

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12949
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DUSTIN SEAN MCCABE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:24-cr-80103-AMC-1

Before ROSENBAUM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

A jury convicted Dustin McCabe of seaman's manslaughter, making a false statement within the jurisdiction of an agency of the United States, and wire fraud. He appeals his convictions, arguing

that the manslaughter charge was improperly joined with the others and the district court abused its discretion by denying his motion to sever. After careful review, we affirm.

FACTUAL BACKGROUND

McCabe owned and operated a scuba charter business, which escorted customers by boat for scuba dives off the coast of Florida. For many years, McCabe used a dive boat for these charters—a boat specially designed for scuba. In 2020, however, McCabe decided to modify a bigger, sport fishing boat called the Southern Comfort to create a “boutique” diving experience and make more money. He falsely registered the vessel with the United States Coast Guard for recreational—not commercial—use.

The Southern Comfort’s inaugural trip was fraught with problems. One of the propellers spontaneously engaged when a diver was boarding the boat, destroying a piece of her scuba gear and nearly sucking her into its blades. And McCabe had trouble steering the boat because he removed the main deck engine controls during his modifications. McCabe did not warn his customers about the problems, fix the issues, or report them to the Coast Guard as required. Instead, he took out a new diving group the very next day, March 29, 2020.

That trip ended in tragedy. Two members of the group, Mollie Ghiz-Flynn and her husband, Sean Flynn, were experienced, certified divers. After their dive, they waited until McCabe gave them a signal that it was safe to swim up to the ship. That signal meant that McCabe had put the engine in neutral, so the propellers

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were disengaged and would not harm them. But as the couple started to board, Sean suddenly felt a strong pulling sensation as he and his wife were sucked underwater toward one of the propellers. The propeller grabbed Mollie's wetsuit, her legs were mangled by the propeller's blades, and she was held underwater until she drowned and died.

After her death, the Coast Guard shut down McCabe's scuba business. During the shutdown, McCabe applied for Paycheck Protection Program loans, which were created to help small businesses keep employees on payroll during the Covid-19 pandemic. A few days after his business was shut down, on April 3, 2020, he asked the general manager of the marina he docked at for help printing out a PPP loan application. McCabe applied for his first loan a month later, in May 2020, declaring that he had had \$7,500 in monthly payroll expenses but no employees on the payroll. He applied for his second loan in February 2021, declaring that he had one employee on payroll and over \$8,000 in monthly payroll expenses. But McCabe's business never generated those amounts, even in his best month; he never paid payroll, not even to himself; and the small crew he kept worked solely for tips. After he received the two loans, McCabe applied for forgiveness on both loans, claiming he had five employees at the time of both loan applications.

PROCEDURAL HISTORY

McCabe was charged with seaman's manslaughter, making a false statement within the jurisdiction of an agency of the United

States, and three counts of wire fraud for his fraudulent PPP loan and loan-forgiveness applications. *See* 18 U.S.C. § 1115; *id.* § 1001(a)(2); *id.* § 1343. Before trial, he moved to sever the manslaughter charge from the others, arguing that the counts were improperly joined under Federal Rule of Criminal Procedure 8(a) and the joinder would prejudice him under Federal Rule of Criminal Procedure 14.

At a hearing on the motion, McCabe argued that the counts did not relate to each other on the face of the indictment and that it would “unduly prejudice a jury to hear [about] the [victim’s] negligent and very sad death.” McCabe was also concerned that his right to testify on his own behalf “would be compromised.”

The government responded that the manslaughter on the Southern Comfort occurred the same month McCabe lied about using the vessel recreationally. And McCabe started asking about the PPP loans after the death shut down his scuba business. Three witnesses, the government added, would touch on multiple counts.

