FILED
United States Court of Appeals
Tenth Circuit

May 1, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANE LEE MACK, JR.,

Defendant - Appellant.

No. 21-4100
(D.C. No. 4:18-CR-00054-DN-1)
(D. Utah)

ORDER AND JUDGMENT[*]

Before **HARTZ**, **KELLY**, and **MORITZ**, Circuit Judges.

A jury convicted Shane Mack of possessing counterfeit obligations or securities, unlawfully transporting a debit card, and being a felon in possession of firearms and ammunition. The district court sentenced Mack to 84 months in prison, slightly below the advisory sentencing range of 87 to 108 months under the United States Sentencing Guidelines (U.S.S.G. or the Guidelines). Mack now appeals his sentence. He argues that the district court (1) plainly erred in failing to group his fraud-related offenses with his felon-in-possession offense under U.S.S.G. § 3D1.2(c) and (2) erred in applying a two-level enhancement under U.S.S.G. § 3A1.1(b)(1) for

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

defrauding a vulnerable victim. But it is not clear or obvious that Mack's fraud and felon-in-possession offenses are sufficiently closely related to warrant grouping them, and the district court properly determined that one victim of Mack's fraudulent scheme was unusually vulnerable. We therefore affirm.

Background

According to the evidence at Mack's trial, Mack ran a scam on Facebook. Posing as a woman named "Rue Lavish," Mack targeted young women with a get-rich-quick "business opportunity." R. vol. 3, 653. To lure victims, Mack flaunted a life of luxury and posted pictures of high-end cars, cash, checks, and bank statements showing high balances. "I can get you paid [$]9,000 today," he advertised. *Id.* at 485. The catch: When someone expressed interest, Mack would reveal that they could receive the money only if they gave him their debit card, bank account information, and online banking credentials.

When victims fell for this scam and handed over access to their bank accounts, Mack would deposit counterfeit checks and money orders into the bank accounts he now controlled and then promptly withdraw the funds before the banks could detect any fraud. Mack created the checks from whole cloth using blank check stock, check-writing software, and a printer. As for the money orders, he bought them from the post office for a few dollars and then altered them by scratching off the purchase price with sandpaper and printing over the sanded-down number with a larger amount. When the banks later discovered that the checks and money orders were

fraudulent, they would reverse the deposits. But by then, Mack had made off with the money, leaving the account holders with negative balances.

Law enforcement in Utah caught wind of the fraudulent scheme when an officer pulled Mack over for a traffic stop and searched his car. Inside, the officer discovered checks, money orders, a printer, sandpaper, and other items used in the scheme. The officer also found two firearms and some ammunition. Ultimately, the government charged Mack in an information with four counts: (1) possessing a counterfeit United States obligation or security, (2) possessing a counterfeit security of an organization, (3) unlawfully transporting a debit card, and (4) being a felon in possession of firearms and ammunition. At trial, various witnesses testified about these facts, including Leah Haraway, who was Mack's girlfriend and accomplice, and Cheyenne Hunt, one of the victims of the scam.[1]

The jury convicted Mack on all four counts. Before sentencing, the United States Probation Office prepared a presentence investigation report (PSR). To calculate Mack's Guidelines sentencing range, the PSR grouped the three fraud-related counts together, finding them closely related under U.S.S.G. § 3D1.2(d) because the offense level for each count was determined largely based on the total amount of loss. This meant there were two groups of offenses: the fraud counts and the felon-in-possession count. From there, the PSR calculated the adjusted offense level for each group. For the felon-in-possession count, the PSR calculated an

[1] Haraway pleaded guilty to possessing counterfeit obligations or securities and received three years of probation.

adjusted offense level of 22 (from a base level of 20 plus a two-level enhancement for obstructing justice). For the fraud counts, the PSR calculated an adjusted offense level of 19, which included a two-level enhancement under U.S.S.G. § 3A1.1(b)(1) for defrauding a vulnerable victim.[2] Adjusting for multiple counts, the PSR then determined that the total offense level was 24. And with Mack's criminal-history category of III, that total offense level produced a Guidelines sentencing range of 63 to 78 months.

