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United States Court of Appeals
Tenth Circuit

April 24, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LOUGARY EDDINGTON, a/k/a Lougary Marquin Eddington,

Defendant - Appellant.

No. 22-1076

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CR-00278-DDD-3)

Robert T. Fishman, Ridley, McGreevy & Winocur, PC, Denver, Colorado, appearing for Appellant.

J. Bishop Grewell, Assistant United States Attorney (Cole Finegan, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Colorado, Denver, Colorado, appearing for Appellee.

Before **MORITZ**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Lougary Eddington appeals the 84-month sentence he received after pleading guilty to one count of being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1)—a sentence at the bottom of the 84–105-month Guidelines range,

as calculated by the United States District Court for the District of Colorado. Eddington contends that the district court erred in imposing this sentence because it (1) improperly applied a four-level enhancement to his base offense level for possessing ammunition "in connection with another felony offense" under U.S.S.G. § 2K2.1(b)(6)(B), and (2) failed to adequately consider the need to avoid sentencing disparities between Eddington and one of his codefendants.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that Eddington waived his challenge to the district court's consideration of sentencing disparities, but that the district court procedurally erred when it applied a four-level enhancement. Accordingly, we vacate Eddington's sentence and remand for resentencing.

I. BACKGROUND

A. Factual Background

On July 1, 2020, outside of a liquor store in Denver, Colorado, Eddington and Zyaire Williams were involved in a shootout which resulted in their fellow gang member, Daniel Epperson, being shot and killed. All three men were members of the Eastside Crips street gang. The shootout was the result of their encounter with Roy Fernandez, who was a Westwood HUD gang member.

Video footage from multiple angles inside the liquor store prior to the shooting shows Fernandez at the checkout counter as Eddington and Williams enter through the front door. Williams and Fernandez look each other over and briefly exchange words as Williams walks towards the counter and Fernandez walks towards the front door. When

Fernandez reaches the front door, he and Eddington similarly look each other over. Eddington, who had removed a beverage from a cooler near the front door, then joins Williams at the counter, and Fernandez walks just out of the front door but remains facing inward.

Moments later, Fernandez reenters the store, approaches Eddington and Williams, and becomes animated, making hand movements and facial expressions while talking directly to Williams. Walking backwards and still talking to Williams, Fernandez again exits the store through the front door. Williams turns to talk to Eddington and then follows Fernandez and pulls his hoodie over his head as he leaves the store. According to Eddington, Williams asked him something to the effect of "Bro, is you on this?," meaning "open your eyes" or, as interpreted by the interviewing officer to mean: "it's about to go down." Video Exhibit Interview at 17:19:55. Eddington, who is still in the store, returns his beverage to the cooler and then proceeds toward the front door but does not fully exit.

Outside, Fernandez walks left out of the door towards the store's parking lot on the side of the store, and Williams walks out onto the sidewalk, takes a few steps in the opposite direction of Fernandez, and then walks towards a white vehicle parked along the curb directly in front of the store. At the same time, Epperson exits from the passenger door of the white vehicle. Together, Williams and Epperson move towards Fernandez, and, at that point, they exchange gunfire. All the while, Eddington is either inside the

store or standing behind the store's ajar front door (he later states that he could see Fernandez to his left from around the door).

Epperson is struck by a bullet as he is discharging his firearm, and he falls to the ground in the middle of the sidewalk, between the white vehicle and the front door of the store. Williams runs behind another parked car on the street. Eddington runs fully back into the store. The shooting pauses.

Moments later, Eddington runs out of the store with a gun in his hand, crouches facing the direction of Fernandez (although, at this point, Fernandez was out of view), and then runs in the opposite direction of Fernandez. He loses his cap on the ground near Epperson, gets behind a parked car (at which point Fernandez comes back into his view), and he and Fernandez exchange gunfire. Eddington then runs back to where Epperson is lying and grabs his cap.

After a failed attempt to load Epperson into the white vehicle, Eddington and Williams drive away. Paramedics arrived shortly thereafter and transported Epperson to a local hospital, where he died from his injuries.

