

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH WESLEY AVILA,

Defendant - Appellant.

No. 22-1081
(D.C. No. 1:20-CR-00229-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

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

Joseph Avila appeals his jury convictions for carjacking and unlawful possession of a firearm by a felon. He argues that the district court erred in denying his pretrial motion to sever after concluding that the offenses were properly joined under Federal Rule of Criminal Procedure 8(a). But Avila has waived his primary argument that the district court erred by looking beyond the indictment to determine whether his counts of conviction were properly joined. And the government has shown that the district court's error, if any, was harmless: Overwhelming evidence

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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).

supported Avila's convictions, and the district court provided a proper limiting instruction on three occasions. We therefore affirm.

Background¹

Late one evening in July 2020, Natalie Alvarez was having trouble starting her boyfriend's Chevrolet Tahoe. So she walked to a nearby gas station, where a man gave her his phone number and offered to help her a bit later; he said that he could not help immediately because he had somewhere to be. After managing to start the Tahoe on her own, Alvarez drove to a McDonald's across the street and called the man to let him know. The man then arrived at the McDonald's and asked Alvarez if she would drive him to see someone nearby. Alvarez said she would, and the man joined her in the front passenger seat of the Tahoe. They left and eventually ended up purchasing some heroin before returning to the McDonalds. The man then told Alvarez that his red SUV or truck had been towed (apparently from the McDonald's parking lot) and that he had recently been released on parole. Alvarez agreed to drive the man somewhere else, and a few minutes into the drive, the man told Alvarez that they needed to pick up his friend. They then picked up a second man with a skateboard "off the side of the road"; he sat in the backseat of the Tahoe directly behind Alvarez. R. vol. 3, 11.

A short time later, the two men instructed Alvarez to pull over. After Alvarez did so, the man sitting in the front passenger seat told her to get out of the Tahoe.

¹ We recite the facts as adduced at trial.

Alvarez “felt the [man] in the backseat press something up against [her] neck.” *Id.* at 13. She believed it was a gun because both men said “they were going to kill [her].” *Id.* at 14. The man in the front passenger seat beat Alvarez with his hands, and after the two men pushed Alvarez out of the Tahoe, the man in the backseat “jumped out and hit [Alvarez] in the face with the skate[board].” *Id.* at 13. The two men then drove away in the Tahoe.

One week later, police officers sought and received a search warrant for GPS data on a phone number associated with Avila.² Using that data, officers found Avila “driving [the stolen Tahoe] erratically, making unusual turns, driving at unusual speeds, [and] stopping in unusual places.” *Id.* at 260. During one of those stops, Avila got out of the Tahoe and attempted to flee the scene; he was wearing latex gloves and carrying a backpack. As officers sought to apprehend him, Avila threw a black object—later determined to be a .380 caliber firearm—into a nearby yard. A DNA profile confirmed that Avila was “the source of the major male DNA” on the firearm. *Id.* at 179. Officers eventually apprehended Avila, and during a search incident to arrest, they found a key fob for the Tahoe on Avila’s person. They also found a box of .380 ammunition and a firearm magazine inside the backpack Avila was carrying when he abandoned the stolen Tahoe.

Based on these events, the government charged Avila with carjacking (or aiding and abetting carjacking) and unlawful possession of a firearm by a felon in a

² The search warrant was part of an investigation unrelated to the stolen Tahoe.

single indictment. *See* 18 U.S.C. §§ 2, 922(g)(1), 2119. Avila moved to sever the counts, arguing joinder was improper under Rule 8(a) because the government's proffered evidence did not establish that joinder was proper. The district court, however, disagreed and denied the motion.³

At trial, the government sought to establish that Avila was the man sitting in the front passenger seat of the Tahoe on the night of the carjacking. Though Alvarez could not identify Avila in a photo array, the government's evidence showed that Avila—like the man sitting in the front passenger seat—had recently been released on parole. Consistent with what that man had told Alvarez, the evidence further showed that a red SUV had in fact been towed from the McDonald's that night; it contained a wallet with Avila's identification and social security cards, as well as paperwork bearing Avila's name. The government's evidence also established that the phone number associated with Avila for which officers obtained and executed a search warrant was the same phone number that Alvarez had received from the man who sat in the front passenger seat of the Tahoe on the night of the carjacking.

