See Maggard*, 865 F.3d at 970–71 (concluding issue had been waived despite the court repeatedly overruling defendants' objections at trial because "the court [had not] explicitly indicate[d] that such a renewed motion w[ould] not be entertained"). Moreover, at the close of evidence, Tinsley's attorney made an oral motion for acquittal but did not renew the motion to sever. *See id.* (explaining defendants' presentation of other motions at the close of evidence supported finding waiver where defendants did not renew their motion to sever).

As there is no compelling evidence of futility, Tinsley has waived his arguments with respect to his motion to sever.

B. Admission of the Text Messages

The district court admitted into evidence Tinsley's text messages from before and after the robbery. The

government's argument in favor of admission was that the texts show Tinsley's motive to commit the robbery. Tinsley, for his part, says the text messages amount to inappropriate propensity evidence bearing on his drug possession charges—that is, the jury could treat his drug dealing efforts from around the time of the robbery as evidence of his drug possession with intent to distribute in September 2019.

"Decisions to admit evidence are reviewed for abuse of discretion," *United States v. Frazier*, 213 F.3d 409, 414 (7th Cir. 2000), and will "be overturned only if no reasonable person would agree with the trial court's ruling," *Griffin v. Foley*, 542 F.3d 209, 218 (7th Cir. 2008).

"Rule 404(b) excludes relevant evidence of other crimes, wrongs, or acts if the purpose is to show a person's propensity to behave in a certain way …." *United States v. Gomez*, 763 F.3d 845, 855 (7th Cir. 2014) (en banc). However, such evidence is admissible for other purposes, including "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* (quoting Fed. R. Evid. 404(b)(2)).

The court here admitted the text messages, with a limiting instruction, solely for the permissible purpose of determining whether Tinsley "had the motive, intent, or plan to commit armed bank robbery." The messages were relevant in that context, particularly because whether Tinsley committed the robbery was a disputed fact at trial. *See id.* at 857 (considering whether "the non-propensity factual proposition is actually contested in the case"). Indeed, one may infer "motive, intent, or plan" by comparing Tinsley's texts before the robbery (indicating he did not have drugs to sell) to his texts afterwards (seeking to purchase drugs and then attempting to sell them).

Tinsley does not dispute that the texts can go to his motive for the robbery. Instead, he argues that the prejudicial impact of this evidence as to the drug distribution counts outweighs its probative value as to the robbery counts. In doing so, he takes aim at the district court's Rule 403 analysis.

Even after finding the evidence relevant for a non-propensity purpose, the court may exclude it under Rule 403 if its probative value is substantially outweighed by a danger of unfair prejudice. *See Gomez*, 763 F.3d at 856–57. While "other-acts" evidence often "raises special concerns about unfair prejudice," *id.*, that alone is not sufficient to prohibit admission. For example, we have held that it is not an abuse of discretion to admit evidence of defendants' drug use to establish their motive to commit bank robbery, where drug use or possession is uncharged conduct. *See, e.g.*, *United States v. Brooks*, 125 F.3d 484, 499–500 (7th Cir. 1997) (holding that while it was "detrimental to the defendants for the jury to view them as drug addicts," evidence that they used cocaine and "desire[d] to obtain more" was admissible on the basis that it "was relevant to [their] motive" to rob a bank).

Granted, there may be greater potential for prejudice where the "other-acts" evidence supports a propensity inference as to other crimes tried in the same proceeding. *See, e.g.*, *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994) (recognizing that joinder of offenses elevates "the risk of unnecessary unfairness" such that courts "should be especially watchful for … illegitimate cumulation of evidence"). That said, there is no categorical bar to admitting such evidence. Rather, the Rule 403 balancing test invokes the district court's considerable discretion. *See Gomez*, 763 F.3d at 856–57.