Both parties objected to the PSR. The government challenged the PSR's failure to apply a four-level enhancement to the felon-in-possession count under U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm "in connection with another felony offense"—namely, the fraud counts. In support, the government asserted that Mack was a "fraudster with a gun," noting that he posted pictures of guns to the Rue Lavish Facebook page and stated that he was a "'plug' (i.e., source)" for guns and "stay[ed] strapped," meaning he regularly carried a gun. R. vol. 1, 434. Mack opposed the government's position but asserted that if the district court decided to apply the enhancement, then it needed to group the felon-in-possession count with the fraud counts under § 3D1.2(c) because the former would encompass conduct "treated as a specific offense characteristic in . . . the guideline applicable to" the latter. R. vol. 3, 883. Further, Mack objected to the PSR's application of the

[2] The other enhancements to the base level of 7 were four levels for the total loss amount; two levels for using sophisticated means; two levels for possessing counterfeit money orders, fraudulent checks, and others' debit cards; and two levels for obstructing justice.

vulnerable-victim enhancement under § 3A1.1(b)(1), arguing primarily that it should not apply because Hunt was not "unusually vulnerable," as required by the guideline's commentary. § 3A1.1 cmt. n.2.

The district court sustained the government's objection, overruled Mack's objection, and rejected Mack's grouping argument. That meant the district court accepted the PSR's sentencing recommendations with one exception—it added four levels to the felon-in-possession count's offense level under § 2K2.1(b)(6)(B). The adjusted offense level for that count therefore rose from 22 to 26, and the adjusted offense level for the grouped fraud counts remained 19. To determine the combined offense level, the district court took the higher offense level—26 for the felon-in-possession count—and added one level as directed by U.S.S.G. § 3D1.4. *See* § 3D1.4(a)–(b) (directing court to (1) assign one unit for group with highest offense level, (2) assign one-half unit for group that is "[five] to [eight] levels less serious," and then, (3) when the total number of units is one and one-half, add one level to highest offense level). With a total offense level of 27, Mack's Guidelines sentencing range was 87 to 108 months. In the end, the district court imposed a slightly below-range, 84-month prison sentence because it was "troubled" by the § 2K2.1(b)(6) enhancement, given that Mack's firearm possession was "relatively incidental" to his Facebook scam. R. vol. 3, 901, 919.

Mack appeals.

Analysis

Mack challenges (1) the district court's failure to group his felon-in-possession and fraud counts together and (2) its decision to impose the vulnerable-victim enhancement. We take these two issues in turn.

I. Grouping

Mack first contends that the district court erred in not grouping his felon-in-possession count with his fraud counts under § 3D1.2(c).[3] Grouping under the Guidelines aims "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct" in multiple-count cases. U.S.S.G. ch. 3, pt. D, introductory cmt. To that end, § 3D1.2 generally requires grouping "[a]ll counts involving substantially the same harm . . . into a single [g]roup." As relevant here, subsection (c) states that counts involve substantially similar harm "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." § 3D1.2(c).

Mack's overall grouping argument presents what he calls "two intertwined

[3] According to Mack, doing so would have reduced his total offense level by one because when counts are grouped together under § 3D1.2(c), the offense level for the group is "the highest offense level of the counts in the [g]roup." U.S.S.G. § 3D1.3(a). And here, the count with the highest offense level was the felon-in-possession count, which had an offense level of 26. Thus, Mack says, grouping all counts under § 3D1.2(c) would have lowered his total offense level from 27 to 26, thereby reducing his Guidelines range to 78–97 months.