After being instructed three times to consider the two counts separately, the jury found Avila guilty of carjacking and unlawful possession of a firearm by a felon.

³ In doing so, the district court also rejected Avila's argument that trying the counts together would unfairly prejudice him under Federal Rule of Criminal Procedure 14. Avila does not renew his Rule 14 argument on appeal.

The district court sentenced Avila to 240 months in prison and three years of supervised release.

Avila now appeals.

Analysis

Avila argues that his counts of conviction should not have been joined under Rule 8(a). That rule permits joinder if the offenses “are based on the same act or transaction.” Fed. R. Crim. P. 8(a). Courts “construe Rule 8 broadly to allow liberal joinder to enhance the efficiency of the judicial system.” *United States v. Hill*, 786 F.3d 1254, 1272 (10th Cir. 2015) (quoting *United States v. Jones*, 530 F.3d 1292, 1298 (10th Cir. 2008)). In doing so here, the district court determined that the carjacking and felon-in-possession offenses were based on the same act or transaction because Avila was caught illegally possessing a firearm immediately after he abandoned the stolen Tahoe that was the basis for the carjacking offense.

On appeal, Avila primarily argues that the district court erred by looking beyond the four corners of indictment to decide whether his counts of conviction were properly joined under Rule 8(a). But as the government observes, Avila never made this argument in the district court. Instead, he argued only that the government’s proffered evidence did not permit joinder. And because Avila does not argue for plain-error review on appeal, even in his reply brief, we conclude that Avila has waived any argument that joinder analysis under Rule 8(a) is limited to the four corners of the indictment. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (“[T]he failure to argue for plain error and its application on appeal .

. . . surely marks the end of the road for an argument for reversal not presented to the district court.”). We thus decline to consider this argument.

To a more limited extent, Avila suggests that the district court erred because the government’s proffered evidence, even if properly considered, was insufficient to permit joinder under Rule 8(a). The government responds that the district court correctly found that the carjacking and felon-in-possession offenses were properly joined because they were based on the same act or transaction. We need not resolve this dispute, however, because we agree with the government that any error in joining the offenses was harmless. *See United States v. Lane*, 474 U.S. 438, 446–48 (1986) (holding that harmless-error rule applies to misjoinder); *United States v. Herrera*, 51 F.4th 1226, 1258 (10th Cir. 2022) (stating that government bears burden of proving harmlessness), *petition for cert. filed* Mar. 1, 2023 (No. 22-827).

Misjoinder is harmless if it does not affect a party’s substantial rights, meaning it did not “result[] in actual prejudice because it ‘had [no] substantial and injurious effect or influence in determining the jury’s verdict.’” *Lane*, 474 U.S. at 449 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We have concluded that misjoinder is harmless where the government shows that “overwhelming evidence” supported each count of conviction. *United States v. Levine*, 983 F.2d 165, 167 (10th Cir. 1992); *see also Jones*, 530 F.3d at 1299 (holding that misjoinder was harmless

because “overwhelming evidence” supported convictions for bank fraud and conspiracy counts and drug and firearm counts).

Avila concedes that “the evidence on the felon-in-possession count was strong.” Aplt. Br. 23. Indeed, the parties stipulated at trial that Avila was convicted of a felony and that he knew as much. The government’s evidence also established that when officers pursued Avila, he threw a black object that was later determined to be a .380 caliber firearm into a nearby yard. Additionally, the jury heard testimony that Avila was “the source of the major male DNA” on the firearm, and they learned that officers found ammunition for a .380 caliber firearm and a magazine for a firearm inside Avila’s backpack. R. vol. 3, 179. This evidence was overwhelmingly sufficient to convict Avila of unlawful possession of a firearm by a felon. *See United States v. Trujillo*, 960 F.3d 1196, 1200–01 (10th Cir. 2020) (noting that felon-in-possession conviction requires proof that defendant had been convicted of a felony, knowingly possessed a firearm, and “knew ‘he had the relevant status’ as a felon when he possessed the firearm” (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019))). Any misjoinder of the carjacking count with the felon-in-possession count, therefore, did not affect Avila’s substantial rights as to his felon-in-possession conviction.