B. Procedural History

Eddington, Williams, and Fernandez were charged in a single indictment. Without entering into a plea agreement with the government, Eddington pleaded guilty to the sole charge against him, i.e., being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1). The presentence investigation report (the PSR) calculated his base offense level at 20 and included a four-level enhancement pursuant to U.S.S.G

§ 2K2.1(b)(6)(B) for having "possessed . . . ammunition *in connection with* another felony offense," which the PSR identified as attempted second-degree assault under Colorado Revised Statute § 18-3-203(1)(b) and (1)(d). ROA Vol. II at 9–10 (emphasis added). The PSR also applied a three-level decrease for acceptance of responsibility, and it arrived at a total offense level of 21. With a calculated criminal-history category of VI, the PSR settled on a Guidelines sentencing range of 77–96 months' imprisonment. Eddington objected to these calculations.

First, Eddington objected to the offense-level computation in the PSR. In a written objection to the PSR, he argued that the four-level enhancement should not apply "because he acted in self-defense and defense of others," which is an affirmative defense to attempted second-degree assault under Colorado law.[1] ROA Vol. I at 48–49. Thus, he argued, U.S.S.G § 2K2.1(b)(6)(B) was inapplicable and "the appropriate total offense level [was] 17." *Id.* at 49. The government disagreed, arguing that Eddington did not act in self-defense but was a mutual combatant.

The district court overruled Eddington's objection to the four-level enhancement. At the sentencing hearing, the district court concluded that Eddington reasonably feared for his own life. Nonetheless, the court concluded that Eddington qualified as a mutual combatant and then determined that the four-level enhancement applied because

[1] It appears that Eddington has dropped his pursuit of "defense of others" argument, as he offers no discussion about it on appeal.

Eddington "kn[e]w what was going on, he was part of the people who started this fight, and it seems to me that self-defense isn't available to a person who entered into mutual combat." ROA Vol. IV at 53. In addition, the district court *sua sponte* concluded that there was "an additional potential reason that that enhancement should apply," namely that Eddington possessed ammunition (the federal offense at issue) in connection with illegally possessing a firearm in violation of Colorado law.[2] *Id.* at 32. Eddington's counsel responded to the district court's *sua sponte* consideration of this state offense as satisfying the "in connection with" requirement largely by requesting additional time to brief this new rationale.

Second, through counsel during his sentencing hearing, Eddington argued that the four-level enhancement would create a "disparate sentence" because Williams did not also receive the enhancement. *See* 18 U.S.C. § 3553(a)(6); ROA Vol. IV at 51. The district court agreed that it did not make sense for Eddington to have a longer sentence than Williams. *See* ROA Vol. IV at 52 ("[I]t seems potentially a disparate sentencing issue to apply self-defense in other circumstances but not to Mr. Eddington and to end up him having potentially . . . a higher sentence than Mr. Williams, who obviously is the one

[2] The government charged Eddington with illegally possessing ammunition—not a firearm—because it "did not recover his gun" and, therefore, "could not prove the interstate nexus needed to charge Eddington with being a felon in possession of a firearm at the federal level." Aple. Br. at 18. The state never charged Eddington with being a felon in possession of a firearm either. However, the video footage clearly shows Eddington in possession of a firearm.

who sort of followed Mr. Fernandez out and maybe made things worse."); *see also id.* at 66 ("I in a lot of ways agree . . . that it doesn't make sense for Mr. Eddington to have a longer sentence, for example, than Mr. Williams."). The court determined, however, that "the place probably to take that disparity into account is in the sentencing rather than in the calculation of the guidelines." *Id.* at 52.

Ultimately, the district court opted to apply the four-level enhancement and determined that Eddington's advisory Guidelines range was 84–105[3] months' incarceration. Then, considering the factors in § 3553(a), it imposed a sentence at the bottom of that range: 84 months. The district court noted that the Guidelines provided for a "long" and "significant" sentence, "especially given [the district court's] decision on the self-defense" argument. *Id.* at 83. The district court concluded that an 84-month sentence was justified after considering the factors outlined in 18 U.S.C. § 3553(a). The parties indicated that they had nothing further to address, and the district court entered judgment. Eddington timely appealed.

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[3] While the PSR indicated that Eddington would receive a three-level deduction for acceptance of responsibility, as the district court noted, "[t]he government did not grant a one-level decrease for acceptance of responsibility pursuant to §3E1.1(b)." ROA Vol. III at 3; *see also* ROA Vol. IV at 56–57 (the government discussing its decision to not give Eddington a third acceptance of responsibility level). Accordingly, Eddington received only a two-level deduction for acceptance of responsibility, and his Guidelines range was, therefore, higher than that stated in the PSR.

II. STANDARD OF REVIEW

We review challenges to a district court's sentencing decision in two steps. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1261 (10th Cir. 2014). First, we "ensure that the district court committed no significant procedural error." *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Second, "[i]f there is no reversible procedural error, we then 'consider the substantive reasonableness of the sentence.'" *Id.* (quoting *Gall*, 552 U.S. at 51). Here, Eddington raises only procedural challenges to his sentence.

"Our review of procedural reasonableness 'focuses on the manner in which the sentence was calculated.'" *Id.* (quoting *United States v. Masek*, 588 F.3d 1283, 1290 (10th Cir. 2009)). Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range," "failing to consider the § 3553(a) factors," and "failing to adequately explain the chosen sentence." *Id.* (quoting *Gall*, 552 U.S. at 51).

When a defendant has preserved his procedural challenge in district court, "we generally review the procedural reasonableness of that defendant's sentence using the familiar abuse-of-discretion standard of review." *Id.* at 1262 (internal quotation marks and citation omitted). Under the abuse-of-discretion standard, "we review de novo the district court's legal conclusions regarding the [G]uidelines and review its factual findings for clear error." *Id.* (citation omitted). "An error of law is per se an abuse of discretion." *Id.* (citation omitted). But, when a procedural challenge was not preserved, it is reviewed for plain error. *United States v. Chavez*, 723 F.3d 1226, 1232 (10th Cir.

2013). "[F]ailure to argue plain error on appeal waives the argument." *United States v. Isabella*, 918 F.3d 816, 845 (10th Cir. 2019) (citation omitted).

III. DISCUSSION

On appeal, Eddington raises two procedural challenges to the district court's sentencing decision. First, he argues that the district court improperly applied the four-level enhancement to his base offense level. *See* U.S.S.G. § 2K2.1(b)(6)(B). Second, he argues that the district court failed to adequately account for "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when it imposed the four-level enhancement to his base offense level but the same enhancement was not applied when Williams was sentenced by a different judge. *See* 18 U.S.C. § 3553(a)(6).

We conclude that the district court committed procedural error by applying the four-level enhancement, but that Eddington waived his argument that the district court erred in not considering the disparate-sentencing factor. Finally, because the government does not argue that any procedural error was harmless, we conclude that Eddington was prejudiced by the district court's application of the four-level enhancement. Accordingly, we vacate Eddington's sentence and remand for resentencing.

A. Application of the Four-Level Sentencing Enhancement, U.S.S.G. § 2K2.1(b)(6)(B)

Eddington first argues that his sentence is procedurally unreasonable because the district court incorrectly applied the four-level sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Under the Guidelines, "[i]f the defendant . . . used or

possessed any firearm or ammunition in connection with another felony offense," the offense level is to be "increase[d] by 4 levels." U.S.S.G. § 2K2.1(b)(6)(B). The "in connection with" requirement means that "the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense." *Id.* cmt. 14(A). "'Another felony offense', for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." *Id.* cmt. 14(C).

The district court applied the four-level enhancement based on Eddington's possession of ammunition "in connection with" (1) attempted second-degree assault under Colorado law, and (2) possession of a firearm by a prohibited person (i.e., a felon) under Colorado law. We conclude that neither rationale provides support for the four-level enhancement.

1. Attempted Second-Degree Assault

First, the district court applied the four-level enhancement because it determined that Eddington's possession of ammunition was "in connection with" the state felony offense of attempted second-degree assault. *See* Colo. Rev. Stat. § 18-3-203(1)(b), (1)(d) (2022). The parties do not dispute that Eddington's actions meet Colorado's definition of attempted second-degree assault, nor do they dispute that, if a defendant acts in self-defense, culpability for that offense is negated. *See People v. Gross*, 287 P.3d 105, 111, *as modified on denial of reh'g* (Nov. 5, 2012) ("Self-defense is an affirmative

defense to second-degree assault."). Instead, their argument focuses on whether the district court properly determined that Eddington was a mutual combatant and, thereby, was precluded from invoking self-defense under Colorado law. We conclude that the district court committed procedural error by failing to correctly analyze the question under Colorado law.

a. Preservation and Standard of Review

The government does not argue that Eddington failed to preserve the self-defense/mutual-combatant issue. We conclude that Eddington did preserve the issue. Accordingly, we review for abuse of discretion.

b. Analysis

Under Colorado law, a person is not justified in using deadly force for self-defense if "[t]he physical force involved is the product of a combat by agreement not specifically authorized by law." Colo. Rev. Stat. § 18-1-704 (2022). The affirmative defense of self-defense is unavailable to a defendant if the "mutual combatant" or "mutual combat" exception applies. To come within this exception to self-defense, the government must "prove that an agreement to fight existed between the parties, and that the parties entered into the agreement before beginning combat." *Kaufman v. People*, 202 P.3d 542, 561 (Colo. 2009). The Colorado Supreme Court has concluded that, "[u]nless a clear agreement to fight can be gleaned from the facts presented, the [trial] court should not instruct the jury on the mutual combat exception to self-defense." *Id.* at 562. In other

words, in the absence of a clear prior agreement between the combatants, the affirmative defense of self-defense is available to a defendant.

During Eddington's sentencing, the district court found determinative "that [Eddington] went out knowing there was combat going on. And maybe he didn't know for sure there was going to be continuous shooting, but he stepped into a gunfight with his own gun and didn't just happen to get caught up in this but was part of it." ROA Vol. IV at 37; *see also id.* at 65 ("He knew what was going on, and once it started he joined in . . . . And that is mutual—if you want to call it mutual combat, whatever you want to call it, he was—part of the cause for the danger was his own involvement."). This standard for mutual combat—one which focuses on whether Eddington knew about an altercation and intended to join it—sets a lower standard for rejecting the affirmative defense of self-defense than the applicable standard under Colorado law, which requires an agreement between parties to engage in mutual combat before combat commences. The district court's conclusion that Eddington knowingly joined an ongoing fight does not equate to Eddington having entered into an agreement with Fernandez to fight before the fight began. *See Kaufman*, 202 P.3d at 562. In other words, the district court's finding that Eddington knowingly joined an ongoing fight does not preclude Eddington from asserting the affirmative defense of self-defense.

In its briefing on appeal, the government argues that "[t]here was plenty of evidence from which the district court *could* infer that an agreement to fight had been reached before the violent shootout," Aple. Br. at 9 (emphasis added), and "[t]he court

could fairly infer that the conversation between Williams and Fernandez inside the liquor store involved an agreement to fight, which Eddington joined," *id.* at 13 (emphasis added). However, as Eddington notes, even if the evidence could support an inference that he and Fernandez agreed to engage in mutual combat, "the fact of the matter is the district court did not draw such an inference."[4] Reply at 4. Nowhere in the record did the district court make a factual finding that Eddington and Fernandez entered into an agreement to fight before the fight commenced, as is required under Colorado law. In fact, it does not appear that the district court was aware that it needed to make such a finding. The court cited cases provided by the government to decide the self-defense issue, *United States v. Wooten*, 696 F. App'x 337 (10th Cir. 2017), *United States v. Mayberry*, 567 F. App'x 643 (10th Cir. 2014), and *United States v. Kupfer*, 68 F. App'x 927 (10th Cir. 2003). But these cases do not deal with Colorado law, and the government now concedes that "little is offered by [them]," Aple. Br. at 13 n.1.

The district court's self-defense/mutual-combatant ruling is inconsistent with Colorado law and constitutes an abuse of discretion. *See Sanchez-Leon*, 764 F.3d at 1264 ("Following an incorrect legal standard to decide a sentence is per se an abuse of discretion." (internal quotation marks and citation omitted)). Accordingly, we conclude

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[4] The government's factual arguments appear to imply that our review of the record could supply the needed support for the enhancement. But, "it is not [our] role to make the factual findings necessary to support a sentencing calculation; that is the task of the district court." *United States v. Williams*, 48 F.4th 1125, 1136 (10th Cir. 2022) (quoting *United States v. Roberts*, 14 F.3d 502, 523 (10th Cir. 1993)).

that the district court erred in applying the four-level enhancement based on Eddington's attempted second-degree assault.[5]

2. Felon In Possession of a Firearm

Second, the district court ruled, *sua sponte*, that it had an additional basis to support a four-level enhancement. The district court concluded the four-level enhancement was also justified because Eddington possessed ammunition "in connection with" the state felony offense of being a felon in possession of a firearm under Colorado law. *See* Colo. Rev. Stat. § 18-12-108 (2022).[6] On appeal, the parties do not dispute that Eddington was a felon, nor that he was illegally in possession of a firearm under Colorado law. Instead, they dispute whether the district court properly determined that the state felon-in-possession-of-a-firearm violation satisfies the "in connection with" requirement of U.S.S.G. § 2K2.1(b)(6)(B). We conclude that the district court committed procedural error by ruling that the state felon-in-possession violation could serve as a basis for applying the four-level enhancement.

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[5] At oral argument, the government offered that because Williams and Fernandez mutually agreed to engage in combat, and because Eddington agreed to "aid and abet" Williams in his combat with Fernandez, Eddington can be presumed to have agreed to engage in mutual combat with Fernandez. The government introduced this argument for the first time at oral argument. We will not consider this related argument. *See United States v. Anthony*, 22 F.4th 943, 952 (10th Cir. 2022) ("Issues raised for the first time at oral argument are considered waived." (citation omitted)).

[6] The district court never cited the state law on which it relied. Eddington points to Colorado Revised Statute § 18-12-108 (2022), "[p]ossession of weapons by previous offenders," as the state law on which the district court was likely relying.

a. Preservation and Standard of Review

During the sentencing hearing, the district court, *sua sponte*, raised the state felony as an additional basis for applying the four-level enhancement. Prior to the hearing, neither party had briefed this issue nor had the PSR cited the state felony as an additional basis for the enhancement. After the district court raised the state felony as additional support for the four-level enhancement, Eddington's counsel requested that "if the Court is considering the four-level increase on that issue alone, I would ask for time to brief on that issue." ROA Vol. IV at 60. Then, in an on-the-spot response, defense counsel focused on whether there was sufficient evidence to support a state felon-in-possession charge. On appeal, Eddington does not raise this sufficiency-of-the-evidence challenge to the state firearm possession offense but, instead, makes the argument that the state felon-in-possession violation cannot legally satisfy the "in connection with another felony offense" requirement of U.S.S.G. § 2K2.1(b)(6)(B). The government argues that the court should treat this issue as unpreserved and waived.

"As a general rule, when a defendant fails to preserve an objection to the procedural reasonableness of his sentence, we review only for plain error." *United States v. Martinez-Barragan*, 545 F.3d 894, 899 (10th Cir. 2008). And, where a defendant does not request plain-error review, we consider the procedural challenge waived. *Isabella*, 918 F.3d at 845. However, "a defendant is not required to object when the sentencing court commits an error that the defendant cannot be expected to anticipate." *Martinez-Barragan*, 545 F.3d at 899 (citing *United States v. Begay*, 470 F.3d 964, 976

(10th Cir. 2006), *rev'd on other grounds*, 553 U.S. 137 (2008)). Eddington could not have anticipated the district court's *sua sponte* invocation of the state felon-in-possession felony as an alternative basis for applying the four-level enhancement, and his counsel immediately sought the opportunity to brief the question before the district court entered judgment. Given the *sua sponte* action by the district court, defense counsel's response was sufficient to preserve the issue on appeal. We review Eddington's appeal on this issue for abuse of discretion.

b. Analysis

As noted, U.S.S.G. § 2K2.1(b)(6) instructs that "[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense[,] . . . increase [the base offense level] by 4 levels." U.S.S.G. § 2K2.1(b)(6). Application Note 14, titled "In Connection With," states that the four-level enhancement applies "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense." U.S.S.G. § 2K2.1(b)(6) cmt. 14(A). To determine whether the district court abused its discretion, some historical background on the definition of "another felony offense" is useful.

Prior to 2006, Application Note 15 provided that "'another felony' . . . refer[s] to offenses *other than explosives or firearms possession or trafficking offenses*." *United States v. Jones*, 528 F. App'x 627, 631 (7th Cir. 2013) (quoting U.S.S.G. § 2 K2.1(b)(6) cmt. n.15 (2005)) (emphasis added in original). At the time, this definition "was

understood to create a categorical exclusion for firearms and explosives offenses." *Id.* at 631–32 (collecting cases).

Then, the Guidelines were amended to remove Application Note 15 and to insert Application Note 14(C), which presently reads as follows:

> "Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than *the* explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

U.S.S.G. § 2K2.1(b)(6) cmt. 14(C) (emphasis added). At least three of our sister circuits have concluded that "[t]he addition of the word 'the' in the amendment indicates the Sentencing Commission's intention to no longer exclude all explosive or firearms possession or trafficking offenses from the definition of 'another felony offense' under § 2K2.1(b)(6)." *United States v. Juarez*, 626 F.3d 246, 254 (5th Cir. 2010); *see also Jones*, 528 F. App'x at 632 ("[L]ike the Fifth Circuit we conclude that the addition was meant to end the categorical exclusion of firearms and explosives offenses from the definition of 'another felony offense.'"); *United States v. Jackson*, 633 F.3d 703, 705–06 (8th Cir. 2011) ("[A]pplication note 14(C) does not exclude 'any,' 'an,' or 'a' firearms possession offense. The word 'the' is a definite article commonly employed to refer to something specific."). Those courts have concluded that Application Note 14(C) "now excludes from the definition of 'another felony offense' only the possession or trafficking offense that serves as the basis for the defendant's conviction." *Juarez*, 626 F.3d at 255.

On appeal, Eddington argues that, while there is no longer a categorical exclusion on firearm possession serving as the basis for a four-level enhancement under § 2K2.1(b)(6)(B), "there is no authority holding that the enhancement can be based on a firearm possession offense (under state law) that is identical, in terms of the underlying conduct, to the firearm possession offense of conviction (under federal law)." Aplt. Br. at 18. In other words, Eddington maintains that the conduct underlying his federal offense (possession of ammunition) involves that same conduct as his alleged state offense (possession of a firearm), and, therefore, they are not separate felony offenses for purposes of the Guidelines. We need not resolve this question as Eddington prevails on his alternative argument that possession of ammunition does not "facilitate" or make it easier to commit the offense of possession of a firearm in violation of state law.

As Eddington discusses, the Guidelines provide that § 2K2.1(b)(6)(B) applies "if the firearm or ammunition *facilitated*, or had the *potential of facilitating*, another felony offense or another offense." U.S.S.G. § 2K2.1(b)(6) cmt. 14(A) (emphasis added). We have previously stated that "[t]he plain and commonly understood meaning of 'facilitate' is to make easier." *United States v. Marrufo*, 661 F.3d 1204, 1207 (10th Cir. 2011); *see also United States v. Justice*, 679 F.3d 1251, 1255 (10th Cir. 2012) ("[P]ossession of a firearm may facilitate an offense by emboldening the possessor to commit the offense."). Eddington convincingly notes that "it is difficult to understand how [his] possession of ammunition can be said to 'facilitate' or make it 'easier' to commit the offense of illegally possessing a firearm under Colorado law." Reply at 9. Indeed, one's possession

of ammunition in violation of federal law does not "facilitate," "make easier," or "embolden" one's possession of a firearm in violation of state law.

The government responds that "the ammunition possession facilitates the illegal firearm possession by making a firearm more than simply a well-functioning club." Aple. Br. at 21. But Eddington's federal offense and alleged state offense concern *possession*—not *use*. It is unclear how possession of ammunition facilitates possession of a firearm.[7] We conclude that the district court erred in applying the four-level enhancement based on Eddington's alleged possession of a firearm in violation of state law.

B. Consideration of the Need to Avoid Sentencing Disparities, 18 U.S.C. § 3553(a)(6)

Eddington next argues that the district court committed procedural error by not adequately "account[ing] for" or "consider[ing]" disparities in sentencing between Eddington and Williams. Aplt. Br. at 25; *see* 18 U.S.C. § 3553(a)(6) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid

[7] At oral argument, the government introduced an additional theory—that possession of ammunition facilitates possession of a firearm because the presence of ammunition assists the possessor of the firearm in maintaining his possession of the firearm. The government likened the present case to those where we concluded that the possession of a firearm facilitated possession of drugs. But the government provides no case to support this proposed holding, and without the benefit of briefing, the comparison between the possession of a firearm emboldening the possession of drugs versus the possession of ammunition emboldening the possession of a firearm is not self-evident. We decline to adopt the government's new theory, which was introduced for the first time at oral argument. *See Anthony*, 22 F.4th at 952 ("Issues raised for the first time at oral argument are considered waived." (citation omitted)).

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."). Specifically, Eddington states that the district court failed to explain why Williams, unlike Eddington, did not receive the four-level enhancement to his base offense level despite being more culpable. The parties dispute whether Eddington preserved this challenge. We conclude that he did not.

During the sentencing hearing, Eddington argued that applying the four-level enhancement would create sentencing disparities between him and his codefendant, Williams. On appeal, Eddington argues that the district court failed to consider and explain sentencing disparities in its analysis. While these arguments are related, they are different. Eddington's desire to have the district court apply the factor in his favor differs from his contention that the district court did not adequately explain its decision on the factor at sentencing.

In *Chavez*, we had opportunity to consider a similar preservation issue. 723 F.3d at 1231–32. There, at sentencing, the defendant "argued that the district court should not impose a consecutive sentence." *Id.* at 1232. On appeal, however, the defendant argued "that the [district] court did not sufficiently explain why it chose a consecutive sentence." *Id.* We concluded that these were "different argument[s]" and that "[t]he claim [on appeal was] therefore unpreserved." *Id.*

In his briefing, Eddington does not address preservation of this challenge in light of *Chavez*, and we conclude that Eddington failed to preserve this issue on appeal.

Further, because Eddington has not argued for plain-error review, we treat the argument as waived. *Isabella*, 918 F.3d at 845.

C. Harmless Error

Once a defendant meets "the initial burden of showing that the district court erred," "resentencing is required only if the error was not harmless." *Sanchez-Leon*, 764 F.3d at 1262 (internal quotation marks and citations omitted). "Procedural error is harmless if the record viewed as a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s)." *Id.* (internal quotation marks and citations omitted). "Harmlessness must be proven by a preponderance of the evidence, and the burden of making this showing falls on the beneficiary of the error," in the present case, the government. *Id.* at 1262–63 (internal quotation marks and citations omitted). Here, the government makes no argument regarding the harmlessness of the enhancement error. Thus, we conclude that the government has not met its burden and that the sentence must be vacated and the case remanded for resentencing.

IV. CONCLUSION

The district court committed procedural error by applying the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Accordingly, we VACATE Eddington's sentence and REMAND for resentencing.