procedural errors," and he concedes that he raised neither of them below.[4] Aplt. Br. 13. We therefore review for plain error. *See United States v. Wolfname*, 835 F.3d 1214, 1217 (10th Cir. 2016). To prevail, Mack must show "(1) an error occurred; (2) the error was plain; (3) the error affected [his] substantial rights; and (4) the error 'seriously affected the fairness, integrity, or public reputation of a judicial proceeding.'" *Id.* (quoting *United States v. Makkar*, 810 F.3d 1139, 1144 (10th Cir. 2015)). For an error to be "plain," it must be "clear or obvious under current law." *United States v. Silva*, 981 F.3d 794, 797 (10th Cir. 2020) (quoting *United States v. Poe*, 556 F.3d 1113, 1129 (10th Cir. 2009)). Such clarity or obviousness may come either from on-point Supreme Court or Tenth Circuit decisions or from the plain language of the Guidelines. *Id.*

The first step of Mack's argument concerns firearms enhancements. Recall that the district court applied an enhancement to the felon-in-possession count based on a finding that Mack possessed the firearm "in connection with another felony offense"—that is, the fraud counts—under § 2K2.1(b)(6)(B). Although Mack objected to this enhancement below, he does not renew such challenge here. Instead, he shifts gears and contends that once the district court found his firearm possession satisfied the "in connection with" requirement under § 2K2.1(b)(6)(B), it should have then turned to the fraud counts and applied what he contends is a similarly worded

[4] Although Mack invoked § 3D1.2(c) below, he argued that this guideline required grouping all counts together based only on the enhancement in § 2K2.1(b)(6)(B), a position he abandons on appeal.

enhancement in § 2B1.1(b)(16)(B) based on that finding. *See* § 2B1.1(b)(16)(B) (providing for two-level increase "[i]f the offense involved . . . possession of a dangerous weapon (including a firearm) in connection with the offense"). We will assume, for purposes of argument, that Mack is correct at this first step and that the district court plainly erred in failing to apply this enhancement.

At the second step of his argument, Mack argues that once the district court enhanced the grouped fraud counts under § 2B1.1(b)(16)(B), it was then required to group all his counts under § 3D1.2(c) because the felon-in-possession count embodied conduct—firearm possession—treated as a specific offense characteristic of the fraud counts. To be sure, the plain language of § 3D1.2(c) facially supports Mack's position. That is likely why Mack relies solely on the Guidelines' text to assert that any error was plain: He contends that the plain language of § 3D1.2(c) clearly and obviously mandates grouping his counts together because the firearm possession is treated as a specific offense characteristic of the fraud counts under § 2B1.1(b)(16)(B).

But any such clarity is significantly muddied by the application note accompanying § 3D1.2(c). *See Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). This commentary explains that the purpose of the grouping rule in subsection (c) is to "prevent[] 'double counting' of offense behavior." § 3D1.2 cmt. n.5. And importantly, it states that

§ 3D1.2(c) "applies only if the offenses are closely related." *Id.*

Here, it is not clear or obvious that Mack's fraud and felon-in-possession offenses are closely related.[5] These offenses involved different conduct, different victims, and different harms. *See, e.g.*, *United States v. Peterson*, 312 F.3d 1300, 1304 (10th Cir. 2002) (concluding that tax evasion and mail fraud were not closely related offenses under § 3D1.2(c) because they involved different victims, behaviors, and harms). Mack's fraud offenses stem from his operation of a fraudulent-check scheme that caused financial harm to individuals who fell prey to the scam, various banks, and the United States. In contrast, the felon-in-possession offense arose from Mack's possession of firearms and "implicates the societal interest in keeping firearms from those unqualified to possess them." *United States v. Baeza-Suchil*, 52 F.3d 898, 900 (10th Cir. 1995).