The district court found that the government met its burden to prove that joinder was proper and that McCabe did not show that possible prejudice from the joinder outweighed the public interest in the efficient and economic administration of justice. The counts were properly joined, the district court explained, because they were related to each other: McCabe falsely stated that he’d only use the Southern Comfort recreationally; he then modified the vessel and used it commercially for scuba charters, resulting in

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the manslaughter; and he applied for PPP loans when his business was shut down because of the death. McCabe had not demonstrated that his ability to present his defense would materially differ if severance was granted. And any possible prejudice could be mitigated by instructing the jury on how to consider the separate counts.

After trial, a jury convicted McCabe on all five counts.

STANDARD OF REVIEW

We review de novo whether joinder of counts in an indictment is proper, *United States v. Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002), but we will reverse only if the error was harmful, *United States v. Weaver*, 905 F.2d 1466, 1476–77 (11th Cir. 1990). “The improper joinder is harmless unless it results in actual prejudice because it had [a] substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 1477 (citation modified). We review the district court’s denial of a motion to sever for an abuse of discretion. See *United States v. Tapia*, 59 F.3d 1137, 1141 (11th Cir. 1995).

DISCUSSION

McCabe challenges the initial joinder of his counts and the denial of his motion to sever. We agree with the government that there was no error.

Misjoinder

Starting with joinder, rule 8(a) permits joinder of offenses that “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” Fed. R. Crim. P. 8(a). We “construe [r]ule 8(a) broadly in favor of initial joinder so that charges that are similar may be tried together even if the offenses do not arise at the same time or out of the same series of acts or transactions.” *United States v. Annamalai*, 939 F.3d 1216, 1223 (11th Cir. 2019) (citation modified).

The government bears the burden of establishing that initial joinder was proper. *United States v. Walser*, 3 F.3d 380, 385 (11th Cir. 1993). To determine whether the government met that burden, we look first to “the allegations stated on the face of the indictment” *Annamalai*, 939 F.3d at 1223 (citation modified).

Here, joinder was proper on the face of the indictment. “[T]he fact that one illegal activity provides the impetus for the other illegal activity is sufficient to constitute a common scheme for joinder purposes.” *United States v. Dominguez*, 226 F.3d 1235, 1239 (11th Cir. 2000). McCabe’s indictment explained that the seaman’s manslaughter arose from McCabe’s covert use of the Southern Comfort as a commercial vessel after he lied to the Coast Guard that the vessel would be used recreationally. And the manslaughter provided the motive for the PPP loans and explained why they were fraudulent.

As alleged in the indictment, McCabe applied for the PPP loan because, after being shut down, he “was no longer able to earn income from operating unauthorized scuba charters.” Yet, “[d]espite his ceasing to operate the [Southern Comfort] as a passenger vessel,” McCabe “nevertheless submitted . . . false and fraudulent PPP loan applications.” *See id.* at 1238–41 (ruling that drug-distribution and mortgage-fraud charges were properly joined because “the government’s representations before trial, which were borne out in the evidence presented during trial,” showed the drug charges provided the motive and necessity for the mortgage fraud charges).

In response, McCabe contends that the trial evidence (the texts between McCabe and the Coast Guard, the order shutting him down, and the overlapping witnesses) was insufficient to support joinder. But “[w]hether joinder is proper under [r]ule 8 is to be determined by examining the allegations in the indictment alone.” *Id.* at 1239. Here, the allegations in the indictment alone showed that joinder was proper.

McCabe also argues that temporal proximity between the counts, by itself, was insufficient to establish joinder. But here, the indictment showed more than temporal overlap in the changes. As the district court found, each count “provide[d] the impetus for the other illegal activity,” which was “sufficient to constitute a common scheme for joinder purposes.” *See id.*

Prejudicial Joinder

Even if the initial joinder was proper, McCabe maintains that the district court should have severed the manslaughter count to avoid prejudice. McCabe is right that, where the initial joinder is proper, severance may still be warranted if the joinder is overly prejudicial. *See* Fed. R. Crim. P. 14(a) (“If the joinder of offenses . . . appears to prejudice a defendant . . . , the court may order separate trials of counts . . . or provide any other relief that justice requires.”); *United States v. Morales*, 868 F.2d 1562, 1567 (11th Cir. 1989) (“In contrast [to a rule 8 claim], a [r]ule 14 claim assumes that the initial joinder . . . was proper but challenges the[] joint trial as unduly prejudicial.”).