Here, the district court, exercising its discretion, determined that the text messages' relevance was not substantially outweighed by unfair prejudice. Nevertheless, it issued a limiting instruction that addressed Tinsley's concern head-on. *See Rollins*, 301 F.3d at 520 ("[T]he risk of prejudice was substantially reduced by limiting instructions given by the district court, which directed the jury to limit their consideration of this evidence to the issue of identity."); *United States v. Mallett*, 496 F.3d 798, 802 (7th Cir. 2007) ("Absent any showing that the jury could not follow the court's limiting instruction, we presume that the jury limited its consideration of the testimony in accordance with the court's instruction."). The court's decision to admit this evidence was far from an abuse of discretion—all the more so because it is quite possible that the text messages *could* have come in as evidence in a separate trial concerning only the drug charges. *Cf. Rollins*, 301 F.3d at 519 (affirming admission of prejudicial "other crimes" evidence in trial on joined offenses "[b]ecause evidence of the [crimes] would have been mutually admissible if the counts had been tried separately").

For all these reasons, we cannot conclude that "no reasonable person would agree with the trial court's ruling." *Griffin*, 542 F.3d at 218.[2]

[2] Tinsley makes another argument based on benign language in the advisory committee notes to Rule 404(b). Essentially, he takes the position that Rule 404(b) does not apply at all when the at-issue evidence concerns a different crime in the same case. We do not read the notes as announcing such a broad rule.

C. Secor's Testimony

Tinsley argues that the district court erred in permitting an expert witness to opine on his intent. During trial, Special Agent Secor testified in a dual capacity, both about facts learned through his investigation of the robbery, as well as in an expert capacity concerning narcotics, code language, and distribution activities. Tinsley contends that Secor improperly testified about Tinsley's intent when he interpreted text messages Tinsley sent and received around the time of the robbery—the same text messages previously discussed.

Tinsley did not object to Secor's testimony on that basis during trial, so our review is for plain error. *United States v. Winbush*, 580 F.3d 503, 510 (7th Cir. 2009). "We will reverse only if the error compromised the defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Rule 704(b) prohibits experts from testifying to "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." *Id.* at 512 (quoting Fed. R. Evid. 704(b)). Even still, an expert can "testify in general terms about facts or circumstances from which a jury might infer that the defendant intended to distribute drugs … as long as it is clear that the opinion is based on the expert's knowledge of common criminal practices." *Id.* (citations and internal quotation marks omitted). In determining on which side of the line the expert testimony falls, "a relevant factor is the degree to which the expert witness states, and/or specifically refers to, the intent of the defendant." *United States v. Mancillas*, 183 F.3d 682, 706 (7th Cir. 1999).

During Secor's testimony, and after he was designated as an expert witness, the government questioned him about the meaning of texts Tinsley exchanged with various individuals. The government cabined much of its questioning with phrases like: "[B]ased on your training and experience, what … was your opinion …?" Secor did not testify directly to Tinsley's intent. Rather, the questioning focused on the meaning of drug dealing terminology used in the text messages. Secor testified that Tinsley arranged to purchase and sell drugs, skirting the issue of whether Tinsley intended to deal drugs.

We have held that the prohibition against expert testimony about a defendant's intent is "implicate[d]" by the expert's use of the word "intended." *United States v. Brown*, 7 F.3d 648, 653 & n.2 (7th Cir. 1993) (finding no error even where agent testified that the drugs were "intended for distribution" because it was clear in context that the testimony was based on the agent's experience); *see also United States v. Blount*, 502 F.3d 674, 679 (7th Cir. 2007) (admitting an officer's testimony as to the defendant's motive where it was clear that it was based on his experience as a police officer, not "special personal knowledge" of the defendant). Tinsley does not point us to Secor's use of the word "intended." Even if he had, the nature of the government's questioning clarified that Secor based his testimony on his expertise.

Furthermore, Rule 704(b) prohibits an expert from "testify[ing] to 'an opinion or inference as to whether the defendant … ha[d] the mental state or condition *constituting an element of the crime charged*.'" *Winbush*, 580 F.3d at 512 (emphasis added) (quoting Fed. R. Evid. 704(b)). Even if we accept Tinsley's proposition that Secor testified about his intent, Secor's

testimony about texts from around the time of the robbery was not admitted to prove an element of any crime charged. Instead, Secor's testimony explained Tinsley's drug dealing activities to establish his motive to rob the bank.

While there is an increased risk of prejudice where a witness has a dual role, a cautionary instruction is sufficient to dissipate the risk. For example, in *United States v. Glover*, we found no error in admitting testimony from a witness who was both an evidence technician working on the case and a fingerprint expert, in part because the district court gave "cautionary instructions" that diminished any prejudice. 479 F.3d 511, 519 (7th Cir. 2007); *see also Blount*, 502 F.3d at 679–80 ("[T]he district court cautioned the jury that it could take [the expert's] opinion or leave it, further reducing any fear of inappropriate influence.").