Moreover, there is no evidence that Mack used a firearm on anyone who fell prey to his fraudulent scheme. *Cf.* § 3D1.2(c) cmt. n.5 ("[U]se of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under [§ 3D1.2(c)]."); *United States v. Rafal*, 748 F. App'x 813, 816–17 (10th Cir. 2018) (finding plain error in failure to group bank-robbery and felon-in-possession counts under § 3D1.2(c) where district court "applied a five-level

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[5] We reject the government's assertion that Mack has forfeited appellate consideration of whether his offenses are closely related by failing to brief the issue. In his opening brief, Mack specifically argues that "based on the district court's findings . . . , the use of the firearms in connection with the fraud offenses and the unlawful possession of the firearms were 'sufficiently related to warrant' grouping of all counts." Aplt. Br. 17 (quoting § 3D1.2(c) cmt. n.5).

enhancement to the bank-robbery count because [defendant] possessed a firearm" during the robbery, noting "the guideline's application note specifically addresses [defendant]'s situation").[6] The absence of such evidence—which could have established that Mack's offenses were sufficiently related to justify grouping them under § 3D1.2(c)—is telling, particularly on plain-error review.

Consider, for instance, our decision in *United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000). There, the defendants carjacked a manager of a check-cashing business, forced her into the passenger seat of her car, and then drove to the business so that they could get inside and rob it. *Id.* at 1289. Even though the carjacking facilitated the robbery, we held that the district court did not plainly err in finding that these offenses were not closely related. *Id.* at 1297–98. If the defendants "had carjacked [the manager] and robbed *her*," we explained, "then the offenses would clearly need to be grouped." *Id.* at 1297. But because "the crimes [were] distinct and separated by different underlying facts" and harms, we determined that it was not plain error for the district court to conclude they were not "closely related for purposes of grouping" under § 3D1.2(c). *Id.* Here, the district court found that Mack's firearm possession facilitated his fraud offenses, and we assume for purposes of analysis that there is an enhancement to the fraud offenses for possession of a firearm in connection with the fraud. Nevertheless, on plain-error review, it is not clear or obvious in light of well-settled law that Mack's felon-in-possession offense

[6] We cite unpublished cases for their persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

and fraud offenses are closely related because they constitute distinct crimes and caused different harms.

For the first time in his reply brief, Mack argues that § 3D1.2's commentary does not actually require that offenses be closely related as a prerequisite to grouping under subsection (c). In his view, the "better understanding" is that two offenses are "necessarily 'closely related' when the specific offense characteristic in question applies." Rep. Br. 4. Otherwise, Mack asserts, the commentary impermissibly adds to—rather than interprets or explains—§ 3D1.2(c)'s text, exceeding its authority under *Stinson*. Mack waived this argument, however, by failing to make it in his opening brief. *See United States v. Pickel*, 863 F.3d 1240, 1259 (10th Cir. 2017) ("[A]ppellate courts will not entertain issues raised for the first time on appeal in an appellant's reply brief." (quoting *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006))). But even if he had not waived the issue, we have already interpreted the commentary as requiring that offenses be closely related for the grouping rule in § 3D1.2(c) to apply. *See Malone*, 222 F.3d at 1297; *Peterson*, 312 F.3d at 1304.[7] Other circuits have reached the same conclusion. *See, e.g.*, *United*

[7] To be sure, in *Malone* and *Peterson*, we also found that no count embodied conduct treated as a specific offense characteristic of another count—a determination that could have resolved the grouping issue on its own. *See Malone*, 222 F.3d at 1296–97; *Peterson*, 312 F.3d at 1303–04. But in both cases, we separately concluded that the district court did not reversibly err in failing to group the offenses at issue because they were not closely related, emphasizing the commentary that § 3D1.2(c) applies only to closely related counts and deferring to it. *See Malone*, 222 F.3d at 1297–98; *Peterson*, 312 F.3d at 1304. Additional or alternative rationales such as these, "providing as they do further grounds for the [c]ourt's disposition, ordinarily cannot be written off as dicta." *Anderson Living Tr. v. Energen Res. Corp.*, 886 F.3d

