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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TRE C. JAMES, Defendant - Appellant.	No. 24-5871 D.C. No. 3:22-cr-08073-DLR-1 MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted September 17, 2026
Phoenix, Arizona

Before: M. SMITH and TUNG, Circuit Judges, and DIMKE, District Judge.[**]

Tre C. James appeals from the district court's decisions to: (1) admit evidence of his domestic violence as proof of murder; (2) refuse to sever his murder count from his domestic violence counts; and (3) instruct the jury that it

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

[**] The Honorable Mary K. Dimke, United States District Judge for the Eastern District of Washington, sitting by designation.

may consider domestic violence evidence as proof of murder. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. We need not address whether the district court erred by admitting evidence of James's domestic violence against other women, because any error was harmless. "We review de novo whether evidence is other act evidence within the meaning of Fed. R. Evid. 404(b), but the admission of this evidence for abuse of discretion." *United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019). "Where a district court errs in admitting other act evidence, we review for harmless error." *Id.* at 1181. An evidentiary error is harmless if "it is more probable than not that the error did not materially affect" the verdict. *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). If the record includes "overwhelming evidence" of the defendant's guilt, we sustain the conviction. *See Carpenter*, 923 F.3d at 1183.

James was convicted of murdering his romantic partner, Jamie Yazzie. At trial, the district court admitted evidence of James's domestic violence against other women as proof of his intent or motive to control romantic partners through violence. James claims that the district court violated Federal Rule of Evidence 404, which bars most propensity evidence. Even if the district court erred in admitting the domestic violence evidence, the error would have been harmless given the overwhelming evidence against James.

The night before Yazzie disappeared, James and Yazzie invited Yazzie's brother to visit the house where James lived. Yazzie told her brother that James shot a gun at her before. When confronted by Yazzie's brother, James giggled and showed him a loaded handgun and a homemade shotgun. Yazzie's brother told James to take better care of his sister and left the couple later that night. By the next day, Yazzie had gone missing. James was the last person who saw her alive. Over the next few days, James texted other women that he needed to clean his house.

A week after Yazzie's disappearance, law enforcement searched the house. They found signs of a violent scuffle: stale bloodstains on the walls, floors, clothing, and bedding; an empty ammunition box; and spent shell casings. Amid the chaos, the officers saw signs of a sloppy clean-up job: someone had tried to burn the mattress and wipe blood off the walls. Forensic experts later ran DNA tests on the bloodstains. Nearly every bloodstain tested positive for Yazzie's DNA. Most of those matches were billions, quadrillions, or quintillions of times more likely to have come from Yazzie rather than an unknown person. Eventually, Yazzie was found dead. Someone had shot her in the head and hidden her body in a remote area familiar to James.

The FBI interviewed James twice. At his first interview, he told authorities that he never owned a firearm. Forensic experts soon found his fingerprints on the

empty ammunition box in his bedroom. He also said he never fought with Yazzie the night she disappeared, and that she left with her brother. But at his second interview, he changed his story. He claimed that Yazzie left the house alone.

This evidence is damning. The record creates an overwhelming inference that someone murdered Yazzie with a gun in the house where James lived, dumped her body in a remote area nearby, and attempted to destroy the evidence. All signs point to James as the culprit. And James's false exculpatory statements are "evidence of consciousness of guilt," *United States v. Perkins*, 937 F.2d 1397, 1402 (9th Cir. 1991), which is "second only to a confession in terms of probative value," *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995). Given the overwhelming evidence of James's guilt, we cannot conclude that admitting evidence of James's violent behavior towards women "materially affect[ed] the verdict." *Morales*, 108 F.3d at 1040; *cf. Carpenter*, 923 F.3d at 1183 ("Considering the mountain of evidence against [Defendant], we conclude that the [errors] . . . were harmless."). If the district court erred, the error was harmless.

James also claims that the admission of domestic violence evidence violated his right to due process. *See Chapman v. California*, 386 U.S. 18, 24 (1967). James forfeited this argument, so we review for plain error. *United States v. Ruiz*, 167 F.4th 1024, 1036 (9th Cir. 2026). Here, we cannot say that the district court *plainly* erred. First, the supposed error was not "clear or obvious." *See United*

States v. Johnson, 979 F.3d 632, 636 (9th Cir. 2020). We have equivocated on the question of whether due process bars propensity evidence. *Compare Ruiz*, 167 F.4th at 1037 (declining to "decide whether admitting evidence purely for [propensity] purposes would violate the Constitution"), *with Kipp v. Davis*, 971 F.3d 939, 957 (9th Cir. 2020) (stating that a "lack of permissible inferences alone" did not violate due process but could in some contexts). And we have held that "there is nothing fundamentally unfair" about admitting propensity evidence under other rules of evidence. *See, e.g.*, *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001); *United States v. Porter*, 121 F.4th 747, 751–52 (9th Cir. 2024). Second, given the mountain of evidence against James admitted at trial, the error did not affect the outcome or otherwise affect his substantial rights. *See United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994).