In this case, the court's instruction achieved the same effect. Most notably, it told the jury that "some of [Secor's] testimony is opinion based on his training and experience, rather than first-hand knowledge, and it will be up to you to determine how much weight, if any, to give those opinions." That sufficed to undercut any danger of the jury misconstruing Secor's testimony. Tinsley's opportunity to cross-examine Secor provided yet another safeguard. *See United States v. Doe*, 149 F.3d 634, 637 (7th Cir. 1998) (noting a "greater danger of unfair prejudice" where an expert is "involved in the defendant's arrest" but that "[s]pecial cautionary instructions" and the "full opportunity for cross-examination" offset the prejudice). Any error was harmless in light of these protections. *See Winbush*, 580 F.3d at 510.

D. Theis's Testimony

Tinsley takes issue with the district court's decision to permit identification testimony from Officer Adam Theis.[3] He argues it was improper for the court to permit Theis, who was not an eyewitness to the robbery, to identify Tinsley through the bank's surveillance footage. Tinsley contends that admitting this evidence was an error because it was "unfounded opinion testimony on the ultimate issue before the jury." As Tinsley failed to object, our review is for plain error. *See, e.g.*, *United States v. Malagon*, 964 F.3d 657, 660 (7th Cir. 2020).

In *United States v. Jett*, we explained that to admit identification testimony based on surveillance footage, there must be a "basis for concluding that the witness 'is more likely to correctly identify the defendant from the photograph than is the jury.'" 908 F.3d 252, 271 (7th Cir. 2018) (quoting *United States v. White*, 639 F.3d 331, 336 (7th Cir. 2011)). But "[w]hen the same match can be made by the jury, 'the witness is superfluous' and the testimony should not be admitted." *Id.* (quoting *United States v. Earls*, 704 F.3d 466, 472 (7th Cir. 2012)). We determined that, in *Jett*, the agent's identification testimony was inappropriate because his "fleeting interaction with [the defendant]" was "not the sort of familiarity … that we have generally thought helpful to a jury under [Federal] Rule [of Evidence] 701." *Id.* at 272. Regardless, we held that admission of the agent's testimony was harmless error in large part because "[t]he jurors observed the surveillance footage on their own."

[3] Tinsley conceives of this argument as a challenge to the sufficiency of the evidence to convict him of robbery; however, it is better understood as another challenge to the district court's evidentiary rulings.

Id.; *see also White*, 639 F.3d at 336 (noting that "the jury was free to disregard" the identification testimony).

Theis's identification of Tinsley was based on his investigation of the robbery as lead detective. This involved examination of evidence and speaking with eyewitnesses. To make the identification, Theis matched clothes and other evidence to the grainy surveillance footage. This fact pattern differs from *Jett*, where the only basis for the agent's identification of the defendant was a short, in-person interaction while executing a search warrant. *Jett*, 908 F.3d at 271–72. Still though, *Jett* collected cases suggesting that while "a witness's experience with the defendant need not be lengthy," identification testimony is "helpful to a jury" when the witness's familiarity is based on longer periods of "close association." *Id.* at 272.

Even if Theis lacked the background to substantiate his eyewitness identification testimony, also like *Jett*, the jury reviewed the surveillance footage and other evidence during the trial. As a result, any error was harmless.

E. Sufficiency of the Evidence

"[W]e review a challenge to the sufficiency of the evidence … to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the government." *United States v. Faulkner*, 885 F.3d 488, 492 (7th Cir. 2018) (quoting *United States v. Webster*, 775 F.3d 897, 904–05 (7th Cir. 2015)). Reversal is warranted "only if 'the fact finder's take on the evidence was wholly irrational.'" *Id.* (quoting *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000)). As a result, "[a] defendant posing this challenge 'faces a nearly insurmountable hurdle.'" *United States v.*

Dinga, 609 F.3d 904, 907 (7th Cir. 2010) (quoting *United States v. Morris*, 576 F.3d 661, 665–66 (7th Cir. 2009)).[4]

1. Methamphetamine Conviction

Tinsley takes aim at the sufficiency of the evidence to convict him for possession with intent to distribute methamphetamine.