States v. Martin, 363 F.3d 25, 42 (1st Cir. 2004) ("[E]ven when one count embodies conduct treated as an adjustment to a second count, the counts cannot be properly grouped under § 3D1.2(c) unless they are 'closely related.'"); *United States v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (same); *United States v. Vucko*, 473 F.3d 773, 779–80 (7th Cir. 2007) (same); *United States v. Doxie*, 813 F.3d 1340, 1344 (11th Cir. 2016) (same). Moreover, *Malone* specifically held that it is not plain error for a district court to determine that offenses are insufficiently closely related to warrant grouping them under § 3D1.2(c) when, as here, "the crimes are distinct and separated by different underlying facts." 222 F.3d at 1297. Accordingly, the district court did not plainly err in failing to group Mack's offenses under § 3D1.2(c).[8]

II. Vulnerable-Victim Enhancement

Mack also argues that the district court erred in imposing the two-level enhancement under § 3A1.1(b)(1) for defrauding a vulnerable victim. When reviewing a district court's application of the Guidelines, "we review legal questions

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826, 835 (10th Cir. 2018) (italics omitted) (quoting *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008)); *see also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

[8] As a result, we need not address the government's argument that Mack's "subtraction-by-addition approach to sentencing" amounts to "a request to absolve him of punishment for the fraud he committed." Aplee. Br. 39, 41. We do, however, pause to note that the government further recognizes that even if the district court had applied the two-level enhancement in § 2B1.1(b)(16)(B), raising the fraud group's offense level from 19 to 21, Mack's combined offense level would have remained 27 (unless, of course, his counts were then grouped together). That's because 19 and 21 are both "[five] to [eight] levels less serious" than the felon-in-possession's offense level of 26. § 3D1.4(b). Accordingly, applying the two-level enhancement, on its own, would not have increased Mack's Guidelines range.

de novo and factual findings for clear error, giving due deference to the district court's application of the [G]uidelines to the facts." *United States v. Halliday*, 665 F.3d 1219, 1222–23 (10th Cir. 2011) (quoting *United States v. Mollner*, 643 F.3d 713, 714 (10th Cir. 2011)).

Section 3A1.1(b)(1) directs district courts to increase a defendant's offense level by two "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." An application note to the guideline defines a "vulnerable victim" as a person "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." § 3A1.1 cmt. n.2(B). The district court imposed this enhancement here based on a finding that Hunt—a victim of Mack's scheme who testified at trial—was a vulnerable victim. Because this issue turns in part on Hunt's testimony, we begin by recounting it here.

Hunt testified that she learned about "Rue Lavish" a few weeks before her high-school graduation when she saw a video on Facebook of a friend "flashing money." R. vol. 3, 632. When that friend said she received the money from Rue Lavish, Hunt sent Rue Lavish a message seeking more information. Rue Lavish responded, "Good morning honey, do you currently work or bank?" *Id.* at 634. Hunt shared that she worked a minimum-wage job at a movie theater and asked: "[W]hat do you mean by bank? Bank as in making a lot of money or bank as in having a bank account?" *Id.* at 635. Rue Lavish clarified by asking if Hunt had a bank account and stating that she could earn $9,000 in just three days. Rue Lavish provided a vague

description of how the process worked: "It's basically like you did under[-]the[-]table work for my company[,] and we owe you back pay for you not receiving your paycheck in the mail. So we issue and file a claim. I do all the paperwork . . . [, and] then we split the funds." *Id.* at 638. Believing this was a legitimate opportunity, Hunt handed over her account information. She later explained her conduct to the jury by describing herself as "a gullible and naive 18-year-old" who "knew nothing about what a scam was." *Id.* at 636.

Soon after Hunt handed over access to her bank account, Hunt's bank notified her that the bank was closing the account because someone had used it for unlawful activity. Undeterred by this setback, Mack (still posing as Rue Lavish) instructed Hunt to open new accounts with two credit unions. Hunt testified that she did so because she was "broke," "living paycheck to paycheck," and "needed extra money" to support herself and her four younger siblings. *Id.* at 639. Although she saw posts on Facebook warning this was a scam, Hunt testified that she "was buried too deep in the process to realize what was going on." *Id.* at 640. And Rue Lavish kept reassuring her that she would receive her share. Hunt eventually caught on when, against Rue Lavish's instructions and about six months into the scam, she logged into one of her credit-union accounts and discovered a negative balance of over $5,500.

