NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12342
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZACHARY RUGEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:24-cr-00057-VMC-AEP-1

Before GRANT, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Zachary Rugen pleaded guilty to wire fraud and illegally possessing a firearm. The district court sentenced him to 60 months of imprisonment. On appeal, Rugen argues that his

sentence should be vacated because (1) the district court did not give him advance notice that it would consider an upward departure from the Sentencing Guidelines, and (2) his sentence was procedurally unreasonable. Both arguments are meritless. We therefore affirm.

I.

In April of 2019, Rugen began to work as a contract employee at RMS Protective Services, a small cybersecurity service provider. But before starting at RMS, Rugen had developed a criminal history. In 2012, he pleaded guilty to impersonating a DEA agent on multiple occasions—one of which involved him crashing his car into another driver, exiting his vehicle while holding a handgun, forcibly unbuckling the other driver's seatbelt, and then instructing the other driver to show his license. In May of 2013, he pleaded guilty to a hit-and-run that caused over $1,000 in property damage. And in October of that same year, he was found guilty of driving while intoxicated.

RMS was aware of Rugen's DWI conviction (but not the other convictions). Even so, it decided to hire him as a contractor. According to RMS's operations officer, Rugen portrayed himself as "a broken person who had risen above his personal faults and was a changed man," and the company accepted this explanation because it believed "in the power of redemption."

Over the next two years, Rugen assumed more responsibilities at RMS. In January of 2021, RMS hired Rugen as a full-time employee, giving him the title "Director of Global

Personnel Management" and entrusting him with sensitive financial information. Around that same time, RMS secured a new contract to provide cybersecurity services to a large facility in France, and it tasked Rugen with managing much of the job.

But instead of faithfully carrying out his duties at RMS, Rugen charted a different course—one that involved embezzling over $500,000 from RMS through its French contract. Over the course of about a year, Rugen falsified invoices received from French companies, used those invoices to overcharge RMS, and then funneled the excess funds into a bank account that he could siphon from. Rugen then used nearly all of the money to enrich himself and his family. Most of it went toward his personal gambling outings at a Florida casino; a vacation to Disney World got upward of $20,000; and another chunk was used for his children's private school tuition. In total, Rugen used at least $473,372.01 of his fraudulent proceeds.

By March of 2022, RMS discovered that Rugen was making unauthorized payments to himself. But the company did not immediately seek any legal action against Rugen. In fact, it "kept him on for another six to seven months" as he "continually made promises to pay."

But by May of 2023, Rugen had not made good on his promises, and the FBI got involved. Agents interviewed Rugen, who admitted to most of the alleged embezzlement. The agents also searched his home, where they discovered, among other things, multiple 9mm handguns and several 9mm rounds.

Rugen was arrested and charged with wire fraud under 18 U.S.C. § 1343. He was also charged with being a felon in possession of a firearm and ammunition under 18 U.S.C. §§ 922(g)(1) and 924(a)(8). Rugen accepted a plea agreement, which required him to pay about $473,372.01 in restitution.

At sentencing, the district court heard testimony about the harm that Rugen's embezzlement caused to RMS and its employees. For instance, the prosecutor read a victim statement from RMS's owner and CEO, Lyndon Brentnall. Brentnall claimed that Rugen had "refused to pay a number of companies and individuals monies for work," that he "cared little for the employees in France," and that he spent most of his time "boasting online about being a millionaire." Brentnall also stated that multiple RMS employees had their jobs "placed in jeopardy by his lies." Another RMS official, Matthew Nelson, claimed that the company had "no insurance" to address Rugen's embezzlement because the company at that time "was literally four people."

Afterward, the district court told Rugen's counsel that it was "considering varying upward from the guidelines" based on this testimony. Although the prosecution only sought 46 months of imprisonment, the district court stated that it felt compelled to give a longer sentence because it was "so troubled by somebody taking money from their own employer." The court believed that RMS had shown Rugen "all the consideration in the world" and offered him "a great opportunity for somebody who has his criminal

history." As the court saw it, Rugen had stolen "from somebody who [had] shown faith in [him] and opened the door to [him] and hired [him] and made him part of [its] family," which was "such an abuse of trust." The district court concluded that the recommended guideline range would not "punish him enough for what he did" and that "an upward variance [was] in order."

Rugen's counsel objected. In particular, he shared what he called his "understanding" that the district court needed to give "notice of any upward variance" before sentencing. The court rejected this argument by telling Rugen's counsel, "I don't know what you're talking about," and stating that it has "never given notice before the sentencing."

The district court then sentenced Rugen to 60 months' imprisonment "[a]fter considering the advisory sentencing guidelines and all of the factors identified in" 18 U.S.C. § 3553(a). Rugen timely appealed his sentence.

II.