"To sustain a conviction for possession of methamphetamine with intent to distribute, the government has to prove the following elements beyond a reasonable doubt: the defendant knowingly and intentionally possessed methamphetamine, he possessed methamphetamine with the intent to distribute it, and he knew the material was a controlled substance." *United States v. Lopez*, 907 F.3d 537, 543 (7th Cir. 2018). Tinsley's only arguments on appeal are that he did not have a large quantity of meth (a bit more than ten grams) and there was no evidence he actually sold the meth.

At trial, a government witness testified that Tinsley possessed a quantity of meth consistent with distribution as opposed to personal use. Evidence of Tinsley's intent to distribute was bolstered by the presence of baggies, a scale, and firearms, which were found alongside the drugs. Tinsley's text messages from the days prior to his arrest in September were also introduced. They show individuals contacting Tinsley to

[4] Tinsley first argues there was insufficient evidence to convict him for possession with the intent to distribute marijuana. However, he does not identify any evidence lacking for his conviction. Instead, he restates his prior arguments concerning the denial of his motion to sever, the admission of Rule 404(b) evidence, and Secor's testimony. We have already affirmed those rulings, so for the reasons previously stated, Tinsley's marijuana conviction stands.

purchase pills, discussion about the quantity needed, and Tinsley arranging the sale.

We have regularly found evidence of this sort sufficient to support an inference of intent to distribute. *See, e.g.*, *United States v. Irby*, 558 F.3d 651, 654 (7th Cir. 2009) (holding that possession of a distribution quantity of crack cocaine packaged in fifty-nine baggies along with a scale was sufficient to infer intent); *United States v. Morris*, 576 F.3d 661, 671 (7th Cir. 2009) (holding that 0.09 grams constituted a distributable amount of drugs where there was other evidence of intent including evidence of prior "probable drug transactions" and other drugs "packaged for resale"); *United States v. Huddleston*, 593 F.3d 596, 601 (7th Cir. 2010) (holding that possession of 5.6 grams of cocaine was sufficient to support an inference of intent to distribute where "the jury heard other evidence from which to infer that intent"). It is beyond debate that "circumstantial evidence is no less probative of guilt than direct evidence," *United States v. Starks*, 309 F.3d 1017, 1021 (7th Cir. 2002), and a conviction for possession with *intent to distribute* does not require an actual sale. We have no doubt this evidence is sufficient to convict Tinsley.[5]

2. Robbery Conviction

Tinsley's last argument regarding the sufficiency of the evidence concerns his bank robbery conviction.

Conviction for bank robbery requires the jury to find that (1) Tinsley took "from the person or presence of another"

[5] Tinsley also challenges the sufficiency of the evidence for his conviction of carrying a firearm during and in relation to a drug trafficking crime (Count Five). His only argument, though, is that if his meth charge is reversed, this charge must be too. In light of the above, Count Five stands.

money belonging to Stock Yards Bank & Trust; (2) "by force or violence, or by intimidation;" and (3) that Stock Yards Bank & Trust was federally insured. *See United States v. Carter*, 410 F.3d 942, 952 (7th Cir. 2005) (referencing 18 U.S.C. § 2113(a)). Tinsley argues the evidence was insufficient to find beyond a reasonable doubt that he was the person who committed the robbery, so, in essence, he disputes the first two elements of the crime.

In support of Tinsley's conviction, the government introduced, in part, the following evidence: (1) text messages from around the time of the robbery, previously discussed; (2) the blue, disposable glove found in the parking lot of the bank that contained Tinsley's DNA, as well as similar blue gloves found at Tinsley's home; (3) evidence that Tinsley owned a silver Aspen and that it was a rare car; (4) Tinsley's clothing matching or resembling clothing worn by the bank robbers; and (5) the zip ties found at Tinsley's home matching or resembling those used to zip tie the bank employees.

Tinsley tries to explain away a few of these pieces of evidence. The main event is the blue glove. He emphasizes that the glove returned positive for three people's DNA—not just his—and claims it was found a distance from where the getaway vehicle was parked.

