

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOMONIC MCCARNS,

Defendant-Appellant.

Nos. 16-10410
17-10016

D.C. No.
2:08-cr-00116-KJM-5

MEMORANDUM*

Appeals from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted July 10, 2018
San Francisco, California

Before: GRABER and TALLMAN, Circuit Judges, and LEMELLE,** Senior
District Judge.

In an opinion filed concurrently with this unpublished memorandum
disposition, we addressed two issues raised on appeal and affirmed Domonic
McCarns' conviction and sentence for conspiracy to commit mail fraud in violation

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ivan L.R. Lemelle, Senior United States District Judge
for the Eastern District of Louisiana, sitting by designation.

of 18 U.S.C. § 1349. We now resolve the remaining issues.

1. The district court did not plainly err when instructing the jury. The elements of conspiracy and of mail fraud (the object of the conspiracy) were in separate instructions. McCarns argues that this allowed the jury to convict him without considering mail fraud's mailing element. *See* 18 U.S.C. § 1341.

McCarns has not shown that his substantial rights were affected because there is "strong and convincing evidence that the prosecution has adequately proved the missing element of the crime." *United States v. Conti*, 804 F.3d 977, 981-83 (9th Cir. 2015) (internal quotation marks omitted). For example, McCarns stipulated that, when a home was sold as part of the conspiracy, a copy of the deed was mailed via the United States Postal Service. The Government also admitted e-mails in which McCarns discussed using the mails in furtherance of the conspiracy.

Nor was there a constructive amendment of the indictment. McCarns' constructive amendment argument simply restates, in different terms, his previous argument that the jury instructions omitted an essential element.

2. There was sufficient evidence of McCarns' identity. A defense witness who worked with McCarns identified him in court. McCarns stipulated to writing a series of e-mails that discussed the conspiracy. McCarns' co-defendants testified about working with him and expressed no concern that the wrong man was on trial.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found McCarns' identity beyond a reasonable doubt. *See United States v. Alexander*, 48 F.3d 1477, 1489-91 (9th Cir. 1995).

3. The district court did not abuse its discretion when it denied McCarns' motion to sever. We reverse the denial of a motion to sever when "a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (per curiam) (internal quotation marks omitted). That was not the case here. "A joint trial is particularly appropriate where," as here, "the co-defendants are charged with conspiracy." *United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 1565 *and* 138 S. Ct. 1572 (2018). The limiting instructions used at trial, further weigh against severance "because the prejudicial effects of the evidence of codefendants are neutralized." *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011) (internal quotation marks omitted).

4. The district court properly calculated the loss. The court sufficiently explained its conclusion that McCarns was aware of the full scope of the conspiracy based on his active role, the duration of his involvement, and his physical location at headquarters. *See United States v. Blitz*, 151 F.3d 1002, 1012-14 (9th Cir. 1998). McCarns knew that lenders were involved in each of the

transactions he closed; lenders' losses were therefore reasonably foreseeable. *See United States v. Treadwell*, 593 F.3d 990, 1004-05 (9th Cir. 2010); *Blitz*, 151 F.3d at 1012-14.

5. The vulnerable victim adjustment was warranted. Victims of fraud can be "vulnerable victims" when they are targeted because of their poor credit histories. *See United States v. Peters*, 962 F.2d 1410, 1415-18 (9th Cir. 1992). The vulnerable victim adjustment was appropriate here because McCarns targeted homeowners who were in financial distress and could not make payments on their existing mortgages. *See id.*

6. McCarns' below-Guidelines sentence was substantively reasonable.

AFFIRMED.