At sentencing, based on Hunt's testimony and other trial evidence, the district court found that Mack targeted young, inexperienced women who were "naive enough and gull[i]ble enough" to believe his Facebook scam would work and were "desperate" enough to try it. *Id.* at 892. The district court also specifically identified

Hunt as a victim Mack knew was vulnerable, finding that Mack was aware of her financial circumstances, her lack of financial knowledge, and her young age.

On appeal, Mack contends that the district court erred in concluding that Hunt was a vulnerable victim. In so doing, Mack takes a piecemeal approach, arguing that several characteristics the district court relied on, such as her age, are insufficient standing alone to establish that Hunt was unusually vulnerable. To be sure, "[t]he focus of the inquiry must be on the 'victim's personal or individual vulnerability.'" *United States v. Brunson*, 54 F.3d 673, 676 (10th Cir. 1995) (quoting *United States v. Lee*, 973 F.2d 832, 835 (10th Cir. 1992)). "[I]t is not enough that a victim belongs to a class generally considered vulnerable." *United States v. Scott*, 529 F.3d 1290, 1300–01 (10th Cir. 2008). Thus, for instance, we have said that "the label 'young[]' is too vague, standing alone, to provide the basis for a finding of unusual victim vulnerability." *United States v. Smith*, 930 F.2d 1450, 1455 (10th Cir. 1991).

Here, although the district court applied the vulnerable-victim enhancement based at least in part on Hunt's age, it also looked to several other vulnerabilities that Mack exploited, including her financial circumstances, desperation for money, naiveté, and lack of financial knowledge. *Cf. United States v. Williams*, 21 F. App'x 824, 826 (10th Cir. 2001) (finding vulnerable-victim enhancement appropriate where in addition to being elderly, victims of investment scam were "unexperienced concerning investment matters" and "lacked sophisticated financial knowledge"); *United States v. Johns*, 686 F.3d 438, 460 (7th Cir. 2012) (agreeing with two other circuits that "financial desperation [alone] is enough to make one vulnerable to

financial crimes"). Recognizing as much, Mack pivots and asserts that the district court erred in finding Hunt was naive and lacked financial knowledge.[9] But the evidence supports these factual findings. Hunt was a recent high-school graduate working a minimum-wage job at a movie theater. And Hunt herself testified at trial that she was "gullible," "naive," and "knew nothing about what a scam was." App. vol. 3, 636. Mack counters that other evidence shows Hunt received ample information that he was engaged in unlawful conduct, calling into question her naiveté. He also asserts that the evidence of Hunt's financial ineptitude is thin, noting that she was employed, had a bank account, and figured out how to set up new credit-union accounts on her own. But even if multiple reasonable inferences may be drawn from the evidence, "we view the evidence and inferences therefrom in the light most favorable to the district court's determination." *United States v. Leib*, 57 F.4th 1122, 1126 (10th Cir. 2023) (quoting *United States v. Hoyle*, 751 F.3d 1167, 1174 (10th Cir. 2014)). In that light, the evidence supports the district court's factual findings. The district court therefore did not err in finding Hunt unusually vulnerable and applying the vulnerable-victim enhancement.

Conclusion

Because the district court (1) did not plainly err in failing to group Mack's felon-in-possession and fraud offenses under § 3D1.2(c), even if the enhancement

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[9] The government asserts that Mack's challenge to these factual findings should be subject to plain-error review rather than clear-error review because he did not object to them below. But we need not decide which standard applies because Mack's challenge fails under either.

under § 2B1.1(b)(16)(B) applied to the fraud offenses, and (2) did not err in applying the vulnerable-victim enhancement under § 3A1.1(b)(1), we affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge