UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-3409

UNITED STATES OF AMERICA

v.

NAQUANN SIMMONS,
Appellant

On Appeal from the U.S. District Court for the Middle District of Pennsylvania
Judge Malachy E. Mannion, No. 3:24-cr-00270-001

Before: SHWARTZ, MONTGOMERY-REEVES, and RENDELL, Circuit Judges
Submitted: Nov. 10, 2026; Filed: November 16, 2026

NONPRECEDENTIAL OPINION*

SHWARTZ, Circuit Judge.

Naquann Simmons appeals his sentence. For the following reasons, we will affirm.

I

Simmons pleaded guilty to two counts of aiding and abetting the making of false statements in the acquisition of firearms, in violation of 18 U.S.C. §§ 2, 922(a)(6), and 924(a)(2). At sentencing, the District Court determined that his total offense level was nineteen and his criminal history category was III, resulting in a Guidelines range of

* This is not an opinion of the full Court and, under 3d Cir. IOP 5.7, is not binding precedent.

thirty-seven to forty-six months' imprisonment, but the Court upwardly varied under 18 U.S.C. § 3553(a) and imposed a 120-month sentence.

Simmons's criminal history category was predicated on two prior convictions, including a New York conviction for second-degree harassment based on a violation of an order that barred contact with a victim. The violation occurred when Simmons texted the victim to come to his house to pick up her belongings and then travelled to the victim's location four hours later. Simmons received a time-served sentence for this harassment conviction.

Simmons appeals.

II[1]

Under the Guidelines, misdemeanor and petty offense convictions generally count toward a defendant's criminal history score. U.S. Sent'g Guidelines Manual § 4A1.2(c) (U.S. Sent'g Comm'n 2025). Certain listed offenses, such as "[d]isorderly conduct or disturbing the peace" and "[c]ontempt of court," as well as "offenses similar to them," count for criminal history purposes only if "the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days," or if "the prior offense

[1] The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. "We review de novo a district court's interpretation of the Guidelines," United States v. Hines, 628 F.3d 101, 105 (3d Cir. 2010) (citation omitted), but we review Simmons's unpreserved challenge to the application of the Guidelines for plain error, United States v. Barkers-Woode, 136 F.4th 496, 500 (3d Cir. 2025). To prevail under this standard, an appellant must show (1) an error (2) that is plain and (3) that has affected his substantial rights. United States v. Dorsey, 105 F.4th 526, 528 (3d Cir. 2024) (citing United States v. Olano, 507 U.S. 725, 732-33 (1993)). We may exercise our discretion to correct such an error if it seriously affects the fairness, integrity, or reputation of judicial proceedings. Id.

was similar to an instant offense." Id. § 4A1.2(c)(1). Since Simmons's offense did not involve probation or jail of more than thirty days, we must decide whether New York second-degree harassment is "similar to" an offense excluded from receiving criminal history points.

The Guidelines commentary instructs courts to consider several factors to determine whether a prior offense is "similar to" disorderly conduct, disturbing the peace, or another excluded offense, including:

> (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

U.S. Sent'g Guidelines Manual § 4A1.2 cmt. n.12(A).[2]

Contrary to Simmons's arguments, his harassment conviction was not "similar to" disorderly conduct, disturbing the peace, or contempt of court. We have held that

[2] Administrative law principles govern whether "the [G]uidelines' commentary controls our interpretation of the [G]uidelines themselves." United States v. Nasir, 17 F.4th 459, 469 (3d Cir. 2021) (en banc). Under such principles, we afford no deference to an agency's interpretation of its own regulation when the regulation is unambiguous. When the parties dispute whether consideration of the regulation is permitted, a court must exhaust the traditional tools of statutory construction to determine whether the regulation is genuinely ambiguous. Id. at 470-71 (citing Kisor v. Wilkie, 588 U.S. 558, 572-75 (2019)). We need not decide whether Application Note 12 should be afforded deference under Nasir because no party challenges consideration of Application Note 12, and the Government acknowledges that deference thereto does not impact the outcome here. See United States v. Wise, 134 F.4th 745, 748 (3d Cir. 2025) (concluding that we did not need to evaluate deference to the Guidelines commentary where the appellant did not challenge such deference); United States v. Abreu, 32 F.4th 271, 277 (3d Cir. 2022) ("We need not decide . . . whether we are bound by this commentary or its significance in the wake of Kisor, for under either approach the result in this case is the same.")**;**