2. The district court did not abuse its discretion when it denied James's motion to sever. Federal Rule of Criminal Procedure 14 allows a district court to order separate trials if the joinder of offenses would prejudice the defendant. We review a district court's decision to deny severance for abuse of discretion. *United States v. Throckmorton*, 87 F.3d 1069, 1071 (9th Cir. 1996). To succeed, a defendant must prove that he suffered prejudice from the joint trial that "was so clear, manifest or undue that he was denied a fair trial." *Id.* at 1071–72 (quotation omitted).

In making this determination, our precedents require us to consider four factors:

> (1) [W]hether the jury may reasonably be expected to collate and appraise the individual evidence against each defendant; (2) the judge's diligence in instructing the jury on the limited purposes for which certain evidence may be used; (3) whether the nature of the evidence and the legal concepts involved are within the competence of the ordinary juror; and (4) whether Appellant[] could show, with some particularity, a risk that the joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

United States v. Fernandez, 388 F.3d 1199, 1241 (9th Cir. 2004), *modified*, 425 F.3d 1248 (9th Cir. 2005).

None of these considerations weighs in James's favor. First, James insists that the jury could not reasonably be expected to evaluate the individual evidence for each count because "[s]tudies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986), *amended on denial of reh'g*, 798 F.2d 1250 (9th Cir. 1986). But this concern arises in every joint trial. Alone, it cannot suffice. Alternatively, he argues that the prosecution wrongfully invited the jury to weigh the evidence together. Yet, James has not offered a single instance when the prosecution encouraged jurors to conflate the evidence. We find no reason to believe that the

jury could not appraise the individual evidence for each count.

Second, James claims that the district court failed to diligently instruct the jurors because its "other acts" instruction allowed them to consider his past domestic violence as propensity evidence. But the district court took care to inform the jurors that a "separate crime is charged against the defendant in each count," and that their "verdict on one count should not control [their] verdict on any other count." 2-ER-26. The district court diligently instructed the jury.

Third, James argues that the joint trial prevented him from exercising his right to testify. He claims that he would have taken the stand to refute the domestic violence counts if they were severed from the murder count. But if "a defendant seeks severance because he wishes to testify on some counts and not others, he must show that he has important testimony to give on some counts and a strong need to refrain from testifying on those he wants severed." *United States v. Nolan*, 700 F.2d 479, 483 (9th Cir. 1983). James never made that showing. Instead, he asks us to excuse him from the usual standard because the district court ordered him *not* to offer the required showing. But he misrepresents what the district court said. Indeed, the district court invited him to elaborate on the testimony he had in mind.

Fourth, James argues that the jury could not come to a reliable conclusion about the murder count. He offers two reasons, but neither is compelling. To start,

James argues that there was a stark "disparity" between the evidence supporting his murder count and the far stronger evidence supporting his domestic violence counts. *Bean v. Calderon*, 163 F.3d 1073, 1085 (9th Cir. 1998). But as we concluded previously, there was overwhelming evidence to support his murder conviction as well. Next, he says the domestic violence evidence was too inflammatory. But the fact that the domestic violence evidence could have inflamed the jury's passion alone does not require severance. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 846–47 (9th Cir. 1994). The acts giving rise to James's murder and domestic violence charges were separate incidents that occurred over several years. As such, the jury could compartmentalize them without difficulty. *See id.* at 846. Overall, nothing suggests that the jury failed to evaluate each count on its own merits.

3. We cannot review James's challenge to his "other acts" jury instruction because he waived it below. *See United States v. Lopez*, 4 F.4th 706, 732 (9th Cir. 2021). Parties "bear the legal consequences" of jointly proposing jury instructions and waive the right to challenge them. *United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997). Accordingly, they waive the right to challenge those instructions on appeal. *See id.* Here, James jointly proposed and stipulated to the "other acts" instructions. And he made no substantive objections at trial.

James claims he did not make a *knowing* waiver because he did not know

which arguments he would raise on appeal. But that is "no answer." *Id.* at 384. A defendant waives any right to appeal a jury instruction if he "proposed or accepted a flawed instruction" despite having "considered the controlling law, or [the] omitted element." *United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010) (quotation omitted). Here, "the basis for his challenge, the Ninth Circuit model instruction and our case law supporting it, was already on the books." *Cain*, 130 F.3d at 383 (quotation omitted). And he extensively litigated the issue of whether the court properly admitted evidence of domestic violence.

Finally, James argues that he preserved his objection to the instruction by making a pretrial objection to the admission of the domestic-violence evidence. He relies on *United States v. Varela-Rivera*, 279 F.3d 1174 (9th Cir. 2002). There, we held that a defendant preserved his objection to the admission of the government's expert witness testimony because he offered the same objection in an *in limine* motion. *Id.* at 1177. We held that the defendant had preserved his objection because the purpose of the rule "is to ensure that the district court has an opportunity to cure any potential errors in the first instance." *Id.* (quotation omitted). But here, James argues that a pretrial objection to the admission of evidence preserves an objection to a *limiting instruction*. Those are two different objections, and James fails to explain why one should preserve the other. James's challenge is forfeited. And like the district court's admission of the domestic

violence evidence, the district court's limiting instruction was not plain error.

AFFIRMED.