The fact that Tinsley's DNA was on a glove found outside the bank is significant, particularly given his initial representation during his custodial interview that he never goes to Carmel. (The closest place he identified going was five to ten miles from the bank.) The jury heard extensive testimony from a DNA expert, who explained that the glove contained DNA from two other individuals whose DNA did not match

an existing profile. Even so, the jury found Tinsley guilty of bank robbery.

That a trier of fact could conceive of a theory of innocence based off the evidence does not mean the evidence was insufficient to support a conviction. "[T]he government's proof need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt; the trier of fact is free to choose among various reasonable constructions of the evidence." *Starks*, 309 F.3d at 1022 (quoting *United States v. Harris*, 271 F.3d 690, 703–04 (7th Cir. 2001)).

Tinsley makes much out of precisely where police found the glove—next to the curb in the accessible aisle for the handicap parking space. Trial testimony established that the Aspen was parked at an angle "right next to the handicap space." It is eminently clear that these locations were close to each other. The fact that the glove was not found in the precise location of Tinsley's Aspen does not ruin the government's case or render the jury's guilty verdict "wholly irrational." *United States v. Kapp*, 419 F.3d 666, 672 (7th Cir. 2005) (explaining that a verdict may be overturned "only when the record contains no evidence, regardless of how it is weighed, upon which a rational trier of fact could find guilt beyond a reasonable doubt" (citation and internal quotation marks omitted)).

Tinsley claims there are a host of other material discrepancies too. For instance, he argues that his Aspen is silver, and the one at the crime scene was originally identified as white. Still, the volume of evidence in support of his conviction is significant. *See United States v. Edwards*, 869 F.3d 490, 503 (7th Cir. 2017) (explaining that we will not "reweigh evidence" when examining a jury's verdict). Where, as here, "there is a

reasonable basis in the record supporting the verdict, then … the verdict must stand." *Id.*

Looking at the totality of the evidence that the government presented in this case, it is sufficient to "provide[] a rational basis upon which a jury could find guilt beyond a reasonable doubt." *Starks*, 309 F.3d at 1025. Consequently, we affirm Tinsley's convictions.

F. Guidelines Calculation

We review a district court's application of the Sentencing Guidelines for plain error in cases like this when a defendant inadvertently fails to preserve his objection. *United States v. Boyle*, 28 F.4th 798, 801 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 173 (2022) (mem.). To be plain, the error must be "clear or obvious," "affect[] the defendant's substantial rights," and "seriously impugn[] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hammond*, 996 F.3d 374, 400 (7th Cir. 2021) (quoting *United States v. Goodwin*, 717 F.3d 511, 518 (7th Cir. 2013)).

Tinsley contends that the district court's Guidelines calculation was incorrect because the court double counted the guns that formed the basis for his 18 U.S.C. § 924(c) convictions (brandishing a firearm in furtherance of the bank robbery and carrying a firearm during a drug trafficking crime). The base offense levels for Tinsley's 18 U.S.C. § 922(g) convictions (felon in possession) were increased because he, a felon, possessed eight guns. Two of those guns also formed the basis for his § 924(c) convictions (*i.e.*, the guns used during the bank robbery and in relation to his drug offenses). Tinsley contends this was error—that the district court should have considered

only six guns when calculating the base offense level for his § 922(g) convictions.

Tinsley's primary support for this argument is Application Note 4 to Guideline § 2K2.4, the Guideline applicable to his § 924(c) convictions. It provides: "If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." U.S.S.G. § 2K2.4, cmt. n.4. Tinsley's briefing leaves his argument obscure, but the gist seems to be that his § 922(g) convictions constitute an "underlying offense" for which Application Note 4 prohibits application of "specific offense characteristics" for the use of a gun.

Tinsley fundamentally misunderstands § 924(c) and its applicable Guideline. Section 924(c) is "one of several measures [used] to punish gun possession by persons engaged in crime," specifically crimes of violence and drug crimes. *Abbott v. United States*, 562 U.S. 8, 12 (2010). Guideline § 2K2.4, titled "Use of a Firearm … During or in Relation to Certain Crimes," applies to § 924(c) convictions. Logically then, Application Note 4's use of the phrase "underlying offense" refers to the crime of violence or drug crime the defendant was engaged in while possessing a gun—not to any additional charges resulting from the defendant's possession of that gun, such as being a felon in possession. *See United States v. Foster*, 902 F.3d 654, 657 (7th Cir. 2018) (interpreting "underlying offense" in Application Note 4 to refer to the armed robbery underlying the defendant's § 924(c) conviction, not his additional § 922(g) conviction).