harassment under Pennsylvania law is not "similar to" disorderly conduct or disturbing the peace because the harassment statute includes a specific mens rea and an actus reus directed toward a person rather than the public, which reflects the different elements and heightened culpability associated with Pennsylvania harassment. See United States v. Elmore, 108 F.3d 23, 26 (3d Cir. 1997) (reaching this conclusion before the adoption of Application Note 12). New York second-degree harassment is no different. Like Pennsylvania, see 18 Pa. Cons. Stat. Ann. § 2709(a), New York requires an "intent to harass, annoy or alarm another person" for a harassment conviction, N.Y. Penal Law § 240.26. The intent element and the target of the act are missing from both the federal definitions of disorderly conduct, Model Penal Code § 250.2(1), and contempt of court, 18 U.S.C. § 401.[3] Thus, Simmons's prior conviction is not "similar to" an excluded offense under the Guidelines, and the District Court properly awarded criminal history points for the conviction.[4]

Even if Simmons's prior convictions were "similar to" disorderly conduct, disturbing the peace, or contempt of court, the District Court did not plainly err in counting his harassment offense toward his criminal history score. "An error is 'plain'

[3] We apply federal law to determine the meaning of the excluded offenses under § 4A1.2(c)(1). See Elmore, 108 F.3d at 25-26 (applying the Model Penal Code and Black's Law Dictionary to determine the meaning of disorderly conduct under § 4A1.2(c)(1)). Notably, federal contempt shares no elements with New York harassment. Compare 18 U.S.C. § 401, with N.Y. Penal Law § 240.26. In addition, the N.Y. Penal Law contempt statute, § 215.50, also does not include the harassment statute's specific mens rea requirement or an actus reus directed toward another person.

[4] Simmons's conduct also reflects a pattern of criminal activity at risk to recur. In committing harassment, Simmons violated a protective order involving the same victim on two occasions within a four-hour period.

only if it is 'clear or obvious' in light of 'the state of the law while the case under review is on appeal.'" United States v. Abrams, 165 F.4th 784, 809 (3d Cir. 2026) (quoting United States v. Dorsey, 105 F.4th 526, 530 (3d Cir. 2024)). We have never held that New York harassment is "similar to" an excluded offense under the Guidelines. To the contrary, we have held that a materially identical harassment statute was not "similar to" disorderly conduct or disturbing the peace. See Elmore, 108 F.3d at 26. As a result, it would not be clear or obvious that the District Court should have reached a different conclusion.[5] Thus, even if the District Court erred, the error could not have been plain.

III

For the foregoing reasons, we will affirm.

[5] "'[T]he lack of in-circuit case law on [a] specific question does not doom a finding of plain error . . . so long as the Courts of Appeals that have addressed the question have uniformly' adopted an appellant's position." Abrams, 165 F.4th at 809 (third alteration in original) (quoting United States v. Scott, 14 F.4th 190, 198 (3d Cir. 2021)). Like us, one of our sister circuits has held that a harassment conviction requiring an "intent to harass, annoy, or alarm another person" is not "similar to" an excluded offense under the Guidelines. United States v. Norman, 129 F.3d 1393, 1401 (10th Cir. 1997) (concluding that such harassment was not "similar to" excluded offenses). The Court of Appeals for the Second Circuit has concluded that such harassment is "similar to" excluded offenses in one case, United States v. Morales, 239 F.3d 113, 118-20 (2d Cir. 2000), but the state of the law within that circuit is not clear or obvious. In two unpublished opinions, that court has limited Morales's holding to its facts. See United States v. Detke, 650 F. App'x 85, 87-88 (2d Cir. 2016) (non-precedential); United States v. Gordon, 126 F. App'x 12, 13 (2d Cir. 2005) (non-precedential). The Morales court noted as "key circumstances" that the victim was the initial aggressor, and the defendant hit back once in apparent self-defense, resulting in a harassment conviction. 239 F.3d at 118-19. Here, there is no indication that Simmons's victim was the initial aggressor, and Simmons twice violated a protective order in committing harassment, distinguishing the instant case from Morales.