The evidence supporting Avila’s conviction for carjacking or aiding and abetting carjacking was also overwhelmingly strong.⁴ The government showed that

⁴ The parties do not dispute the elements of carjacking or aiding and abetting carjacking. The former offense requires the government to prove “(1) that [the

the Tahoe was stolen by two men, one of whom had recently been released on parole, had provided Alvarez with a phone number, and had just had his red SUV or truck towed from the McDonald's. In the government's words, "Avila fit this profile."

Aplee. Br. 24. Specifically, the parties stipulated at trial that Avila had been released on parole about two months before the carjacking occurred, and the jury heard testimony that officers found documents identifying Avila in a red SUV that had been towed from the McDonald's that night. The government also established that officers later determined the phone number at issue—the one Alvarez received from the man who was sitting in the front passenger seat of the Tahoe—was linked to Avila.

Additionally, the jury learned that (1) law enforcement encountered Avila a week later driving the stolen Tahoe in an erratic and unusual manner while wearing latex gloves, and (2) officers found a key fob to the Tahoe on Avila's person when he was apprehended. This evidence strongly supports a finding that Avila was the man

defendant] took a motor vehicle from the person or presence of another; (2) that he did so by force, violence or intimidation; [and] (3) that [the defendant] intended to cause death or serious bodily harm." *United States v. Gurule*, 461 F.3d 1238, 1243 (10th Cir. 2006). To prove aiding and abetting of carjacking, the government must establish that "(1) the offense of carjacking . . . was committed by some person; (2) [the defendant] associated himself with the carjacking; (3) [the defendant] participated in the carjacking 'as something [he] wished to bring about'; and (4) [the defendant] sought to make the carjacking successful." *United States v. Vallejos*, 421 F.3d 1119, 1122–23 (10th Cir. 2005) (fourth alteration in original) (quoting *United States v. Hanson*, 41 F.3d 580, 582 (10th Cir. 1994)).

sitting in the front passenger seat of the Tahoe on the night it was carjacked and that he was thus guilty of carjacking or aiding and abetting the carjacking.

Avila nevertheless asserts that joinder of the offenses improperly “permitted the jury to confuse the fact of a gun, clearly shown to support the felon-in-possession conviction, with the carjacking victim’s tenuous suggestion of a gun.” Aplt. Br. 23. He argues that the jury likely used that evidence “to conclude that [he] must have used the gun in the carjacking.” *Id.* at 25. But the government never suggested to the jury that Avila used a gun during the carjacking. Rather, it theorized that Avila was the man sitting in the front passenger seat who beat Alvarez with his hands, not the man sitting in the backseat who, Alvarez believed, pressed a gun up against her neck and then hit her with a skateboard. So the gun was not significant to Avila’s carjacking conviction. We also find it relevant that the district court properly instructed the jury, on three occasions, to consider each count separately. *See Lane*, 474 U.S. at 450 (finding harmless misjoinder error in part because district court provided proper limiting instruction); *Jones*, 530 F.3d at 1299 (noting that misjoinder errors are “almost always harmless where . . . the trial court issues a careful limiting instruction to the jury on the issue of possible prejudice resulting from the joinder” (quoting *United States v. Cody*, 498 F.3d 582, 587 (6th Cir. 2007))). Thus, any misjoinder did not affect Avila’s substantial rights as to his carjacking conviction.

Conclusion

Avila waived his argument that a district court may not look beyond the indictment when assessing whether joinder is proper under Rule 8(a). Further, the

district court's error, if any, in concluding that Avila's convictions for carjacking and unlawful possession of a firearm by a felon were properly joined under Rule 8(a) was harmless considering the strength of the government's evidence against Avila on each count and the district court's limiting instruction. We accordingly affirm Avila's convictions.

Entered for the Court

Nancy L. Moritz
Circuit Judge