Undeterred, Tinsley argues, and emphasized during oral argument, that the Guideline for § 924(c) convictions—§ 2K2.4—should be read in conjunction with the Guideline for § 922(g) convictions—§ 2K2.1. However, "[w]hen interpreting a specific provision of the sentencing guidelines, we begin with the text of the provision" and consider "th[at] guideline's application notes;" we do not look to "application notes [that] pertain to a different guideline." *United States v. Cook*, 850 F.3d 328, 332 (7th Cir. 2017) (citations and internal quotation marks omitted); *see also, e.g.*, *United States v. Slone*, 990 F.3d 568, 572 (7th Cir. 2021) (applying an application note to § 2K2.1 to evaluate the Guideline sentence for a § 922(g) conviction), *cert. denied*, 211 L. Ed. 2d 70 (Oct. 4, 2021). The only portion of § 2K2.4 that refers to § 2K2.1 is not applicable to Tinsley's case. *See* U.S.S.G. § 2K2.4, cmt. n.4 ("If the … weapon that was … brandished[] [or] used[] … in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under … § 2K2.1(b)(6)(B) … do not apply that enhancement.").

Tinsley points to our decision in *United States v. Bustamante* for support. 493 F.3d 879, 889–90 (7th Cir. 2007) (applying Application Note 4 to § 2K2.4 as support to prohibit double counting the conduct underlying a § 922(g) conviction). However, since *Bustamante*, this Court has "reversed course" on its prohibition against double counting. *Cook*, 850 F.3d at 334 (explaining that in 2012, this Circuit stopped applying the rule that double counting is generally impermissible). Now, "double counting is generally permissible unless the text of the guidelines expressly prohibits it." *United States v. Vizcarra*, 668 F.3d 516, 519 (7th Cir. 2012); *Cook*, 850 F.3d at 334 ("Any language in our earlier cases contradicting our holding in *Vizcarra* is no longer good law."). The state of the law in 2007

motivated our effort to avoid double counting and led us to a misinterpretation of the Guidelines in *Bustamante*, reading Application Note 4 to § 2K2.4 as applying to sentences under § 2K2.1. With the landscape changed, it is evident that the Guidelines do not support such a reading. Consequently, that portion of *Bustamante* must now be considered overruled.[6]

Nothing in § 2K2.1 (the Guideline applicable to Tinsley's § 922(g) convictions), or its application notes, prohibits double counting and neither § 2K2.1 nor § 2K2.4 expressly prohibit using the guns that form the basis for a § 924(c) conviction to increase the defendant's sentence for a § 922(g) conviction. Instead, § 2K2.4 "specifically directs the court *not* to apply any offense-characteristic enhancement for firearm possession to the underlying count"—which, as explained above, is the underlying crime of violence or drug crime. *United States v. Sinclair*, 770 F.3d 1148, 1158 (7th Cir. 2012). As such, the district court's Guidelines calculation did not amount to inappropriate double counting.[7] If the district court made any error in calculating Tinsley's sentence, it is far from plain.[8]

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[6] Because this opinion overrules a portion of *Bustamante*, 493 F.3d at 889–90, we circulated this opinion among all active circuit judges pursuant to Circuit Rule 40(e). No judge voted to rehear this case en banc. Judge Pryor did not participate in the Rule 40(e) consideration.

[7] Tinsley's double-counting argument concerning his guns with large-capacity magazines fails for similar reasons.

[8] As a final note, Tinsley contends the Guidelines are ambiguous and therefore, application of the rule of lenity requires us to remand his case for resentencing. As our analysis suggests, we do not find the Guidelines ambiguous. Thus, the rule of lenity does not apply. *See United States v. Anderson*, 517 F.3d 953, 962 (7th Cir. 2008) (applying the rule of lenity only "when there are serious ambiguities in the text of a criminal statute").

III. Conclusion

For the reasons explained, the judgment of the district court is AFFIRMED.