We review legal questions about the Federal Rules of Criminal Procedure de novo. *United States v. Spears*, 443 F.3d 1358, 1361 (11th Cir. 2006). When a defendant challenges the procedural reasonableness of his sentence, we review legal issues de novo and factual findings for clear error. *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010).[1]

[1] The government argues that Rugen failed to object to the procedural reasonableness of his sentence before the district court, which would call for

III.

Rugen raises two challenges to his sentence. First, he argues that the Federal Rules of Criminal Procedure entitled him to advance notice of the district court's "upward departure" from the guideline range. And second, he argues that his sentence was procedurally unreasonable. Neither contention has merit.

A.

The district court did not commit any error by giving Rugen an "upward departure" without advance notice. That is so for one simple reason: the court did not impose an "upward departure" at all. Instead, it imposed an upward *variance*, which requires no advance notice.

When it comes to the Sentencing Guidelines, "departures" and "variances" are two distinct concepts. A variance is a sentence imposed "outside the guidelines range" when a court does not think that the proposed range will "adequately further the purposes reflected in 18 U.S.C. § 3553(a)." *United States v. Hall*, 965 F.3d 1281, 1295 (11th Cir. 2020). The power to vary is simply a consequence of the advisory nature of the Guidelines, which allows district

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plain error review. *United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006). When Rugen's counsel was asked if he had "any objections to the sentence or to the manner in which the Court pronounced [the] sentence," he responded "Yes, Judge. We object to the upward variance." We need not decide whether this statement was sufficiently "clear and simple" to preserve Rugen's procedural reasonableness challenge because his challenge is meritless under either standard of review. *Id.* at 819.

courts to impose above-guideline and below-guideline sentences on a case-by-case basis. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1258–59 (11th Cir. 2015). A departure, on the other hand, is "a term of art" under the Guidelines. *Irizarry v. United States*, 553 U.S. 708, 714 (2008). Departures are authorized by specific provisions in the Guidelines that call for "non-Guidelines sentences" under special circumstances. *Id.*; *see, e.g.*, U.S.S.G. § 5K1.1 (downward departure for defendants who provide substantial assistance to authorities). A district court must give notice if it is considering a departure, but not if it is considering a variance. *Irizarry*, 553 U.S. at 715–16; Fed. R. Crim. P. 32(h).

Here, the district court unquestionably imposed a variance rather than a departure. To tell the difference, we look to "the court's reasoning" for indicia of a variance—especially whether it refrained from citing "a specific guidelines departure provision," whether "its rationale was based on the § 3553(a) factors," and whether it determined that "the guidelines range was inadequate" in light of the defendant's conduct. *Hall*, 965 F.3d at 1296. And, under that approach, all signs point to a variance: the district court repeatedly stated that "an upward variance [was] in order," never cited any specific departure provision, and made clear that it was going above the guidelines range because the recommended sentence would not "punish [Rugen] enough for what he did."

Rugen's sole argument to the contrary relies on a stray remark by the district court. At one point during sentencing, the district court said the following: "[T]he government has asked for

a guideline sentence and the guidelines are advisory. I can depart upwards. I can depart downwards." But in this context, the district court's use of the word "depart" while discussing the advisory nature of the Guidelines was undoubtedly a slip of the tongue. As we already explained, *variances* are enabled by the advisory nature of the Guidelines, whereas departures are enabled by specific provisions in the Guidelines. And, regardless, we do not give dispositive weight to a district court's statement that it granted an "upward departure" when it "actually granted a variance." *United States v. Kapordelis*, 569 F.3d 1291, 1316 (11th Cir. 2009). For the reasons stated, the district court imposed an upward variance during Rugen's sentencing, and no advance notice was required.

B.

Rugen next asserts that the district court failed to adequately address the 18 U.S.C. § 3553(a) factors, as well as "several factors warranting a lower sentence."

We disagree. Rugen never explains *what* factors he believes the district court overlooked. And in any case, we conclude that the sentence was procedurally reasonable.

Procedural reasonableness requires district courts to "adequately explain the chosen sentence to allow for meaningful appellate review." *Gall v. United States*, 552 U.S. 38, 50 (2007). When a district court imposes a variance, it must "offer a justification sufficient to support the degree of the variance." *United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013). Although this requires district courts to consider the § 3553(a)

sentencing factors, it is not necessary to explicitly discuss each of them as if they were a checklist. *Id.*

Here, the record provides ample explanation for the district court's decision. The court repeatedly said that it was imposing an upward variance on Rugen because of his "abuse of trust," the need to "discourage other people" from doing what Rugen did, and its belief that the guideline range would not "punish him enough for what he did." These concerns correspond to several of the § 3553 factors, which the court expressly stated that it had considered. *See, e.g.*, 18 U.S.C. § 3553(a)(1) ("circumstances of the offense"); *id.* § 3553(a)(2)(A) ("seriousness of the offense"); *id.* § 3553(a)(2)(B) ("adequate deterrence"). We cannot conclude that the court failed to adequately explain its decision.

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We **AFFIRM** Rugen's sentence.