“[T]he defendant bears a heavy burden in demonstrating clear and compelling prejudice from the inclusion of the count in question ‘which could not be alleviated by the trial court and that he was unable to obtain a fair trial.’” *United States v. Kabbaby*, 672 F.2d 857, 861 (11th Cir. 1982) (quoting *United States v. DeSimone*, 660 F.2d 532, 539 (5th Cir. 1981)). When deciding whether to sever counts, the district court “[must] balance the rights of the defendant[] and the government to a trial that is free from the prejudice that may result from joint trials against the public’s interest in efficient and economic administration of justice.” *United States v. Novaton*, 271 F.3d 968, 989 (11th Cir. 2001) (citation modified). We will reverse the denial of severance motion “only when the defendant demonstrates a clear abuse of discretion resulting in compelling

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prejudice against which the district court could afford no protection.” *Annamalai*, 939 F.3d at 1223 (citation modified).

McCabe offers four reasons why joining the manslaughter count with the others resulted in compelling prejudice. First, he argues that the manslaughter evidence was “less than overwhelming” because the government did not present the vessel or “any report or review of the boat’s engine or propulsion system that identified any mechanical failures.” But the failure to present some kinds of evidence doesn’t mean the evidence the government did present wasn’t overwhelming. A slew of witnesses testified that: the Southern Comfort was having mechanical issues; McCabe knew about the issues; he did not fix the problems; and he didn’t warn his customers or report the issues to the Coast Guard, which he had the duty to do as the vessel’s captain charged with keeping passengers safe.

Second, McCabe contends that the district court’s separate-counts instruction was insufficient because it was “singular.” But the instruction was not insufficient. The district court told the jury before deliberations that “[t]he indictment charge[d] five separate *crimes* called counts against the defendant.” And “[e]ach count of the indictment charge[d] a separate crime. You must consider each crime and the evidence related to it separately.”

The district court gave a similar instruction during voir dire. It told the jury at the start of the trial that “there are *five counts* in this indictment” and “I will instruct you later to consider each count separately, based on your review of the evidence relevant to

that particular count.” “Absent evidence to the contrary, we presume that the jury was able to follow the court’s instructions and evaluate the evidence [on] each [count] independently.” *See Weaver*, 905 F.2d at 1478 (citation modified).

Third, McCabe asserts that evidence of the manslaughter would have been inadmissible for the other counts since its probative value would have been substantially outweighed by the risk of unfair prejudice, and there was less-prejudicial evidence that showed McCabe’s scuba business was shut down. But, as the district court explained, the manslaughter evidence was necessary to explain why McCabe applied for the PPP loans and why the loans were fraudulent. McCabe needed the loans because, in the wake of the manslaughter, his business closed. And the representations he made in the loan documents about the business were false because the manslaughter stopped him from operating as he did before.

Finally, McCabe maintains that he was prejudiced because he was “tried, at least in part, as a ‘killer.’” But there’s prejudice any time different offenses are tried together. *See United States v. Lopez*, 649 F.3d 1222, 1238–39 (11th Cir. 2011) (affirming the denial of a motion to sever the trials of two defendants who had drug and weapons charges and who were tried with two other defendants who also had capital charges for four murders). That’s not the question. The question for us is whether the prejudice could not be alleviated such that McCabe was unable to obtain a fair trial. Here, the district court made efforts to alleviate any prejudice. It

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instructed the jury, twice, to consider the counts, and the evidence of those counts, separately. And it excluded a prejudicial photo of the manslaughter.

CONCLUSION

We conclude that the counts were properly joined and the district court did not abuse its discretion in denying the motion to sever.

AFFIRMED.